



European Communities Trade Mark Association

## **BIO, ECO, ORGANIC on food and food supplements**

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*This article aims at providing answers or possible answers to the following questions:*

*What are the conditions for use of the terms bio, eco and organic on food?*

*Do these conditions also apply to food supplements?*

*Do the limits on use of the terms bio, eco and organic apply universally throughout all Member States or are these limitations country / language specific?*

*Can the terms bio, eco or organic be registered as a trademark?*

*Can the terms bio, eco or organic be used and/or registered as a trademark for other products than foodstuff?*

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### **Conditions for use of the terms bio, eco and organic on food**

1. Organic food market together with the "fair trade" foodstuff market represents the fastest growing market segment. One of the important conditions of success is communication of the story about the organic origin and method of production to consumers. Bio, eco and organic currently represent an attractive marketing label, that guarantees consumers interest and willingness to pay higher prices. For the sake of consumer protection and fair competition the terms used to indicate organic products (in particular bio, eco, organic) should be protected from being used on non-organic foodstuff.
2. Organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs has been regulated on the level of the European Communities since 1991 by the Council Regulation (EEC) No. 2092/91. The scope of the regulation included unprocessed agricultural crop products, livestock and unprocessed livestock products, processed agricultural crop and livestock products

intended for human consumption and feeding stuffs. Disparities have occurred in implementation of this regulation throughout the Member States of the EC.

3. Certain national legislations, for example the Czech legislation, have regulated the use of the organic production labelling expressly in respect of any foodstuff including food supplements for many years. In certain Member States food supplements were not considered to be within the scope of the regulation and thus no regulation applied in respect of the use of bio, eco or organic on food supplements.
4. Disparities also occurred as to whether the use of bio, eco and organic was country specific or applied uniformly throughout the Member States of the EC. The case of the European Court of Justice *the Commission of the European Communities v. Kingdom of Spain* C-135/03 and the case of *Comité Andaluz de Agricultura Ecológica v. Administración General del Estado, Comité Aragonés de Agricultura Ecológica* C-107-04 provided interpretation rules in this respect. In the first case the Commission challenged the Kingdom of Spain for not fulfilment of obligations under the Council Regulation no. 2092/91, in the second case Spanish court posed a preliminary question regarding the interpretation of Article 2 of the Regulation.
5. Article 2 of the Council Regulation 2092/91 provided that:

*"For the purposes of this Regulation a product shall be regarded as bearing indications referring to organic production methods where, in the labelling, advertising material or commercial documents, such a product or its ingredients is described by the indications in use in each Member State suggesting to the purchaser that the product or its ingredients have been obtained in accordance with the rules of production laid down in Articles 6 and 7 and in particular the following terms, unless such terms are not applied to agricultural products in foodstuffs or clearly have no connection with the method of production:  
- in Spanish: ecológico,..."*

6. Article 2 of the Council Regulation 2092/91 has been amended by the Council Regulation no. 392/04 and provided that:

*"For the purposes of this Regulation a product shall be regarded as bearing indications referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules of production laid down in Article 6. In particular, the following terms or their usual derivatives (such as bio, eco etc.) or diminutives, alone or combined, shall be regarded as indications referring to the organic production method throughout the Community and*

*in any Community language, unless they are not applied to agricultural products in foodstuffs or feeding stuffs or clearly have no connection with this method of production:*  
*- in Spanish: ecológico,.."*

7. In the case of the European Court of Justice *the Commission of the European Communities v. Kingdom of Spain* C-135/03 the Commission objected to the Spanish national legislation, by which it prohibited the use of "ecológico" or its derivative "eco" on products, which do not originate in organic production method, but it allowed the use of "bio" on dairy products because this term has been customarily and continuously used as a term bearing no relation to the organic method of production. Kingdom of Spain argued that in customer's mind, the term "bio" is much less well-known in Spain than in other Member States, and does not in fact refer to the organic method of production but is instead associated with products which in general terms are wholesome and good for the health. The court ruled that Kingdom of Spain did not breach the obligation set out by the Council Regulation 2092/91 and it did not fail to implement the obligations imposed on Member States regarding the regulation of labelling of products originating in organic production method.
8. In the case of *Comité Andaluz de Agricultura Ecológica v. Administración General del Estado, Comité Aragón de Agricultura Ecológica* C-107-04 the European Court of Justice ruled that Article 2 of Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, was to be interpreted as not precluding products which were not organically produced from bearing, in Spain, the indication 'biológico' or its prefix 'bio' in the labelling, advertising material and commercial documents; however that the same Article 2, as amended by Council Regulation (EC) No 392/2004 of 24 February 2004, must be interpreted as precluding from now on such products from bearing, in Spain, the indication 'biológico' or its prefix 'bio' in the labelling, advertising material and commercial documents.
9. The Council Regulation (EEC) No. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs as amended has been replaced by the Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products of 28 June 2007 in order to define more explicitly the objectives, principles and rules applicable to organic production, in order to contribute to transparency and consumer confidence as well as to a harmonised perception of the concept of organic production.

10. The Council Regulation (EC) No. 834/2007 concerns all of the following products:
  - a. live or unprocessed agricultural products;
  - b. processed agricultural products for use as food;
  - c. feed;
  - d. vegetative propagating material and seeds for cultivation;
  - e. yeasts used as food or feed.

Whereas products of hunting and fishing of wild animals shall not be considered as organic production.

The definition of food shall be the same as defined by the Regulation (EC) No. 178/2002 laying down the general principles and requirements of food law. This is the main difference from the Council Regulation (EEC) No. 2092/91.

11. The Regulation (EC) No. 178/2002 defines food or foodstuff in a broad general manner as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. Food shall not include medicinal products within the meaning of Council Directives 65/65/EEC and 92/73/EEC.
12. The definition of food supplements provided for by the Directive 2002/46/EC on the approximation of the laws of the Member States relating to foods supplements, falls within the definition of food of the Regulation (EC) No. 178/2002. Food supplements shall mean foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities.
13. Under the Council Regulation (EC) No. 834/2007 the terms referring to organic production shall be used on processed food, provided that the product shall be produced mainly from ingredients of agricultural origin, at least 95% of weight, of its ingredients of agricultural origin are organic, and the only additives, minerals, vitamins, enzymes, trace elements, amino acids and other micronutrients used shall be those authorised for use in organic production.

14. Since food supplements are part of foodstuff any conditions on organic food production and labelling in particular on production and labelling of organic processed food shall apply also to food supplements. Not all Member States adhere yet to this conclusion, therefore it is yet to be determined in practice by national controlling authorities, whether the limits on organic food labelling will be also applied to food supplements or not. In the Czech Republic for example the ministry of agriculture, as the national controlling body, applies the Council Regulation (EC) No. 834/2007 also on food supplements.
15. As regards the restrictions on use of "bio", "eco" and "organic" on food and/or food supplements in a uniform manner through out the Member States the answer ensues from Article 23 of the Council Regulation (EC) No. 834/2007. Any terms suggesting that the product, its ingredients have been obtained in accordance with the conditions laid down for organic method of production, in particular the country specific terms listed in the Regulation (such as organic, biologique, ecológico), their derivatives or diminutives, such as "bio" and "eco" alone or combined, may be used throughout the Community and in any Community language for the labelling and advertising of products which satisfy the requirements set out under the Regulation. In line with the conclusion of the European Court of Justice in the case of *Comité Andaluz de Agricultura Ecológica v. Administración General del Estado, Comité Aragonés de Agricultura Ecológica* C-107-04 this shall be interpreted in such a manner, that these expressions are banned from use on non-organic food production in all Member States, even if in the Community languages used in a particular Member States such expression may not be understood by consumers as indication of the organic origin of the particular foodstuff.

### **The EU-logo and national logos**

16. According to the Council Regulation (EC) No. 834/2007 the EU-logo shall be created in order to create clarity for consumers throughout the Community market. It should be allowed to use it in the labelling of processed foodstuffs of which not less than 95 % of its ingredients of agricultural origin are organic. According to the new legislation, producers of packaged organic food must use the EU organic logo as of 1 July 2010. When the EU organic logo is used, the place of production of the agricultural ingredients must be indicated starting on 1 July 2010.



17. The EU-logo should under no circumstances prevent the simultaneous use of national or private logos. Member States have adopted their own national logos. Examples are provided below.



Germany



Czech Republic

18. As regards the use in trademarks, according to the Council Regulation no. 834/2007 any terms, including the terms used in trademarks liable to mislead the consumer by suggesting that a product or its ingredients satisfy the requirements of the Regulation shall not be used.

#### **Registration of the terms "bio", "eco" and "organic" as a trademark**

19. By its character the EU-logo and a national logo, where the design and conditions for use are set out by public laws, shall represent a public mark, which shall be clearly distinguished from trademarks that constitute by its character private marks. Public marks shall be official signs, hallmarks, badges, emblems or escutcheons, which use is regulated by public law and controlled by government authorities. Whereas the private marks, such as trademarks or certification marks or collective marks shall be marks which design and conditions for use are set out by their owner, a private body. The rules on use of private marks are set out by owners of trademarks in license agreements, rules of association of the owner of a collective trademark, regulations on use set out by the owner of a certification mark.

By its purpose and manner of use the public mark is in clear contradiction to the purpose of a trademark. Therefore registration of a public mark as a trademark is controversial. For example in the Czech Republic, the Act of Parliament No. 242/2000 Coll. on ecological farming, provides for national logo used for organic production and conditions of its use. The design of the national "bio" logo is set out by a decree of the Czech ministry of agriculture No. 16/2006 Coll.



20. However, the Czech ministry of agriculture in 2001 also registered this logo as a trademark with the Czech Industrial Property Office under no. 233 787 for goods and services in class 1, 4, 5, 7, 18, 22, 24, 29, 30, 31, 32, 33, 35, 41, 42, the holders of the certificate on organic production are registered as non-exclusive licensees. This registration contradicts the main purpose and substance of a trademark.



21. The main purpose of a trademark is to distinguish the goods or services of one undertaking from those of other undertakings. It establishes an exclusive proprietary right of its owner. The trademark owner shall be entitled to prevent any third party not having his consent from using the trademark in the course of trade. Signs that are devoid of any distinctive character, that consist exclusively of signs or indications which may serve, in trade, to designate the kind or quality or other characteristics of goods are excluded from registration as a trademark. Owner of a trademark is limited in enforcing his trademark rights against third parties, he shall not have the right to prohibit a third party from using in the course of trade indications concerning the kind, quality, or other characteristics of the goods. All these features are in opposition to the principles respective to public marks.
22. Public marks serve as a general indicator of quality of goods, they do not confer exclusive right to a sole entity and they do not establish exclusive proprietary right. By their nature the public marks are to be used by unlimited number of subjects, the only condition being the fulfilment of conditions on use set out by public law. Unlike trademarks the public marks are often descriptive signs, generic expressions.
23. Certification marks represent a special category of trademarks. Even though they may be used by unlimited number of subjects that fulfil the regulations on use set out by the owner of a certification mark, unlike a public mark, it establishes an exclusive proprietary right to its owner, who is the sole person that can determine the regulations on use of such trademark. A certification mark still has to fulfil the general conditions for a trademark, i.e. it must be a distinctive sign capable of distinguishing goods which are certified from those which are not. By this feature certification marks are close to collective trademarks provided for in certain jurisdictions and among others also by the Council Regulation No. 40/94 on Community Trade Mark.

24. The terms "bio", "eco" and "organic" or "biologique", "ecológico" etc. are signs that are devoid of any distinctive character. These signs are descriptive as to the quality of goods for which they are used, as they identify live or unprocessed agricultural products, processed agricultural products for use as food, feed, vegetative propagating material and seeds for cultivation, yeasts that originate in organic method of production. Even though in a particular Community language a certain term may not immediately associate in the mind of a consumer the organic origin of the product, under the Council Regulation (EC) No. 834/2007 these terms and their derivatives and diminutives shall be protected as the indicator of organic origin throughout the Member States regardless of the Community language used in a particular Member State. As such these terms shall not be capable of registration as a trademark.
25. If these terms are used in combination of a certain design in a word & device trademark certain registration authorities may conclude that the design is so specific and individual that as a whole a particular mark has distinctive character. This registration however shall not confer the rights of its owner to prevent others from using the descriptive term "bio", "eco", "organic" etc. as it falls within the limitation of a trademark owner since it represents an indication concerning the kind, quality, or other characteristics of the goods.
26. However since the use of these terms is regulated by public laws and controlled by government authorities a question arises whether there exist also other grounds for refusal of registration of these terms as trademarks. Under Article 7 para 1 lett. (i) of the Council Regulation (EC) No. 207/2009 on Community Trade Marks which include badges, emblems or escutcheons other than those covered by Article 6ter of the Paris Convention<sup>1</sup> and which are of particular public interest, unless the consent of the competent authority to their registration has been given, shall not be registered.

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<sup>1</sup> Article 6ter

**Marks: Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations**

(1)

(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

27. It shall be considered whether the terms "bio", "eco" and "organic" and the like do not fall within the definition of official signs and hallmarks indicating control and warranty adopted by them under Article 6ter of the Paris Convention. If so, registration shall be refused under Article Article 7 para 1 lett. (h) of the Council Regulation (EC) No. 207/2009 on Community Trade Marks.

### **Registrations of food supplements in class 5 of Nice classification**

28. According to the above stated food supplements fall under the definition of food and thus under the regulation of the use of the terms "bio", "eco" or "organic" by the Council Regulation (EC) No. 834/2007. In the Czech Republic the national laws have been interpreted in this manner since 2000. Certain trademark owners claim that their food supplements have "medicinal effect" and apply for trademark registration in class 5 in order to avoid the restriction on use of "bio" for non-organic foodstuff. Where the Czech Industrial Property Office refused registration of marks containing the term "bio" for food, it allowed registration for food supplements "with medicinal effect" in class 5.
29. Under the Directive 2001/83/EC on the Community Code relating to medicinal products for human use a medicinal product is not only a substance which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis, but also any substance presented as having properties for treating or preventing disease in human beings.
30. Therefore is a trademark owner presents his food supplement as a product with "medicinal effect" it can be regarded as presentation of properties for treating or preventing disease in human beings. As such it can no more be marketed as a food supplement and the trademark owner needs to obtain marketing authorisation for a medicinal product. Therefore trying to obtain trademark protection in class 5 for a food supplement, which mark contains the term "bio" may be counter productive as it may cause prohibition of marketing of such food supplement.
31. As regards applications for trademark registration of signs containing "bio", "eco" or "organic" for goods in class 5 under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks: class 5 is designated for pharmaceutical preparations, dietetic substances adapted for medical use, food for babies. The dietetic substances adapted for medical use may also be food supplements for medical use. Medical use however shall not be confused with "medicinal effect". Medical use means that the foodstuff is aimed for special dietary requirements due to special health conditions of a patient, e.g. low fibrin diet requirements. Whereby the special dietary requirements are determined by a doctor according to patient's diagnosis. However, in no way this shall mean that these products are exempt from the regulation on the use of the terms "bio", "eco" or "organic" on foodstuff. The Council Regulation (EC) No. 834/2007 is applicable to these dietetic substances adapted for medical use, as well as for food for babies like

any other processed food. This fact may not be obvious to trademark registration authorities, therefore they may be lead to believe by applicants that the "medical use" exempts these products from the regulation on the use of "bio", "eco" and "organic" for foodstuff.

### **Effect of the Council Regulation (EC) No. 834/2007 on registered trademarks**

32. All the above shall be interpreted in line with the basic legal principal that no law shall have retroactive effect, therefore the Council Regulation (EC) No. 834/2007, shall not lead to cancellations of already registered trademarks. However, in practice trademark owners may be prevented from further continued use of their trademarks if the use would collide with the limitations set out in the Regulation. This may lead to their cancellation due to non use in the future.

### **Use of terms "bio", "eco" or "organic" and trademark registration on non-foodstuff products**

33. All of the above has been said in connection with foodstuff. However, producers may use the terms "bio", "eco" or "organic" in connection with other non-alimentary products, e.g. electronics, automotive, and clothing. In some of the Community languages the terms "bio", "eco" or "organic" may convey a message to the consumer that represent a special quality of the advertised product. For example the term "eco" used in connection with electronics may suggest lower electricity consumption and therefore more ecologic operation of an electronic product, or the use of the term "bio" in connection with clothing, in particular cotton clothing may suggest to the consumer that the cotton used in manufacture of the particular clothing item has an origin in organic method of production. The Council Regulation (EC) No. 834/2007 does not regulate use of the terms "bio", "eco" or "organic" on non-food products. However general principles of non-misleading advertising laid out by the Directive 2006/114/EC concerning misleading and comparative advertising shall apply. Also a trademark registration may be refused for non-foodstuff, if the application contains the term "bio", "eco" or "organic" if the trademark may deceive the public as to the nature and quality of the goods, for which the trademark has been applied.

### **Laws on the level of the European Communities**

- Council Regulation (EC) No. 40/94 on Community Trade Marks (codified version Council Regulation No. 207/2009)
- Regulation (EC) No. 178/2002 of the European Parliament and the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters on food safety
- Council Regulation (EEC) no. 2029/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (replaced by Council Regulation (EC) no. 834/2007)
- Council Regulation (EC) no. 834/2009 on organic production and labelling of organic products and repealing Regulation (EEC) No. 2029/91
- Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements
- Directive 2001/83/EC of the European Parliament and of the Council on the Community Code relating to medicinal products for human use as amended by the Directive 2004/27/EC of the European Parliament and the Council
- Directive 2006/114/EC concerning misleading and comparative advertising

### **Case Law**

- Decision of the European Court of Justice C-135/03 (and the opinion of the advocat general)
- Decision of the European Court of Justice C-107/04
- Decision of the OHIM Board of Appeal case R 190/1999-3
- Decision of the OHIM Board of Appeal case R 1058/2007-2