

Case C-438/23**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:**

13 July 2023

Referring court:

Conseil d'État (France)

Date of the decision to refer:

12 July 2023

Applicants:

Association Protéines France

Union végétarienne européenne

Association végétarienne de France

Beyond Meat Inc.

Defendant:

Ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique

Subject matter and circumstances of the dispute

- 1 Three separate applications for annulment have been lodged with the Conseil d'État (Council of State, France) by (i) Association Protéines France, (ii) Union végétarienne européenne and Association végétarienne de France, and (iii) the company Beyond Meat. A number of companies active on the vegetable protein-based foods market have intervened in support of the application of Association Protéines France, including the company Beyond Meat.
- 2 The applicant companies ask the Council of State to annul as ultra vires décret n° 2022-947 du 29 juin 2022 relatif à l'utilisation de certaines dénominations employées pour désigner des denrées comportant des protéines végétales (Decree No 2022-947 of 29 June 2022 on the use of certain names to designate foods

containing vegetable proteins; ‘Decree No 2022-947’). That decree applies Article L. 412-10 of the code de la consommation (Consumer Code), resulting from Article 5 of the loi du 10 juin 2020 relative à la transparence de l’information sur les produits agricoles et alimentaires (Law of 10 June 2020 on the transparency of information on agricultural and food products; ‘the Law of 10 June 2020’).

- 3 The Council of State has decided to join the three applications.

Legal framework

A. Relevant European Union law

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

- 4 Under Article 38 of Regulation No 1169/2011:

‘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.’

- 5 Under Article 1(1) (Subject matter and scope) of Regulation No 1169/2011:

‘1. This Regulation provides 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 Under Article 3(1) (General objectives) of that regulation:

‘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.’

- 7 Under Article 7 (Fair information practices) of that regulation:

‘1. Food information shall not be misleading, particularly:

(a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;

...

(d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.

2. Food information shall be accurate, clear and easy to understand for the consumer.

...

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) advertising;

(b) the presentation of foods, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed.'

8 According to Article 9 of that regulation (List of mandatory particulars):

'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:

(a) the name of the food:

...'

9 Under Article 17(1) and (5) (Name of the food) of that regulation:

'1. The name of the food shall be its legal name. In the absence of such a name, the name of the food shall be its customary name, or, if there is no customary name or the customary name is not used, a descriptive name of the food shall be provided.

...

5. Specific provisions on the name of the food and particulars that shall accompany it are laid down in Annex VI.'

10 Under point 4 of Part A (Mandatory particulars accompanying the name of the food) of Annex VI (Name of the food and specific accompanying particulars) to that regulation:

‘4. In the case of foods in which a component or ingredient that consumers expect to be normally used or naturally present has been substituted with a different component or ingredient, the labelling shall bear – in addition to the list of ingredients – a clear indication of the component or the ingredient that has been used for the partial or whole substitution:

(a) in close proximity to the name of the product; and

(b) using a font size which has an x-height of at least 75% of the x-height of the name of the product and which is not smaller than the minimum font size required in Article 13(2) of this Regulation.’

Relevant judgments of the Court of Justice

- 11 In the judgment of 1 October 2020, *Groupe Lactalis* (C-485/18, EU:C:2020:763), the Court of Justice ruled that no provision of Regulation No 1169/2011 listed the ‘matters specifically harmonised’ referred to in Article 38(1) of that regulation and that, in the light of that expression, the identification of those matters must be carried out in strict conformity with the wording of that regulation (paragraph 25).
- 12 In the judgment of 1 December 2022, *LSI – Germany* (C-595/21, EU:C:2022:949), the Court ruled that the provisions of point 4 of Part A of Annex VI to Regulation No 1169/2011 were intended, in essence, to supplement those of Article 7 of that regulation by means of special labelling requirements, in order to protect consumers from being defrauded by incorrect information (paragraph 31).

Commission notice on questions and answers on the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers (2018/C 196/01)

B. Provisions of national law relied on

- 13 Under Article L. 412-10 of the Consumer Code (inserted by Article 5 of the Law of 10 June 2020):
‘The names used to designate foods of animal origin cannot be used to describe, market or promote foods containing vegetable proteins. A decree shall determine the proportion of vegetable proteins beyond which such names cannot be used.’
- 14 Under Article 1 of Decree No 2022-947:
‘[This decree shall apply] to foods manufactured in the national territory containing vegetable proteins’.
- 15 Under Article 2(3) and (4) of that decree:

‘It shall be prohibited to use, in order to designate a processed product containing vegetable proteins:

...

(3) A name using terminology specific to butchery, charcuterie or fish products;

(4) A name of a food of animal origin as used commercially.’

16 Under Article 3 of that decree:

‘By way of derogation from the provisions of Article 2, the name of a food of animal origin may be used:

(1) For foods of animal origin containing vegetable proteins in a set proportion where the presence of such proteins is laid down by regulation or mentioned in the list annexed to this decree;

...’

17 Under Article 5 of that decree:

‘Products legally manufactured or marketed in another Member State of the European Union or in Turkey, or legally manufactured in another State which is a party to the Agreement on the European Economic Area, are not subject to the requirements of this decree.’

18 Article 7 of the decree provides for the administrative penalties incurred for any non-compliance with the rules laid down therein.

Arguments of the parties

A. *Main arguments of the applicants (and interveners)*

19 The applicants (and interveners) maintain that the contested decree is unlawful and rely on a number of pleas in law in that regard. They claim in particular that the contested decree:

- was adopted following an unlawful procedure, because it was not properly notified to the European Commission in accordance with the specific notification procedure laid down in Article 45 of Regulation No 1169/2011;
- infringes the clear labelling requirement laid down in Regulation No 1169/2011, the objective, of constitutional status, of intelligibility and accessibility of the measure, and the principle that offences and penalties must have a proper legal basis;

- is unlawful because Article L. 412-10 of the Consumer Code, which the contested decree applies, establishes a general prohibition contrary to Article 5(5) of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market;
 - constitutes a misuse of powers, since it was allegedly adopted in order to protect consumers, on the basis in particular of Article 38 of Regulation No 1169/2011, whereas it was intended in reality to protect the interests of meat producers, under Regulation No 1169/2011.
- 20 They also plead infringement of the provisions on the free movement of goods and of Article 39 of Regulation No 1169/2011, since the contested decree requires vegetable protein-based products manufactured and marketed in France to be provided with additional mandatory particulars concerning the indication of the country of origin without any justification and increases the administrative burden on the same products manufactured elsewhere in the European Union, but marketed in France. They submit that it therefore constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 34 TFEU or a measure having equivalent effect to a quantitative restriction on exports within the meaning of Article 35 TFEU. Moreover, they maintain that the regulatory authority has not established that such a measure having equivalent effect to a quantitative restriction is proportionate to the objective pursued of clarifying the information provided to consumers and that there were no other more appropriate means of fulfilling that objective.
- 21 More fundamentally, the applicants submit, in the first place, that the contested decree, by prohibiting the use of the names of foods of animal origin to designate vegetable protein-based foods, infringes Article 38(1) of Regulation No 1169/2011, since it deals with a matter specifically harmonised by Articles 7 and 17 of that regulation in conjunction with point 4 of Part A of Annex VI thereto.
- 22 In the second place, the applicants submit, in the alternative, that the contested decree infringes Articles 9 and 17 of Regulation No 1169/2011, because, in the absence of a legal name prescribed by national or European provisions, producers of vegetable protein-based foods are prohibited from designating their products by their customary name, whether it be a name whose use appeared prior to the publication of the decree or appears subsequently, or a descriptive name.
- 23 In support of that plea, the applicants, finding that no legal name for vegetable protein-based foods is provided for by national law or EU law, claim that the producers and distributors of such foods are thereby prevented from using names authorised by Regulation No 1169/2011 for presenting and marketing their products and note that the Commission had itself pointed out, in its observations in response to the prior notification of the draft decree drawn up on 1 October 2021 in the context of the procedure laid down in Article 5 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015

laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, and in connection with Regulation No 1169/2011, that some of the terms whose use is prohibited by the draft decree had been widely used in recent years on the EU market to describe vegetable-based products and that consumers had familiarised themselves with those types of products and those names.

B. Ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique (Minister for Economic Affairs, Finance, and Industrial and Digital Sovereignty)

The Minister for Economic Affairs, Finance, and Industrial and Digital Sovereignty contends that the applications should be dismissed. He maintains that the pleas in law relied on by the applicants and interveners are unfounded.

Assessment of the Council of State

- 24 The Council of State rejects the pleas alleging irregular notification to the European Commission of the contested decree, finding that it was properly notified.
- 25 The Council of State rejects the pleas alleging infringement of the clarity requirement, the objective, of constitutional status, of intelligibility and accessibility of the measure and the principle that offences and penalties must have a proper legal basis, finding that the provisions of the contested decree in question are sufficiently clear and intelligible.
- 26 As regards the alleged infringement of the provisions on the free movement of goods, the Council of State considers that, since the contested decree applies only to products manufactured in the national territory, its purpose or effect cannot be to obstruct the importation of goods to France from another Member State. Moreover, in the light of the material in the file, the contested decree does not have the purpose or effect of restricting exports of French products abroad. The Council of State has therefore rejected the plea alleging infringement of Article 34 or 35 TFEU.
- 27 As regards the alleged infringement of Directive 2005/29, the Council of State considers that the contested decree does not have the purpose or effect of supplementing, for the purposes of Article 5 of that directive, the single list, annexed thereto, of those commercial practices which are in all circumstances to be regarded as unfair, and that the pleas alleging infringement of that directive must therefore be rejected.

The alleged infringement of Regulation No 1169/2011

- 28 The Council of State points out that it follows from the provisions of the contested decree that the regulatory authority, with the objective pursued by Regulation

No 1169/2011 of protecting consumers against misleading names, intended to prohibit the use of names designating products of animal origin to describe, market or promote foods containing vegetable proteins. That prohibition applies not only where additional indications are provided in close proximity to those names in order to inform consumers of the partial or whole substitution of the vegetable proteins in the composition of those foods, but also where such indications are placed beside those names. In the first case, the contested decree imposes limits on the proportion of vegetable proteins below which the name is still authorised.

- 29 Thus, by way of illustration, the contested decree prohibits the use of the names ‘steak’ or ‘sausage’, without further indication, in order to designate a ‘steak’ or ‘sausage’ in which the animal proteins are replaced by vegetable proteins, but nonetheless authorises those same names where the proportion of vegetable proteins remains below a limit determined in the decree. That decree also prohibits the use of the names ‘soya steak’ or ‘vegetable sausage’, owing to the use of the words ‘steak’ or ‘sausage’ in designating products of animal origin, in order to designate foods in which the animal proteins are replaced by vegetable proteins.
- 30 The Council of State considers that the pleas in law put forward by the applicants raise a number of questions relating to the interpretation of Regulation No 1169/2011. More particularly, those pleas raise the issue of whether the matters dealt with by the contested decree (namely the prohibition on the use of names of foods of animal origin to designate vegetable protein-based foods) have been specifically harmonised, within the meaning of Article 38(1) of that regulation, by Articles 7 and 17 thereof, in conjunction with point 4 of Part A of Annex VI thereto. If the matters dealt with by the contested decree have been specifically harmonised, the question arises as to the consequences of such harmonisation. However, in the absence of specific harmonisation, the question arises whether the contested decree infringes the provisions of Articles 9 and 17 of Regulation No 1169/2011.
- 31 The Council of State takes the view that those questions are decisive for the resolution of the dispute which it has to decide upon and present serious difficulty. It therefore considers that it must refer them to the Court of Justice pursuant to Article 267 TFEU.

Questions referred for a preliminary ruling

- 32 Consequently, the Council of State refers the following questions to the Court of Justice for a preliminary ruling:
1. Must the provisions of Article 7 of Regulation (EU) No 1169/2011, which require consumers to be provided with information that does not mislead them as to the identity, nature and properties of foods, be interpreted as meaning that they specifically harmonise, within the meaning of and for the application of

Article 38(1) of that regulation, the matter of the use of names of products of animal origin from the butchery, charcuterie and fish sectors to describe, market or promote foods containing vegetable proteins which may mislead the consumer, thereby preventing a Member State from acting in that matter by adopting national measures regulating or prohibiting the use of such names?

2. Must the provisions of Article 17 of Regulation (EU) No 1169/2011, which provide that the name by which the food is identified is, in the absence of a legal name, to be its customary name or a descriptive name, in conjunction with point 4 of Part A of Annex VI thereto, be interpreted as meaning that they specifically harmonise, within the meaning of and for the application of Article 38(1) of that regulation, the matter of the content and use of names, other than legal names, designating foods of animal origin to describe, market or promote foods containing vegetable proteins, including in the case of whole substitution of ingredients of vegetable origin for all the ingredients of animal origin constituting a food, thereby preventing a Member State from acting in that matter by adopting national measures regulating or prohibiting the use of such names?

3. If Question 1 or Question 2 is answered in the affirmative, does the specific harmonisation carried out, within the meaning of and for the application of Article 38(1) of Regulation (EU) No 1169/2011, by the provisions of Articles 7 and 17 of that regulation, in conjunction with point 4 of Part A of Annex VI thereto, prevent:

(a) a Member State from adopting a national measure providing for the imposition of administrative penalties in the event of non-compliance with the requirements and prohibitions resulting from the provisions of that regulation?

(b) a Member State from adopting a national measure determining the proportions of vegetable proteins below which the use of names, other than legal names, designating foods of animal origin to describe, market or promote foods containing vegetable proteins would still be authorised?

4. If Questions 1 and 2 are answered in the negative, do the provisions of Articles 9 and 17 of Regulation (EU) No 1169/2011 authorise a Member State:

(a) to adopt a national measure determining the proportions of vegetable proteins below which the use of names, other than legal names, designating foods of animal origin is permitted for the purpose of describing, marketing or promoting foods containing vegetable proteins?

(b) to adopt a national measure prohibiting the use of certain customary or descriptive names, including where they are accompanied by additional indications ensuring that the consumer is provided with information in good faith?

(c) to adopt the measures referred to in Question 4(a) and (b) only in respect of products manufactured in its territory, without, in that case, infringing the principle of proportionality of those measures?