FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 8 of 19 April 2013

The EU Single Market for Green Products and the proliferation of environmental claims

On 9 April 2013, the EU Commission published a Communication to the EU Parliament and the Council (*Building the Single Market for Green Products - Facilitating better information on the environmental performance of products and organisations,* hereinafter, the Communication*)* and a related draft Recommendation (*The use of common methods to measure and communicate the life cycle environmental performance of products and organisations*). The Communication states that it is a problem that there is no widely accepted, science-based definition of what a '*green*' product and a '*green*' organisation actually are. There are different methods currently used for measuring and benchmarking environmental performance, but they vary and may give different results even when applied to the same product or organisation.

Currently, operators who want to highlight the environmental performance of their products face numerous obstacles. There are plenty of schemes promoted by Governments and private initiatives. The Ecolabel Index, the largest global directory of eco-labels, is currently tracking 435 eco-labels awarded worldwide under different schemes in 197 countries, including, *inter alia*, the German Blue Angel, the EU Organic Products label and the Roundtable on Sustainable Palm Oil (RSPO) seal. Operators are often forced to pay multiple fees in different EU Member States for providing environmental information, and they also face the mistrust of consumers who are confused by a *plethora* of labels with environmental information that make comparison of products difficult when taking a purchasing decision. The range of '*green*' initiatives in the EU has started to act as a barrier for the circulation of '*green*' products in the Single Market, inasmuch as a company wishing to market its product as a '*green*' product, for example, in France, Italy, and the UK needs to apply different schemes in order to compete on different national markets.

With its Communication, the EU Commission is proposing EU-wide methods to measure the environmental performance of products and organisations, encouraging EU Member States and the private sector to build on them. The Communication puts forward two methods to measure environmental performance throughout the lifecycle: the Product Environmental Footprint (PEF) and the Organisation Environmental Footprint (OEF). The voluntary use of these methods is recommended to EU Member States, companies, private organisations and the financial community. The EU Commission also announced a three-year testing period to develop product- and sector-specific rules through a multi-stakeholder process, including provision for organisations with other methods to have them assessed as well. The Communication provides principles for communicating environmental performance, such as transparency, reliability, availability, accessibility, completeness, comparability and clarity. It also supports international efforts towards more coordination in the methodological development and data availability.

There is no EU legislation specifically addressing all *'green'* claims and marketing. The EU has disciplined the use of claims either by means of requirements in specific legislation regulating different types of products and their performance (such as for example in *Regulation (EC) No. 106/2008 on a Community energy-efficiency labelling programme for office equipment*) or by setting general rules for the prevention of misleading environmental claims, leaving the task to interpret and enforce them to national authorities on a case-by-case basis as provided for by *Directive 2005/29/EC on unfair commercial practices in the internal market*.

Another important aspect are the so-called '*uncontrolled self-declared environmental claims*' or '*green claims'* which are not subject of the Communication. There is also no specific EU legislation on this type of claims. As early as in 2000, the EU Commission's Directorate General for Health and Consumers (DG Sanco) defined, in the *Guidelines for Making and Assessing Environmental Claims,* these claims as *'environmental claims that are made, without independent third-party certification, by manufacturers, importers, distributors, retailers or anyone else likely to benefit from such claims',* and outlined a possible approach at EU level to contribute ensuring that self-claims by economic operators, about the environmental characteristics of products and services supplied, are not misleading and can serve the purpose of promoting more sustainable consumption. In relation to the possible EU approach in the area of *'green*' claims, the EU Commission stated in its guidelines that the *'Proliferation of misleading or confusing green claims limits the ability of consumers to act in favour of sustainable consumption through their purchasing choices. Unreliable or misleading green claims limit the potential of serious eco-label schemes, discourage companies to invest in more environmentally friendly products and services and de-motivate consumers to look for such 'greener' products and services'*.

In addition, the international standard ISO 14021:1999 sets specifications for making self-declared environmental claims on goods and services. It establishes general requirements on self-declared environmental claims (including the use of symbols), specific requirements for selected claims, and requirements for the evaluation and verification of claims. The standard defines an environmental claim as a: *'statement, or symbol that indicates the environmental aspects of a product, a component, packaging or a service'.* It is noted that an environmental claim may be made on products or packaging labels, through product literature, technical bulletins, advertising, publicity or similar applications. The basic principle is that '*self-declared environmental claims (i) must be accurate, verifiable, relevant, able to be substantiated and not misleading; (ii) must be based on scientific methodology that is sufficiently thorough and comprehensive to support the claim and that produces accurate and reproducible results; (iii) information concerning the procedure, methodology and any criteria used to support environmental claims must be available and provided upon request to all interested parties; and (iv) the formulation of environmental claims must take into consideration all relevant aspects of the life cycle of the goods or service, although not necessarily considering a full life-cycle analysis'.*

At the international level, there is only limited coordination regarding methodologies for measuring the environmental performance of products and organisations. Examples for coordination initiatives include guidance for the development of product category rules, coordination in the framework of the International Standards Organisation (ISO), and efforts to approximate carbon footprint methodologies through the Carbon Disclosure Standards Board.

The three-year testing period announced in the Communication is expected to be launched soon after its adoption. An open call will be published by the EU Commission on the Internet websites for the Product Environmental Footprint (PEF) and the Organisation Environmental Footprint (OEF), inviting companies, industrial and stakeholder organisations in the EU and from third countries to participate in the development of product-group specific and sector-

specific rules. A second phase will build on an in-depth evaluation of the results of the three-year testing and on additional actions carried-out under the Communication and the Recommendation. Based on this evaluation, the EU Commission will decide on further policy applications of the PEF and OEF methods. The EU should exercise care in relation to the way it *'disciplines'* the area of environmental claims and their assessment. Even though it is perhaps not done by means of mandatory regulation, but through non-binding guidelines, these might (*de facto*, if not *de jure*) give a layer of '*governmental'* authority to the standards, triggering the application of the WTO Agreement on Technical Barriers to Trade. This recalls the debate on private voluntary standards, in particular in the areas of food safety and animal health, which, although providing in many cases a stimulus to improved production practices and performance in exporting countries, and potentially giving a competitive advantage to complying producers, may also act as significant barriers to market access for some industries in a number of countries, especially least developed ones (see Trade Perspectives Issue No. 14 of 16 July 2010). Manufacturers, importers, distributors, retailers or anyone else making environmental or *'green'* claims or thinking about making them on the one side and, on the other side, Governments and private initiatives operating such *'green'* schemes are encouraged to monitor this process launched in the EU Commission's Communication or even actively participate.

The EU Commission proposes to modernise EU Trade Defence Instruments

On 10 April 2013, the EU Commission submitted its proposal on the modernisation of trade defence instruments (hereinafter, TDIs). The EU Commission's package includes a '*Communication from the Commission to the Council and the European Parliament on Modernisation of Trade Defence Instruments*' and a '*Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1125/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community*'. This legislative action is the result of an initiative launched by the EU Commission aimed at revising the EU's legal framework on TDIs, particularly Regulation (EC) No. 1225/2009 (hereinafter, the Basic Anti-dumping Regulation) and Regulation (EC) No. 597/2009 (hereinafter, the Basic Anti-subsidy Regulation), which have remained largely unchanged for the last 16 years. The initiative stems from an independent evaluation study of trade defence instruments, which was published on 16 March 2012, and a process of public consultation on the '*Initiative on Modernisation of Trade Defence Instruments*' completed in July 2012.

A previous attempt to reform the use of TDIs in the EU was made in 2006, but failed due to diverging views among different EU stakeholders. This most recent attempt was launched with the view to update the EU's TDIs, in the Commission's words, '*in a pragmatic and balanced way for the benefit of all stakeholders*' and bearing in mind that, given the current stall of the WTO Doha Development Agenda negotiations (which cover TDIs reform through the '*Rules*' negotiations), the multilateral framework will not change in the foreseeable future.

In the '*Communication from the Commission to the Council and the European Parliament on Modernisation of Trade Defence Instruments*', the Commission explains that the proposed revisions concern six main areas, which the Commission has identified as areas requiring change '*in order to address the changes in the economic environment*': (i) increased transparency and predictability; (ii) tools to deal with the threat of retaliation; (iii) better effectiveness and enforcement; (iv) facilitation of cooperation; (v) optimisation of the review process; and (iv) codification of certain practices, intended to bring EU legislation in line with current practice and relevant EU jurisprudence and WTO rulings. Not all issues indentified

within these areas will, according to the Commission, require an actual amendment to the basic regulations.

Among the most relevant proposed amendments, and with the aim of increasing transparency and predictability for affected stakeholders, the EU Commission suggests introducing pre-disclosure before the imposition of provisional measures. Pre-disclosure should take place at least 2 weeks before the adoption of provisional measures and be limited in scope to a summary of the proposed measures and the relevant calculations for each cooperating exporter and the EU industry. Interested parties would be granted an opportunity to comment on the calculations within 3 working days, in order to avoid disrupting the time limits of the investigation. The proposed rules also require that parties be informed in advance (*i.e.*, around 2 weeks prior to the 9 months deadline) of the intention not to impose provisional anti-dumping or countervailing duties, and that they be given advanced notice of the imposition of provisional measures. Of particular interest to EU importers, the Commission also proposed amending the relevant legal framework to ensure that duties collected during expiry review investigations be reimbursed when the expiry review investigation does not lead to a renewal of the measures.

In addition, the EU Commission proposes to open *ex-officio* investigations where EU producers are exposed to threats of retaliation and there is sufficient *prima facie* evidence of injurious dumping or subsidisation. This initiative is aimed at avoiding or limiting the threat of retaliation that EU producers intending to lodge anti-dumping or anti-subsidy complaints are increasingly subject to in third countries. The current Basic Anti-dumping and Anti-subsidy regulations already cater for the possibility of initiating investigation *ex officio*, in special circumstances and on the basis of information on injurious dumping or countervailable subsidisation meeting the '*sufficient evidence*' test applicable to complainants. As noted by some scholars and practitioners, this type of evidence can, for instance, be obtained from a Member State or derive from a recently concluded investigation. There is, therefore, a high burden placed on the initiation of *ex officio* investigations, which appears to have discouraged the use of this instrument. To enhance the use of this tool, the Commission did not propose amendments to the current rules, but suggested that the use of *ex officio* investigations be encouraged, *e.g.*, through the publication of an outline of the type of information that Union procedures will be requested to provide for the initiation of *ex officio* proceedings. The Commission has also stated that it will resort to *ex officio* anti-circumvention investigations, as a tool to enhance the effectiveness and enforcement of TDIs.

Another important proposal that will benefit EU producers concerns the lesser-duty rule. The current EU framework requires that anti-dumping and countervailing duties be set at a level which is lower than the actual dumping or subsidy margin found, if such lower level is sufficient to remove the injury caused to domestic producers. This rules goes actually beyond the minimum standard required by the WTO framework, which allows measures to be imposed at the level of the dumping and subsidy margins. The EU Commission proposed that the lesser-duty rule should not apply, on a country-wide basis, in instances of subsidisation as well as in presence of policies aimed at restricting trade in raw materials. The rationale behind this proposed amendment is that third-country producers already benefiting from subsidisation or from restrictions applied to trade in raw materials (such as differential export taxes, which may also have the effect of subsidising inputs for competing third-country downstream producers) should not profit from the lesser-duty rule, which may actually also deter governments from terminating their subsidisation and trade-restrictive practices.

As part of the modernisation process, the EU Commission is also expected to publish a set of draft guidelines on: (i) expiry reviews; (ii) the application of the EU interest criterion; (iii) the calculation of the injury margin; and (iv) the choice of the analogue country in case of

investigations concerning non-market economy countries. These draft guidelines will be subject to public consultations for a period of 3 months, while the draft proposed amendments to the Basic Anti-dumping and Anti-subsidy Regulations will be subject to the ordinary legislative procedure, which will involve evaluation by the EU Parliament and the Council. Interested parties and stakeholders should continue to monitor and contribute to this process given the importance of this legislative framework on business, for EU producers and third country manufacturers alike. The EU Commission reports that, at the end of 2012, the EU had 102 anti-dumping and 10 anti-subsidy measures in force.

Would GI protection under EU law defend Belgian Chocolate from misuse of the name '*Belgian Chocolate'*?

The Royal Belgian Association of the Biscuit, Chocolate, Pralines and Confectionary (hereinafter, '*Choprabisco*') is reportedly considering seeking Geographical Indication (hereinafter, '*GI*') protection under EU law for '*Belgian Chocolate*'. This move is intended to ensure that, by acquiring the status as Protected Geographical Indication (hereinafter, PGI), the term '*Belgian Chocolate*' be preserved for the exclusive use of chocolate made in Belgium. The PGI is supposed to avoid that *'Belgian chocolates'* become a generic name and to prevent use of the term *'Belgian'* associated with chocolate products made outside of Belgium.

Belgium possesses more than 200 chocolate making firms and over 2,000 stores with years of experience in making chocolate, which has resulted over the years in Belgian chocolate becoming synonym of high quality and mastery. Choprabisco's reported intention to propose such protection is based on the fact that there are an increasing number of chocolate makers claiming their chocolate as *'made in Belgium'* or *'Belgian style'*, while the chocolate has no connection to Belgium whatsoever. Since 2008, even though it has no legal weight, in its Belgian Chocolate Code, Choprabisco only allows the use of '*Belgian Chocolate*' or '*Chocolate from Belgium*' labels if the product contains chocolate that was mixed, refined, conched and moulded in Belgium. Further, the Code provides that a company outside Belgium, using Belgian chocolate in producing its product, may only declare its product as '*made with Belgian Chocolate*', but not as '*Belgian Chocolate*'. Only if all the chocolate used is of Belgian origin, references to chocolate with the wordings '*Belgian style', 'Belgian collection', 'Belgian recipe', 'Belgian tradition', 'Belgian heritage',* or *'Belgian flavour*' may be allowed.

The misappropriate use of the names associated to a certain product quality has always been the rationale for protection of GIs. GIs are linked to the name of a region, a specific place, or even, in exceptional cases, to the name of a country and are used to describe an agricultural or food product from that region, place, or country, which bears a specific quality or characteristics attached to that geographical origin. GI protection serves to acknowledge the essential function or role of the climatic and/or *'human know how'* factors embodied in the final product. A trend in using names of regions to distinguish agricultural product has been followed by food producers, knowing that consumers are acknowledging the values in products associated to a certain place for its special characteristic and unique qualities.

The relevant EU framework is currently provided by *Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs*, which, since 3 January 2013, has replaced *Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of GI and designations of origin for agricultural products and foodstuffs.* The new regime is intended to clarify and improve the registration procedures of Protected Designations of Origin, PGIs and Traditional Specialities Guaranteed.

Under the new regime, Article 5(2) of *Regulation (EU) No. 1151/2012* provides that products may qualify for GI protection: (i) where they originate in a specific place, region or country; (ii) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (iii) where at least one of the production steps took place in the defined geographical area. Further provided in Article 49 of *Regulation (EU) No. 1151/2012*, application for registration may only be submitted by groups who work with the products to be registered. A group in this case may refer to an association of producers of Belgian chocolate. Therefore, to obtain GI protection for Belgian chocolate, if Choprabisco acts as the group that works with Belgian chocolate, it would need to show that the products marked with the PGI '*Belgian Chocolate*' are really originating in Belgium and that the *'Belgian'* mark, as a country name, identifies the quality, reputation or other characteristic that are essentially attributable to Belgium. The next qualifier to meet is that '*Belgian Chocolate*' be either produced, processed, or prepared in Belgium as the defined area. To meet all the requirements, the application must provide all relevant information in great detail. In the case of a country name to be registered, the application must be able to show that the area of the entire country presents a homogenous characteristic with respect to those factors that confer the peculiar features of the product that are protected by the PGI.

In order to support this, Choprabisco must provide convincing and conclusive information that all chocolate makers in Belgium have similar characteristics in producing Belgian chocolate. The application must specify details on the physical, chemical (which may include minimum fat content, maximum water content, etc.), microbiological, biological and/or organoleptic characteristics of the Belgian chocolate used to differentiate it from other products of the same category. To show that Belgian chocolate really originates in Belgium, traceable information on the path of Belgian chocolate from the area of production to its final destination must also be provided. The application must also provide detailed information on the authentic and unvarying local method used for the production of Belgian chocolate. The next important detail that the application must provide relates to the explanation of the link between Belgian chocolate and Belgium and the extent to which Belgian chocolate is affected by the unique characteristic of Belgium in at least one of the production stages. For example, Cornish pasties must be prepared in Cornwall even if the actual baking does not have to be done in Cornwall, but in the area where they can be baked in ovens for consumption. The Cornish Pasty Association noted that there are strong links between pastry production and local suppliers of the ingredients Cornish Pastry, even though the ingredients do not necessarily have to come from the county. As provided in *Regulation (EU) No. 1151/2012*, in exceptional cases, the country name as the geographical indication may be granted a PGI status. Where a '*country name'* is the name to be registered as geographical indication, an indication must be clearly given on whether the registration is based on specific characteristics or on the grounds of the product's reputation. In the latter case, proof of this reputation must be included in the application.

Belgian chocolate manufacturers believe that their chocolate is unique due to its ingredients and manufacturing process. Assuming that all the above requirements can be met, it appears that Belgian chocolate may indeed be eligible for PGI status and protection. However, even if PGI status under EU law is granted to Belgian chocolate, problems might arise from the principle of territorial application of PGIs. A prohibition of using the *'Belgian Chocolate'* name can only be enforced in EU Member States' jurisdiction (EU law jurisdiction), but not in other countries where EU regulations on PGI are not enforceable. One notable solution for this issue of territorial application could be the inclusion of specific provisions on the recognition of GIs for agricultural products, foodstuffs and wines in Free Trade Agreements (hereinafter, FTAs) negotiated by the EU with selected trading partners, as in the one that was concluded by the EU with Korea in 2010. However, this approach would clearly only provide limited international protection and likely fall short of Choprabisco's goal. This PGI, if formally requested, looks poised to be a controversial

application that may have far-reaching systemic consequences. As such, it should be closely watched by all interested stakeholders.

Recently Adopted EU Legislation

Market Access

Commission Regulation (EU) No 348/2013 of 17 April 2013 amending Annex XIV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

Commission Implementing Regulation (EU) No 349/2013 of 17 April 2013 amending the rate of additional duty for products listed in Annex I to Council Regulation (EC) No 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America

Commission Implementing Regulation (EU) No 352/2013 of 17 April 2013 on the issue of licences for the import of garlic in the subperiod from 1 June 2013 to 31 August 2013

Commission Implementing Decision of 3 April 2013 amending Annex I to Decision 2004/211/EC as regards the entry for Mexico in the list of third countries and parts thereof from which imports into the Union of live equidae and semen, ova and embryos of the equine species are authorised (notified under document C(2013) 1794) (1)

Trade Remedies

Commission Regulation (EU) No 322/2013 of 9 April 2013 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 791/2011 on imports of certain open mesh fabrics of glass fibres originating in the People's Republic of China by imports of certain open mesh fabrics of glass fibres consigned from India and Indonesia, whether declared as originating in India and Indonesia or not, and making such imports subject to registration

Council Implementing Regulation (EU) No 311/2013 of 3 April 2013 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) No 467/2010 on imports of silicon originating in the People's Republic of China to imports of silicon consigned from Taiwan, whether declared as originating in Taiwan or not

Food and Agricultural Law

Commission Implementing Regulation (EU) No 342/2013 of 16 April 2013 amending Regulation (EC) No 589/2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs

Commission Implementing Regulation (EU) No 335/2013 of 12 April 2013 amending Regulation (EC) No 1974/2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)

Commission Regulation (EU) No 293/2013 of 20 March 2013 amending Annexes II and III to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards

maximum residue levels for emamectin benzoate, etofenprox, etoxazole, flutriafol, glyphosate, phosmet, pyraclostrobin, spinosad and spirotetramat in or on certain products

Other

Commission Implementing Decision of 28 February 2012 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for iron and steel production (notified under document C(2012) 903).

Council Decision of 3 October 2011 on the approval, on behalf of the European Union, of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.

Commission Implementing Decision of 26 March 2013 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for the production of cement, lime and magnesium oxide (notified under document C(2013) 1728)

Commission Implementing Regulation (EU) No 336/2013 of 12 April 2013 amending Regulation (EC) No 1010/2009 as regards administrative arrangements with third countries on catch certificates for marine fisheries products

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