FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 20 of 05 November 2010

EU Parliament approves country-of-origin markings ('*Made in*') on non-EU goods

The EU Parliament approved, on 21 October 2010, a proposal for a regulation on the indication of the country-of-origin of certain products imported from third countries. The proposal sets out mandatory requirements for the labelling and marking of products and their packaging with the '*Made in*' mark referring to the country-of-origin, according to the applicable EU non-preferential rules of origin. Products originating in the territories of the EU, Turkey and Contracting Parties of the EEA Agreement (*i.e.*, Iceland, Liechtenstein, Norway and Switzerland) do not require any marking.

The EU Commission had adopted its '*Made in*' proposal in December 2005, based on the results of a consultation process that had involved the main stakeholders (*i.e.*, industry, trade unions, consumers and other institutions). Considering the stakeholders' interests, the proposed regulation for compulsory country-of-origin marking has a sectoral approach, including end-consumer products such as tools, furniture, footwear, jewellery, ceramic, textiles, leather and other accessories of animal fur and gut. The main objectives of the regulation, as referred to in its recitals, are: to allow the consumers to make informed choices about the products based on their origin; to increase EU industry competitiveness as a result of the reputation that EU products hold in consumers' minds with respect to high production standards and quality, as well as to harmonise the country-of-origin rules; and to enable effective protection against counterfeited products.

It has been claimed by some that the imposition of such measure would significantly increase the costs of imported products subject to such requirement and may even delay the timeframe of customs-clearance at the border, since the control on imported products would be applied upon importation. As a result, the claim is made by various constituencies that producers and retailers of imported products are likely to be adversely affected by such requirements. In the event that the proposal is approved by the EU Council and the regulation enters into force, it is expected that some WTO Members may challenge its consistency with EU obligations under Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement), Articles IX:2 and IX:4 of the General Agreement on Tariffs and Trade (hereinafter, GATT) and Articles 2(c) and 2(e) of the Agreement on Rules of Origin (hereinafter, RoO Agreement).

According to Article 2.1 of the TBT Agreement, technical regulations shall not accord less favourable treatment to products imported from any WTO Member in relation to the treatment accorded to national products or to products of any other WTO Member. However, as already mentioned, the '*Made in*' marking of origin would be mandatory and applicable only for certain imported products, excluding products originated in the territory of the EU, Turkey and the EEA Agreement's Contracting Parties. Therefore, opponents of the measure have argued that it would be inconsistent with the Most-Favoured-Nation and the National Treatment principles

stated in Article 2.1 of the TBT Agreement. In addition, the requirement to mark individual products and their packaging with the '*Made in*' indication could be argued as being excessive and burdensome, resulting in a measure which is more trade restrictive than necessary to achieve the EU's legitimate objectives of, *inter alia*, consumer protection. Consequently, opponents argue that the measure would be in violation of Article 2.2 of the TBT Agreement.

In relation to Article IX:2 of the GATT, detractors of the EU country-of-origin marking argue that it would be WTO-inconsistent if found not to reduce to a minimum the difficulties and inconveniences caused to the commerce and industry of countries exporting to the EU. This would be a more difficult test to meet as it rests on criteria of proportionality and reasonableness. Furthermore, should compliance with the '*Made in*' marking unreasonably increase the costs of imported products, such measure could be considered as contrary to Article IX:4 of the GATT and subject to another possible profile of WTO inconsistency concerning marks of origin.

Finally, with regard to the RoO Agreement, Article 2(c) thereof states that '*rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade*'. Using the same rationale described above with respect to Article 2.2 of the TBT Agreement, opponents to the '*Made in*' marking claim that such EU measure would also be a violation of Article 2(c) of the RoO Agreement. As for Article 2(e) thereof, it is also being argued that the EU measure would likely not meet the requirements that it be administered in a consistent, uniform, impartial and reasonable manner, if the rules for the marking of origin were to be considered discriminatory in nature.

The approval of this regulation by the EU Parliament indicates the continuation of an EU trend to adopt technical regulations concerning country-of-origin in order to increase EU products' competitiveness on the EU internal market. This is *per se* legitimate (and understandable, in the trading world that we live in), but a risky undertaking by the EU in relation to the possible risks of WTO litigation. Along the same lines, in June 2009, the EU Parliament had also voted on proposed modifications to the EU food regulation introducing mandatory country-of-origin labelling for meat, poultry, dairy products and fresh fruits and vegetables. To some extent, the imposition of mandatory country-of-origin rules on non-EU products might be understood or perceived as a promotion by the EU of the idea of '*Buy European*'. Producers and retailers of products to be imported into the EU territory have considerable commercial interests at stake that could be affected by the approval by this proposal by the EU Council, especially regarding the competitiveness of their products and the increase in their transaction and compliance costs. The legitimate policy needs and objectives of the EU must take such commercial interests into account when deciding on the final characteristics of the '*Made in*' marking, particularly if the EU wants to minimise the trade impact of this regulation and its exposure to possible WTO dispute settlement.

US Trade Representative accepts petition against Chinese policies on green technologies

On 15 October 2010, the United States Trade Representative (hereinafter, USTR) accepted a petition from the United Steelworkers Union (hereinafter, USW) requesting the US Government to initiate dispute settlement proceedings at the WTO against China with regard to measures taken by the Chinese Government affecting trade and investment in 'green technology' (*i.e.,* renewable energy and other energy-efficient technologies), which, allegedly, violate China's commitments under the GATT, the Agreement on Subsidies and Countervailing Measures

(hereinafter, SCM Agreement), and under China's Protocol of Accession to the WTO. The USTR has announced a 90-day investigation of Chinese practices and is now inviting public comments on the case.

The USW had filed a petition on 9 September 2010 under Section 301 of the US Trade Act of 1974 against a group of measures taken by the Chinese Government to support the domestic green technology sector. The petition defines products of green technology as '*products used to produce renewable energy or reduce the emissions associated with the production and use of energy. These are the products necessary to produce energy from wind, solar, biomass, geothermal, hydro, and nuclear resources, products to enable the production of energy from coal with fewer greenhouse gas emissions, and products that consume less energy or alternative sources of energy, such as energy-efficient vehicles and energy efficient lighting*.' The main measures indicated in the petition are, *inter alia*, laws and regulations affirmed to be discriminatory in relation to foreign producers, including projects of wind and solar energy; technology transfer requirements for the participation of foreign investments; export restrictions of rare earth minerals and other raw materials essential to the energy industry; and subsidies contingent to export performance or to the use of locally-produced inputs for a range of products, including wind turbines and other renewable energy industries.

According to the brief description in the executive summary of the USW petition, if challenged under the WTO, the measures affirmed as subsidies contingent to export performance and local content could be found inconsistent, respectively, with Articles 3.1(a) and (b) of the SCM Agreement, in as much as they could be found to amount to prohibited subsidies. The USW also claims that other Chinese subsidies are causing injury to the US industry through significant price undercutting of US products as well as loss of sales and market share in the EU; therefore, these subsidies would be actionable and inconsistent with Articles 5 and 6 of the SCM Agreement. Regarding the export restraints of rare earth minerals and other essential materials (see Trade Perspectives, Issue No. 16 of 10 September 2010), including export quotas, taxes and licensing procedures, they are claimed to be inconsistent with China's commitments to eliminate export quotas and export taxes on all but a selected list of products indicated in China's Protocol of Accession. With regard to the investment requirements imposed on foreign producers of 'green technology', the USW's petition argues that this is a form of discrimination inconsistent with Paragraph 3(a) of China's Protocol of Accession. Moreover, all other laws and regulations alleged to be discriminatory against foreign producers are claimed to violate Article III:4 of the GATT, which sets out the obligation of WTO Members not to accord less favourable treatment to imported products than that accorded to national products. Finally, the USW claims that most of the measures violate WTO rules and are inconsistent with China's Protocol of Accession to the WTO, which makes integral part of China's WTO obligations. This Protocol contains all the commitments that China undertook at time of WTO accession, including (as argued by the USW) a compromise not to impose measures such as the ones mentioned above.

Under Section 301, '*the United States may investigate and sanction foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce*'. Upon initiation of an investigation, the USTR must request consultations with the specific foreign government. However, in this case, the USTR decided to delay the request for consultations with the Chinese Government for up to 90 days *'in light of the number and diversity of the acts, policies, and practices covered by the petition*' and '*for the purpose of verifying and improving the petition*.' USTR officials will use the 90-day period (*i.e.*, up to 13 January 2011) to '*thoroughly examine and verify the USW's claims*'. Given that the petition

alleges the violation of WTO obligations, the USTR aims at putting forward only the allegations that are considered to have sufficient evidence and that can effectively be argued under the WTO dispute settlement mechanism.

While the US might have recourse to alternative mechanisms such as safeguards and unfair competition remedies to tackle China's policies affecting 'green technologies', the representatives of the 'green industry' sector should be aware of such potential future actions and prepare to cope with the likely impact of such dispute on the world market of 'green technologies', whether as a consequence of US judicial review or WTO dispute settlement. Since the USTR has opened the case to public comments up to 15 November 2010, the affected industry should take advantage of this opportunity in order to manifest its position.

EU Commission authorises a number of '*non-Article 13*' health claims (concerning reduction of disease risk and children's development and health) and rejects others

On 22 October 2010, the EU Commission adopted Regulation (EU) No. 957/2010 on the authorisation and refusal of authorisation of certain health claims made on foods and referring to the reduction of disease risk and to children's development and health (in relation to generic Article 13 health claims, see Trade Perspectives Issue No. 19 of 22 October 2010). The EU Commission adopted this regulation on the basis of five opinions of the European Food Safety Authority (hereinafter, EFSA). Two opinions related to applications for reduction of disease risk claims, as referred to in Article 14(1)(a) of Regulation (EC) No. 1924/2006 and three opinions related to applications for health claims referring to children's development and health, as referred to in Article 14(1)(b) of Regulation (EC) No. 1924/2006. On the basis of the data presented, EFSA concluded that a cause and effect relationship had been established between the intake of iodine and iron, respectively, and the claimed effects. Accordingly, health claims reflecting these conclusions should be considered as complying with the requirements of Regulation (EC) No. 1924/2006 and should be included in the EU list of permitted claims made on foods and referring to children's development and health. This is what the EU Commission now did.

EFSA concluded in three more opinions that a cause and effect relationship had not been established between the intake of OPC PremiumTM, the food supplement Uroval® (with the main active ingredients Cranberry extract and D-mannose), and bifidobacteria, respectively, and the claimed effects. Accordingly, the EU Commission states in Regulation (EU) No. 957/2010 that, as the claims do not comply with the requirements of Regulation (EC) No. 1924/2006, they should not be authorised.

Including the two-out-of-five positively-assessed claims in Regulation (EU) No. 957/2010, the EU Commission has so far approved four Article 14(1)(a) health claims referring to the reduction of a risk factor in the development of a disease and eight Article 14(1)(b) health claims referring to children's development and health, while it has rejected eight health claims referring to reduction of disease risk and twenty-nine health claims referring to children's development and health. It should be noted that in all those forty-nine approvals or rejections, the EU Commission has always systematically followed EFSA's opinion on whether a cause and effect relationship between the claim and the claimed effect had been established or not.

Regulation (EC) No. 1924/2006 establishes that, *'in some cases, scientific risk assessment alone cannot provide all the information on which a risk management decision should be based. Other legitimate factors relevant to the matter under consideration should therefore be taken into account'.* From a mere statistical point of view (*i.e.*, in forty-nine out of forty-nine cases), it appears that, in practice, the scientific EFSA opinion is (*de facto*) the anticipated regulatory decision.

So far, the EU Commission has delivered regulatory decisions on the Article 14 health claims referring to the reduction of disease risk and to children's development and health in five EU regulations (*i.e.*, Regulation (EC) No. 983/2009 of 21 October 2009, Regulation (EC) No. 1024/2009 of 29 October 2009, Regulation (EC) No. 1167/2009 of 30 November 2009, Regulation (EC) No. 384/2010 of 5 May 2010, and now, Regulation (EU) No. 957/2010 of 22 October 2010). An '*omnibus decision*', as for the Article 13 claims, is not possible as Article 14 applications can be made at any time (there is no closed list).

However, the time elapsed between EFSA's opinion and the EU Commission's regulatory decision (almost a year for the five claims dealt with in Regulation (EU) No. 957/2010) may raise concerns as to potential market distortions (and *de facto* discriminations) between operators whose claims are rejected and those for which assessments are still pending. Many operators are concerned about the drastic (negative) effects that the rejection of applications at EFSA level have on their products and even on their stock value when investors abandon companies knowing that certain promising products will lose market value and commercial appeal because of the *de facto* impossibility to claim certain effects. EFSA opinions can hardly be challenged at EU Courts because they do not have binding and definitive legal nature. It is likely, however, that in the time between adoption of the opinion by EFSA and the entry into force of the (challengeable) EU Commission's regulatory decision, the scientific EFSA opinion (which is in principle non-binding but, *de facto,* it seems to be) may already cause harm to operators. The question is whether operators have no legal options left with some realistic chance of success. An option could be that of to scrutinising this situation through the lenses of WTO provisions. A potential negative opinion by EFSA and a delayed EU Commission's decision regarding certain claims could be interpreted as a *de facto* trade ban on the imported products using that claim.

Article 14 applications submitted to EFSA are included in the Register of Questions, with indication of the food substance and claimed effect. EFSA has received to date 267 applications. 44 applications have been withdrawn, 134 registrations have not yet been completed, 6 are in progress and, so far, 75 scientific opinions have been adopted.

In consideration of technical developments, the EU Commission approves a number of new food additives and new uses for previously-approved food additives

On 22 October 2010, the EU Commission adopted Directive 2010/69/EU amending the Annexes to European Parliament and Council Directive 95/2/EC on food additives other than colours and sweeteners. In consideration of technical developments, the EU Commission approved a number of new additives and new uses for food additives. The approval of those additives and uses is particularly relevant for the food supplement industry, although conventional food operators and traders in fresh fruit are also concerned.

European Parliament and Council Directive 95/2/EC on food additives other than colours and sweeteners lays down a list of food additives that may be used in the EU and the conditions for their use. In accordance with Article 31 of Regulation (EC) No. 1333/2008 of the European Parliament and of the Council on food additives, the Annexes to Directive 95/2/EC are to remain in force until the establishment of the EU lists of food additives (as provided for in Article 30 of that Regulation) has been completed and they shall be amended, where necessary, by measures adopted by the Commission.

Two amendments established in Directive 2010/69/EU concern post-harvest treatments of fruit. To prevent the development of moulds on citrus fruit, their post-harvest treatment with pesticides such as imazalil and thiabendazole is authorised (as plant protection product, not as an additive). The Commission now authorises use of sorbates (*i.e.*, E 200, E 202 and E 203), which could be used to replace these pesticides, partly or completely, for the treatment of citrus fruit on the surface of the unpeeled fresh citrus fruit via the authorised waxes: beeswax, candelilla wax, carnauba wax and shellac. Sulphur dioxide and sulphites are food additives authorised under Directive 95/2/EC, which act primarily as antimicrobial agents and for purposes of controlling chemical spoilage. As transport of fresh fruit, in particular by sea freight, may take several weeks, the additional use of sulphur dioxide and sulphites is authorised in order to help preserve fresh blueberries against fungi growth at the concentration level of 10 mg/kg. The use of sulphur dioxide (through the use of SO2 pads during transport) in table grapes and fresh lychees had already been approved in 2006.

A number of changes concern food supplements. The addition of sorbates (*i.e.*, E 200, E 202 and E 203) and benzoates (*i.e.*, E 210, E 211, E 212 and E 213) is authorised in vitamin A and in combinations of vitamins A and D, when used in food supplements supplied in dried form. Phosphates are authorised in sport drinks containing whey protein. The additional use of triethyl citrate (*i.e.*, E 1505) is authorised at EU level as a glazing agent for food supplement tablets. Polyvinyl alcohol (*i.e.*, PVA) is authorised as a film-coating agent for food supplements. This new food additive is assigned the E number E 1203. Six grades of polyethylene glycols (*i.e.*, PEGs) are authorised as film coating agents for use in food supplement products. All these PEGs are assigned E 1521 as an E number.

Where there is a technological justification for their use, extracts of rosemary as antioxidant are also authorised and E 392 is assigned as their E number. Prior to the authorisation, EFSA assessed the safety of use of extracts of rosemary derived from Rosmarinus officinalis L. containing several compounds which exert antioxidative functions (mainly phenolic acids, flavonoids, diterpenoids and triterpenes) when used as an antioxidant in foodstuffs. EFSA concluded in its opinion on 7 March 2008 that the dietary exposure resulting from the proposed uses and use levels were of no safety concern.

The use of a 20 different stabilisers has been authorised for unflavoured live fermented cream products and certain substitute products due to technological needs. To control the growth of microbial pathogens, (*e.g.*, Listeria, E. coli O157), the use of the food additives sodium and potassium salts of lactate (*i.e.*, E 325 and E 326), potassium acetate (*i.e.*, E 261), sodium acetate (*i.e.*, E 262i) and sodium hydrogen acetate (*i.e.*, E 262ii) is extended to pre-packed preparations of fresh minced meat. To prevent the growth of moulds and yeasts and the formation of mycotoxins, an additional use as preservative of the food additives sorbates (*i.e.*, E 200, E 202 and E 203) and benzoates (*i.e.*, E 210, E 211, E 212 and E 213) is permitted in seaweed-based fish product analogues (*e.g.*, caviar analogues made of seaweed). The use of sorbates and benzoates is also permitted for beers in keg to which more than 0,5% fermentable sugars and/or fruit juices or concentrates have been added and which are directly served on

draft. The additional use of sulphur dioxide and sulphites is authorised in cinnamon sticks (Cinnamomum ceylanicum only), also known as 'quills'. Also the use of nisin in pasteurised liquid eggs is authorised. The additional uses of dimethyl dicarbonate (*i.e.*, DMDC and E 242) in cider, perry and fruit wines, alcohol-reduced wine, wine-based drinks and other products covered by Regulation (EEC) No. 1601/91 are authorised. Beeswax (*i.e.*, E 901) is authorised as a glazing agent to replace fully or partly the in-layer chocolate in pre-packed wafers containing ice-cream and as a carrier of flavourings in non-alcoholic flavoured drinks. Cassia gum is authorised at EU level as a new food additive (as E 427) acting as gelling agent and thickener. The use of neotame is authorised as a flavour enhancer. L-cysteine (*i.e.*, E 920) is authorised in biscuits for infants and young children at EU level.

However, an enzyme preparation based on thrombin with fibrinogen derived from cattle and/or pigs (also known as 'meat glue') was not authorised as a food additive. Although EFSA, assessing the safety of use as a food additive for reconstituting food, had concluded in its opinion on 26 April 2005 that there was no safety concern, the European Parliament (exercising its right of scrutiny, see Trade Perspectives Issue No. 9 of 7 May 2010) in its Resolution of 19 May 2010 considered that the inclusion in Annex IV to Directive 95/2/EC of this enzyme preparation was not compatible with the aim and content of Regulation (EC) No. 1333/2008, as it does not meet the general criteria of Article 6 thereof, especially in paragraph 1(c) of Article 6. Article 6(1) provides that '*a food additive may be included in the EU lists of approved additives only if it meets the following conditions and, where relevant, other legitimate factors, including environmental factors: (a) it does not, on the basis of the available scientific evidence, pose a safety concern to the health of the consumer at the level of use proposed; (b) there is a reasonable technological need that cannot be achieved by other economically and technologically practicable means; and (c) its use does not mislead the consumer*.'

As being said, the approval of these additives and uses offers a wide range of opportunities and is particularly relevant for the food supplement industry and fresh fruit industry, although conventional food operators and traders are concerned as well as since their products need to be labelled accordingly. The amendments to the annexes of Directive 95/2/EC are in force as of 12 November 2010. The EU Commission review of permitted additives shall be completed by 20 January 2011.

Recently Adopted EU Legislation

- *Commission Regulation (EU) No 990/2010 of 4 November 2010 entering a name in the register of protected designations of origin and protected geographical indications [Jabłka łąckie (PGI)]*

- *Commission Regulation (EU) No 991/2010 of 4 November 2010 entering a name in the register of protected designations of origin and protected geographical indications [Olive de Nîmes (PDO)]*

- *Commission Regulation (EU) No 983/2010 of 3 November 2010 amending Regulation (EU) No 185/2010 laying down detailed measures for the implementation of the common basic standards on aviation security*

- *Commission Regulation (EU) No 984/2010 of 3 November 2010 entering a name in the register of traditional specialities guaranteed [Ovčí hrudkový syr – salašnícky (TSG)]*

- *Commission Regulation (EU) No 985/2010 of 3 November 2010 entering a name in the register of protected designations of origin and protected geographical indications [Bruna bönor från Öland (PGI)]*

- *Commission Regulation (EU) No 986/2010 of 3 November 2010 entering a name in the register of protected designations of origin and protected geographical indications (Szegedi fűszerpaprika-őrlemény/Szegedi paprika (PDO))*

- *Commission Regulation (EU) No 987/2010 of 3 November 2010 entering a name in the register of protected designations of origin and protected geographical indications [Marrone della Valle di Susa (PGI)]*

- *Commission Regulation (EU) No 970/2010 of 28 October 2010 entering a name in the register of protected designations of origin and protected geographical indications (Lapin Poron kuivaliha (PDO))*

- *Commission Regulation (EU) No 971/2010 of 28 October 2010 entering a name in the register of protected designations of origin and protected geographical indications (Vastedda della valle del Belìce (PDO))*

- *Commission Regulation (EU) No 966/2010 of 27 October 2010 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China by imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, and making such imports subject to registration*

- *Council implementing Regulation (EU) No 964/2010 of 25 October 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium road wheels originating in the People's Republic of China*

- *Council implementing Regulation (EU) No 965/2010 of 25 October 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of sodium gluconate originating in the People's Republic of China*

Ignacio Carreño, Eugenia Laurenza, Anna Martelloni, Natália S. Ruschel and Paolo R. Vergano contributed to this issue.