



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

Directorate F. Horizontal aspects of rural development
F.5. Organic farming

B.7

Brussels,
F.5/JFH/ag/D(2008) 19514
CAB/A/2738, A/1042

Dear Mr.

Thank you for your letter dated 30 November 2007 sent by e-mail to Commissioner Mariann Fischer Boel and to the Cabinet of Commissioner Joe Borg. I have been asked to reply on behalf of Mariann Fisher Boel, and I apologize for having kept you waiting until now. The question you posed was carefully analysed, and I am now able to give you the elements of reply.

You are asking in your letter on behalf of your client BioMar Holding A/S, whether it would legally be still possible after the application of Council Regulation (EC) No. 834/2007¹ to use the abbreviation "bio" in company names, and whether there could be granted a transitional period for already registered trade marks containing this abbreviation.

To develop elements of reply to this question, I am referring to the Article 23 of the new Council Regulation (EC) No. 834/2007. This article defines that a product is referring to the organic production method where there are used certain terms, as listed in its Annex or their abbreviations, in the labelling, advertising material or commercial documents. These terms can also be found in the currently applied Council Regulation (EEC) No. 2092/91² in its Article 2, and "bio" is one of them.

Article 23(2) of Council Regulation (EC) No. 834/2007 lays down two rules:

- (1) The first sub-paragraph is a specific rule against using the terms in the annex to the regulation and their derivatives or diminutives on the labelling, advertising (etc.) of products not complying with the organic production method. This is subject to two exceptions:
 - (1) the terms are not applied to agricultural products in food or feed, or
 - (2) the terms clearly have no connection with organic production.
- (2) The second sub-paragraph is a general rule against using terms which are "liable to mislead the consumer or user".

¹ OJ L 189, 20.7.2007, p. 1

² OJ L 198, 22.7.1991, p. 1

Both rules aim at ensuring that consumers (or other users or trade partners) are not misled into buying products thinking that they are organic when they are not. This reflects also Recital 23 to Council Regulation (EC) No. 834/2007, which refers to consumer protection and fair competition. As a consequence, an operator should not be considered to breach these rules if purchasers are not actually misled by the labelling, advertising material or commercial documents used.

In principle, the use of a company name might also be misleading, if it is given prominence on the packaging. In other words, the use of a company name would only come under Article 23 insofar as it was reflected in a misleading way on the packaging, labelling, container etc. However, a prohibition of the use of a certain company name or a demand of modifying it should be interpreted in the light of the principle of proportionality. In most of the cases, it may appear that prohibiting the use would go too far, and if the name is used the risk of confusion might be addressed by specific disclaimers on packaging, indicating that the products are not organic.

The analysis for trade marks should be the same as for company names. Therefore, Council Regulation (EC) No. 834/2007 would not invalidate the existence of a trade mark, but simply govern its use in specific situations. Specifically, the use of a trade mark would not be permitted on packaging or other documents accompanying the product, if it could give rise to confusion, as discussed above. However, the validity of the trade mark would not be called into question.

To illustrate the abstract analysis developed above, I suggest to take the trade mark "BioFocus" used by your client for fish feed for non-organic fish production as an example. In such a case, in order to prevent farmers and other trade partners from getting confused and misled by the presence of the term "bio" in that trade mark, some precautionary actions should be taken. It could be suggested as a minimum precaution that non-organic fish feed BioFocus sold from 31 December 2008 should have a disclaimer on the package or label that it is a non-organic fish feed and not to be used in organic aquaculture. Of course your client may judge more appropriate to take some other actions of equivalent effect on consumers, other users or trade partners, or more radical actions.

To conclude, in each case assessment, whether consumers, farmers or other trade partners will be misled by different company names or trade marks will always require a thorough case-by-case analysis.

Regarding the second part of your question about possible transitional measures to be taken by the Commission, it appears from the analysis above that they are not needed to solve the problem of already registered trade marks containing terms referring to organic production. As a consequence it is not intended to propose such transitional measures.

Yours sincerely,

Signed
p.o. Lars Hoelgaard
Jean-Luc DEMARTY
Director General