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Made in EU

How country-of-origin labelling affects the internal market

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Foreword

The Internal Market for goods is often viewed as the area where the European market is most integrated and where barriers to trade have been eliminated. This is true to a large extent. However, the Internal Market for goods remains a mosaic of national markets where common rules for products must coexist with national product requirements.

During the last few years, the National Board of Trade has noticed an increase in national regulations on country of origin labelling of food products. This increase raises questions on how national origin labels affect the free movement of goods within the EU. It also demonstrates the need for a transparent review system to ensure compliance with EU law.

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Stockholm, February 2020

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Summary

'It's very simple to say Italian food is the best. If you ask a Hungarian, a Lithuanian, or an Irish person, they tell you their food is the best.'[1]

To label food with origin is a debated issue within the EU, and according to a Eurobarometer published in 2019, the origin of food is the top priority for EU consumers when picking food products from the shelves.[2] Over the last few years, several Member States have adopted country-of-origin labelling (COOL) for food products. Although the EU has a framework for food labelling, eight Member States have adopted mandatory origin labelling for food products such as milk and meat.

The purpose of this report is to discuss how national origin labels affect the free movement of goods within the EU. What is the reasoning behind national origin labelling, and can it be guaranteed that such measures do not create unjustified barriers to trade? This analysis shows that COOL can have a negative impact on trade within the EU since it puts imported goods in an unfavourable position by steering consumers towards domestic products. This is also the approach adopted by the Court of Justice of the European Union (CJEU) following rulings on COOL and the free movement of goods.

When Member States adopt rules on origin labelling it is usually motivated by the consumer's wish to know where the food they eat comes from. Origin labelling can help consumers decide on the quality of a product in the sense that its origin may relate to certain tastes or characteristics. However, origin sometimes says nothing about the quality or characteristics of the product but instead may act as a signal for other attributes that consumers value. What information origin provides and if other, more targeted ways of providing information would allow consumers to make well-informed decisions can therefore be questioned.

A Member State that introduces origin labelling of food products must notify the Commission about this in advance. Two procedures serve this purpose: the notification procedure for technical regulations under Directive (EU) 2015/1535 and the notification procedure in Regulation (EU) 1169/2011 on food information to consumers. This report will discuss and compare these procedures in light of COOL. The purpose of this is to determine whether there are differences between the procedures that could affect the free movement of goods.

The analysis shows that the notification procedures do not offer the same guarantees with regard to review and transparency. Directive 2015/1535 allows for a formalised and extensive examination of notified proposals that includes the possibility for both Member States and economic operators to react and give their input on draft regulations. However, the lack of transparency under Regulation 1169/2011 makes it difficult for both Member States and economic operators to obtain information about new proposals. This, in turn, can affect the prevention of trade barriers on the Internal Market.

Given that national origin labelling seems to become more common, a transparent review system must be in place to ensure compliance with EU law. One could therefore question the sole recourse to Regulation 1169/2011 as the notification procedure for COOL measures.

We hope that this report will contribute to the discussions on the future of the Internal Market by highlighting the need for a consistent approach on mandatory COOL.

Content

1 Introduction

From Italian pasta and French milk to Spanish honey or Finnish meat, when shopping for groceries at your local supermarket, you will likely find food products marked with origin labelling. Since 2016, several Member States have introduced mandatory country-of-origin labelling (COOL) for food products. Although the EU has adopted a comprehensive framework for food labelling, eight Member States now have national COOL measures in effect or in process.[3]

Concern on how these origin labels affect the free movement of goods is growing. National labelling requirements place a burden on food business operators and may constitute a barrier to trade. This is not only because of differences in the labelling requirements but also because of how consumers perceive an origin label and their preference to consume domestic goods. There have been warnings of a potential renationalisation of the Internal Market following national COOL initiatives, and whether these measures comply with existing EU law can be discussed.[4]

The National Board of Trade is the Swedish governmental agency responsible for issues relating to foreign trade, the Internal Market, and trade policy. In that capacity, we are responsible for a number of EU functions in Sweden, such as the notification procedure for technical regulations (Directive 2015/1535).[5] Within this procedure, we have, during the past few years, noticed an increase of notifications on COOL of food products. These notifications include both mandatory and voluntary origin labelling as well as national quality systems linked to a label that indicates the origin by referring, for example, to the national flag.[6]

The regulatory basis within the EU for mandatory COOL is the regulation on the provision of food information to consumers (Regulation 1169/2011). Regulation 1169/2011 allows Member States to adopt national measures on the mandatory labelling of food products as long as these are justified by reasons specifically defined in the regulation and consistent with the Treaty on the Functioning of the European Union (TFEU). A Member State that deems the mandatory labelling of food products necessary must also notify the Commission about this in advance.[7]

Consequently, before adopting national measures on origin labelling, Member States need to consider both the notification procedure for technical regulations under Directive 2015/1535 and the notification procedure in Regulation 1169/2011. The purpose of these procedures is the same – to inform the Commission and other Member States of national legislation – but they serve to monitor different aspects of the proposed legislation. That some country of origin measures have been accepted by the Commission under Regulation 1169/2011 and, at the same time, received criticism from the Commission and other Member States under Directive 2015/1535 is therefore interesting.[8]

1.1 The purpose of the report and its limitations

The purpose of this report is twofold. On the one hand, it will discuss the impact of Member States' COOL regulations on the free movement of goods. What are the reasoning behind origin labelling and can it be guaranteed that such measures do not create unjustified barriers to trade? On the other hand, the report will discuss and compare the notification procedures under Directive 2015/1535 and Regulation 1169/2011 in light of COOL. Within this report, the rules on COOL will also be interpreted.

The report will focus on origin labelling within the EU and does not intend to evaluate to what extent COOL measures conflict with international trade commitments. In this report, we will refer to COOL as any regulatory measure introducing labelling requirements that indicate the country or provenance of a food product.

For this analysis, discussing industry-driven origin labels and their impact on the Internal Market would also have been interesting. However, given that these labels are often not regulated by the Member States and fall outside the scope of the notification procedures analysed in this report, the focus will be limited to COOL measures proposed by the EU Member States.

The subject of COOL is closely related to questions regarding, for example, sustainability and animal welfare. The report touch upon these questions briefly, but the purpose of the report is not to discuss the differences in national legislation in these areas. Instead, the report will analyse, from a legal perspective, the impact of Member States COOL regulations on the free movement of goods.

1.2 Outline

This report will embark on a discussion regarding the concept of COOL and its impact on the free movement of goods (Chapter 2). It will also discuss how COOL can be justified according to EU law and present information on COOL measures adopted by EU Member States (Chapter 3). The notification procedures under Directive 2015/1535 and Regulation 1169/2011 will then be compared and analysed. The purpose of this is to identify if there are differences between the procedures that could affect the free movement of goods (Chapter 4). Finally, the conclusion and recommendations for the future examination of COOL measures are presented (Chapter 5).

2 Country-of-origin labelling within the EU

EU food law consists of a comprehensive legislative framework covering rules on the official control of food products, food labelling and the traceability of food. Food labelling was one of the earliest areas of harmonised EU food law, coming into force in 1979, and it continues to be one of the more comprehensively covered areas of EU food law.[9]

Given that consumers today have become increasingly concerned about the constituents of their food, food labelling is unsurprisingly the area of food law that, in general, leads to the most contention.[10] COOL is no exception as it raises several questions, from consumer information and food safety to the risk of market fragmentation and the emergence of protectionist tendencies. However, before addressing some of these questions, the concept of COOL must be well understood.

2.1 What is COOL?

On one hand, COOL can be defined as a label or mark that indicates the origin of a product. The purpose of COOL is to provide consumers with information on the geographical area a certain product comes from or where the product has been produced. On the other hand, the definition of origin differs depending on the food product. Origin can indicate the country of birth for livestock produce, the place for its fattening and slaughtering, or the place where, for example, fruits are harvested. For processed products, origin often indicates the place of last substantial transformation, e.g. where a sausage was made and not the place where the pork used to produce the sausage originates.[11]

Within the EU there are harmonised rules on the indication of origin for certain food products. For example, indication of origin is mandatory for prepacked beef, pork, and poultry as well as for honey, fruit, and olive oil.[12] However, the definition of origin sometimes varies within the harmonised legislation. For beef, the place of birth, rearing, and slaughter has to be marked,[13] while for honey, only marking the product with EU/non-EU origin, without reference to a specific country, is mandatory.[14] When it comes to honey, some Member States have recently notified proposals requiring that product labels give detailed information on the countries of origin.[15]

Despite common EU rules on origin labelling, Member States are still able to adopt origin labels under certain conditions provided for in harmonised legislation. EU legislators took nearly four years to adopt Regulation 1169/2011, with COOL measures being one of the contentious issues. Although legislators reached an agreement to develop COOL on a more horizontal basis and eventually extend it to more food products and ingredients, the Member States could not agree on harmonised criteria. For that reason, Regulation 1169/2011 includes a provision that allows Member States to adopt national COOL measures.[16]

When introducing mandatory origin labelling, the Member State needs to inform the Commission and other Member States, according to Regulation 1169/2011. If the measure includes a technical regulation, the Member State will also have to notify the Commission under Directive

2015/1535. The concept 'technical regulation' includes, for example, the characteristics required of a product, such as levels of quality and safety or production methods.[17]

Origin labelling can also be provided on a voluntary basis. If food business operators want to indicate the origin of a product, they can do so as long as they comply with the general provisions of Regulation 1169/2011. This means, for example, that the label should not mislead consumers.[18] For food business operators, voluntarily providing information on the origin could result in added value since this information may influence the consumers' purchasing behaviour.[19]

When Member States propose COOL measures, their arguments primarily stem from consumers wishing to know where the food they eat comes from. The consumers' relationship to COOL is therefore an important aspect when examining measures on origin labelling, and a number of studies have been carried out on how consumers perceive COOL.[20]

Consumers can base their choice of food on objective differences of taste and quality, but the choice of food based on origin can also be linked to more complex psychological concepts, such as a wish to consume high-status food products, ethical reasoning, or other personal preferences. Origin can thus act as a signal for other attributes that consumers value, such as food quality, safety, animal welfare, health-related issues, or social concern.[21]

However, associating origin with factors such as quality, animal welfare, or environmental concern can be misleading since these factors also vary among producers within the Member States. For example, goods that originate from neighbouring countries can be more environmentally friendly than domestically produced goods since the production method sometimes has greater impact on the environment than the transportation of the food product. The distance of transportation can also be shorter between neighbouring countries than within a country. Consumers' interpretation of origin labelling might simplify these aspects and orientate the consumer towards domestic goods without it having the qualities that consumers might believe.[22]

A recent Eurobarometer from the European Food Safety Authority (EFSA) showed that 53per cent of Europeans find information on origin to be the most important factor when buying food. The same barometer also indicated that a majority of consumers prefer information on origin to information on food safety or on ethical beliefs such as animal welfare.[23] Another report, based on a study from the Food Chain Evaluation Consortium, indicated that 42.8per cent of the interviewed EU consumers would use information on origin to favour national or local production over food from other countries.[24]

2.2 Possible impact of origin labelling

A report by the Commission on the country of origin on meat used as an ingredient indicates that when food business operators are required to label their products with their origins, their

operating costs can increase from 15–20 per cent to 50 per cent.[25] In the same report, the Commission estimates that 90 per cent of that cost increase would be passed on directly to consumers and the pricing of the food product.[26] Food business operators will also have to deal with operational challenges when COOL measures are introduced. These operators' varying supply chains can place further costs and restraints on companies – for example, if they need to introduce a new traceability system to guarantee the origin.[27]

A food business operator active in a Member State with mandatory origin labelling would have to change its labelling and segregate its batches depending on the sourcing of the food product, which often varies. National product requirements could thus increase the costs and the administrative burden for food business operators and make it more difficult for companies to sell their products in different Member States.[28] In addition, origin labelling can lead to an increased burden for national authorities since the demand of official control over the information placed on the product would increase.[29]

The Commission has also concluded in several reports that a voluntary origin labelling is preferable over mandatory measures, both at the national and EU levels. Voluntary origin labelling places the least constraint on the Internal Market, food business operators, and public authorities.[30] However, as mentioned earlier, the Commission has already approved several national mandatory measures on COOL, one of them being the French initiative on the origin labelling of milk and meat products.

Following France's introduction of COOL, which entered into force in January 2017, Belgium presented information on how the French labelling, even since its first announcement, affected trade between Belgium and France. In the spring of 2016, a 17 per cent decline in exports of milk to France was reported, the explanation being that many fixed-term contracts in the retail sector were abandoned or not renewed when the French measures were announced. Belgium also reported that exports of milk and milk products to France received an even further decline after the start of the measure and urged the Commission to take action and evaluate the effects of different national COOL measures.[35]

Box 1

France COOL initiative

France was one of the first Member States to set national COOL measures for milk, milk used in dairy products, and meat used as an ingredient in foods under Regulation 1169/2011.[31] According to the French measure, the origin label must indicate the place of birth, raising, and slaughter of the animals used as ingredients in meat products. For products containing more than 50 per cent milk, the label must indicate the 'country of collection' as well as the 'country of transformation'. If the production took place outside France, the label may state the origin as 'EU' or 'non-EU'.

In their notification, France referred to an increased interest from French consumers to know where the food they eat comes from and that information on origin and food ingredients is important for the consumers' perception of food quality. France justified their measure by arguing that information on origin is important for the protection of consumers and the prevention of food fraud.

During the Commission's inter-service consultation, multiple directorate generals (DGs) raised concerns about France not fulfilling the justification grounds in Regulation 1169/2011. Concerns were also raised regarding the impact on the Internal Market. Some DGs presented warnings on a potential renationalisation of the Internal Market if other Member States were to follow the French initiative.[32]

The Commission approved the French initiative, considering that the issue of origin labelling is a priority for consumers. The Commission also referred to the fact that the French initiative was a 'pilot project' with a limited period. The French origin label was approved as a two-year initiative from January 2017 to December 2018. France, however, notified an extension of the two-year trial scheme, which the Commission accepted in 2019.[33] The Commission's non-objection to the French draft law triggered a wave of similar national COOL initiatives from other Member States.[34]

2.3 COOL and the free movement of goods

One of the key achievements of the EU has been to create a well-functioning Internal Market where the markets of the Member States are highly integrated. Within the Internal Market, goods should be traded freely without encountering any barriers to trade – neither tariff barriers such as import licences nor non-tariff barriers such as unnecessary red tape and national technical requirements.

Today we often view the Internal Market for goods as the area where the European market is most integrated and where barriers to trade have been largely eliminated. This is true to a large extent. However, the Internal Market for goods remains a mosaic of national markets where common rules for products must coexist with national product requirements. The EU has tried to grapple with problems raised by differences in national legislation and their negative impact on trade by treading a fine line between developing common rules and standards and using free-movement-of-goods principles, such as the principle of mutual recognition,[36] to discipline the regulatory diversity of the Member States.

EU food law is no exception as it consists of harmonised and non-harmonised areas that must coexist within the Internal Market to ensure the free movement of food products. As a result, EU rules and principles on the free movement of goods influence the food industry in many ways.[37] As mentioned above, the regulatory basis for adopting national mandatory measures on origin labelling is provided for in Regulation 1169/2011. Article 39 of that regulation allows the Member States to adopt legislation on origin as long as these are justified by reasons specifically defined in the regulation.

In addition, national measures that are not subject to harmonisation must always be interpreted in light of the treaty provisions on the free movement of goods. The CJEU has consistently held that when interpreting a provision of secondary law,[38] preference should, as far as possible, be given to the interpretation which renders the provision consistent with the treaty and the general principles of EU law.[39]

According to the advocate general in case *Douwe Egberts*, Article 39, Regulation 1169/2011 should be interpreted in light of the treaty rules and case law on the free movement of goods. This means that national COOL measures must not only be justified according to Article 39 but also be appropriate for protecting the interests concerned and must not obstruct trade any more than necessary to fulfil the objective.[40] For the reasons set out above, we will assess origin labelling against the free movement of goods and the requirements in Regulation 1169/2011.[41]

Origin labelling in EU case law

According to the CJEU in Dassonville, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially' trade between Member States are prohibited under Article 34 TFEU.[42] In principle, this means that national rules that may create

barriers to trade among the Member States should be prohibited, unless they can be justified and are proportionate.[43]

An example of rules that can affect intra-union trade are national rules that give preference to domestic goods.[44] This can be seen in *Commission v. Ireland*, concerning an Irish law requiring that all imported jewellery that looked like souvenirs of Ireland had to be labelled with origin. The CJEU stated that such a requirement breached Article 34 TFEU. In *Commission v. United Kingdom*, concerning a British law that certain imported goods should be marked with origin, the CJEU further developed its view on origin labelling. It stated that the purpose of origin labelling is to enable consumers to distinguish between domestic and imported products, allowing them to 'assert any prejudice which they may have against foreign products'.[45] National rules that promote the consumption of domestic goods are therefore seen as contrary to Article 34 TFEU.[46]

In this case law, the CJEU's reasoning tends to focus on the effect of a taken measure. If a measure affects domestic and imported goods differently, either in law or in fact, the measure is considered directly discriminatory.[47] This is apparent in *Commission v. United Kingdom*, where the CJEU stated that origin labels 'are applicable without distinction to domestic and imported products only in form because, by their very nature, they are intended to enable the consumer to distinguish between two categories of products, which may thus prompt him to give preference to national products'.[48]

Furthermore, the CJEU has, in *Commission v. Germany*, regarding a domestic labelling system

of food products, established that the use of voluntary labels referring to national quality systems can constitute an unlawful barrier to trade – if the use of such labels promotes the sale of products with that label over goods lacking the label.[49] Member States have also tried to use campaigns to encourage the consumption of national or local goods.[50] However, the Court has repeatedly stated that such measures are designed to 'achieve the substitution of domestic products for imported products' and are therefore liable to have a trade restrictive effect.[51]

Origin labelling can help stimulate the consumption of domestic goods through consumers' preference towards national goods, which could make it more difficult for companies to sell imported products.[52] Consequently, even if a COOL measure treats domestic and imported products the same way in law, it does, in fact, discriminate imported products by giving preference to domestic goods.

Box 2

Product of Slovakia

Slovakia notified a regulation on the voluntary origin labelling of agricultural products and foodstuffs under Directive 2015/1535.[53] The regulation specifies the conditions for using different statements such as 'Product of Slovakia', 'Foodstuff from Slovakia', and 'Foodstuff manufactured in Slovakia'. The proposal also defined the term 'country of origin', which was argued by several Member States and the Commission, to be incompatible with the definition in Regulation 1169/2011.

The Commission reacted to the proposal, referring to *Commission v. United Kingdom*, and stated that 'if the national origin of goods brings certain qualities to the minds of consumers, the protection of consumers is sufficiently guaranteed by rules which enable the use of false indications of origin to be prohibited'. The Commission called on Slovakia to change the origin label to one that could also be given to products from other Member States. Slovakia replied that the proposal was based on consumers' demand for information. However, the origin label was later removed from the proposal.[54]

3 Justifying country-of-origin labelling

The Commission has approved several national COOL measures despite opposition by other Member States and stakeholders such as European food and drink associations.[55] As discussed in Chapter 2, origin labelling can have a trade-restrictive effect; therefore, Member States that introduce such measures will need to justify them. The following analysis will elaborate on how national origin labelling measures would have to be justified according to EU law. The analysis will cover both Regulation 1169/2011 and the treaty provisions on the free movement of goods.[56]

3.1 Justification grounds

Protection of consumers

The protection of consumers is the justification ground most frequently invoked by the Member States when introducing origin labelling. Member States often argue that the lack of information on origin might mislead consumers and that such information is important for consumers to make well-informed decisions about the food they want to consume. When France introduced their COOL initiative, their main argument was that consumers have a right to be informed about the characteristics of their food choices. France, however, also pointed out that origin labelling would increase consumer protection by improving transparency and traceability throughout the food chain.[57]

The CJEU's reasoning on consumer protection is often based on the assumption that if consumers have sufficient information at their disposal, they can make their own decisions regarding the quality of a food product.[58] The protection of consumers is thus linked to their ability to make informed choices. The level of information that a consumer needs to make an informed choice should be based on 'the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant'.[59]

In *Commission v. Germany*, the CJEU discussed whether a German purity requirement on beer could be justified based on consumer protection. The Court stated that consumers can have different preferences and that their ability to make informed choices is important. However, consumer behaviour and preferences change over time. Therefore, legislation should not 'crystallise given consumer habits so as to consolidate an advantage acquired by national industries'. Even if the CJEU has been reluctant to justify trade-restrictive measures on the grounds of consumer protection,[60] it has not yet provided any guidance on national origin labelling under Regulation 1169/2011.[61]

Therefore, assessing whether or not the same approach would be applied regarding mandatory country of origin measures initiated under that regulation is difficult. However, during the Commission's inter-service consultation on the French COOL measure, two DGs raised concerns as to whether the indication of origin would contribute to consumer protection.[62] When Lithuania introduced their COOL measure, their reasoning also focused on the consumers' ability to make an informed decision.

Box 3

Lithuania's country-of-origin labelling on milk

In 2015, Lithuania submitted a proposal on mandatory origin labelling for milk and milk products. The proposal was simultaneously notified under Directive 2015/1535 and Article 45 Regulation 1169/2011.[63] The Commission responded to the notification and informed that they were going to assess the proposal solely under the regulation.

To justify their measure, Lithuania argued that Lithuanian consumers have high expectations of knowing the origin of milk and milk products. According to data from a consumer survey, 67 per cent of the Lithuanian respondents found that it is important for milk and milk products to have indications of origin. The measure was also motivated by the fact that 33 per cent of the respondents would pay more to receive information about their origin. Therefore, Lithuania argued that consumers must be properly informed about the origin of the milk products offered. Lithuania also argued that the origin label would allow for the development of small dairy farms and short food supply chains, which could result in a 'positive boost' for the regional development.

To prove that milk originating from Lithuania has certain specific qualities, Lithuania argued that 91.5 per cent of the national dairy farm structure consists of small farms with up to 10 cows and that the conditions under which these cows are kept lead to the milk having a higher biological value because of the corresponding composition of fatty acids. These characteristics had been scientifically proven by an accredited laboratory, which also compared Lithuanian milk with milk from other Member States. Lithuania also argued that the long-distance transportation of milk deteriorates its quality and that locally produced milk is processed as soon as possible after milking the cow, resulting in a possibility to protect the biological values of domestic milk.

Under the notification procedure in Directive 2015/1535, the proposal received three detailed opinions and two comments from other Member States. The Member States argued that the Lithuanian measure would be contrary to Article 34 TFEU and that COOL measures that could have an adverse effect on the Internal market should be avoided. The Commission did not leave a negative opinion under Regulation 1169/2011, which meant that Lithuania could adopt the measure. In October 2016, the proposal was adopted with a limited period.

Consumer protection is one of the mandatory or public-interest requirements developed by the CJEU to justify trade-restrictive measures.[64] Traditionally, these mandatory requirements can be invoked by a Member State only if the measure is not distinctly applicable (i.e. directly discriminatory).[65] For example, in *Commission v. Ireland*, the Court said that the exceptions listed in Article 36 TFEU could not be extended to include cases other than those specifically laid down. This meant that the Irish government could not rely on consumer protection to justify its directly discriminatory origin labelling. Following this reasoning, since COOL in fact discriminates against imported products, it should not be possible to justify these measures based on consumer protection, as provided for in Article 39.1(b), Regulation 1169/2011. Whether the Commission should accept consumer protection as a justification ground for mandatory origin labelling could therefore be questioned. However, some scholars argue that this strict distinction between applicable derogations based on the measure being directly or indirectly discriminatory is becoming less significant.[66]

Protection of public health

Member States can also justify a trade-restrictive measure based on the protection of public health. For this, the CJEU requires the Member States to demonstrate that they have genuine health concerns and to show the existence of a consistent and systematic health policy/political strategy.[67]

The reason for this is previous attempts to use health protection as a means of affording a disguised restriction on trade. This was the situation in the *Turkeys* case, where the UK introduced an import ban on poultry meat and eggs from several other Member States to protect animal health. Britain argued that without an import ban, the British poultry flock could, in the absence of a vaccination policy, be exposed to infection from imports. The CJEU, however, noted an increase in the number of turkeys imported into the UK and that British turkey producers lobbied the British government to take action to protect the domestic industry. The CJEU therefore said that the measure constituted a disguised restriction on imports since the real aim was to hinder imports of poultry from other Member States.[68]

In 2015, an Italian member of the European Parliament asked the Commissioner for health and food safety, Vytenis Andriukaitis, a written question on COOL. In his reply, the Commissioner elaborated on the grounds for justifications in Article 39 of Regulation 1169/2011 and said that 'the Commission would like, however, to clarify that it does not consider information on origin or provenance neither as a tool for the prevention of fraud nor as a tool for the protection of public health. There are other mechanisms in place to ensure the safety and the traceability of food'.[69] Having regarded the case law and the aspects described above, a Member State could have a difficult time using either consumer protection or public health to justify the introduction of a mandatory COOL measure.

3.2 Is there a link between quality and origin?

Once a Member State has demonstrated that the COOL measure can be justified according to Regulation 1169/2011, the Member State also needs to prove a link between certain qualities of the food and its origin.[70]

When Member States demonstrate the link between quality and origin, their reasoning seems to differ. When Finland proposed a COOL measure under Regulation 1169/2011, they referred to national quality aspects unique to Finland, such as certain standards of animal welfare.[71] France instead referred to the fact that origin is an essential factor in the consumer's perception of food quality. To support their definition of quality, the French authorities referred to standards defining quality as 'the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs'.[72] The Commission's Directorate-General for Internal Market, Industry, Entrepreneurship (DG Grow) questioned this definition during the Commission's inter-consultation of the French proposal and argued that the definition of quality needs to imply certain characteristics of the food and that 'this may include DNA characteristics of the animal concerned, organoleptic, sanitary, chemical qualities, etc.'[73]

When Lithuania submitted a proposal on the origin labelling of milk, they referred to scientific studies showing that locally produced Lithuanian milk had unique biological qualities because of the conditions animals are kept under and the possibility to allow for a swift processing of the milk because of shorter transportation times.

The arguments presented by Lithuania have similarities with the reasoning used when Member States apply for a protected designation of origin (PDO) or a protected geographical indication (PGI).[74] To provide guidance on the interpretation of the link between quality and origin, we will therefore turn to the reasoning behind the EU legislation on PDO and PGI. According to case law from the CJEU, Regulation (EU) 1151/2012,[75] on quality schemes for agricultural products and foodstuffs, is exhaustive when it comes to the possibility of introducing an indication of origin as a means of product quality.[76]

The aim of PDOs and PGIs is to protect and promote products with particular characteristics linked to their geographical origin. The main difference between the two is how close this link is.[77] The CJEU has made several statements regarding PDOs and PGIs that might provide guidance on the connection between quality and origin. An example of an approved PDO is feta cheese from Greece. In the feta cheese cases, the CJEU stated that if a food product was to be granted a PDO, the area of origin must be defined as 'a geographical environment with specific natural and human factors and which is capable of giving an agricultural foodstuff its specific characteristics'. The geographical characteristics also needed to be homogenous and possible to distinguish from any neighbouring areas. In the case of Greek feta cheese, the Court said that the area of origin could be defined by the nature of the terrain, the climate, the mild winters and the hot summers, and by the botanical characteristics and vegetation of the area.[78] According to this

Box 4

Finland's origin labelling on meat in restaurants

In November 2017, Finland informed the Commission, under Regulation 1169/2011, about a proposal to introduce mandatory COOL on fish and meat served in restaurants.

After reviewing the proposal, the Commission argued that the Finnish authorities had failed to prove and explain on what basis Finnish consumers want to receive information on origin. The Commission further argued that Finland had failed to provide evidence of a link between the origin and the quality of the food. The Finnish authorities had related the evidence of quality to aspects relating to Finnish rules on food safety and animal welfare. According to the Commission, this was not information or data that would allow it to assess whether a link existed between certain qualities of the food and their origin.

Regarding the impact of the free movement of goods, the Commission stated that any additional national labelling requirements must not create disproportionate barriers to the free movement of goods. The Commission went on to argue that since the scope of the Finnish measure only refers to non-prepacked food, the measure would unlikely have a significant effect on the Internal Market and create barriers to trade. Finland reviewed their proposal to include only origin labelling on meat served at restaurants. The Commission accepted the reformed proposal, and it was later adopted by Finland.

reasoning, if products from a specific area possess certain qualities, informing consumers about the origin of the product could be relevant.

3.3 Consumers' interest in information on origin

To justify the introduction of COOL measures under Regulation 1169/2011, the Member States must also provide evidence that a majority of consumers attach significant value to information about origin.[79] When France proposed its origin label, it pointed at studies from the Commission, findings in a Eurobarometer,[80] and national surveys showing that consumers want to know where the food they eat comes from. Lithuania also referred to national surveys in their notification which showed not only that consumers have an interest in the origin of milk and milk products but also that they would be willing to pay more for such information.

When Spain notified their country of origin proposal on milk and milk products, they referred to several consumer surveys that argued that consumers want to know the origin of milk and milk products.[81] Spain also referred to the fact that consumers associate the origin of a product with its quality. Even though a majority of the Member States raised concerns about the labelling requirements, the Commission did not react to the Spanish proposal.[82] However, when Finland proposed to introduce origin labelling on fish and meat in restaurants, the Commission stated that Finland had failed to provide enough evidence on the consumers' interest of information on origin.

3.4 The aspect of free movement

One aspect that the Member States need to consider when introducing national measures is the principle of free movement.[83] Given that national measures within the non-harmonised area should be consistent with the free movement of goods, this aspect also needs to be considered when COOL measures are introduced.

When COOL proposals are notified, imported products are often excluded from the labelling requirements. This is usually done by the inclusion of a mutual-recognition clause stating that products lawfully marketed in an EU Member State are not subject to the provisions of the national regulation.[84] However, even if goods imported from other Member States are excluded from the technical aspect of the COOL requirement, it may still have an impact on trade, partially because consumers, when possible, tend to choose local and domestic food products over imported goods. With a mutual-recognition clause, food business operators would not be required to label their milk products with origin, but their products would still compete with labelled domestically produced products.

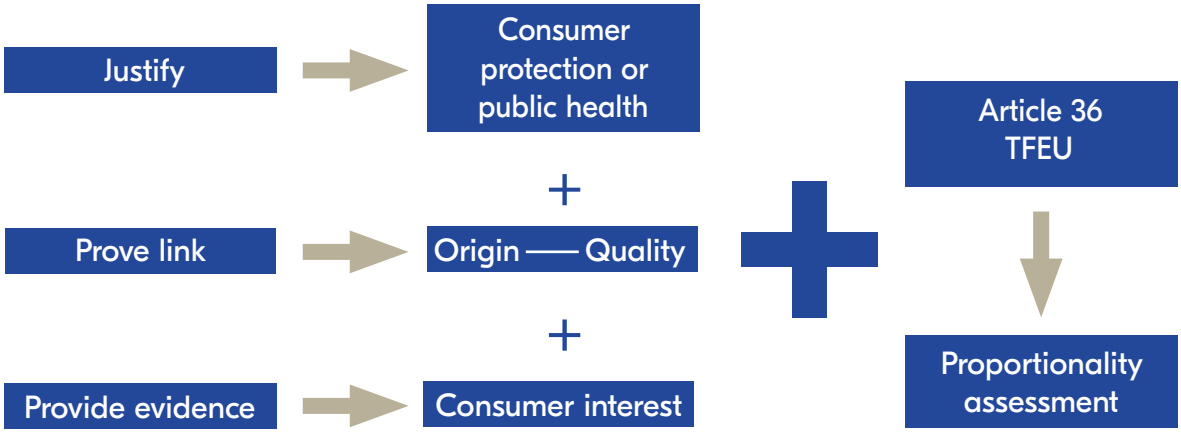
Since origin labelling constitutes a barrier to the free movement of goods, the measure also needs to be justified according to the treaty provisions. The list of treaty derogations in Article 36 TFEU on the free movement of goods is exhaustive,[85] and the justification grounds are only applicable if the restriction does not constitute a 'means of arbitrary discrimination or a disguised restriction on trade between Member States'.[86] The purpose is to prevent Member States from protecting domestic products.[87]

3.5 Is the measure proportionate?

According to EU law, before introducing national regulations, the Member State must also demonstrate that their proposed measure is proportionate to the legitimate aim pursued. This means that the Member State must assess whether other, less restrictive measures can achieve the same purpose of, for example, protecting consumers or protecting public health. The proportionality assessment requires that the Member State balance different interests at stake. This is often a complex exercise, not least concerning COOL. From a free movement perspective, labelling requirements are often considered more proportionate than, for instance, import bans. In addition, voluntary labelling requirements are often viewed as less trade restrictive compared to mandatory requirements.

An important aspect when conducting a proportionality assessment of COOL could also be to consider if other labels, such as the indication of animal welfare, could be sufficient in ensuring that consumers have access to the information

Justifying COOL



needed to make well-informed decisions about the food they consume. As mentioned in Chapter 2, a number of studies carried out on how consumers perceive COOL have concluded that origin can act as a signal for other attributes that consumers value, such as food quality, safety, health-related issues, and social concern. With this in mind, origin labelling could become an ineffective instrument if it aims to inform consumers of differences in food quality and animal welfare. A national measure introducing animal welfare labelling could then be more proportionate to protect consumers.

However, according to the Eurobarometer mentioned earlier, 53 per cent of Europeans find information on origin to be the most important factor when buying food. The same barometer also indicated that a majority of consumers prefer information on origin to information on food safety or animal welfare. Following this result, a national measure introducing COOL could be a proportionate response to ensure consumer protection.

Summary

In Chapter 3, we discussed how national COOL measures have to be justified according to EU law, i.e. according to Regulation 1169/2011 and the treaty provisions on the free movement of goods. Several requirements and conditions need to be fulfilled by the Member States before adopting origin labelling at the national level. We have concluded that whether COOL measures can be justified based on consumer protection is questionable since origin labels do not treat domestic and imported products the same way in fact. In addition, a Member State that notifies a proposal on COOL according to Regulation 1169/2011 must demonstrate a link between quality and origin. How Member States choose to demonstrate this link seems to differ. Nevertheless, the Commission still accepts these measures.

After examining the EU framework on COOL, a lack of consistency is apparent in EU law on how to handle origin labelling. First, according to case law, national measures on COOL are not accepted under Articles 34–36 TFEU. Second, Regulation 1169/2011 provides for harmonised legislation and opens up for national COOL measures. Third, rules on PDOs and PGIs aim to ensure that products with particular characteristics linked to their geographical origin are protected.

The regulations mentioned above are intended to provide a framework on origin labelling within the EU. However, COOL measures are interpreted differently depending on the regulation used, which gives rise to legal uncertainty and a lack of consistency.

4 The notification procedures

When examining COOL notifications made under Directive 2015/1535 and Regulation 1169/2011, it seems that the notifications are reviewed differently depending on the procedure used. To provide an example, when Spain proposed its initiative on the origin labelling of milk, it did not receive criticism from the Commission under the procedure in Regulation 1169/2011. The measure was, however, also submitted under Directive 2015/1535, where both the Commission and the Member States reacted to the proposal's trade-restrictive effect.[88] In the following, we will compare and analyse the functions of the notification procedures. The discussion will also elaborate on how their differences can affect the possibility of preventing trade barriers on the Internal Market.

4.1 The interplay between the notification procedures

The legal framework on origin labelling within the EU consists of both harmonised rules and the possibility for the Member States to introduce national rules. When a Member State introduces national measures on COOL, it needs to inform the Commission of the proposed measure. As mentioned above, within the EU are two procedures for this purpose, namely, the notification procedures under Directive 2015/1535 and Regulation 1169/2011.

The notification procedure under Directive 2015/1535 allows the Commission and the Member States to examine draft technical regulations for products and information society services before they are adopted. The notification procedure under Regulation 1169/2011 requires that the Member States notify the Commission and other Member States before adopting new legislation on food information.[89]

In some cases, COOL measures have been notified under both procedures. In other cases, notifications have come through either under the regulation or under the directive. Which procedure should be applied depends on how the measure is drafted. If the measure falls entirely under Regulation 1169/2011, Article 45.5 of that regulation excludes the application of Directive 2015/1535. However, if the COOL proposal includes technical regulations, such as a national quality scheme, the measure also needs to be notified under Directive 2015/1535. For example, if a notified proposal includes both mandatory and voluntary origin labelling requirements, it would have to be notified according to both procedures. However, if the proposal only includes measures on mandatory origin labelling, it would fall entirely under Regulation 1169/2011.

The objective of the notification procedures

Regulation 1169/2011 has a substantive orientation as opposed to Directive 2015/1535, which is purely a technical procedure. Directive 2015/1535 aims to protect the free movement of goods and the proportionality of restrictions at a technical (and non-political) level. The purpose of this procedure is to prevent the creation of new barriers on the Internal Market before they have been

put in place. As the CJEU expressed in *Belgische Petroleum Unie*, Directive 2015/1535 is designed to protect, 'by means of preventive control, the free movement of goods'.[90]

The objective of Regulation 1169/2011 is to achieve a high level of health protection for consumers and guarantee the consumers' right to information on the food they consume. The regulation sets out a comprehensive regime on the information that must be provided to consumers in relation to food products. However, the union lawmakers deliberately left some areas of food labelling for national legislators to deal with.[91] In this report, the analysis is limited to Articles 39 and 45 of the regulation. Even if Directive 2015/1535 and Regulation 1169/2011 differ, the main objective of the notification procedures is the same: to inform the Commission and other Member States of new national legislation.

The need for transparency

One important aspect when discussing the effectiveness of the notification procedures is transparency. As expressed by the Commission, an open and transparent procedure will enable national authorities and stakeholders to anticipate the creation of obstacles to trade and prevent unnecessary burdens from affecting companies.[92]

Notifications under Directive 2015/1535 are available in a database called the Technical Regulation Information System (TRIS) and are therefore easy to track. The notified proposals are also translated into all official languages of the EU, which makes the procedure user-friendly.

Notifications under Regulation 1169/2011 are not public, and since no official database for notifications exists, the notifying Member State is responsible for informing the Commission and other Member States about the proposal. Notifications are usually sent by email to the Commission and the national representatives of the Member States. However, Member States have raised concerns regarding the transparency of the procedure and the lack of a structured system to cope with the notifications since these are often received on very short notice.[93] This can make it difficult for economic operators and other stakeholders, for instance, to take an active role and prepare for new legislation.

Scrutiny of notified proposals

The notification procedures oblige the Member States to notify national measures that fall within the non-harmonised area. However, not only are notifications compulsory according to Directive 2015/1535, but also, following a judgement from the CJEU, non-notification renders the national law inapplicable.[94] This means that companies cannot be forced to comply with technical regulations that have not been notified. This judgement has played a crucial role in increasing the credibility of the procedure.

Under Directive 2015/1535, the Commission, the Member States, and stakeholders can scrutinise notified proposals during an initial standstill period of three months. Directive 2015/1535 thus creates a peer-review system whereby other parties, including private operators and interest groups, can examine a draft regulation. This peer-

review system limits the possibility for Member States to pass legislation incompatible with EU law. If the notifying Member State receives a sharper form of reaction, a so-called detailed opinion from the Commission or a Member State, it is obliged to reply and is encouraged to consider the comments.[95]

The Commission has estimated that Member States in around 95 per cent of the cases where the Commission has reacted to a notified proposal have changed their proposals to bring them into accordance with EU law.[96] For example, in 2014, the Commission reacted to an Italian notification concerning a regional logo which linked the origin of products with their quality. The Commission argued that this measure was contrary to the free movement of goods as it could encourage consumers to buy national products. Following a dialogue, the Italian authorities changed the draft and removed the reference to the origin of the products.[97]

Article 45 of Regulation 1169/2011 also provides for a three-month standstill period but without a sanction for non-notification. Once a notification is made, the Commission consults the Standing Committee on Plants, Animals, Food, and Feed (PAFF Committee) if it considers such a consultation to be useful or if another Member State requests it.[98] Furthermore, no formal procedure exists for Member States to comment on one another's proposals. If a Member State wishes to express their opinion over a notified proposal, it can do so within the PAFF Committee. However, the notifying Member State has no official obligation to respond to the comments or adjust the draft accordingly.

Regulation 1169/2011 allows the Commission to examine a notified proposal and leave a negative opinion if the proposal does not fulfil the criteria in Article 39. In case of a negative opinion, the Commission will initiate an examination procedure to determine whether the measures can be adopted.[99] The Commission can also ask for supplementary information before giving a negative opinion. The scrutiny of the proposed measure, to some extent, is made from different perspectives depending on the procedure used, why the results of the review can differ because of the material differences of the directive and the regulation. Furthermore, different DGs are responsible for the directive and the regulation, which could also affect the scrutiny of notified proposals.[100]

4.2 Procedural differences matter

Based on the analysis above, the notification procedures do not offer the same guarantees with regard to review and transparency. This, in turn, can affect the prevention of trade barriers on the Internal Market. Directive 2015/1535 allows for a formalised and extensive examination of notified proposals that includes the possibility for both Member States and economic operators to react or give their input on draft regulations. Member States can react to notified proposals within the PAFF Committee,

but they cannot offer sharper reactions and urge Member States to change their drafts.

The TRIS notification procedure is also open for other stakeholders such as companies to react directly to a notified proposal, which provides important input from the industry and ensures that all aspects of the proposal are examined. This peer-review system ensures a healthy regulatory dialogue between Member States and the Commission and limits the possibility for a Member State to pass legislation that is incompatible with EU law.

Even if the Commission can examine notifications made under the regulation and leave negative opinions which will prevent the Member State from introducing the measure, the procedure does not allow for an equally thorough examination. The lack of transparency under the regulation makes it difficult for both Member States and economic operators to obtain information about new proposals and to know what reasons the notifying Member State has used to justify the measure. The system is also unavailable for economic operators, even if the measures proposed affect businesses on the Internal Market.

Given that national measures on COOL seem to become more common, a transparent review system must be established to inform Member States and food business operators about new requirements. The procedural differences of the notification procedures and the material differences of the regulation and the directive are important and need to be addressed to avoid unjustified measures on origin labelling. The notification procedure under Directive 2015/1535 is not perfect; there is room for improvement in terms of follow-up to reactions and potential breaches of EU law, but the procedure does offer valuable structured exchanges between the Commission and the Member States that help ensure compliance with EU law.

	Directive 2015/1535	Regulation 1169/2011
Purpose	Ensures the free movement of goods	Ensure a high level of health protection/right to information for consumers
Transparency	Open to all stakeholders via TRIS	Open to Member States via the PAFF Committee
Standstill period	Initially three months (six months if a detailed opinion is issued)	Three months
Non-notification	Regulation cannot be applied (inapplicable to individuals)	No sanction
Responsible DG	DG Grow	DG Sante

5 Concluding remarks

The Internal Market is a work in progress. New rules are continuously adopted at the EU level to deepen the integration among the Member States. At the same time, Member States need to take regulatory action to address demands from their citizens. Such regulatory requirements can co-exist in various Member States but, if divergent, may create barriers for companies selling products on the Internal Market. Today you can have dinner consisting of meat from Ireland, potatoes from Denmark, tomatoes from Spain and end it with some Italian gelato – without having to doubt that the food you consume is safe. However, this highly integrated European market for food products has also increased consumers' interest in finding out where the food they eat comes from.

In this report, we have discussed the impact of national COOL on the free movement of goods. We have concluded that national measures on COOL fall within the scope of Article 34 TFEU and constitute a restriction on trade among the Member States. COOL may have a negative impact on trade within the EU since it puts imported goods in an unfavourable position by steering consumers towards domestic products as well as increasing the administrative and operational burden for food business operators. As argued by the CJEU, 'origin labelling can be applicable without distinction to domestic and imported products only in form because, by their very nature, they are intended to enable the consumer to distinguish between two categories of products, which may prompt the consumer to give preference to national products'.[101]

When Member States introduce COOL measures, they are usually motivated by consumers' wish to know where the food they eat comes from. COOL can sometimes objectively help consumers decide on the quality of a product in the sense that its origin may relate to certain tastes or characteristics.[102] However, origin sometimes says nothing about the quality or characteristics of the product but instead may act as a signal for other attributes that consumers value based on preconceptions. It can therefore be questioned what information origin actually provides and if other, more targeted ways could provide information that would allow consumers to make well-informed decisions, for example, indications of environmental effects, the use of antibiotics, or information on animal welfare conditions. If consumers refer to origin alone, they might be misled rather than enabled to make well-informed decisions, but if the consumers are interested in origin as such, then an indication of origin might be the only way to satisfy such a demand.

To justify a measure that hinders intra-union trade, the measure cannot aim at protecting domestic products. If this is the case, the measure is protectionist and cannot be justified. Regardless of the Member States' reasoning that consumers want to know where the food they eat comes from, undeniably, Member States stimulating the consumption of domestic goods incurs economic benefits.

The purpose of this report was also to discuss and compare the notification procedures used by the Member States when introducing new food

information legislation, Directive 2015/1535 and Regulation 1169/2011, in light of COOL. We conclude that the two notification procedures differ and do not offer the same guarantees in review and transparency. Therefore, measures notified under Regulation 1169/2011 may not be examined as closely as notifications under Directive 2015/1535, which could result in barriers to trade. Furthermore, since origin labelling does not treat domestic and imported products the same way in practice, these measures must be fully reviewed. One could therefore question the sole recourse to Regulation 1169/2011 as the notification procedure for COOL measures.

5.1 Ways forward

To prevent disruption on the Internal Market, a consistent approach must be taken for mandatory COOL within the EU. This approach should consider the consumers' demand for information on origin, but the consumer demand must also be balanced against the impact of COOL on the free movement of goods. For example, French consumers may lack sufficient information on origin to make well-informed decisions when buying milk. However, this interest needs to be balanced against the Belgian company that struggles to sell their milk products on the French market because they cannot label their milk 'from France', even if they were to follow French rules on livestock farming.

While French milk may be of excellent quality, is it possible that milk of such quality cannot be found anywhere else in the EU? If so, then why cannot milk from another Member State obtain the French label so French consumers may recognise that although the milk is of Belgian or Dutch origin, it is of the same quality as domestic milk products?[103] We therefore stress that before accepting measures on COOL, the Commission needs to conduct an assessment of existing national COOL measures and their impact on the Internal Market.

The issue of origin labelling also raises questions on the need for harmonised legislation on COOL to avoid gold-plating and a fragmented Internal Market. Exhaustive harmonisation limits the diversity of rules, and the 'one size fits all' approach sets clear rules for manufacturers and creates a level playing field for competition. However, it leaves little room for the Member States to adjust their rules to the national contexts, and the impact of COOL on the Internal Market could remain despite a common regulatory framework because of the consumer's natural preference towards domestic goods.

To ensure a comprehensive review on COOL, we propose that COOL measures must always be notified under both Regulation 1169/2011 and Directive 2015/1535. This could be done by removing the reference to Directive 2015/1535 in Article 45.5 of Regulation 1169/2011.[104] This will also give the Commission the ability to use the TRIS database for COOL notifications instead of, as mentioned by former Commissioner Andriukaitis, developing an EU database to facilitate the identification of all EU and national mandatory labelling rules.[105] A transparent and easily accessible notification procedure is essential to avoid barriers to trade.

Our recommendations are therefore that:

- COOL measures should be notified under both Directive 2015/1535 and Regulation 1169/2011 to ensure transparency and an extensive examination of notified proposals.
- The Commission needs to assess existing national COOL measures and their impact on the Internal Market before accepting any other proposals on COOL.

When the French proposal was discussed, the Commission raised concerns regarding the risk of 'renationalisation' if multiple Member States would follow the French initiative. As discussed above, the Commission's decision to accept the French initiative opened Pandora's box and encouraged a trend towards regulatory diversity. The key issue is therefore whether we can expect a Internal Market that opens up for greater flexibility on national derogations to cope with these tendencies.

Annex I
COOL notifications under Regulation (EU) 1169/2011[106]

Country	Product		Notified or Discussed	Other Information
Greece	Royal jelly	Quality standards and labelling requirements, including mandatory COOL	2017 (December)	Also notified in TRIS (2016/292/GR)
Greece	Milk and dairy products	Mandatory COOL on prepacked products	2016 (October)	
Greece	Rabbit meat	Mandatory indication of the 'country of slaughter' for prepacked and non-prepacked products	2016 (October)	
Spain	Milk and dairy products	Mandatory indication of the 'country of milking' and the 'country of processing'	2017 (October)	Also notified in TRIS (2017/421/E)
France	Milk and milk used as an ingredient	Mandatory COOL	2016 (April)	
France	Meat used as an ingredient	Mandatory COOL	2016 (April)	
Italy	Milk and milk as an ingredient	Mandatory COOL	2016 (September)	
Italy	Durum wheat in pasta	Mandatory indication of the 'country of cultivation of wheat' and the 'country of flour milling'	2017 (May)	Notification withdrawn and then adopted
Italy	Rice	Mandatory indication of the 'country of cultivation of rice', the 'country of processing', and the 'country of packaging'	2017 (May)	Notification withdrawn and then adopted
Italy	Prepacked food products	Mandatory indication of the name and address of the production facility or, if different, of the packing facility on labels of prepacked food intended for mass caterers or directly to consumers	2017 (August)	Also notified in TRIS in March 2017 (2017/135/I), withdrawn and then notified under Article 114 of the TFEU
Italy	Products containing at least 50% tomato	Mandatory COOL		Never notified but applies from February 2018
Lithuania	Milk and milk used as an ingredient in dairy products	Mandatory COOL	2016 (September)	
Portugal	Milk and milk used as an ingredient in dairy products	Mandatory COOL	2016 (September)	
Romania	Fresh milk for consumption and dairy products	Mandatory COOL	2017 (March)	Also notified in TRIS (2016/554/RO)
Finland	Milk and milk used as an ingredient in dairy products	Mandatory COOL	2016 (October)	
Finland	Meat and fish, also used as ingredients	Mandatory indication of country of origin of fresh, chilled, and frozen meat and fish in non-prepacked food delivered by mass caterers	2017 (December)	Reviewed proposal following a negative opinion

* Notifications made until September 2018

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86 Article 36.2 TFEU.

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88 TRIS notification 2017/421/E.

89 Article 45 of Regulation 1169/2011.

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95 Article 6.2 of Directive 2015/1535.

96 European Commission (2005), A Guide to the Procedure for the Provision of Information in the Field of Technical Standards and Regulations and of Rules on Information Society Services, p.72.

97 Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the operation of Directive (EU) 2015/1535 from 2014 to 2015, p.12.

98 Article 45.2 of Regulation 1169/2011.

99 Articles 45.3 and 45.4 of Regulation 1169/2011.

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101 Case 207/83, *Commission v. United Kingdom* (1985).

102 This is the case with food products that have received status as PDOs or PGIs, such as feta cheese from Greece or whitefish roe from Kalix.

103 Hojnik, (2012) p.309.

104 Article 45.5 of Regulation 1169/2011 states that Directive 2015/1535 shall not apply to the measures falling within the notification procedure specified in this article.

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106 Notifications made until September 2018. European Parliament Research Service, Laaninen (2018), p. 4.

Sammanfattning på svenska
(Summary in Swedish)

Inom ramen för arbetet med att förebygga handelshinder på EU:s inre marknad har Kommerskollegium under de senaste åren identifierat en trend inom EU där medlemsländer tar fram nationella regler för ursprungsmärkning av livsmedel.

Syftet med denna utredning är att ur ett juridiskt perspektiv analysera hur nationella krav för ursprungsmärkning av livsmedel förhåller sig till bestämmelserna om fri rörlighet för varor inom EU. I utredningen analyseras även skillnader i de anmälningsprocedurer som används när ett medlemsland vill införa nationella regler för ursprungsmärkning.

Det finns idag ett gemensamt regelverk inom EU som anger de allmänna reglerna för märkning av livsmedel. Trots detta har flera medlemsländer valt att införa ytterligare krav på att livsmedel som mjölk, ris och pasta ska märkas med information om ursprung. Märkningskraven har motiverats utifrån att konsumenter i hög grad efterfrågar information om ursprung.

Alla nationella regler som antas av medlemsländer inom EU måste vara förenliga med de grundläggande principerna om den fria rörligheten för varor. Det gäller även ursprungsmärkningsregler. Detta innebär att reglerna inte får hindra handeln inom EU genom att exempelvis göra det svårare för importerade produkter att säljas i landet jämfört med inhemska produkter. Om ett medlemsland inför en åtgärd som försvårar handeln för importerade produkter så måste åtgärden motiveras av t.ex. hälso-, miljö- eller säkerhetsskäl, och dessutom vara stå i proportion till syftet.

Ett medlemsland som vill införa nationella krav på ursprungsmärkning måste alltså kunna motivera detta mot bakgrund av exempelvis skyddet för konsumenter. Medlemslandet måste även visa att det finns en koppling mellan ursprunget och kvalitén på livsmedlet samt att en majoritet av konsumenterna i landet efterfrågar information om ursprung.

Syftet med ursprungsmärkning är att konsumenter ska kunna välja livsmedel baserat på varifrån produkten kommer, vilket i praktiken tillåter dem att skilja mellan utländska och inhemska produkter. Detta kan i sin tur leda till att konsumenter i större utsträckning väljer nationella produkter och därmed göra det svårare för utländska produkter av likvärdig kvalité att säljas i landet.

En vanlig motivering bakom att man inför nationella krav på ursprungsmärkning är att ett medlemsland vill göra det möjligt för konsumenter att göra välinformerade val i livsmedelsbutiken. Ursprung kan indikera att en produkt innehåller viss smak eller har en viss karaktär och på så sätt hjälpa konsumenter att avgöra kvalitén på ett livsmedel. Men ursprungsmärkning kan också bli missvisande om konsumenter tolkar in information om ett visst livsmedel

baserat på ursprung. Detta eftersom märkningen som sådan enbart indikerar vilket land eller region en produkt kommer ifrån.

Om konsumenter efterfrågar information om exempelvis miljöpåverkan eller god djurhållning så svarar inte just ursprung mot konsumenternas efterfrågan. Om konsumenter däremot enbart efterfrågar information om ursprung så kan en märkning som indikerar var livsmedlet kommer ifrån vara den mest proportionerliga åtgärden.

I denna utredning jämförs även de anmälningsprocedurer som medlemsländerna måste förhålla sig till när de vill anta nationella regler om ursprungsmärkning. Anmälningsprocedurerna kan ses som en form av remissförfarande som används inom EU för att ge kommissionen och andra medlemsländer möjlighet att granska nationell lagstiftning.

För denna utredning är det två anmälningsprocedurer som är relevanta. Å ena sidan anmälningsproceduren enligt direktiv 2015/1535 som syftar till att förebygga att handelshinder uppstår inom EU, å andra sidan anmälningsförfarandet i förordning 1169/2011 om livsmedelsinformation till konsumenterna. Vilken procedur som medlemsländerna ska använda för att informera kommissionen och övriga medlemsländer om nationella ursprungsmärkningsregler beror på hur reglerna är utformade. Om reglerna enbart omfattar obligatorisk märkning av livsmedel blir förordning 1169/2011 aktuell. Om reglerna däremot även innehåller frivillig information eller om märkningen hör samman med ett nationellt kvalitetssystem, så ska regeln också anmälas enligt direktiv 2015/1535.

Vid en jämförelse av anmälningsprocedurerna framkommer att det finns skillnader både vad gäller transparens och möjligheten till granskning av anmälda förslag, vilket kan skapa skillnader i möjligheten att förebygga att omotiverade hinder uppstår på EU:s inre marknad.

Anmälningsproceduren enligt direktiv 2015/1535 gör det möjligt för medlemsländerna och kommissionen att delta i en öppen regleringsdialog om anmälda förslag. Dialogen innebär att kommissionen och de deltagande länderna kan diskutera hur ett enskilt lagförslag bör utformas för att inte strida mot EU-rätten eller skapa omotiverade hinder. Det anmälande medlemslandet har även en viss skyldighet att beakta kommentarer och synpunkter som inkommer från kommissionen och andra medlemsländer.

Anmälningsproceduren enligt förordning 1169/2011 ger inte samma utrymme för dialog och granskning av anmälda förslag. Övriga medlemsländer har möjlighet att kommentera på förslagen i den ständiga kommittén för växter, djur, livsmedel och foder. Det anmälande medlemslandet har dock ingen skyldighet att anpassa förslaget efter synpunkter som framförs. Däremot har kommissionen möjlighet att hindra ett förslag genom att avge ett så kallat negativt yttrande i de fall ett förslag inte bedöms uppfylla de krav som ställs i förordningen.

Därutöver är skillnaden i transparens stor. Proceduren enligt direktiv 2015/1535 är öppen för företag, branschorganisationer och andra intresserade eftersom alla förslag finns tillgängliga i en offentlig databas. Företag kan på så sätt påverka utformningen av föreslagna regler genom att lämna synpunkter. Detta är inte möjligt enligt anmälningsproceduren i förordning 1169/2011. Mot bakgrund av att ursprungsmärkning tycks bli alltmer vanligt inom EU är det viktigt att det finns ett transparent granskningssystem för att informera medlemsländerna och företag om nya krav. Kommerskollegiums rekommendation är därför att medlemsländerna vid en anmälan av krav på ursprungsmärkning bör vara hänvisade till både anmälningsproceduren enligt direktiv 2015/1535 och anmälningsproceduren enligt förordning 1169/2011.

Kommerskollegium rekommenderar även att kommissionen utreder hur nationella ursprungsmärkningskrav påverkar den fria rörligheten för varor innan man godkänner fler nationella initiativ till obligatorisk ursprungsmärkning.

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