

COMMISSION IMPLEMENTING DECISION (EU) 2022/100**of 24 January 2022****concerning a draft Decree by the Kingdom of the Netherlands on toddler drinks and toddler milk notified in accordance with Article 45 of Regulation (EU) No 1169/2011 of the European Parliament and of the Council***(notified under document C(2022) 312)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1169/2011 of the European Parliament and of the Council 25 October 2011 on the provision of food information to consumers amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 ⁽¹⁾ and in particular Article 45(4) thereof,

Whereas:

- (1) In accordance with Article 45(1) of Regulation (EU) No 1169/2011, the Dutch authorities notified to the Commission on 28 July 2020 a draft Decree containing rules on foods based on (cow or goat milk) protein, to which at least one or more vitamins, minerals or other substances have been added, and which are intended to be used as a drink for young children between the ages of one and three years (Commodities Act Decree on toddler drinks and toddler milk) ('the notified draft').
- (2) Regulation (EU) No 1169/2011 establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling. In this regard, Article 9(1) of Regulation (EU) No 1169/2011 lists the particulars that are to be provided on foods, in accordance with Articles 10 to 35 and subject to the exceptions contained therein.
- (3) Article 39(1) of Regulation (EU) No 1169/2011 provides that in addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt measures requiring additional mandatory particulars for specific types or categories of food, justified on the grounds of the protection of public health, or the protection of consumers, or the prevention of fraud or the protection of industrial and commercial property rights, indications of provenance, registered designations of origin, or the prevention of unfair competition.
- (4) The notified draft sets out, amongst others, additional mandatory particulars for specific categories of food in the form of declarations that have to be provided to consumers when 'toddler drinks' and 'toddler milk' are placed on the market in the Netherlands. Therefore, it is necessary for the Commission to examine its compatibility with the above mentioned requirements of that Regulation and the provisions of the Treaty on the Functioning of the European Union.

⁽¹⁾ OJ L 304, 22.11.2011, p. 18.

- (5) The notified draft lays down specific compositional, fortification, labelling and marketing requirements for foods based on cow or goat milk protein, which are intended to be used as a drink for young children between the ages of one and three years. In particular, section 2 of the notified draft lays down requirements with respect to the composition of, and addition of vitamins and minerals and other substances to 'toddler drinks' and 'toddler milk'. Section 3 of the notified measure lays down certain requirements for designations, declarations and presentation of information to consumers.
- (6) Article 7 of the notified draft requires that the following declarations are used for the marketing of 'toddler drinks' and 'toddler milk': 'a. the age category between one and three years for which it is intended; b. a declaration that the product is not a substitute for a balanced diet; c. a declaration that the product is not a substitute for vitamin D supplements; and d. a declaration that the product is not a substitute for breast milk'.
- (7) The Dutch authorities explain that these mandatory particulars contained in the notified draft are justified on the grounds of the protection of public health and on the protection of consumers.
- (8) The Dutch authorities did not submit any evidence to justify the measure on the grounds of the protection of public health. On the contrary, in the explanatory memorandum to the notified draft, the Dutch authorities explain that 'toddler drinks' and 'toddler milk' are not necessary to satisfy the nutritional requirements of young children.
- (9) Article 7(1)(a) of Regulation (EU) No 1169/2011 provides that food information shall not be misleading, particularly 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.
- (10) Milk-based drinks intended for young children used to fall under the scope of Directive 2009/39/EC of the European Parliament and of the Council on foodstuffs intended for particular nutritional uses ⁽²⁾ but the latter was repealed by Regulation (EU) No 609/2013 of the European Parliament and of the Council ⁽³⁾ as from 19 July 2016.
- (11) In view of that repeal, Article 12 of Regulation (EU) No 609/2013, requires the Commission to analyse in a report if specific provisions for milk-based drinks and similar products intended for young children – between the ages of one and three years – are necessary. The Commission adopted a Report concerning those products on 31 March 2016 ⁽⁴⁾ ('the 2016 Report').
- (12) The 2016 Report concluded that there is no necessity for specific provisions for this category of foods as the correct and complete application of the general framework of EU food law can adequately regulate the composition of milk-based drinks intended for young children and the communication on the characteristics of these products.
- (13) Such conclusions were based on the scientific advice of the European Food Safety Authority ('the Authority'). In its Opinion of 2013 ⁽⁵⁾, the Authority noted that these products have 'no unique role' and 'cannot be considered as a necessity to satisfy the nutritional requirements of young children' when compared to other foods that may be included in their normal diet.

⁽²⁾ Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (recast) (OJ L 124, 20.5.2009, p. 21).

⁽³⁾ Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 (OJ L 181, 29.6.2013, p. 35).

⁽⁴⁾ Report from the Commission to the European Parliament and the Council on young child formulae (COM(2016) 169 final).

⁽⁵⁾ EFSA Panel on Dietetic Products, Nutrition and Allergies, 2013, Scientific Opinion on nutrient requirements and dietary intakes of infants and young children in the European Union, EFSA Journal 2013;11(10):3408.

- (14) As a consequence, the Commission did not accompany the 2016 Report with a legislative proposal to lay down the rules for milk-based drinks and similar products intended for young children. Hence, from 20 July 2016 milk-based drinks intended for young children are considered normal foods, fortified in certain nutrients and targeting a specific sub-group of the population and are exclusively covered by horizontal rules of EU food law.
- (15) Based on the observations above, the notified draft measure deviates from the rules applicable to normal foods, and instead introduces a new legal framework for toddler drinks and toddler milks in the Netherlands. In that sense, it creates *de facto* a new category of products intended for toddlers, which are subject to specific compositional, fortification, labelling and marketing requirements. This is not compliant with the current EU legal framework.
- (16) In particular, toddler drinks and toddler milk fall under the scope of Regulation (EC) No 1925/2006 of the European Parliament and of the Council on the addition of vitamins and minerals and of certain other substances to foods ⁽⁶⁾ and have to comply with the rules of that Regulation on the conditions for the addition of vitamins and minerals and on labelling, presentation and advertising. Milk-based drinks intended for young children must provide food information, including the nutrition declaration, in line with the rules of Regulation (EU) No 1169/2011 and can only bear specific nutrition and health claims authorised at EU level pursuant to Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods ⁽⁷⁾.
- (17) The provisions of Regulation (EU) No 609/2013 and of Commission Delegated Regulation (EU) 2016/127 ⁽⁸⁾ do not apply to toddler drinks and toddler milk.
- (18) Mandatory labelling requirements for toddler drinks and toddler milk, as proposed in Article 7 of the notified draft in addition to the mandatory labelling requirements set out in Regulation (EU) No 1169/2011 reinforce the perception for consumers that toddler drinks and toddler milk constitute a separate category of products, similar to infant and follow-on formula, that are particularly suitable for toddlers aged one to three years in comparison to other foods that may be included in their normal diet.
- (19) In accordance with the provisions of Article 45(2) of Regulation (EU) No 1169/2011, the Commission consulted on 5 October 2020 the Standing Committee on the Food Chain and Animal Health.
- (20) In light of the above, the Commission considers that Article 7 of the notified draft is misleading as to the nature of toddler drinks and toddler milk and therefore is in conflict with Article 7(1)(a) of the Regulation (EU) No 1169/2011 and can not be justified on the grounds of consumer protection. Article 7 also can not be justified on the grounds of public health, as the Dutch authorities did not submit any justification in this regard.
- (21) In light of these observations, pursuant to Article 45(3) of Regulation (EU) No 1169/2011, the Commission has delivered a negative opinion on the notified draft, on 27 October 2020. The Commission notified the negative opinion to the Dutch authorities on 28 October 2020.
- (22) The Dutch authorities should accordingly be requested not to adopt the notified draft order.
- (23) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

⁽⁶⁾ Regulation (EC) No 1925/2006 of the European Parliament and of the Council on the addition of vitamins and minerals and of certain other substances to foods (OJ L 404, 30.12.2006, p. 26).

⁽⁷⁾ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404, 30.12.2006, p. 9).

⁽⁸⁾ Commission Delegated Regulation (EU) 2016/127 of 25 September 2015 supplementing Regulation (EU) No 609/2013 of the European Parliament and of the Council as regards the specific compositional and information requirements for infant formula and follow-on formula and as regards requirements on information relating to infant and young child feeding (OJ L 25, 2.2.2016, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

The Kingdom of the Netherlands shall, based on the observations of the Commission in its negative opinion and this Decision, not adopt Article 7 of the draft Commodities Act Decree on toddler drinks and toddler milk, which it notified to the Commission pursuant to Article 45 of Regulation (EU) No 1169/2011, and which was subject to a Commission negative opinion notified to Dutch authorities on 28 July 2020.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 24 January 2022.

For the Commission
Stella KYRIAKIDES
Member of the Commission
