

# Food & Beverage Insight

Retrospective view on  
labelling, advertising and  
trademark for the Norwegian  
food sector.



Winter Edition 2024

# Introduction

## Dear reader

This is the first edition of Food & Beverage Insight, Haavind's publication providing an overview on some of the significant legal developments concerning trademarks, labelling and advertising of food in Norway during the past year.

At Haavind, we are quite passionate about the food industry. Our firm has long traditions in providing food business operators with a wide range of legal services. Three of the many legal areas we frequently assist food business operators with are intellectual property rights, advertising and food law. While these are separate legal fields within their own spheres and thus subject to different rules and considerations, there is an increasing convergence between the three fields.

This convergence is particularly visible when it comes to trademarks, labelling and advertising of food products. Knowledge of these three areas is crucial for food business operators in the retail sector, as well as for any advisor providing legal assistance to such clients. But the legal part is only one aspect – these areas also receive a lot of press attention and certain aspects are sensitive from a political aspect.

With this publication, we intend to share with you some of the legal developments within the abovementioned areas which occurred over the last year. Our focus will be both on legal developments in Norway and the European Union.

As a leading law firm on intellectual property and food law in Norway, our team continuously and closely monitors legal developments relevant to the food sector. If you wish to discuss how your business can meet the legal challenges of this innovative and highly regulated sector, you are always welcome to contact us.

Kind regards

Ida and Håkon

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# Stratos vs. Boble: The colorful clash of chocolate packaging

Long-term use of a color on a product can provide acquired distinctiveness protection, allowing to prevent competitors from using similar colors.

## Case overview

On 7 June 2024, Oslo District Court issued a judgment (case reference TOSL-2023-186489) in a trademark infringement case between Orkla Confectionery & Snacks Norge AS (Orkla) and Mondelez Norge AS (Mondelez). Orkla claimed that the packaging of the aerated milk chocolate product, Freia Boble, constituted an infringement upon Orkla's intellectual property rights. The case has received significant media attention in Norway.

The dispute arose when Mondelez introduced Freia Boble in 2023. The packaging of Freia Boble featured a blue color (Pantone 2145 C) that closely resembled the blue color used by Orkla on its well-established aerated milk chocolate, Stratos (Pantone 2144 C). Stratos has been in production since 1936 and has consistently used the blue color in its packaging since 1985.



Trademark



[Illustrations of the two packaging designs. On the left is a redacted image of the Stratos packaging, with the name removed. On the right is the packaging of Freia Boble. Both images are taken from the court decision as published]

The primary issues before the District Court were whether Orkla had obtained protection for the blue color Pantone 2144 C through the sale of Stratos chocolate, and whether Mondelez had infringed upon the Trademarks Act or the Norwegian Marketing Control Act by using a similar color on Freia Boble. Orkla sought a prohibition on the sale and marketing of Freia Boble with its current packaging, as well as compensation for damages.

The District Court ruled in favor of Orkla. The Court imposed significant measures, including a prohibition on marketing and sales, a recall order, and an award of damages amounting to NOK 20 million.

### **The Court's reasoning**

The District Court first examined the issue of whether the blue color Pantone 2144 C had acquired distinctiveness as a trademark. In 2024, the Norwegian Industrial Property Office (KFIR) had previously assessed this matter in relation to “chocolate” when Orkla sought to register the color as a trademark. KFIR, at that time, found insufficient evidence to establish distinctiveness in that particular case.

Orkla argued before the District Court that Pantone 2144 C had acquired distinctiveness specifically for the more limited category of “aerated milk chocolate.” After conducting a comprehensive assessment, the court concluded that Pantone 2144 C had indeed acquired distinctiveness as a trademark for this narrower product category. In reaching this conclusion,



Trademark

the court considered various factors, including Stratos' market share, which ranged between 66% and 100% in the aerated milk chocolate segment from 2012 to 2022. The court also considered the long-term use of Pantone 2144 C on Stratos chocolate and the fact that the blue color did not describe the characteristics or functions of aerated chocolate. Brown, not blue, is commonly associated with chocolate, and the market's association between Pantone 2144 C and chocolate required training and familiarity. Market surveys were also presented, which supported the association of the blue color with Stratos or Orkla in the context of chocolate, as 71% of the test group recognized this association.

Having concluded that Pantone 2144 C was protected through use, the District Court had to assess whether the packaging of Freia Boble infringed upon Orkla's trademark rights and whether it violated the prohibition against actions in breach of business practices under the Norwegian Marketing Control Act. The court answered both questions in the affirmative.



In concluding that the packaging of Freia Boble infringed upon Orkla's trademark rights, the District Court emphasized the



complete similarity of the products between Stratos and Freia Boble, the close resemblance of the blue colors, and the fact that only Orkla and Mondelez offer this type of aerated chocolate in Norway.

In concluding that the packaging of Freia Boble also violated good business practices among traders, the District Court placed particular weight on research that shows packaging color is a central and perhaps dominant navigational element for consumers when buying food products. The court found that Mondelez had not fulfilled its obligation to sufficiently differentiate itself from a competitor and deliberately chose a blue color for Freia Boble that closely resembled Stratos' shade of blue, with the intention of exploiting the fact that consumers had already been trained to associate this shade with the market-leading Stratos' aerated milk chocolate.

Finally, the District Court assessed the legal consequences of Mondelez's trademark infringement and violation of good business practices. The court issued a prohibition on further marketing and sale of Freia Boble chocolate with the disputed packaging. It also deemed it reasonable and proportionate to order a recall of all Freia Boble chocolates under the Trademarks Act, considering the feasibility of the recall and the fact that Mondelez had chosen to launch Freia Boble after receiving a notice of legal action from Orkla, thus assuming the risk. Lastly, the District Court determined that Mondelez should pay appropriate compensation of NOK 20 million to Orkla.

### **Comments**

The Stratos case stands as a rare example of a Norwegian court recognizing that the criteria for acquired distinctiveness have been met for a color trademark. The case proves an opportunity for owners of other well-known brands who have consistently used the same color on their packaging for a significant period to prevent others from employing similar colors on identical products.





However, brand owners should be aware that establishing distinctiveness through use requires substantial effort and entails a high threshold. Orkla's triumph in this case can largely be attributed to the extensive evidence they were able to provide regarding the marketing and sales of Stratos chocolate over many years. Brand owners who wish to have the opportunity to challenge competitors' use of similar colors should ensure that they continuously preserve and organize marketing materials so that they can easily document their use retrospectively.

At the time of the decision, it was initially reported that Mondelez planned to appeal the case. However, it was later reported that Orkla and Mondelez had reached a settlement, marking the end of the colorful saga between the two chocolate titans. With regard to KFIRs previous refusal to register Pantone 2144 C for chocolate in general, Orkla had initiated an action before the courts to get this decision overturned. However, this case was also reported to be withdrawn from the courts. The colorful chocolate saga therefore seemed to reach the end. But that was a premature conclusion. Because Orkla had also applied for the registration of Pantone 2144 C for aerated chocolate (i.e. a narrower category). And in a rather interesting move, the Norwegian Industrial Property Office in late November 2024 refused to register the color for aerated chocolate. Alas, we expect that the colorful chocolate saga will continue into 2025.



## Fishy business

Is “gluten free” a misleading claim for fish cakes? Find out in this article.

### Case overview

On 4 May 2023, the Norwegian Food Safety Authority (NFSA) by a regional division issued an administrative decision (case reference 2023/65435) against a Norwegian food business operator manufacturing a specific brand of fish cakes, claiming that the use of “gluten free” on the labelling was in violation of the food information for consumer regulation (FIC).

The reason for the violation? The labelling violated article 7(1) litra c, which prohibits misleading practices insofar that the labelling suggests that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasizing the presence or absence of certain ingredients.



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The alleged reason for the violation was that the regional division had not found that there were any other fish cakes on the market which contained wheat flour.

The food business operator disagreed with the regional division's decision and filed an administrative complaint to the central division at the NFSA.

The key aspects of the complaint were:

- There were good reasons for labelling the fish cakes with “gluten free”, as it is helpful for consumers with coeliac disease.
- It is customary that homemade fish cakes are made with wheat flour.
- Until recently, the fish cakes in question contained oat fibers, and oat and wheat are stated in Annex II of FIC as cereals which contain gluten.

On 16 May 2024, the central division of the NFSA issued its decision, which upheld the decision of the regional division, i.e. that the labelling was in violation.

### **The reason for the decision**

The central division of the NFSA first points out the applicable rules, stating that “gluten free” is a claim governed by Implementing Regulation 824/2014. The NFSA points out that in addition to the technical requirements of the Implementing Regulation, there is a requirement that the statement gluten free is relevant to the product and that the labelling is not misleading. At a first glance, this statement is somewhat confusing, since it indicates two separate requirements. However, this is further rectified when the NFSA points out the fact that the statement is relevant to the product involves an assessment of whether other similar products normally contain the substance that the product is claimed to be free of – i.e. the requirement is that the claim is non-misleading pursuant to Article 7(1) litra c of FIC.



The NFSA points out that due to article 7(1) litra c, claims such as “free of” etc. cannot be used about a substance or ingredient which normally is not found in a food. Consequently, using “gluten free” for specific products presupposes that there are other similar products or products in the same category which contain gluten.

The regional office had maintained that it was not common to use ingredients containing gluten in fish cakes, and thus there was no basis for labelling the food with such claims. The food business operator had pointed out that it is common to make homemade fish cakes with gluten. The central division then states that they have investigated several recipes online for fish cakes, by making a simple search online, and that the recipes they find contain potato flour, not wheat flour. The central division also points out that specific named cookbooks do not use wheat flour in fish cake recipes.

With regard to the arguments from the food business operator that labelling with “gluten free” would be helpful for the consumer, the central division pointed out that the rules are formulated so that the consumer would obtain this information from the ingredient list. This was also the argument used with regard to the fact that the product had previously contained oat fibers. Even though the central division actually acknowledged that this could be an advantage, this was not enough to condone use of the claim.

The central division also pointed out that negative claims is not a mandatory claim, and that such claims can cause confusion amongst consumers that other equal or similar products without such claims are not safe since they do not have such claims.

The central division therefore upheld the decision from the regional office, and found the labelling to not be in compliance with FIC, cf. article 7(1) litra c.



### Comments

Assuming one accepts the premise that it is not customary for fish cakes to include wheat flour (or other gluten ingredients), this decision is a classic example of how the NFSA in Norway interprets a claim concerning the absence of an ingredient (i.e. a negative claim). That the consumer would indeed read the ingredient list to obtain information about the product is also in line with CJEU case law (e.g. C-51/94 Commission v Germany).

An interesting aspect is, however, that the NFSA seems to accept that when assessing whether the labelling is misleading, it is not only relevant to assess similar products with those offered by food business operators, but to also make a comparison with homemade fish cakes. Assuming this is the position of the NFSA, this should be noted, as homemade foods can be included with processed foods for the purpose of “all similar foods”.

Questions can nevertheless be made with regard to whether it is not common that fish cakes contain wheat flour (or other gluten-holding ingredients). It is true that most food business operators use potato flour to avoid that their product contains gluten. However, although not the most common ingredient in homemade fishcakes, a quick search on the internet discloses



several recipes where wheat flour is actually used. As such, the question is whether the complainant would have succeeded if these were presented. The wording of article 7(1) litra c states “all similar foods”, which is indicative that even few examples where you could demonstrate that wheat flour is present, should be sufficient to avoid running afoul of this criterion.

A further takeaway from the decision is also that products previously on the market which included gluten free products, will not be taken into consideration by the NFSA, cf. the allegation of the recipe change from the food business operator. As such, in the view of the NFSA, only products currently on the market qualify as “all similar foods”.



# Proposed ban for advertising of “unhealthy foods” towards children

A tale of good intentions going way too far?

## Background

On 22 August 2024, the Ministry of Health and Care Services published its proposal for a ban on advertising of unhealthy foods towards children and young people under 18. The proposal suggests a ban on marketing activities towards children (defined as people under 18) for products further specified in an annex to the proposed regulation.

The proposal defines marketing as any form of communication or action for marketing purposes. Marketing purposes exist if one of the aims of the of the communication or action is to promote sales to consumers. Certain activities are always prohibited, such as:

- Advertising in cinemas in connection with films that are specifically aimed at children under the age of 13, and which starts before 6.30 pm.
- All forms of competitions with an age limit lower than 18 years.
- Distribution of tastings and product samples to children.
- Special exhibitions that have a form of presentation, content or design that may appeal to children, for example because of language, colors, effects, imagery, use of animation or cartoon characters.

For other marketing activities, a specific assessment will have to be made, where emphasis may be placed, inter alia, on:

- whether the product is primarily consumed by or particularly appeals to children,
- whether the marketing has a form of presentation, content or design that may appeal to children, for example due to language, colors animation or cartoon characters,
- The time and place of the marketing,
- whether children or persons who may particularly appeal to children are involved, and
- the use of gifts, toys, vouchers, discounts, collectibles, competitions or games that are particularly appealing to children.



The proposed regulation also specifies that irrespective of whether the marketing is aimed at children, the marketing of products covered by the annex must not be marketed in a way that encourages adults to buy the product for children.

Furthermore, a provision is also included with regard to the



placement of products at the point of sale, where it is not prohibited for products covered by annex to be placed next to other products and services that appeal to children, such as toys, children's books, games and similar.

The annex, i.e. which products that are affected by the prohibition, lists 11 specific categories of foods. These include typical HFSS (high fat, sugar or salt) food categories, such as chocolate and sugary goods, energy bars, sweet spreads and desserts, cakes, cookies and other sweet and/or fatty bakery goods, snacks, ice cream, energy drinks, soda and other sweet refreshments, milk and plant-based drinks, cereals and yoghurts. Maximum nutritional values are also provided for some of these categories.



Somewhat surprisingly, the annex also has a category called “fast food and compound ready to eat meals”. That fast food is included is not very surprising, but the inclusion of “compound ready to eat meals” is. The latter would include sandwiches and wraps, as well as pasta dishes. The maximum values for such foods are an energy content of 225 kcal, saturated fatty acids



exceeding 4 grams and salt exceeding 1 grams (all per 100 gram of food).

The proposal suggests that the agency responsible for supervision of the ban should be the Norwegian Directorate for Health, which also supervises advertising on alcohol and tobacco. Their practice on marketing of these product groups areas is already considered to be rather strict.

Breach of the rules comes with rather hefty sanctions. A breach can be met with violation fines for up to 4% of the annual sales of the business, although not exceeding 50 times the basic amount of the National Insurance Scheme (meaning a cap on approximately NOK 6.2 million).

### **Comments**

A similar proposal prohibiting advertising of unhealthy foods towards children was presented in 2012 but was not adopted. Instead, in order to restrict such marketing, a self-regulatory body (MFU) was established, together with guidelines. However, the self-regulatory body does not involve any sanctions, and thus bad PR was the only risk.

At a first glance, the proposed regulation mimics the guidelines, save for the rather hefty sanctions which obviously is intended as a deterrent. However, there are a few key differences which could have a dramatic effect for food business operators in Norway.

The first is the inclusion of compound “ready to eat” meals. MFU’s list includes “served and takeaway meals”, which is intended to cover typical fast food. The proposal, while using the same nutritional threshold, has extended the scope to basically include all “ready to eat” meals sold at ordinary grocery stores. The number of products that will be affected by the ban compared to the self-regulatory regime is thus extremely widened in the proposal.

A key difference between the proposed regulation and the MFU



guidelines is that the proposed regulation does not differentiate between different ages. The proposed regulation defines children under 18 years, thus making all marketing directed of the affected foods towards anyone under 18 years as prohibited. In contrast the MFU guidelines listed a general prohibition for children under 13 years and included a provision on “duty of care” when advertising affected food categories for youths. In other words, the MFU guidelines differentiated between children under 13 and youths, while allowing reactions towards advertising directed at youths. The proposal, on the other hand, makes no such differentiation.

This is potentially problematic, in particular from an EU/EEA perspective, as the proposed ban could be considered as barrier for trade according to the EEA agreement. In order to be permitted, it thus has to be considered as both necessary, proportionate and suitable. In the consultative letter of the proposal, the Ministry does provide its view on EEA law, but the elaboration is rather brief. Fear of non-compliance with EEA law was also one of the reasons that the proposal in 2012 failed, and introducing a differentiation between age groups in the MFU guidelines. This will likely also be pointed out in the consultative hearing, as it is likely a subject several key players will address in the consultative hearing.

Another problematic aspect is enforcement and sanctions. While sanctions are necessary in order for a deterrence, the level of sanctions seems rather extreme. In addition, while the self-regulatory regime does not allow for sanctions, they do indeed process all complaints, and thus it is a rather resource efficient tool. Enforcement by the Norwegian Directorate of Health, with a possibility to file an appeal on their decision, will require significantly more resources.

In summary, the prohibition as suggested might be well-intended, but several concerns may be raised from both a legal and industrial perspective. The ban as proposed is an extremely restrictive measure which severely impedes communication between food



business operators and the consumers, and while no one would disagree that the children should be spared from advertisements of unhealthy foods, the question is whether this proposal overreaches based on political sentiments.



# A cheesy affair – Tine’s successful challenge of the “Jørnsberg” trademark registration

Armed with multiple Norwegian “Jarlsberg”-registrations, Tine successfully challenged the registration of “Jørnsberg” for cheese.

## Case overview

Tine SA (“Tine”), Norway’s largest dairy product cooperative, holds multiple trademark registrations for the well-known cheese “Jarlsberg.” The Jarlsberg cheese is sold by Tine both within and outside of Norway.

The “cheesy affair” arose after Ostegården AS (“Ostegården”) successfully registered the wordmark “Jørnsberg” for cheese in NICE class 29 with the Norwegian Industrial Property Office (NIPO). Tine objected to the registration, arguing that it infringed upon Tine’s rights to the previously registered “Jarlsberg” trademarks in the same class. Tine also claimed that “Jarlsberg” is a well-established and well-known mark in Norway, granting it enhanced protection under section 4(2) of the Norwegian Trademark Act.

When the Norwegian Industrial Property Office (NIPO) first considered the case, it was concluded that Ostegården’s registration of the “Jørnsberg” trademark did not



infringe upon Tine's rights to "Jarlsberg." NIPO acknowledged the well-known status of "Jarlsberg" but concluded that the use of "Jørnsberg" would not exploit or harm the distinctiveness or reputation of "Jarlsberg." NIPO did not independently assess the likelihood of confusion between the two trademarks.

Tine appealed NIPO's decision to the Norwegian Board of Appeal for Industrial Property Rights (KFIR). On 27 February 2024, KFIR overturned NIPO's decision and revoked the registration of the "Jørnsberg" trademark (case reference VM 23/00125).



### **KFIR's reasoning**

KFIR agreed with NIPO that "Jarlsberg" is a well-known trademark in Norway, enjoying extended protection as a highly distinctive mark. However, contrary to NIPO, KFIR concluded that the use of "Jørnsberg" would constitute an unfair exploitation of the distinctiveness or reputation of "Jarlsberg," thus infringing upon its enhanced trademark protection.

KFIR emphasized that "Jarlsberg" has built significant goodwill as



a high-quality cheese over many years. By creating an association with “Jarlsberg,” Ostegården would gain an unjustified advantage from this goodwill. KFIR rejected NIPO’s argument that the associations between the marks would not be easily perceived by consumers due to the origin of “Jarlsberg” as a Norwegian farm and family name. KFIR considered the pronounced phonetic and conceptual similarities between the marks to be sufficient for consumers to immediately think of “Jarlsberg” when encountering “Jørnsberg” in trade.

KFIR also dismissed NIPO’s interpretation of Tine’s lack of reaction to the use of “Jørnsberg” on the specific cheese for ten years prior to its registration. KFIR found that Tine’s opposition during the opposition period, in accordance with the trademark law system, was sufficient. Additionally, KFIR determined that Tine did not need to demonstrate actual cases of confusion or association between the marks, as the risk of association or confusion was enough to establish infringement. Based on the aforementioned reasons, KFIR decided to cancel the word mark “Jørnsberg.”





## Comments

The KFIR case against Ostegården is not the first instance in which Tine has taken legal action to protect the Jarlsberg cheese. In LB-2016-56897, the Court of Appeal ruled that Synnøve Finden AS' use of the designation 'jarsberg cheese-type' (our translation) infringed upon TINE's trademark rights to JARLSBERG. Consequently, Tine successfully obtained an injunction against Synnøve's use of the designation on their cheese. These cases demonstrate how brand owners can actively intervene against similar designations used by competitors, and in doing so, strengthen their own brand.

In the Jørnsberg case, KFIR recognized "Jarlsberg" as a well-known mark under section 4(2) of the Norwegian Trademarks Act. Consequently, the similarity assessment between the marks was not based on the likelihood of confusion but rather on the risk of association between the marks. However, KFIR rectified NIPO's decision by affirming that Sections 4(1) and 4(2) are independent grounds for infringement. If an infringement is not established under section 4(2), a separate assessment must still be conducted to determine whether the marks are confusingly similar and whether an infringement has occurred under section 4(1).





# Shades of trademark trouble

Monster Energy Company's recent setback in registering its green and black color combination as a trademark for energy drinks in Norway sheds light on the complexities faced by brands in protecting color combinations.

## Case overview

Monster Energy Company ("Monster") had sought to register its signature green and black color combination as a color mark for energy drinks in NICE class 32.



[Graphic representation of Monster's trademark, taken from KFIR's decision as published]

The Norwegian Industrial Property Office (NIPO) rejected the trademark registration due to the application's failure to meet the graphic representation requirements. The decision was appealed to the Norwegian Board of Appeal for Industrial Property Rights (KFIR), which upheld NIPO's conclusion in May 2024 (case reference VM 2023/00137).



### **KFIR's reasoning**

In 2018, when Monster filed its trademark application, the Norwegian Trademarks Act required a mark to be “graphically represented” for registration. Although the Act has been amended in 2023, the requirements for graphical representation for color combination marks remain unchanged for all purposes.

The Court of Justice of the European Union (CJEU) has established that to register a color combination without contours giving them a particular shape, like Monster's application, a description must demonstrate the systematic arrangement of the colors in a uniform and predetermined manner. Mere juxtaposition or indication of colors “in any conceivable form” is not sufficient, as it allows for numerous combinations, making it difficult for the relevant public, authorities, and competitors to perceive and recognize a specific combination and determine the scope of protection. The CJEU's rejection of Red Bull's registration of its silver and blue color combination for energy drinks in case C-124/18 serves as an example. Red Bull's description, stating that the “ratio of the colors is approximately 50%–50%,” allowed for various combinations and did not sufficiently describe the scope of protection.

In Monster's case, before KFIR, four alternative descriptions were submitted in an attempt to supplement the color combination with a systematic and predetermined arrangement. Initially, all four descriptions stated that the mark consists of “50 % black and 50 % green (Pantone 375), juxtaposed and applied in equal proportions” (our translation). KFIR interpreted the use of the word “juxtaposed” as indicating that the colors could be arranged in any form or layout while maintaining equal proportions, lacking a predetermined and uniform manner.

Three of the alternative descriptions provided further details on the use of colors, specifying that black would be used “primarily” as a background color, while green would be used “primarily” on different text parts, other design elements on energy drink cans, specific letters and words, or logo elements. KFIR acknowledged



that these references indicated a certain systematic arrangement. However, KFIR found that the use of the word “primarily” introduced uncertainties, and the descriptions still allowed for different ways of juxtaposing the colors.



After an overall assessment, KFIR concluded that Monster’s proposed trademark descriptions contained too many uncertainties, preventing the relevant public from understanding how the color mark would appear on the goods. Therefore, the requirement of graphic representation was not fulfilled, and KFIR rejected the registration of the application.

Since the requirement of graphic representation was not met, KFIR did not need to consider whether the color combination had acquired distinctiveness through the submitted documentation.

### Comments

In principle, signature color combinations can be registered as Norwegian trademarks. However, this decision highlights the need for good planning and a high level of detail for such applications to be successful. The accompanying description must provide a high degree of specificity and clarity, and vague



terms that may raise doubts about the arrangement should be avoided.

An interesting example of a case from the CJEU where the description was approved for a similar color combination mark is Case T-193/18. In this case, the application consisted of a combination of the colors grey and orange, accompanied by a description stating that “The color orange is applied to the top of the housing of the chainsaw, and the color grey is applied to the bottom of the housing of the chainsaw.” The CJEU considered this description to be sufficiently specified since it clarified that the trademark took the form of a part of a chainsaw housing, with the upper part of the housing being orange and the lower part being grey. This limited the shape variations of the chainsaw housing, providing greater precision and uniformity to the mark.

Owners of color-combination brands may also consider alternative forms of protection. This may involve filing applications for figurative or combined marks, which can provide additional clarity and protection for specific elements of the mark. Exploring design protection for packaging and wrapping is also worth considering for safeguarding the overall visual appearance of the product.



# No friend in Oslo for Philly

Even when you have a rather famous brand, it is exceedingly difficult to register a word mark which can be perceived as a place of origin.

## Case overview

“Philadelphia” is a famous brand for cream cheese spreads which needs no further introduction. The owner of the brand, Intercontinental Great Brands, LLC (IGB) is the holder of several trademarks, most notably the word mark “Philadelphia” for NICE class 29 (cream cheese) as well as several combined marks.

In 2022, IGB attempted to register the word mark “Philadelphia” for further goods in class 29 (including milk-based desserts, milk-based drinks) as well as several goods in NICE class 30 (cakes, cookies, desserts etc). However, in May 2023 the Norwegian Industrial Property Office (NIPO) refused to approve the registration, concluding that the trademark would be perceived as a place of origin for these goods, and thus lacking the necessary distinctive character to be registered.

This decision was appealed to The Norwegian Board of Appeal for Industrial Property Rights (KFIR), which in December 2023 rendered its decision. Like NIPO, KFIR concluded that the trademark could not be registered (case reference VM 2023/00087).

## KFIR's reasoning

A key decision in determining whether a geographical origin in a mark is descriptive is the CJEU's joined cases C-108/97 and C-109/97 (Chiemsee). The Norwegian Supreme Court has concluded that the guidance set out by this decision also applies



when assessing trademark registration in Norway, see HR-2016-2239-A (Route 66).

Consequently, in assessing whether a geographical place of origin in a mark is descriptive, a two-step assessment is required, consisting of the following questions:

- 1) Is the mark known to the public as a geographical place of origin?
- 2) Will - or can in the future - the public associate the geographical place of origin with characteristics of the goods and services in question?



In its assessment, KFIR found that it was clear that Philadelphia was known to the average consumer as a geographical place of origin, since the Norwegian average consumer has relatively good knowledge of American culture and geography. The average consumer would know that Philadelphia is a major city in the United States.

On the second question, KFIR stated that an association between



the geographical place of origin and characteristics of the goods exists if the name of the place is perceived as the place where the goods are or could have been manufactured, or if there are other factors, e.g. that the consumer would believe that the goods were developed or designed in that place, or if the place indicated quality or other characteristics of the goods, or that the place can influence the choice of consumers by the goods being associated with a place which evokes positive feelings. For such marks, there is a clear need for others to be able to use the marks.

KFIR pointed out that the consumer is very used to food and beverages from American manufacturers being offered in Norwegian stores, particularly ice cream, biscuits and other types of sweets, and found that when Philadelphia is used for such goods, the consumer may believe that the foods are made in Philadelphia. KFIR highlights the food industry as one of the major industries in the city Philadelphia, and Philadelphia being a leader in the confectionary industry, with reference to an encyclopedia article. Against this background, KFIR was of the opinion that the word mark Philadelphia would be perceived as indicating the geographical origin of the goods.

One of the arguments used by IGB was that Philadelphia had previously been registered as a word mark for cream cheese, and that the goods sought for now was closely related. However, KFIR considered that IGB had not sufficiently substantiated that the use for cream cheese had influenced the public's perception of the word mark when used for other food and beverages. The few examples provided were not sufficient, and also showed the combined mark (the Philadelphia logo). As pointed out by KFIR, a registration would give exclusive rights to the word "Philadelphia" regardless of the graphic design of the mark. Even if the public would be aware of the combined Philadelphia mark in the advertisement, it is not a given that the average consumer will associate the word mark Philadelphia with IGB when the mark is used in other graphic designs and for other goods other than cream cheese. KFIR also pointed out that there was no evidence that the public would perceive that "Philadelphia ice cake", and "Philadelphia cheesecake" contained IGB's cream cheese.



A final argument made by IGB was the reference to the word mark being registered for these goods in other jurisdictions. In what has become a well-known scenario for Norwegian trademark practitioners, KFIR stated that the fact that the trademark is registered in other countries is a relevant factor, but cannot be given decisive influence, and that the KFIR as a starting point must evaluate how Norwegian consumers perceive the mark, and that it is not necessarily a goal to achieve harmonization in individual cases.

Consequently, KFIR upheld NIPO's refusal to register the word mark Philadelphia for these goods in class 29 and 30.

### Comments

A famous advertisement for the cream cheese spread Philadelphia used the slogan "you've got a friend in Philly". To the extent that friendly feelings have any relevance in trademark prosecution, IGB unfortunately discovered that they had few friends in KFIR in this case.

There are a few important takeaways from this case.

Firstly, Norwegian practice concerning registration of word marks that may be perceived as places of geographical origin is quite strict. As demonstrated by this case, that also applies in case of a well-known brand in cases of closely related goods. As such, to convince that consumers would predominantly consider such a mark to be considered as an indicator of goods instead of a geographical place, compelling evidence is required.

Secondly, the fact that a trademark holder has been able to register a similar trademark in other jurisdictions holds little sway with KFIR. Despite the trademark rules being the same and Norway having implemented Directive 2015/2436/EU (the Trademark Directive), it is a recurring theme that companies are able to register certain trademarks as an EU trademark or by national prosecution in European jurisdictions, but nevertheless fails in Norway. As such, foreign companies should be aware that





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a trademark registration of a similar mark in Europe is no guarantee for, or even a presumption of, an equal result in Norway.

Trademark practitioners should thus take this into account when advising clients on their probability of success, and companies should consider the level of documentation available that can be presented to substantiate the alleged consumer perception.

A fun fact that is not mentioned in KFIR's decision, is that (according to Wikipedia) the brand name "Philadelphia" does not have its origin from the city Philadelphia, but from New York, and the name was chosen due to the city Philadelphia in the late 1800's having a reputation for high-quality dairy products.



# The monster strikes back

Monster Energy Company successfully overturned the rejection of their trademark application by the NIPO, which had cited confusion with prior registrations.

## Case overview

Monster Energy Company (“Monster”) had sought to register the word mark “MONSTER ENERGY ZERO SUGAR” for carbonated beverages and energy drinks in NICE class 32. In April 2023, the Norwegian Industrial Property Office (NIPO) rejected the application, citing confusion with prior registrations of “HONEY MONSTER PUFFS,” “MONSTER MUNCH,” and “MONSTER PUFFS.”

Although none of the cited trademarks were specifically registered in NICE class 32, they covered goods such as coffee, tea, milk, and milk-based beverages in other classes. Considering “MONSTER” as the dominant element in both the earlier marks and the applicant’s mark, the NIPO found that the other elements in the marks were either descriptive or did not sufficiently differentiate from “MONSTER ENERGY ZERO SUGAR.” This resulted in visual, phonetic, and conceptual similarities between the marks, leading the NIPO to conclude that consumers would likely perceive a commercial connection.

The NIPO’s decision was appealed to the Norwegian Board of Appeal for Industrial Property Rights (KFIR), which rendered its decision in January 2024. KFIR disagreed with the NIPO’s assessment and overturned the decision (case reference VM 2023/00097).



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### KFIR's reasoning

In its assessment, KFIR agreed with the NIPO regarding the high degree of similarity between the goods. However, when assessing the similarities between Monster's application and the earlier rights, KFIR was divided, with the majority concluding that there was no likelihood of confusion.



The majority acknowledged that "MONSTER" was a distinctive element in all the marks, creating visual and phonetic similarities. However, contrary to the NIPO, KFIR's majority believed that the older marks also had other distinctive elements that contributed to creating different mental concepts compared to "MONSTER ENERGY ZERO SUGAR." Specifically, the majority pointed out that "MUNCH" and "PUFF" are commonly associated with food, which was not the case for "MONSTER ENERGY ZERO SUGAR." Since there was no direct overlap between the types of goods, but only similarity, the majority believed that these differences made it unlikely for consumers to mistake the marks or perceive a commercial connection between the owners.



Based on this reasoning, the majority of KFIR reversed the NIPO's decision, allowing the registration of the trademark application for "MONSTER ENERGY ZERO SUGAR" for the relevant goods.

### **Comments**

The case highlights the occasionally strict practice of the NIPO when it comes to interpreting the likelihood of confusion between marks. Trademark practitioners should be mindful of this practice when filing applications and providing advice to clients regarding the likelihood of overcoming a refusal in Norway in the first instance.

One notable aspect of this case is that all three earlier marks that the NIPO considered to hinder the registration of "MONSTER ENERGY ZERO SUGAR" were registered between 1993 and 2010. Since then, Monster Energy Company has obtained several other registrations in class 32 that include the text "Monster Energy" without the three mentioned marks hindering registration. This information was brought to the attention of the NIPO during the application process but was not considered relevant. Even though the practice may seem arbitrary, convincing the NIPO to change its opinion about earlier rights once they have been discovered is often challenging.

In the event of an appeal, brand owners should make efforts to distinguish the marks based on the goods and focus on the overall impression rather than individual elements that may be similar.



# Greenlight on “meaty names” for veggie substitutes, but with significant caveats.

A recent landmark decision from the CJEU may be hailed as a victory for the marketing of plant-based products but may cause significant hurdles in the long run.

## Case overview

In 2022, a French decree was adopted, which in essence states that names used to designate foods of animal origin cannot be used to describe, market or promote foods containing vegetable proteins. This decree, which implemented a specific article in the French Consumer Code, was attacked by several associations and companies which promote vegetable-protein based foods. While questions were referred to the CJEU for interpretation, the decree from 2022 was repealed in 2024 by a new decree, with slight modifications. However, the new decree had not made the clarification from the CJEU devoid, and the case thus continued.

The decree from 2024 included provisions which in essence established a prohibition to describe, advertise or promote processed products containing plant-based proteins using names listed in an annex. The annex listed several well-known names, for example “steak”, “cutlet” and “entrecôte”. The intention of the decree was to avoid misleading the consumer. The Annex also established thresholds for a maximum plant content that could



be allowed in products using such names.

The main question of the case was whether the decree was in compliance with Regulation 1169/2011 (the FIC Regulation). Article 38(1) of the FIC Regulation prohibits national measures adopted by member states concerning matters specifically harmonized by the FIC Regulation unless so authorized by EU law, and such national measures must not give rise to obstacles to free movement of goods.

Article 7 of the FIC Regulation prohibits food information from being misleading, and imposes that food information shall be accurate, clear and easy to understand for the consumer. Article 9 makes it mandatory to include the name of the food on the labelling, and the name shall be the legal name, or in its absence of a legal name, the customary name or a descriptive name, cf. Article 17.

The definition of legal name, customary name and descriptive name follows from Article 2(2). A legal name is the name of a food prescribed in EU law provisions, or in the absence of such EU provisions, the name provided for in the laws of a Member State.

### **Conclusions of the CJEU**

In its decision of 4 October 2024 (C-438/23 Protéines France and Other), the CJEU makes a clear distinction between the Member States' possibility to define a legal name by national provisions (which is allowed) and regulates customary or descriptive names (which are not allowed). According to the CJEU, member states cannot in a general and abstract way circumvent these definitions. A customary name for a food exists if ordinary language, use, habit, tradition and customs makes it possible to determine that the consumer recognizes this name as a specific name for that food. A descriptive name shall make it possible for the consumer to make it possible to recognize the most common characteristics of the food.

The CJEU also makes a clear differentiation between establishing legal names in which characteristics are defined, is not the same



as establishing a prohibition to use certain expressions where the characteristics have not been defined. The proposed French decree fell in the latter category.

As such, Article 38 of the FIC regulation does not allow a member state by virtue of a general and abstract prohibition to hinder manufacturers of foods based on plant-based proteins in fulfilling their obligations to use either a customary or a descriptive term of the food.

The CJEU thus clarifies that with regard to preventing the risk for the use of customary or descriptive names misleading the consumer because consumers allegedly are not informed correctly that the animal protein has been replaced by plant proteins, this follows by the provisions of the FIC Regulation (namely Article 7(1) litra d and Annex VI, Part A item 4 which concerns replacements of components and substitutions). Consequently, this question is specifically harmonized by the FIC Regulation.

The CJEU also clarifies that these provisions also cover the question of the information to be provided to consumers where the composition of the food in question is completely different, and with reference to previous case law (C-595/21 LSI), that it follows that the fact that information on the substitution of a component or ingredient is given in the immediate vicinity of the name of a foodstuff is not sufficient to protect the consumer from the risk of being misled.

The CJEU thus clarifies that the provisions of the FIC Regulation harmonize the protection of consumers of the risk of being misled with regard to food names, and that these provisions prohibit a Member State from establishing national rules which regulate and prohibit the use of food names.

However, this specific harmonization that follows from the provision in the FIC Regulation does not hinder a member state from establishing legal names provided these do not follow from EU law, nor pursue administrative sanctions to enforce breach of such rules. However, these provisions do prohibit a member state



from establishing a maximum threshold for the content of plant proteins for products in order to establish such a legal name.

### Comments

Immediate comments on this decision in the press refer to that the present decree on the prohibition of names have been blocked by the ECJ, and thus the decision can be seen as a victory for the plant-based food industry. The consequences are somewhat more nuanced.

It is clear that where there is a legal name established by EU legislation, it cannot be used for plant-based products, even if details on the replacement of the ingredients accompany the name on the packaging. This principle is in line with previous decisions such as C-422/16 TofuTown, where the CJEU stated that “milk” and other dairy names could not be used for plant-based products, and C-595/21 LSI, where the animal fat was replaced with palm fat and rapeseed oil in a mini poultry salami.

It is also clear that EU member states can define national legal names for animal-based products, insofar that they establish the







characteristics the products must have. And given the political climate in several countries concerning the topic of meat names for plant-based products, it is a near certainty that member states will indeed propose and implement such legal names.

With opening the door for more legal names on a national level, the scope of restrictions for plant-based products will be even wider. However, as outlined above, when establishing such legal names, they cannot be general and abstract prohibitions which in essence concerns customary and descriptive names.

Consequently, where legal names exist, either by EU or national rules, it will not be permitted to use legal meat names, even with an explanatory description next to the mandatory food name. It should already be stated that according to EU legislation, there are several meat names that are established legal names. For instance, Regulation 543/2008/EU establishes a list of names for poultry, including for parts of poultry. As such, promotional statements such as “vegan chicken wings” or “vegetarian drumsticks” are thus not allowed.

However, in the absence of any legal name (whether by EU law or by national law), the decision does not mean that manufacturers of food based on plant proteins have a “carte blanche” in their labelling, marketing and promoting of plant-based foods with regard to the use of “meaty names”. Article 7 of FIC still applies, and in particular requires that food information shall not be misleading.

Of particular relevance is the requirement in *litra d* of this provision, and the principle set out in e.g. the CJEU's decision in C-195/14 (Teekanne) still applies, meaning that in order to assess whether labelling is able to mislead, it is necessary to take into account “(...) the presumed expectations, in light of that labelling, which an average consumer who is reasonably well informed, and reasonably observant and circumspect has, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine” (paragraph 36 of the decision).



The decision should instead be considered as a presumption that food information provided in accordance with the rules of the FIC regulation adequately protects the consumer from being misled, a presumption that can be rebutted if the labelling or marketing material by the appearance, description or particular representations give rise for the consumer to believe that this is not a vegetable-based product, which has to be assessed specifically on a case-by-case basis. And if a specific presentation is considered to be misleading in a specific case, member states can take necessary actions against the food business operator.



# Advocate General Opinion on botanical health claims

Are health claims for botanical substances governed by the health claims regulation?

## Background

The Regulation 1924/2006 on nutrition and health claims (the health claims regulation) is based on a principle that only health claims approved by the Commission are permitted. This is reflected in the key provisions of the health claims regulation:

- According to article 10(1) of the health claims regulation, health claims are prohibited to be used, unless they are included in the list of authorized claims provided for in Articles 13 and 14.
- Article 10(3) allows for the use of non-specific health claims, insofar these are accompanied by a specific health claim included in the lists provided for in article 13 and 14. For instance, “good for the heart” is a non-specific health claim, and can only be used in combination with an approved specific health claim (for instance “EPA and DHA contribute to the normal function of the heart”)

However, health claims for botanical ingredients have a rather complex history with regard to the health claims regulation. When the health claims regulation was adopted, a prerequisite was that Member States should notify previous claims used to be scrutinized. Amongst the 44,000 claims reported were approximately two thousand health claims on botanical ingredients. However, when botanical claims were assessed by EFSA in 2010, traditional data for the substantiation of health claims were found to be insufficient, despite the fact that



medical claims for traditional herbal medicines were accepted on the basis of traditional data.

This discrepancy led to the Commission ceasing the assessment of health claims for botanicals, and these were ultimately placed “on hold”, and these claims could be used according to the transitional rules of Articles 28(5) and 28(6), until they had been examined. The status of “on-hold” for these claims have thus lasted for more than 12 years.



### **The case in a nutshell**

A German supplier of nutritional supplements containing saffron extracts and melon juice had made non-specific health claims that the German supervisory organization, Verband Sozialer Wettbewerb eV, (“VSW”) alleged were prohibited under article 10. This initiated legal proceedings in Germany, where both the first instance and the appeal court found that the use of the claims were non-compliant with the health claims regulation.

In order for there to be a violation, it is necessary to determine



whether articles 10(1) and 10(3) do in fact apply to botanical. If this is the case, then non-specific health claims for botanical can only be used combined with an “on hold” botanical claim. However, these are not formally approved.

When the German supplier appealed to the German Supreme Court, the court was of the opinion that it was unclear whether Articles 10(1) and 10(3) did in fact apply to botanicals substances. On one hand, as a matter of principle, this was not precluded by the healthcare regulation. On the other hand, in the view of the court, this was a matter of principle that was not resolved pending the outcome of the examination of the botanical claims. As such, the matter was referred to the CJEU.

On 17 October, the Advocate General issued an opinion concerning the matter (C-386/23 Novel Nutriology). The Advocate General's proposal is that the health claims regulation must be interpreted as precluding botanical substances from being advertised with either specific health claims (Article 10(1)) or with non-specific health claims not accompanied by a specific health claim (Article 10(3)), without those specific health claims either being provided by the lists of Articles 13 and 14, or without those specific health claims being included in the list of pending botanical health claims to be examined by the Commission. The exception is where claims may be continued to be used in accordance with the transitional rules of Articles 28(5) and 28(6).

In other words – there is no free lunch for health claims for botanical substances. The health claims regulation applies, meaning that only the claims that are “on hold” can be used for Article 10(1), and in case of non-specific health claims, use is only acceptable in accordance with Article 10(3), meaning that such claims must be accompanied by an “on hold” claim, and use must be in accordance with all general rules of the health claims regulation (e.g. not misleading).

### Comments

An opinion from the Advocate General is not formally binding for the CJEU, which may deviate from the proposal in its final ruling.



However, that would be unexpected. The interpretation of the Advocate General in this case is not particularly surprising, as this interpretation has been followed by several member states, including the Norwegian Food Safety Authority.



# The new regime on GI's and its implications for Norway

EU has adopted new rules on protection of geographical indications. Which causes a dilemma for Norway.

On 26 March 2024, the Council adopted a new regulation on protection of geographical indications (GI), Regulation 2024/1143/EU. In short, the new regulation considerably improves the protection of GIs within the EU, and improvements included.

The regulation includes several improvements to the existing regime:

- A simplified procedure for registration of protected GIs.
- Developing a common electronic platform for processing applications.
- Strengthening the role of producer organizations/ associations.
- Providing clearer rules on protected designations for traditional distinctiveness.
- Clearer rules on protection against misuse and evocation, including establishing specific conditions for use of GIs as an ingredient in processed food.
- Strengthening the legal protection of designations, including online.
- Increased focus on sustainability by allowing product specifications to voluntarily include requirements for this.
- Clarification of the legal consequences of protection and the consequences of any misuse when marketing an imitation.



However, another effect of the new regulation is the consolidation of GIs for agrifood products, wine and spirits, which causes certain troubles for Norway as a non-EU member but a member of the European Economic Area (EEA). The reason is that Norway has operated with a division of protection of GIs where in essence the rules for GIs for wine and spirits are harmonized with EU, whereas the rules for GIs for agricultural products are national (but heavily inspired by the EU rules). In short, protection of GIs for agricultural products are governed by a national regulation “anchoring” the general rules for application etc., whereas the individual protected GIs are governed by individual national regulations for each protected GI.



In other words, the rules for wine and spirits are part of the EEA agreement, and Norway was thus under obligation to and had implemented these rules, whereas the rules for agricultural products are not a part of the EEA agreement.

The most obvious solution would be to include Regulation 2024/1143/EU as part of the EEA-agreement. If the regulation is incorporated into the EEA agreement, the existing national





regulations on protection of GIs on agricultural products would have to be repealed. This would result in harmonization with EU rules. However, since there are over 3,000 protected GIs in the EU, and the new regulation from the EU requires supervisory authorities to supervise not only GIs from their own nations but also from the entire EU (i.e. imports of products etc.), this will result in a significant burden compared to today's regime. Since new protected GIs are established by implementing regulations, which requires an update of the national regulation each time such an implementing regulation is adopted, this further adds to the workload.

More problematic than the increased burden is, however, that Regulation 2024/1143/EU concerns an area which is outside of the scope of the EEA Agreement, since neither agricultural products nor fishery and aquaculture products are a part of this Agreement. If the regulation is incorporated into the EEA Agreement, it could be perceived as an extension of the scope of the agreement. It is unnecessary to say that such a perception in itself is problematic from a political perspective and will raise political turmoil amongst opponents of EU in Norway. An additional "bonus" with the repeal of protected GI in Norway is of course also that there is a risk that these GIs would not achieve protection in the EU, which of course would be a concern for the involved parties.

On the other hand, not including the new EU regulation likely means continuing a separation between harmonized rules on wine and spirits and non-harmonized on agricultural products. Irrespective of how this will be solved in a legislative manner, it will cause significant challenges both in enforcement and in the general workload for the responsible authority.

From a Norwegian perspective, it is potentially a problem that protected GIs are perceived as part of the rules for agricultural products, and not as part of rules governing intellectual property, which they by all virtues in fact are. If protection of GIs were considered as rules on intellectual property, incorporation of the new EU regulation in the EEA agreement would likely have less political controversy. It is possible that such an argument



would indeed be presented in the legislative procedure, but the political challenges will nevertheless remain.

As such, the future on protection of GIs in Norway is in the blue. However, it is a safe prediction that the legal developments on protection of GIs in Norway will be a hot topic for the food industry in the years ahead.

Finding solutions



**Haavind**