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Food Origin Marking in the European Union: Not a Piece of Cake

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This article analyses the EU origin marking regime for food products, beginning with an overview of the international trade rules overseeing the entire matter, as well as the general principles of EU food law. The author then points out that the EU origin marking regime for food products has both specific mandatory origin marking regimes applicable to certain food products, as well as a general origin marking statute provided for by Articles 26(2)(a) and 26(3) of the EU Regulation no. 1169/2011 on food information to consumers. Such latter provision requires an implementing act which has been long-awaited and it was recently adopted in the wake of the proliferation of national measures. In particular, the IR no. 2018/775 has eventually provided guidelines on the origin labelling of the primary ingredient of a food product. The author then concludes that the interpretation and application of the above-mentioned set of rules requires a case-by-case analysis and further guidance from the EU Commission to solve all the open interpretation issues.

I INTRODUCTION

In a previous article,¹ it was analysed the EU country of origin marking² regime for non-food products. The article began with an overview of the international legal framework, such as Article IX(2) of GATT, which allows WTO members to 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.

The article also remarked that lawmakers should draft origin marking schemes to avoid unnecessary burdens to trade as outlined in Article 2(1) and 2(2) of the WTO Agreement on Technical Barriers to Trade.³ Also, 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 instruments⁴ which are based on the 'wholly produced' and the 'substantial transformation' rules.⁵

2 EU ORIGIN MARKING FOR FOOD PRODUCTS: WHERE ARE WE?

The food sector in the EU is mostly harmonized and is based on the following principles: health and safety, free circulation of food products across the EU, as well as consumer protection and right of information. Such latter rights are Treaty-based⁶ and are also stated in Article 1(1) of the EU Regulation no. 178/2002 setting forth the

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¹ E. Fochesato, *Origin Marking in the European Union: Mandatory or Voluntary?*, 13(6) Global Trade & Cust. J. 263 (2018).

² 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.

³ See the WTO dispute between the USA, Canada and Mexico (DS384, DS386 – Certain Country of Origin Labeling (COOL) requirements).

⁴ Which include the most-favoured-nation treatment, anti-dumping and countervailing duties, safeguard measures, quantitative restrictions or tariff quotas, trade statistics.

⁵ Depending on whether one or two (or even more) countries have come into play in giving origin to the good at stake, see Annex K of the Revised Kyoto Convention.

⁶ See Art. 169(1) of the Treaty on the Functioning of the European Union which states that the EU shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information.

general principles of EU food law, as well as in Article 3 (1) of the EU Regulation no. 1169/2011 on food information to consumers (FIR).

Also, Article 7(1)(a) of the FIR states that food information shall not be misleading as to the characteristics of the food, among which there is its country of origin⁷ or place of provenance.⁸

In this respect, the EU origin marking regime for food products comprises of two areas: (1) specific mandatory origin marking regimes applicable to certain food products; (2) general origin marking statute provided for by Articles 26(2)(a) and 26(3) of the FIR.

In particular, Table 1 indicates the food products whereby a mandatory origin marking is required as well as its legal reference.

Table 1

| Category of food | EU Regulation |
|---|---|
| Beef and beef products (information about the country where the animal was born, raised, slaughtered and the country where the meat was cut are mandatory on the packaging) | Article 13(5)(a)(b) of Regulation no. 1760/2000 |
| Fresh, chilled and frozen meat of swine, sheep, goats and poultry | Article 5 of Regulation no. 1337/2013 |
| Fisheries and aquaculture (information about the area where the fishery or the aquaculture product was caught or farmed) | Articles 35, 38 of Regulation no. 1379/2013 |
| Fruit and vegetables | Articles 6–7 of Regulation no. 543/2011 and Article 76(1) of Regulation no. 1308/2013 |
| Olive oil | Article 4 of Regulation no. 29/2012 |
| Honey | Article 2 of Directive no. 2001/110/EC |
| Eggs | Article 30 of Regulation no. 589/2008 |
| Imported poultry | Article 5(4)(e) of Regulation no. 543/2008 |

Protected designation of origin (PDO), protected geographical indications (PGI), traditional specialties guaranteed (TSG),⁹ as well as organic food¹⁰ regimes are founded on a voluntary basis and have their own origin marking criteria and procedures.

Aside from the specific mandatory origin marking regimes listed above, the general origin marking statute for food products provided for under Article 26(2)(a) of the FIR does not provide for a general obligation to indicate the origin or provenance of the food product. However, such obligation arises only where the omission of such indication 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 label¹¹ as a whole would otherwise imply that the food has a different country of origin or place of provenance.

This is, for instance, the case when the 'trade dress' (i.e. label, packaging, logo or product design) of the product contains statements or terms, graphic presentation or symbols that make the consumer infer that such product has an origin which is not the true origin of the product.

As a matter of example, we may mention the case of a food product which, despite not having any origin link with Italy, makes on its trade dress reference to Italy (e.g. defining the product with the adjective 'Italian' or by using Italian names, monuments, flags, etc.) implying that such product has Italian origin. This misleading consumer practice is known as 'Italian sounding'¹² but of course, is not limited to Italy, since it involves countries with a tradition of excellence in the food sector.

In such cases, Article 26(2)(a) of the FIR requires an origin marking on the product. Although the provision does not specify the exact wording of the marking, a suitable expression could be, for example: 'Country of origin'¹³ of the food: (name of the country) or 'This food is made in (name of the country)' or similar expressions.

However, the interpretation and application of the above-mentioned provision is far from being an easy task, since it requires a case-by-case analysis to ascertain whether the 'trade dress' of the product implies an origin which is not true.

Notes

⁷ Determined in accordance to the non-preferential criteria per Arts 59–63 of EU Regulation no. 952/2013 (EU Customs Code).

⁸ According to Art. 2(2)(g) of the FIR, the place of provenance is not the country of origin as determined in the EU Customs Code, but any place where a food is indicated to come from.

⁹ See Regulation no. 1151/2012, Regulation no. 607/2009 and Regulation no. 1308/2013 (wine), Regulation no. 251/2014 (aromatized wine), Regulation no. 110/2008 (spirit drinks).

¹⁰ Art. 24(1)(c) of Regulation no. 834/2007.

¹¹ According to Art. 2(2)(i) of the FIR, 'label' means any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to the packaging or container of food.

¹² See inter alia, I. Carreño, P. R. Vergano, *Geographic Indications, Food Fraud and the Fight Against Italian Sounding Products*, 7(2) Eur. J. Risk Regulation 416–420 (2016).

¹³ Or place of provenance, as the case may be.

That said, there is a further level of marking compliance provided for under Article 26(3) of the FIR and it involves the primary ingredient¹⁴ of the food product. In fact, in case the country of origin or place of provenance is indicated in the product, but it is not the same as that of its primary ingredient, in such a case it is also necessary to indicate the origin or the provenance of the primary ingredient.¹⁵ For instance, in a product defined as 'Italian mozzarella' it must also be specified the origin of the primary ingredient (milk in this case) if the latter has not been obtained in Italy.

Therefore, Articles 26(2) and 26(3) of the FIR should be read in connection one another, since they both are aimed to guarantee and protect consumers against misleading practices, according to Article 7(1)(a) of the FIR.

However, the application of Article 26(3) needs an implementing act from the EU Commission that should have been issued within 13 December 2013.¹⁶ After almost five years of regulatory vacancy, on 28 May 2018, the EU Commission eventually issued the Implementing Regulation (IR) no. 2018/775.

During this long period and in order to fill the regulatory gap left by the EU Commission, some EU Member States have implemented their own mandatory origin marking schemes for specific categories of food.

3 THE NATIONAL ORIGIN MARKING REGIMES: FRANCE AND ITALY

3.1 France

France was the first EU Member State to bring forth a mandatory origin marking scheme, through Decree no. 2016-1137 of 19 August 2016.¹⁷

The decree has a limited duration from 1 January 2017 to 31 March 2020 (Article 9) as amended. Also, the decree has a mutual recognition provision (Article 6)¹⁸ by which the food products lawfully manufactured or marketed in another EU Member State or in a third country are not subject to the provisions of the decree

and therefore are not compelled to comply with the marking requirements thereof.

The decree (Article 9) also includes the obligation to send to the EU Commission a report on the application of the marking schemes.

Given the above, the decree (Article 1(I)) applies to prepacked food containing milk,¹⁹ milk used as an ingredient²⁰ in dairy products listed in the attached annex.²¹ The decree also applies to prepacked food containing the meat²² listed in the attached annex.²³ PDO, as well as organic food, are not included in the scope of the decree.

In particular, in the case of meat, Article 2(I) of the decree requires that prepacked processed food containing beef, swine, sheep, goat and poultry meat as an ingredient, indicates the country of birth of the animal, as well as the country where it was reared and slaughtered.

Alternatively to the above general marking statute, Article 2(II)(III)(IV) of the decree indicates one of the following marking schemes:

- in case the animal is born, reared and slaughtered in the same country, the origin of the food may be marked with the following wording: 'Origin: (name of the country)' (Article 2(II));
- in case the meat comes from animals born, reared and slaughtered in one or more EU Member States, the origin of the food may be marked with the following wording: 'Origin: EU' (Article 2(III));
- in case the meat comes from animals born, reared and slaughtered in one or more non-EU Member States, the origin of the food may be marked with the following wording: 'Origin: outside EU' (Article 2 (IV)).

Furthermore, in case of milk, Article 3(I) of the decree requires that the origin of milk or milk used as an ingredient in dairy products must be marked by indicating the country of collection of milk, as well as the country of its treating or processing.

Notes

¹⁴ According to Art. 2(2)(q) of the FIR, 'primary ingredient' means an ingredient or ingredients of a food that represent more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required.

¹⁵ Or, according to Art. 26(3)(b), that the country of origin or place of provenance of the primary ingredient shall be indicated as being different to that of the food.

¹⁶ See Arts 26(3) and (8) of the FIR.

¹⁷ For a thorough examination of the content of the French decree and its compliance with EU law, see E. Treuil, *The French Decree on the Labelling of the Origin of Milk and Meat Used as an Ingredient and Its Compliance with European Rules*, 11(6) Eur. Food & Feed L. Rev. 486–493 (2016).

¹⁸ The limited duration as well as the mutual recognition provisions were the key factors that allowed France to get the EU Commission's tacit approval of the decree, according to E. Treuil, *supra* n. 17, at 487.

¹⁹ The decree does not specify the concept of 'milk'.

²⁰ In a percentage of at least 50% of the total weight of the prepacked food, see Art. 1(1) of the *Arrêté du 28 septembre 2016 fixant les seuils prévus par le décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient*.

²¹ E.g. cheese, yogurt, butter, etc.

²² In a percentage of at least 8% of the total weight of the processed food, see Art. 1(2) of the *Arrêté du 28 septembre 2016 fixant les seuils prévus par le décret n° 2016-1137 du 19 août 2016 relatif à l'indication de l'origine du lait et du lait et des viandes utilisés en tant qu'ingrédient*.

²³ Bovine, swine, sheep, caprine and poultry meat.

Alternatively to the above general marking statute, Article 3(II)(III)(IV) of the decree indicates one of the following marking schemes:

- where milk or milk used as an ingredient in dairy products has been collected, treated or processed in the same country, the origin of the food may be marked with the following wording: ‘Origin: (name of the country)’ (Article 3(II));
- where milk or milk used as an ingredient in dairy products has been collected, treated or processed in one or more EU Member States, the origin of the food may be marked with the following wording: ‘Origin: EU’; (Article 3(III));
- where milk or milk used as an ingredient in dairy products has been collected, treated or processed in one or more non-EU Member States, the origin of the food may be marked with the following wording: ‘Origin: outside EU’ (Article 3(IV)).

3.2 Italy

Italy has also brought forth similar origin marking schemes on: (1) milk and dairy products (Decree of 9 December 2016), (2) rice and durum wheat (Decreets of 26 July 2017); (3) tomatoes (Decree of 16 November 2017).

Also the Italian decrees have the mutual recognition provision (Article 6), limited duration of approximately two years, as well as a withdrawal provision (Article 7), according to which the decrees will cease to have force at the date of application of the implementing act per Article 26(8) of the FIR.²⁴

Per the marking requirements of milk and dairy products, they apply to prepacked food containing milk,²⁵ milk used as an ingredient in dairy products listed in the attached annex.²⁶ Fresh milk, PDO, PGI, as well as organic food, are not included in the scope of the Italian decree.

The Italian decree on milk requires (Article 2) that the origin of milk or milk used as an ingredient in dairy products must be marked by indicating the country of collection of milk, as well as the country of its processing or treating. Also, in case of collection, processing or treating in the same country, the origin could be marked as follows ‘origin of milk: (name of the country)’.

Alternatively, when collection, processing or treating are carried out in the territory of several EU countries, the mark ‘origin of milk: EU’ could be used. Also, in case the above operations are performed in the territory of several non-EU countries, then the wording ‘origin of milk: non-EU’ could be used. Finally, in case the collection and processing of the milk is carried out in EU and non-EU countries, then the following wording: ‘milk of EU countries’ and ‘milk of non-EU countries’ could jointly be used.²⁷

Per the origin marking schemes on pasta, rice and tomatoes²⁸ the Italian decrees follow similar marking rules, i.e. indicating: (1) the country of cultivation for wheat, rice and tomatoes, and (2) the country of milling (wheat), processing and packaging (rice) and transformation (tomatoes). In case the latter operations are carried out in the same country, the origin could be marked as follows: ‘origin of [...]’²⁹: (name of country). Also, the marking ‘EU’, ‘non-EU’ or ‘EU and non-EU’ could be used,³⁰ in case the operations are carried out in more EU or non-EU Countries.

Finally, as of the date of drafting of this article, several other EU Countries³¹ have adopted or are in the process of adopting national origin marking schemes mainly on milk, milk used as an ingredient in dairy products, as well as meat.

4 NATIONAL MARKING SCHEMES AND EU INTERNAL MARKET

The adoption of national origin marking schemes has been criticized³² as being a burden to both intra-EU trade, as

Notes

²⁴ The withdrawal provision is missing in the French decree.

²⁵ The decree covers all kinds of milk, excluding fresh milk, coming from any animal. Unlike the French decree, the Italian one does not indicate any threshold.

²⁶ E.g. cheese, yogurt, butter, etc.

²⁷ Even though all these marking options do not appear in the decree, they are considered as acceptable according to the Circular of the Ministry of Economic Growth (‘Circolare del Ministro dello Sviluppo Economico’) of 24 Feb. 2017 (at 3, para. no. 3).

²⁸ The tomato decree applies to prepacked food products with tomatoes as the main ingredient, like tinned tomatoes, tomato sauces, as well as mixed condiments containing at least 50% of tomatoes.

²⁹ Rice or tomatoes, as the case may be. This wording does not apply to pasta.

³⁰ In addition, Art. 3(2) of the pasta decree states that if the pasta is composed by at least 50% of wheat cultivated in one single country, then the country of wheat cultivation could be marked by indicating the main country of cultivation, followed by the wording ‘and other EU Countries’, or ‘non-EU’, or ‘EU and non-EU’, as the case may be.

³¹ Greece, Spain, Lithuania, Portugal, Romania and Finland. For the complete list of the schemes, see EPRS-European Parliamentary Research Service, Mandatory origin-labelling schemes in Member States (4 Sept. 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625182/EPRS_BRI\(2018\)625182_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625182/EPRS_BRI(2018)625182_EN.pdf)

³² See I. Carreño, T. Dolle, *A Myriad of EU Member States Measures on Mandatory Country of Origin Labelling (COOL) of Food Compromise the EU Internal Market*, 8(4) Eur. J. Risk Regulation 779–786 (2017); I. Carreño, T. Dolle, Y. Rovnov, *Country of Origin Labelling on the Rise in EU Member States – An Analysis Under EU Law and the EU’s International Trade Obligations*, 8(2) Eur. J. Risk Regulation 414–423 (2017); B. Klaus, *France and Italy: Introduction of Compulsory Labelling of the Country of Origin for Milk and Dairy Products and Meat as an Ingredient*, 12(4) Eur. Food & Feed L. Rev. 348–351 (2017); D. Pisanello, M. Brunori, *Italy Introduces COOL for Pasta and Rice: Another Gastro-nationalist Move?*, 12(6) Eur. Food & Feed L. Rev. 526–528 (2017).

well as trade with third countries, since food business operators may decide to switch to local supply chains, in order not to mark as foreign the main ingredient of their food products.

To that regard, while it is undoubtedly true that the proliferation of national measures constitutes an impediment to the proper functioning of the internal market, the following circumstances should be taken into due account.

Article 38(1) of the FIR states that: (1) Member States are not allowed to adopt, nor maintain national measures unless authorized by Union law; (2) if authorized, such measures shall not give rise to obstacles to free movement of goods, including discrimination as regards foods from other Member States.

In addition, Article 39(1) of the FIR allows Member States³³ to adopt measures requiring additional mandatory particulars for specific types or categories of foods, provided that they are justified on grounds of, inter alia, protection of consumers. Also, according to Article 39(2) of the FIR, Member States willing to introduce national mandatory origin marking schemes, have the burden to provide a proven link between certain qualities of the food and its origin or provenance, as well as evidence that the majority of consumers attach significant value to the provision of that information.

Given the above, and considering its inertia in adopting the implementing act as requested by Article 26(8) regarding the origin marking of the primary ingredient,³⁴ the EU Commission did not raise any compliance concerns per Article 39(1)(2). Therefore, lacking any negative opinion from the EU Commission, the national decrees were adopted three months after their notification, according to Article 45(3) of the FIR.

Consequently, it appears that the case at stake could fall in the exception provided for under Article 38(1) of the FIR, since the adoption of the national measures were implicitly authorized in order to fill the regulatory gap in the EU law and therefore granting to consumer more protection against misleading practices, per Article 7(1)(a) of the FIR. In fact, the Italian and French decrees comply with the obligation per Article 38(1) of the FIR to grant the free movement of goods, since such measures exempt from the marking obligations food products lawfully produced or marketed in other EU Member States.

Moreover, Italian and French measures have a limited duration as well as – in case of the Italian decrees – an automatic-withdrawal provision (Article 7) which states that in case of adoption by the EU Commission of the implementing act regarding the main ingredient, the

decrees will cease to have force at the date of application of such implementing act.

Nevertheless, the matter at stake is currently under scrutiny by the Court of Justice of the European Union (case no. C-485/18³⁵) to which the French Council of State (*Conseil d'État*) referred, per Article 267 of the Treaty on the Functioning of the EU, four preliminary questions on the mandatory country of origin marking on milk, milk used as an ingredient, as well as meat, per the Decree no. 2016-1137 of 19 August 2016.

Such preliminary questions are of particular importance not only for the litigation at stake, but, in general, to better clarify the boundaries between EU and national measures in the food sector.

In particular, the first and most important question regards harmonization. In particular, the question referred to the EU Court is whether Article 26 of the FIR is to be considered as having harmonized the matter of origin in the food sector in connection with Article 38(1) of the FIR, and whether such circumstance precludes Member States from adopting origin marking measures on the grounds of Article 39 of the FIR.

Also, in case consumer protection is invoked as the reason to adopt national measures, with the second question the EU Court is asked whether the two requirements per Article 39(2) of the FIR should be read in connection one another and therefore whether the 'proven link' could be based merely on subjective elements regarding the value that the majority of consumers attach to the link between certain qualities of the food and its origin or provenance.

The third question regards whether matters, such as the resilience of the food to transportation and the risk of deterioration during transport, could be taken into account in ascertaining the 'proven link' between certain qualities of the food and its origin per Article 39(2).

The last question referred to the EU Court regards whether the assessment of the conditions per Article 39 of the FIR presupposes that the qualities of the food are regarded as being unique on account of its origin or provenance or, instead, as being guaranteed by reason of that origin or provenance. In such latter case, the EU Court is asked, despite the harmonization of health and environmental standards applicable within the EU, whether the indication of origin or provenance could be more precise than the indications 'EU' or 'Non-EU'.

The case was filed before the EU Court on 24 July 2018 and the decision is expected in approximately sixteen months³⁶ from that date.

Notes

³³ Subject to the notification procedure provided under Art. 45 of the FIR.

³⁴ As well as Commission's unwillingness to introduce mandatory origin marking schemes with particular regard to unprocessed food, single ingredient food products, as well as ingredients that represent more than 50% of a food, see EU Commission reports to the EU Parliament and EU Council of 20 May 2015, COM(2015) 204 final.

³⁵ *Groupe Lactalis v. Premier ministre, Ministre de l'Agriculture et de l'Alimentation, Garde des Sceaux, Ministre de la Justice, Ministre de l'Économie et des Finances.*

³⁶ Average duration of proceedings before the Court of Justice of the EU, according to the EU Court of Justice press release no. 36/18, at 1.

5 THE IMPLEMENTING REGULATION AND THE MARKING SCENARIOS

In order to stop the proliferation of national measures, on 28 May 2018, the EU Commission eventually complied with its obligation to implement Article 26(3) of the FIR, issuing the IR no. 2018/775.

The IR applies when the country of origin or the place of provenance of food is provided according to Article 26(2)(a) of the FIR, and it is not the same as that of its primary ingredient.

On the other hand, the IR does not apply to geographic terms included in customary and generic names. Furthermore, the scope of the IR does not include³⁷ PGI as well as registered trademarks which constitute themselves an origin indication, for example when they contain textual or graphic (flags, names, monuments, etc.) references of a specific country. These latter exclusions do not appear to be coherent with Article 26(3) of the FIR, which does not mention them.

Article 2 of the IR leaves to business operators many options on how to mark the origin of the primary ingredient, by referring to one of the following geographical areas:

- ‘EU’, ‘non-EU’ or ‘EU and non-EU’
- Regions or any other geographical area either within several Member States or third countries
- FAO fishing areas, sea or freshwater body
- Member State(s) or third country(ies)
- Region, or any other geographical area within a Member State or within a third country, which is well understood by normally informed average consumers
- The country of origin or place of provenance in accordance with specific EU provisions applicable for the primary ingredient(s) as such.

Alternatively to the above, the marking obligation may be complied with by simply using the following or similar wording: ‘(name of the primary ingredient) do/does not originate from (country of origin or the place of provenance of the food)’.

Also, according to Article 3(2), 3(3) of the IR, the mark of origin of the primary ingredient must appear in the same field of vision as that of the mark of origin or place of provenance of the food product. In this

respect, the font size must not be smaller than the minimum font size provided for in Article 13(2) of the FIR.³⁸

Finally, the IR will be binding from 1 April 2020, and food products placed on the market or labelled before such date may be marketed until the exhaustion of the stocks.

Given the above, Table 2 below summarizes the possible origin marking scenarios to date, according to Article 26(2)(a) and 26(3) of the FIR.

Table 2

| | Trade dress of the food product | Origin marking required | Legal reference |
|----|--|--|--|
| 1. | The trade dress of the product (e.g. product design, packaging, label, logo, etc.) does not contain statements or terms, graphic presentation or symbols implying that such product has an origin which is not the true origin of the product | None | Article 26(2)(a) of the FIR |
| 2. | The trade dress of the product (e.g. product design, packaging, label, logo, etc.) does contain statements or terms, graphic presentation or symbols implying that such product has an origin which is not the true origin of the product | The origin or place of provenance of the food product must be indicated with the following or similar wording: ‘Country of origin’ ³⁹ of the food: [...]’ or ‘This food is made in [...]’ | Article 26(2)(a) of the FIR |
| 3. | If the product falls in the marking situation no. 2 above, in case the origin of the primary ingredient ⁴⁰ is different from that of the food product (e.g. a product defined as ‘Italian mozzarella’ if the milk has not been obtained in Italy) | The country of origin or place of provenance of the primary ingredient must also be indicated according to the criteria and wording set forth under Article 2 of the IR, ⁴¹ for example ‘Country of origin’ ⁴² of the primary ingredient: [...]’ | Article 26(3) of FIR and Article 2 of the IR (application from 1 April 2020) |

Notes

³⁷ Pending the adoption of specific rules on the matter, see Art. 1(2) of the IR.

³⁸ According to such article, characters using a font size where the x-height, as defined in Annex IV, is equal to or greater than 1,2 mm.

³⁹ Or place of provenance.

⁴⁰ According to Art. 2(2)(q) of FIR, ‘primary ingredient’ means an ingredient or ingredients of a food that represent more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required.

⁴¹ Unless the case falls under the exclusions set forth under Art. 1 of the IR. In such case, it is sufficient to mark the food product according to Art. 26(2)(a) (see point no. 2 of the table).

⁴² Or place of provenance.

6 CONCLUSIONS

Unlike the non-food sector,⁴³ the food sector has specific mandatory origin marking regimes applicable to certain food products, as well as its own general origin marking statute, provided for in Article 26(2)(a) and 26(3) of the FIR, which have the scope to guarantee and protect consumers against misleading practices, according to Article 7(1)(a) of the FIR.

However, the application of Article 26(3) needs an implementing act from the EU Commission that was adopted only on 28 May 2018, after almost five years of regulatory vacancy and in the wake of proliferation of national measures.

In light of the adoption of the IR, the national measures are expected to cease at the time of application of the IR (i.e. 1 April 2020). In this respect, the outcome of the proceedings currently pending before the Court of Justice could be of importance to better determine the boundaries between EU and national measures.

Nevertheless, the interpretation of the above-mentioned set of rules is far from being an easy task; in fact to apply Article 26(2)(a) of the FIR it is required a case-by-case analysis to ascertain whether the 'trade dress' of the product implies an origin which is not true.

Also, the IR appears to partially deviate from the provision of Article 26(3) of the FIR, since it excludes from its scope PGI as well as registered trademarks. Still, the exclusion from the IR of the common and generic names comes without providing objective criteria on what is to be defined as such.

Furthermore, it is questionable whether indications like 'EU', 'non-EU' constitute sufficient information to consumers. In this respect, the fourth preliminary question submitted to the EU Court could be of help to clarify this issue. There is also uncertainty on the indication 'EU and non-EU' since there is no legal definition of multiple origins.

Given the above, it is essential that the EU Commission address all the open interpretation issues with a guideline to be issued in advance to the date of application of the IR. In doing so, EU food business operators, as well as third countries food exporter, will be allowed to make the adequate internal planning of the flows of food raw materials.

The guideline would also be of benefit to the national authorities of the Member States which have the responsibility⁴⁴ to enforce the rules mentioned above.

Notes

⁴³ Whereby the origin marking has been shoehorned into the Directive 2005/29/EC on unfair commercial practices, which prohibits misleading commercial actions with the purpose of distorting consumer's purchasing choices, including false or deceiving information about the origin of a product.

⁴⁴ See Art. 1(1)(b) of Regulation 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules; see also Art. 13 of Directive 2005/29/EC on unfair commercial practices.