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Origin Marking in the European Union: Mandatory or Voluntary?

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This article analyses the idiosyncrasies of the EU origin marking regime for non-food products and the latest attempt to reform it. In doing so, it begins with an overview of the international trade rules overseeing the entire matter, as well as some insights about origin marking schemes in other countries, with particular regard to the United States. The author then points out that, aside from certain exceptions, there is no single harmonized legal provision regarding origin marking on non-food products imported into or produced within EU borders, with the consequence that EU manufacturers and importers may decide whether to mark their products with origin information or not. In this latter case, the product label must not contain false or deceptive origin references. The author concludes analysing the latest reform attempt carried out by the EU Commission in 2013 which is still deadlocked within the EU Council.

1 Introduction

Although there is no legal definition of it, a mark of origin can be defined as a designation placed on a good (or its wrapping, packaging, container, etc.) indicating the country where such good was obtained or where it was manufactured.

The mark of origin may be placed on imported and domestic goods and its main scope is, inter alia, to guarantee to consumers transparency as to the geographical origin of the goods and therefore avoiding deceptive practices perpetrated by the manufacturer and/or the importer.

In this respect, according to Article IX(2) of GATT, WTO Members may adopt and enforce laws and regulations relating to marks of origin on imported goods, having the scope of protecting consumers against fraudulent or misleading indications. Moreover, according to Article 1(1) of the Madrid Agreement of 1891 on the repression of false or deceptive indications of origin of goods, the goods bearing a false or deceptive indication of origin must be seized at the importation.

However, bringing forth origin marking schemes is far from being an easy task: in order to pass the WTO exam, they should be carefully shaped in order to avoid unnecessary burdens to trade as set forth in Article 2(1) and 2(2) of the WTO Agreement on Technical Barriers to Trade.[1]

Having said the above, international trade rules allow lawmakers to put in place origin marking schemes on domestic and imported goods and such rules may be based on a mandatory or voluntary base and, according to Article 1(2) of the WTO Agreement on Rules of Origin, the criteria applied to determine origin, are those set forth for non-preferential commercial policy instruments[2] which are based on the ‘wholly produced’ and the ‘substantial transformation’ rules, depending whether one or two (or even more) countries have come into play in giving origin to the good at stake.[3]

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1 *See* the WTO dispute between the US, Canada and Mexico (DS384, DS386 – Certain Country of Origin Labeling (COOL) requirements).

2 Which include the most-favoured-nation treatment, anti-dumping and countervailing duties, safeguard measures, quantitative restrictions or tariff quotas, trade statistics.

3 *See* Annex K of the Revised Kyoto Convention.

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2 Origin marking in the US and in other major UE trading partners

Many countries have adopted internal laws requiring mandatory origin marking on imported goods, such as, among others, US, Canada, South Korea and Australia.

The general marking statute for goods imported into the US is set forth in section 304 of U.S. Tariff Act of 1930, as amended,[4] which requires that every article of foreign origin (or its container) imported into the US 'shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser[5] in the United States the English name of the country of origin of the article'.

The scope of the provision is to guarantee to the US ultimate purchaser the highest degree of transparency so that he can decide among domestic or foreign products, as well as among products of different foreign origins.

In addition and according to the statute, the Secretary of State has the power to authorize exceptions to marking obligation under the circumstances set forth in section 304(a)(1)(A–K), among which are the following: (A) when the article is incapable of being marked (e.g. fruit); (B) when the article cannot be marked prior to shipment to the United States without injury; (C) when articles cannot be marked prior to shipment to the United States except at an expense economically prohibitive of its importation.

Moreover, according to section 304(i), imported items not marked in accordance to the requirements, are subject to a 10% ad valorem duty, in addition to any other duty that might be applicable. The statute (section 304(l)(1–2)) also provides for a maximum fine of USD 250,000, or imprisonment of not more than one year to any person whom 'with intent to conceal (…) defaces, destroys, removes, alters, covers, obscures, or obliterates any mark required under the provisions of this chapter'.

Canadian law also provides compulsory origin marking requirements for many classes of merchandise,[6] and so do, among others, South Korea[7] and Australia[8] laws.

3 EU: Here we stand

At European Union level, as of today and aside from certain specific provisions regarding food products[9] and cosmetics,[10] there is no single harmonized legal provision regarding origin marking on non-food products imported into or produced within EU borders. The quite bizarre consequence of this lack of regulation is that it is well possible to find in the EU single market goods of the same industrial sector duly marked and goods that aren't.

In addition and according to the Court of Justice of the European Union (CJEU) case law, EU Member States cannot impose national mandatory origin marking requirements.

In fact, in the leading case EU Commission vs. United Kingdom, which dates back in the middle of the eighties[11] the CJEU stated the principle that compulsory marking requirements on imported goods provided for by a single EU Member State constitutes a measure having an effect equivalent to a quantitative restriction, making the marketing of goods imported from other Member States more difficult than the marketing of domestically produced goods.

The case started when the EU Commission (at the time Commission of the European Communities) challenged before the CJEU the UK Trade Description (Origin Marking) (Miscellaneous Goods) Order of 2 February 1981 imposing an indication of origin to retailers of certain goods,[12] whether imported or not.

In particular, the Commission pointed out that the Order imposed additional costs on exporters to the

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[4] *See* 19 U.S. Code 1304.

[5] According to the U.S. Customs and Border Protection Agency, an 'ultimate purchaser' could be a consumer, an entity that processes the materials or a recipient. *See* https://help.cbp.gov/app/answers/detail/a_id/492/~/requirements-for-country-of-origin-marking-on-goods-imported-into-the-u.s.

[6] such as: (1) goods for personal or household use; (2) hardware; (3) novelties and sporting goods; (4) paper products; (5) wearing apparel; (6) horticultural products.

[7] Country of origin labelling is required for agro-fishery products, foodstuffs, clothes, bags, electronics and game implements.

[8] A wide range of merchandise subject to country of origin marking and among others are: food, kitchenware, textile products and apparels, including shoes, electrical appliances and toys.

[9] Specific EU regulations exist regarding: (1) geographical indications; (2) meat (information about the country where the animal was born, raised, slaughtered and the country where the meat was cut are mandatory on the packaging); (3) fisheries and aquaculture (information about the area where the fishery or the aquaculture product was caught or farmed). In addition, the general origin marking statute for food not included in the above mentioned categories is set forth in Art. 26(2) of EU Regulation no. 1169/11 which states that indication of the country of origin or place of provenance of the food is mandatory where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance. To avoid the proliferation of national-based country of origin marking schemes, the EU Commission has recently proposed a draft Implementing Regulation (Ref. Ares(2018)34773 of 4 Jan. 2018) with the scope to provide information on the country of origin or the place of provenance of the primary ingredient of the food, as required by Art. 26(3) of EU Regulation 1169/2011.

[10] *See* Art. 19(a) of EU Regulation 1223/2009 which states that imported cosmetic products shall specify the country of origin.

[11] Case 207/83 of 25 Apr. 1985.

[12] Divided into the following four groups: (1) clothing and textile goods; (2) domestic electrical appliances; (3) footwear; (4) cutlery.

United Kingdom and therefore it constituted a measure having an effect equivalent to a quantitative restriction, prohibited by Article 30 of the then European Economic Community Treaty.

On the other part, the United Kingdom denied the allegations, pointing out that the Order did apply both to domestic and imported goods and at the moment of their retail sale. The defendant also remarked that the extra costs involved were negligible.

The United Kingdom also argued that the Order was necessary to protect consumers, given the fact that according to a survey, UK consumers associated the quality of certain goods with the country of manufacturing.

Given the above, the Court ignored the Advocate General's remark that the Commission had not shown any substantial evidence[13] to support its petition that the Order had a *specific* impact on trade; the Court merely expressed the general principle that 'the purpose of origin marking is to enable consumers to distinguish between domestic and imported products and this enables them to assert any prejudices that may have against foreign products'.[14] The Court also added that 'the origin marking requirement not only makes the marketing in a Member State more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as the result of a division of labour between Member States'.[15]

Furthermore, per the consumer protection argument raised by the United Kingdom, the Court merely stated that such protection was guaranteed by the rules prohibiting the use of false indication of origin.

Following the above case, and despite many reform attempts carried out by EU Commission and EU Parliament,[16] the origin marking matter has been shoehorned into the Directive 2005/29/EC[17] on unfair commercial practices.

Such Directive prohibits misleading commercial actions with the purpose of distorting consumer's purchasing choices, including false or deceiving information about the origin of a product.[18]

Given the above, EU manufacturers and importers may decide whether to mark their products with origin information or not. If they decide not to apply any origin marking, the product label must not contain false or deceptive origin references regarding an origin of a certain country which in reality is not present.[19]

In addition, it is common practice in EU to designate origin with the wording 'Made in [*country of origin*]' and in this respect, I am of the opinion that the wording 'Made in the European Union' or 'Made in the EU' cannot be accepted as a valid designation of origin, due to the absence of specific regulations.

Moreover, per the criteria applied to determine the origin, it is commonly accepted that, pursuant to Article 1(2) of the WTO Agreement on Rules of Origin, such criteria are those used for non-preferential purposes as set forth in Article 60 of the EU Customs Code,[20] which are based on the 'wholly produced' and the 'substantial transformation' rules, depending whether one or two (or even more) countries have come into play in giving origin to the good. The single origin criterion are provided for in Articles 31–36 and Annex 22-01 of the EU Regulation 2446/15.

As regards to the penalties for giving to consumers false or deceiving information about the origin of a product, Article 13 of the Directive states that they are left to Member States which must ensure that they are 'effective, proportionate and dissuasive'.

It flows from the foregoing that this regulatory gap gives rise to distortions within the EU single market since there are Member States which are particularly sensitive to the issue of origin labelling and therefore have implemented a robust system of controls and penalties against false or deceptive origin marking. On the other hand, there are other EU Countries with controls and penalties far less dissuasive, with the consequence that importing firms which do not play by the rules can make a 'point of entry shopping', choosing the Member State with fewer customs controls at the borders. This situation also gives rise to

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[13] In fact, the Advocate General pointed out that the documents showed by the EU Commission that were meant to persuade the Court had poor substance. Such documents were limited to two complaint letters from the association *Groupement des industries français des appareils d'equipement menager.*

[14] *See* point 17 first part of the decision.

[15] *See* point 17 last part of the decision.

[16] *See* among others, the following documents: (1) Made in the EU Origin Marking – Working Document of the Commission Services of 12 Dec. 2003; (2) 'Made in' – An EU Origin marking scheme, parameters and prospects of 13 Jan. 2006. *See also* the EU Commission's proposal for a Council Regulation on the indication of the country of origin of certain products imported from third countries dated 16 Dec. 2005 (COM(2005)661). Such proposal was firstly amended by the European Parliament legislative resolution of 21 Oct. 2010 and then withdrawn by the EU Commission due to concerns of its compatibility with the WTO rules as well as lack of agreement within the EU Council.

[17] Oj no. L 149/22 of 11 June 2005.

[18] *See* Art. 6(1)(b) of the Directive.

[19] In fact, there are cases whereby the product label contains false or misleading references (e.g. national flags, well-known national historic monuments, etc.) to a certain country which has a particular standing in that particular industry sector.

[20] EU Regulation 952/2013.

distortions in freight traffic within the EU customs territory.

4 Play it again, Sam

With the intent of making a new attempt to fill the regulatory gap and catching up with EU's major trade partners, on 13 February 2013, the EU Commission proposed a Product Safety and Market Surveillance Package,[21] which included a Regulation on consumer protection safety, repealing Directives 87/357/EEC and 2001/95/EC. Article 7 of such Regulation provides a mandatory indication of origin for manufactured non-food consumer products,[22] whether imported or produced within the EU. According to the proposal, the manufacturer should label the product with the country of origin or a more generic EU origin ('Made in EU'), according to the non-preferential origin criteria.

On 15 April 2014 the European Parliament approved with a large majority the report on the proposal for the consumer product safety Regulation,[23] but the proposal is still deadlocked within EU Council since there is no agreement between the EU Member States on the mandatory origin marking provided for in Article 7 of the proposed Regulation.

To this regard, the Council is basically split between countries[24] in favour of mandatory origin labelling, while other countries[25] are against it because they consider it a mere burden on imported goods. Such *empasse* is destined to continue and so will the legal uncertainty around this sensitive topic.

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21 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0078:FIN:en:PDF.

22 In addition to food and materials and articles destined to come into contact with food, the proposed Regulation would not apply to the goods indicated in Art. 2(3) such as, among others, medicines, living plants and animals, genetically modified organisms and genetically modified microorganisms in contained use, as well as products of plants and animals relating directly to their future reproduction, plant protection products.

23 http://www.europarl.europa.eu/news/en/press-room/20140411IPR43453/meps-push-for-mandatory-made-in-labelling-to-tighten-up-product-safety-rules.

24 Such as Italy, France, Spain and others.

25 Such as Germany, the Netherlands and others.