

Review of "no palm oil" claims under the EU food law rules and possible legal remedies in Belgium and France

EXECUTIVE SUMMARY

This memorandum finds that potential breaches of European Union law are being caused by claims made by food operators in the form of '*no palm oil*' labelling on food products.

In particular, the use of "*no palm oil*" labels could potentially be challenged under the following laws –

European Union Law:

- EU Food Information to Consumers Regulation (Regulation 1169/2011)
- EU Directive on Food Labelling (Directive 2000/13/EC)
- EU Health and Nutrition Claims Regulation (Regulation 1924/2006)
- EU Advertising Directive (Directive 2006/114/EC)
- EU Unfair Commercial Practices Directive (Directive 2005/29/EC)

Belgian Law:

- Royal Decree on Labelling of Foodstuffs (13 Sept 1999)
- Law on Market Practices (6 April 2010)

French Law:

- French Consumer Code (Articles R112-1 to R-112-31; Articles L121-1 to L121-7; Articles L122-11 to L-122-15; and L214-1 to L214-3)
- French Commercial Code (Articles L450-1 to L-450-4)

The new Food Information to Consumers Regulation (1169/2011) will come into force in December 2014. This raises the spectre that some food operators in the European Union – primarily, as laid out in this memorandum, in France and Belgium – could at that time immediately fail to comply with some of the requirements of that Regulation due to their continued use of '*no palm oil*' labelling.

Background

Many food business operators, primarily in France and Belgium, are using "*no palm oil*" claims on food labels or in advertising. In food product marketing, a "*no palm oil*" claim on foodstuffs could be interpreted as suggesting that palm oil, and products containing palm oil, should be avoided. Such claims – without supporting evidence – could lead to the unsupported perception that foods that do not contain palm oil may, be "*better*", "*healthier*" than products that do contain palm oil. The "*no palm oil*" claim may, as a result and by implication, attribute to a product that carries this claim certain perceived beneficial properties or health effects as compared with a product that contains palm oil, without necessarily providing proper justification for doing so.

A review of recent scientific literature concerning evidence of the association between palm oil and adverse effects on human health points to the lack of conclusive scientific evidence or a direct correlation that palm oil has a negative impact on health.

Permissibility of the "*no palm oil*" claim under EU law

Given the growing concerns as regards potential negative health effects of consumption of foodstuffs containing palm oil, "*no palm oil*" claims risk unfairly negatively impacting sales and brand reputation of products that contain palm oil. The present analysis therefore aims to evaluate the permissibility of "*no palm oil*" claims in the EU in light of relevant existing EU food law. It is also intended to identify the means for legal redress that may exist against the misleading, and arguably unfair, consequences for food containing palm oil of use of the "*no palm oil*" claim.

A review of relevant EU legislation including EU food labelling rules, rules on nutrition and health claims, misleading and comparative advertising, unfair commercial practices and the EU Food Information to Consumers Regulation highlights that the use of a "*no palm oil*" claim on food products raises a number of questions as to whether use of such a claim is justified and that use of such a claim could potentially harm sales and brand reputation of similar food products that do contain palm oil.

It may be argued that, since existing EU labelling legislation does not impose an obligation for food business operators to indicate the origin of the vegetable oil used in their foodstuffs, the "*no palm oil*" claim informs and "educates" consumers about the type of oil used in the product. Food manufacturers using this claim could also argue that the claim provides factually correct information. However, at the same time, it is also legitimate to argue that other, less "aggressive", more objective and equally informative means to inform the consumer are available to the food manufacturer. Clarification of the type of oil used could, for example, be provided as part of the ingredients list which generally serves to inform consumers about the make-up of food products.

EU law provides clear rules on what constitutes safe food products and how they should be labelled. Furthermore, in the future, food manufacturers will have to indicate the specific type of vegetable oil used in foods. As a result, "palm oil" will need to be mentioned where it is present. The new EU Food Information Regulation specifically aims to avoid making a distinction between foods that are "good" and foods that are "bad". Rather the aim of the new Regulation is to enable consumers to make informed choices about the food they consume as part of a balanced diet. Consumers should be allowed to choose from a variety of different safe food ingredients in order to create their individual diets based on health, nutrition, taste and other preferences. To single out "*palm oil*" as a "*bad food ingredient*" through use of a "*no palm oil*" claim goes against the spirit and intent of the EU Regulation. Indeed, according to Article 3 of the new Food Information to Consumers Regulation (1169/2011), one of the objectives of the Regulation is to provide a basis for final consumers to make informed choices based on objective and truthful information. This Article should, however, not be understood as therefore providing a basis for making a distinction between "good" and "bad" foods.

1. INTRODUCTION

This memorandum evaluates the permissibility of "*no palm oil*" claims in the EU in light of relevant existing EU food law. In particular, this memorandum will:

- assess the permissibility of the "*no palm oil*" claim and consequences of its use in light of existing EU legislation on food labelling (Directive 2000/13/EC) and health and nutrition claims (Regulation 1924/2006), as well as EU rules on misleading and comparative advertising and unfair commercial practices; and

- assess the permissibility of the "*no palm oil*" claim and consequences of its use under the new EU food labelling rules as laid down in the EU Food Information to Consumers Regulation (1169/2011).

In addition, this memorandum reviews relevant French and Belgian national measures implementing EU legislation in this area, particularly with a view to identifying whether any legal remedies are available under national law against a "*no palm oil*" claim.

2. CLASSIFICATION AND PERMISSIBILITY OF A "NO PALM OIL" CLAIM UNDER CURRENTLY APPLICABLE EU LAW

2.1 EU rules on food labelling, presentation and advertising

Food labelling rules at EU level are currently laid down in EU Directive 2000/13/EC on labelling, presentation and advertising of foodstuffs (the "*EU Labelling Directive*"). Article 2 of the EU Labelling Directive includes a general prohibition on information that misleads consumers to a material degree as regards the foodstuff offered. This is a general principle that applies to all elements of labelling, presentation and advertising.

(a) EU Labelling requirements for (palm) oil

Annex I to the EU Labelling Directive provides that defined categories of ingredients may be labelled by the name of their category only, without indication of the specific name of the ingredient:

Annex I:

(...)

Definition

Refined oils other than olive oil

Designation

Refined oils other than olive oil 'Oil', together with

— either the adjective 'vegetable' or 'animal', as appropriate, or

— an indication of their specific vegetable or animal origin

The adjective 'hydrogenated' must accompany the indication of a hydrogenated oil

Article 6(6) of the current EU Labelling Directive provides that ingredients should be designated by their specific name. However, where ingredients belong to one of the categories listed in Annex I to the Directive, and are constituents of another foodstuff, they need only be designated by the name of that category. Refined oils other than olive oil, therefore, may be designated by the term "*vegetable oil*". As a result, palm oil need not be labelled on food products by its specific name. Article 6(6), however, leaves food business operators the option to indicate the specific origin of the oil and label the ingredient as "*palm oil*" or "*rapeseed oil*", etc. as appropriate. Where the oil used has been subject to a hydrogenation process, this would also need to be stated. The designation of the ingredient would, therefore, need to read "*hydrogenated vegetable oil*" or "*hydrogenated rapeseed oil*".

(b) Is the "no palm oil claim" considered "misleading" under Article 2 of the EU Labelling Directive?

Ingredients lists serve to inform consumers about the content of the food product they purchase. Article 2 of the EU Labelling Directive aims to ensure that food business operators are truthful in the information they provide in product labels.

Article 2(1)

The labelling and methods used must not be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

Article 2(3) provides that the prohibitions or restrictions referred to in paragraph 1 (and 2) shall also apply to:

(a) the presentation of foodstuffs, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed;

(b) advertising.

This Article seeks to address fraudulent practices and incorrect statements in labelling. Labelling a product with a "no palm oil" claim even though the product does contain palm oil, would not be permitted. However, a "no palm oil" claim where no palm oil is present in the product constitutes a simple and verifiable statement which is factually correct and therefore not misleading.

At the same time, a specific "no palm oil" claim appearing on the front label of a product that places emphasis on the absence of palm oil in the product could also be understood as intended to communicate to the consumer more than mere information concerning the type of oil used. The claim could be interpreted as intended to influence the consumer's purchasing behaviour in favour of products that do not contain palm oil for example by implying that palm oil is not healthy. Such a reference would be questionable in light of the reference made in Article 2(1)(i) to the fact that the product label may not mislead the consumer to a material degree as to the "*characteristics of the foodstuff and, in particular, as to its (...) properties*". Determination of whether a "no palm oil" claim misleads consumers "to a material degree" is a question of fact. In that context, a claim that conveys a message that palm oil is not good for consumer health would not be justified given the lack of scientific justification on the potential negative health effects of palm oil. Indeed, Article 2(1)(ii) further provides that food labels may not mislead the consumer to a material degree "*by attributing to the foodstuff effects or properties which it does not possess*". According to Article 2(3), such statements are not permitted in packaging materials used, and in advertising.

It remains a fact that, since existing EU labelling legislation does not impose an obligation for food business operators to indicate the origin of the vegetable oil, consumers cannot

currently verify the plant origin of the oil used in the food product they buy to determine whether palm oil is contained in the product or not. In such circumstances, food manufacturers could argue that the "*no palm oil*" claim front of label provides clarification to the consumer as regards the origin of the vegetable oil present in the product and thereby meets the purpose of the EU Labelling Directive which is to provide factually correct information. However, it would appear that other, less "*aggressive*", more objective and equally informative means to inform the consumer are available to the food manufacturer. Clarification on the type of oil used could for example be provided as part of the ingredients list.

2.2 EU rules on nutrition and health claims

The EU Regulation 1924/2006 on nutrition and health claims made on foods (the "EU Claims Regulation") provides, in Article 2(2)(4), the following definition of a nutrition claim:

"nutrition claim" means any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to:

(a) the energy (calorific value) it

(i) provides;

(ii) provides at a reduced or increased rate; or

(iii) does not provide; and/or

(b) the nutrients or other substances it

(i) contains;

(ii) contains in reduced or increased proportions; or

(iii) does not contain."

Article 2(2)(5) of the EU Claims Regulation contains a definition of a health claim:

"health claim" means any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health."

(a) Could the "*no palm oil*" claim be considered an illegal nutrition or health claim?

Only those nutrition claims that are specifically permitted and listed in Annex I to the Regulation may be used subject to strict use conditions. The question arises as to whether the "*no palm oil*" claim could be considered a nutrition claim and therefore constitute a breach of the EU Claims Regulation where used, due to the fact that the claim is not included in this list of permitted claims. Currently, apart from "*energy-free*", "*(saturated) fat-free*", "*sodium/salt-free*", "*sugars-free*", the Annex does not contain any claims emphasising the absence of specific nutrients or substances in food and a "*palm oil free*" or "*no palm oil*" claim is currently not included. Inclusion of such a claim in the Annex would be subject to a formal evaluation and authorisation process whereby the claim would have to be scientifically substantiated and strict conditions for use would need to be established.

For a "*no palm oil*" claim in food labelling to be considered a nutrition claim, the claim would have to pass the test as provided for in Article 2(2)(4)(b) (iii) and demonstrate that

the food has particular beneficial nutritional properties due to the fact that it does not contain palm oil (a substance other than nutrient).

The same issue arises with respect to the question whether or not the "*no palm oil*" claim could be understood to be an implied health claim. It is true that the claim does not refer to any function in the body and without more information available on the label, much will depend on how "*aware*" or perhaps "*influenced*", the average informed consumer is in his/her understanding of the claim.

In this context, it is important to note that the notion of "*average consumer*" in the EU has a specific meaning having been addressed in several cases issued by the Court of Justice of the EU. This notion of average consumer is used for example, in cases where it is necessary to establish whether a particular trader's practice or communication could be liable to mislead a consumer. In determining the misleading character of information provided by a trader, the Court of Justice has ruled in Case C-210/96, *Gut Springenheide* that the national court should "*take into account the presumed expectations which the statement evokes in an average consumer, who is reasonably well informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll*". Furthermore, in Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*, the Court also indicated that cultural, social and linguistic factors should be taken into account when referring to the standard of "*average consumer*". As a result, the average consumer refers to a reasonably well-informed individual who is reasonably observant and circumspect.

In light of the above, and given that the anti-palm oil lobby points to the potential negative health effects of consumption of foodstuffs containing palm oil, the "*no palm oil*" claim may indeed be understood to convey a message to the consumer that palm oil is not good for your health. Article 6 provides that nutrition and health claims must be based on and substantiated by generally accepted scientific evidence. Furthermore, a food business operator making a nutrition or health claim shall justify the use of the claim. The competent authorities of the EU Member States may also require a food business operator or a person placing a product on the market to produce all relevant elements and data establishing compliance with this Regulation. A review of recent scientific literature concerning the evidence of the association between palm oil and adverse effects on human health concluded that "*this review does not clearly provide evidence of a negative role of palmitic acid for health and much less of native palm oil*"¹.

Furthermore, Article 3 prescribes, among other things, that nutrition and health claims may only be used in labelling, presentation or advertising where they comply with the conditions laid down in the Regulation.

The use of nutrition and health claims shall not:

(a) be false, ambiguous or misleading;

(b) give rise to doubt about the safety and/or the nutritional adequacy of other foods;

(...)

Again, a "*no palm oil*" may directly infringe upon this provision by creating mistrust in the mind of the consumer with respect to products containing palm oil. The consumer may

¹ Fattore & Fanelli, 2013, *Palm oil and Palmitic Acid*, International Journal of Food Sciences and Nutrition, Aug 2013; 64(5): 648-659

question the safety or suitability of palm oil in his/her diet and as a result switch to foodstuffs that do not contain palm oil.

In order to support the argument that the "no palm oil" is understood by consumers as an implied nutrition and/or health claim, it would be essential to provide proof that such is the case to the enforcement authorities. The argument would need to be substantiated.

2.3 **EU rules on misleading and comparative advertising**

Article 2(a) of EU Directive 2006/114/EC on misleading and comparative advertising (the "EU Advertising Directive") defines "advertising" as:

"(...) the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations."

The EU Advertising Directive provides for a prohibition on misleading advertising and specific conditions on comparative advertising in order to protect traders in the EU single market.

(a) Does the "no palm oil" claim constitute misleading advertising?

Misleading advertising is defined in Article 2(b) of the EU Advertising Directive as:

"any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."

Article 3(a) further clarifies that features which should be taken into account when determining whether the advertising is misleading shall include, *inter alia*:

"the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services";

The extent to which a "no palm oil" claim could, on the basis of the above features, be considered misleading, appears rather limited. The statement is factually correct in respect of most of the characteristics listed.

However, with regard to "results to be expected from their use", a claim could be reasonably made under the Article that it is intended to influence the consumer's purchasing behaviour in favour of products that do not contain palm oil by implying that palm oil is not a nutritionally beneficial product. It also infers that the claim is based on substantive clinical data. Similarly, it could be argued that the claim raises a question as to why products not containing palm oil would be better "fit for purpose" than other similar products that do contain palm oil.

(b) Does the "no palm oil" claim constitute comparative advertising?

Comparative advertising is defined under Article 1(c) as:

"any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor."

In addition, Recital 8 of the EU Advertising Directive clarifies that comparative advertising should be interpreted broadly:

"It is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising."

In order to classify the "no palm oil" claim as comparative advertising, a competitor or goods or services offered by a competitor need to be explicitly or by implication identified.

The "no palm oil" claim does not explicitly identify (a) competitor(s), or palm oil containing products offered by (a) competitor(s). For example, there is no reference to a competitor's commercial premises or shop address as highlighted in Case C-44/01, *Pippig Augenoptik*.

The question therefore is whether the claim could be construed as comparative advertising due to an implied reference to competitors or their goods. In Case C-381/05, *De Landtsheer Emmanuel*, the Court of Justice of the EU confirms that "According to settled case law [the definition of comparative advertising] is a broad definition covering all forms of comparative advertising so that, in order for there to be comparative advertising, it is sufficient for there to be a statement referring even by implication to a competitor or to the goods or services which he offers". Furthermore, the Court clarifies that "(...) The mere fact that an undertaking solely refers in its advertisement to a type of product does not mean that the advertisement in principle falls outside the scope of the directive. Such an advertisement is capable of being comparative advertising provided a competitor or the goods or services which it offers may be identified as actually referred to by the advertisement, even if only by implication. In that context, it is irrelevant that the reference to a type of product might, given the circumstances of the case and, in particular, the structure of the market in question, enable a number of competitors, or the goods or services that they offer, to be identified".

In circumstances in which it is established that the "no palm oil" claim could be considered a comparative claim, Article 4 of the EU Advertising Directive subsequently lists the conditions that must be met in order for a comparative claim in advertising to be permitted. Their cumulative character has been confirmed by the Court of Justice of the EU in Case C-44/01, *Pippig Augenoptik*. The relevant conditions in Article 4 require that comparative advertising:

(a) (...) is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') (1);

(b) (...) compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;

(e) for products with designation of origin, it relates in each case to products with the same designation;

(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

Generally speaking, according to Article 4, comparative claims must objectively compare material, relevant, verifiable and representative features of goods and not denigrate or discredit a competitor or his goods.

In light of these conditions, the "*no palm oil*" claim may, by implicitly referring to competitors or goods of competitors, raise certain questions. By emphasising as a distinguishing feature in labelling that a certain brand of chocolate spread, for example that made by Casino, does not contain palm oil, this claim could be understood to imply that palm oil is an ingredient to be avoided and hence that chocolate spread produced by competitors containing palm oil, should not be bought.

With regard to Article 4, the Court of Justice explained in Case C-487/07, *L'Oréal and Others* that "*The purpose of those conditions is to achieve a balance between the different interests which may be affected by allowing comparative advertising. (...) the aim of Article [4] is to stimulate competition between suppliers of goods and services to the consumer's advantage, by allowing competitors to highlight objectively the merits of the various comparable products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice*".

The claim, when used on chocolate spread may be considered "*misleading*". The claim may compare goods "*meeting the same needs or intended for the same purpose*". However, it would be difficult to establish how it "*objectively compares material, relevant, verifiable and representative features*" of those chocolate spreads. The statement "*no palm oil*" without any further clarification as to why it is important to know that the product does not contain palm oil leaves the consumer wondering why it is relevant information. Is the statement provided to inform consumers about the origin of the oil? Is it provided to point at certain potential health issues related to consumption of palm oil? Is it for another reason?

Whatever the answer to these questions may be, it is reasonable to conclude that the statement is provided to inform the consumer that "*no palm oil*" containing alternative food products are available on the market. However, by identifying an alternative to "palm oil" without any further explanation, the statement could risk to "*create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor*" (see Article 4(h) of the EU Advertising Directive, referenced above). In that same vein, such a "*no palm oil*" claim, by implicitly making a comparison with palm oil containing products, may "*discredit*" or "*denigrate*" palm oil containing products of a competitor by implicitly questioning the appropriateness of purchasing or consuming products that contain palm oil.

2.4 EU rules on unfair business-to-consumer commercial practices

Article 2(d) of the EU Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (the "EU Unfair Commercial Practices Directive") defines "*commercial practice*" as:

"any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".

The "*no palm oil*" claim clearly falls within the scope of the above definition as a commercial communication used for the promotion or sale of a product to consumers.

Article 5(1) of the EU Unfair Commercial Practices Directive prohibits "*unfair*" commercial practices. Article 5(2) clarifies that:

"A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers."

Article 5(4) provides that commercial practices shall be unfair, in particular, where they are misleading (as set out in Articles 6 and 7) or are aggressive (as set out in Articles 8 and 9).

Article 6(1) of the EU Unfair Commercial Practices Directive referring to misleading commercial practices reads:

"A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise (...)".

This provision is followed by a list of an additional seven points that should be examined in order to determine whether a practice is misleading. The most relevant would appear to be:

"(a) the existence or nature of the product;

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product (...)".

Article 6(2) provides that a commercial practice shall also be regarded as misleading if it

"(...) causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

Article 7(1) on "misleading omissions" provides that:

"(...) a commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise."

Article 7(2) states that it shall also be regarded as:

"(...) a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise".

In our view the validity of the "no palm oil" claim could also be challenged under the EU Unfair Commercial Practices Directive in that use of the claim may constitute a "misleading" and therefore "unfair commercial practice".

In accordance with Article 6(1), this would need to be determined on the basis of "overall presentation" that "deceives or is likely to deceive the average consumer, even if the information is factually correct". Article 6(2) determines that it is considered a misleading practice if the consumer as a result "(...) takes a transactional decision that he would otherwise not have taken", or where as a result of marketing of the product "confusion" is created with "any products, trade marks, trade names or other distinguishing marks of a competitor". In addition, Article 7(1) and 7(2) appear to indicate that where a trader omits to provide certain material information that the consumer needs in order to make an informed choice, or provides information in an "unclear" or "ambiguous" manner, or fails to indicate the commercial intent of the commercial practice, this may be considered a "misleading" omission.

A challenge to the validity of the "no palm oil" claim based on these arguments would need to be determined on a case-by-case basis in light of the provisions of Articles 5 to 9 of the Directive.

3. **CLASSIFICATION AND PERMISSIBILITY OF A "NO PALM OIL" CLAIM UNDER THE FOOD INFORMATION REGULATION**

From 13 December 2014, new EU rules on the labelling of foodstuffs will replace the currently applicable EU Food Labelling Directive. The new rules are laid down in Regulation (EU) 1169/2011 on the provision of food information to consumers (the "EU Food Information Regulation" or "FIR").

The EU Food Information Regulation will require a change in the way vegetable oils such as palm oil will have to be labelled on pre-packaged products. According to Annex VII, part A, point 8 of the FIR, food business operators will need to indicate the vegetable source of the oil used. It would no longer be possible to use the general descriptor "vegetable oil". In addition, the ingredient will have to be labelled as "palm oil", "olive oil", "sunflower oil", respectively, depending on the type of oil used. Furthermore, the indication "hydrogenated" or "partially hydrogenated" shall accompany the name of the oil and therefore read, for example, "hydrogenated sunflower oil" or "partially hydrogenated sunflower oil", as appropriate. As a result, consumers will be in a position to understand the type of oil used by checking the list of ingredients.

(a) Voluntary food information provided on labels

There is no requirement under FIR to explicitly indicate by means of a "does not contain" claim that certain ingredients or oils in this case, are not present in the product. Such a "no palm oil" claim on a product label could therefore be classified as additional voluntary food information provided on the label by the food manufacturer. Such information may be provided to consumers on labels provided that it meets the requirements laid down in Article 36(2) of the FIR, which provides:

"Food information provided on a voluntary basis shall meet the following requirements:

(a) it shall not mislead the consumer, as referred to in Article 7;

(b) it shall not be ambiguous or confusing for the consumer; and

(c) it shall, where appropriate, be based on the relevant scientific data."

Article 37 of the FIR also provides that voluntary food information may not be displayed to the detriment of space available for mandatory food information.

Article 7(1) of the FIR refers to misleading food information and slightly modifies Article 2(1) of the existing EU Food Labelling Directive. It reads as follows:

"Food information shall not be misleading, particularly:

(a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;

(b) by attributing to the food effects or properties which it does not possess;

(c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;

(d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient."

Point (c) above has been modified in comparison with point (iii) of Article 2(1) of the EU Food Labelling Directive and adds specifically wording related to the emphasis placed on the presence or absence of certain ingredients. The provision applies only where a

particular characteristic is highlighted and gives the impression of being an exceptional characteristic whereas in fact all similar products contain that same characteristic.

The "*no palm oil*" claim is presented in the same way as statements such as "*no preservatives*", "*no artificial colours*", etc. These claims appear to question the safety or appropriateness of duly evaluated and authorised food additives. Such statements relating to 'preservatives' or 'artificial colours' may currently be regarded as providing voluntary information that certain consumers may find useful to know. For example, should they wish to buy products that have been produced in as "*natural*" a way as possible, or that as "*close*" to the original natural source material as possible.

Palm oil is not an additive. But, the claim is presented in a similar way on the label, so additives can be used as an example. Could the "*no palm oil*" claim be argued to provide useful information to a consumer who wishes to know the origin of the oil? It may be useful to know the identity of the oil in a product. However, in the absence of evidence that a specific oil represents a risk to consumer health, inclusion of "*no palm oil*" claim front of label unjustly singles palm oil out and places emphasis on the absence of palm oil in the product in a manner that could be perceived as intended to communicate to the consumer more than mere information concerning the type of oil used.

In fact, while such a statement highlights the type of oil that is not present in a product, it does nothing to educate the consumer about the benefits related to absence of such an oil from the product, nor does it either identify the oil that is present or the benefits of this oil. By not providing the consumer with the full picture as to why this claim is relevant and important to note, the statement could be regarded as ambiguous or confusing under Article 36(2)(b) of FIR, particularly to consumers who are unaware of the relevance of understanding the origin of the oil.

Furthermore, the ingredients list required under the FIR will, from 13 December 2014, require that the type of oil is indicated as part of the ingredients list. As a result, it would not be credible for food manufacturers to argue that use of an additional front of pack "*no palm oil*" claim on the product is necessary to provide consumers with information regarding the oil contained in their food product that would otherwise be lacking on the food label. Continued use of the "*no palm oil*" claim on the label would therefore be likely to increase the perception that such a claim is used to serve another purpose rather than to merely inform the consumer about the absence of palm oil in the product. Given the lack of scientific data pointing at health concerns related to consumption of palm oil, food manufacturers would likely lack the justification to continue using the "*no palm oil*" claim.

It would seem, therefore, that, in accordance with Article 36(2)(b) and (c) of the FIR, justification would need to be provided for making the claim in order not to be "*confusing*" or "*ambiguous*" and that scientific data would need to be provided in order to substantiate continued use of the "*no palm oil*" claim. By not providing such justification, the food business operator making the claim would not fulfil the conditions applicable to providing voluntary food information under FIR. If such justification is not provided, national regulatory bodies, including DGCCRF in France and AFSCA in Belgium, may act, in terms that are examined in more detail in the Annex.

4. CONCLUSION

EU food business operators, especially in France and Belgium, are increasingly using "*no palm oil*" claims on food labels or in advertising. A review of relevant EU legislation shows that a "*no palm oil*" claim used on foodstuffs could be understood to suggest that palm oil, and products containing palm oil, should be avoided. Foods not containing palm oil may, therefore, as a result, promote the perception that they are "*better*", "*healthier*"

than products that do contain palm oil. The "*no palm oil*" claim may, as a result and by implication, attribute to a product that carries this claim certain perceived beneficial properties or health effects as compared with a product that contains palm oil, without necessarily providing proper justification for doing so.

We also understand that a review of recent scientific literature about the evidence of the association between palm oil and adverse effects on human health points to the lack of conclusive scientific evidence. The relevant scientists concluded that "*this review does not clearly provide evidence of a negative role of palmitic acid for health and much less of native palm oil*".² . In light of applicable and relevant EU legislation on labelling, claims, misleading and comparative advertising, unfair commercial practices and food information to consumers, the permissibility of the "*no palm oil*" claim in product marketing is doubtful.

EU labelling legislation aims to ensure that information provided in labelling is truthful and does not mislead. While the "*no palm oil*" claim front of label provides clarification to the consumer as regards the origin of the vegetable oil present in the product and is factually correct, the question remains as to whether the same could be achieved through other, less "*aggressive*", more objective and equally informative means. Clarification on the type of oil used could for example be provided as part of the ingredients list, and from 13 December 2014, all vegetable oils will need to be explicitly listed in the ingredients list, ensuring that such objective information to consumers about palm oil will always be present without the need for additional "*no palm oil*" labels.

A nutrition claim is understood, among other things, as any claim which "*states, suggests or implies that a food has particular beneficial nutritional properties due to (..) the nutrients or other substances it (...) does not contain.*" A "*no palm oil*" claim could therefore be understood as a nutrition claim and would in that case constitute an illegal nutrition claim due to the fact that the claim is not specifically included in the list of permitted nutrition claims in the Annex to the Nutrition and Health Claims Regulation. Similarly, given that the anti-palm oil lobby point at the potential negative health effects of consumption of foodstuffs containing palm oil, the "*no palm oil*" claim may be understood to convey a message to the consumer that palm oil is not good for your health. Use of such an implied claim would only be authorised if strict conditions are met. Indeed, the Claims Regulation provides that nutrition and health claims must be based on and substantiated by generally accepted scientific evidence. Furthermore, a food business operator making a nutrition or health claim has to be able to justify use of the claim. A review of recent scientific literature about the evidence of the association between palm oil and adverse effects on human health however, points to the lack of conclusive scientific evidence or a direct correlation that palm oil has a negative impact on health.

The extent to which a "*no palm oil*" claim could be considered misleading advertising under the EU Misleading and Comparative Advertising Directive appears rather limited. At the same time, one of the conditions is that the advertising may not mislead with respect to the "*results to be expected from their use*". It could be argued that the "*no palm oil*" claim does mislead in this regard since it appears to question the nutritional benefits that may be obtained from products containing palm oil. As such it could be interpreted as intended to influence the consumer's purchasing behaviour in favour of products that do not contain palm oil. Similarly, it could be argued that the claim raises a question as to why products not containing palm oil would be better "*fit for purpose*" than other similar products that do contain palm oil.

² Fattore & Fanelli, 2013, *Palm oil and Palmitic Acid*, International Journal of Food Sciences and Nutrition, Aug 2013; 64(5): 648-659

The “*no palm oil*” claim without any further clarification as to why it is important to know that the product does not contain palm oil leaves the consumer wondering why it is relevant information. Is the statement provided to inform consumers about the origin of the oil? Is it provided to point at certain potential health issues related to consumption of palm oil? Whatever the answer to these questions may be, it is reasonable to conclude that the statement is provided to inform the consumer that “*no palm oil*” containing alternative food products are available on the market. By identifying an alternative to “palm oil” without any further explanation, the statement could risk to “*create confusion among traders, between the advertiser and a competitor or between the advertiser’s trademarks, trade names, other distinguishing marks, goods or services and those of a competitor*”. In that same vein, such a “*no palm oil*” claim, by implicitly making a comparison with palm oil containing products, may risk to “*discredit*” or “*denigrate*” palm oil containing products of a competitor by implicitly questioning the appropriateness of purchasing or consuming products that contain palm oil.

Whether or not it would be possible to question the validity of the “*no palm oil*” claim based on under the EU Unfair Commercial Practices Directive would need to be determined on a case-by-case basis in light of the provisions of Articles 5 to 9 of the Directive. The claim may constitute a “*misleading*” and therefore “*unfair commercial practice*” which need to be determined on the basis of “*overall presentation*” that “*deceives or is likely to deceive the average consumer, even if the information is factually correct*”. The Directive considers it a misleading practice if the consumer as a result “*(...) takes a transactional decision that he would otherwise not have taken*”, or where as a result of marketing of the product “*confusion*” is created with “*any products, trademarks, trade names or other distinguishing marks of a competitor*”. Furthermore, where a trader omits to provide certain material information that the consumer needs in order to make an informed choice, or provides information in an “*unclear*” or “*ambiguous*” manner, or fails to indicate the commercial intent of the commercial practice, this may be considered a “*misleading*” omission.

The Food Information to Consumers Regulation which will apply as from 13 December 2014 will require that the type of oil is indicated as part of the ingredients list. As a result, it would be difficult for food manufacturers to continue to argue that use of an additional front of pack “*no palm oil*” claim on the product is necessary to provide consumers with information regarding the oil contained in their food product that would otherwise be lacking on the food label.

Continued use of the “*no palm oil*” claim on the label would therefore likely increase the perception that such a claim is used to serve another purpose rather than to merely inform the consumer about the absence of palm oil in the product.

Given the successes made by the palm oil industry in sustainable production and processing techniques, and given the lack of scientific data pointing at health concerns related to consumption of palm oil, it should become more difficult for food manufacturers to continue providing the “*no palm oil*” as voluntary information without proper justification. By not providing such justification, the food business operator making the claim would not fulfil the conditions applicable to providing voluntary food information under FIR.

EU legislation provides clear rules on what constitutes safe food products and how they should be labelled. Furthermore, going forward, food manufacturers will have to indicate the specific type of oil used in foods and “palm oil” will need to be mentioned in the ingredients list. The EU FIR Regulation specifically aims to avoid making a distinction between foods that are “good” and foods that are “bad”. Rather the aim of the new EU Food Information Regulation is to enable consumers to make informed choices about the

food they consume as part of a balanced diet. Consumers should be allowed to choose from a variety of different safe foods ingredients in order to create their individual diets based on health, nutrition, taste and other preferences. To single out "*palm oil*" as a "*bad food ingredient*" through using a "*no palm oil*" claim goes against the spirit of the EU Regulation.

ANNEX

OVERVIEW OF "NO PALM OIL" CLAIM UNDER FRENCH AND BELGIAN IMPLEMENTING RULES

Belgium

(a) Implementation and enforcement of food labelling and nutrition and health claims rules

The EU Food Labelling Directive has been implemented in Belgium by the Royal Decree of 13 September 1999 concerning labelling of pre-packaged foodstuffs (as amended). The rules on nutrition and health claims are laid down at EU level in a Regulation which is directly applicable and does not need to be transposed into the Belgian national law. The same applies to the new rules on food labelling laid down in the EU Food Information Regulation.

The EU Food Labelling Directive, the EU Claims Regulation and the FIR do not contain any provisions regarding sanctions that may be imposed against food business operators that act in breach of the relevant legislation. Enforcement of the relevant legislation and potential sanctions are left to the individual EU Member States.

In Belgium it is AFSCA (the Federal Agency for the Safety of the Food Chain – "*Agence Fédérale pour la Sécurité de la Chaîne Alimentaire*") that oversees compliance with EU food legislation. AFSCA is an autonomous agency that is responsible for risk evaluation, risk management and risk communication. It also carries out official inspections and controls of foodstuffs on the market. AFSCA essentially organises two types of controls: 1) planned controls as part of a yearly programme that is often sector specific; and 2) *ad hoc* controls that tend to respond to trends and specific needs for controls as they arise. The latter controls appear more randomly.

(b) Implementation and enforcement of advertising rules and unfair commercial practices rules

EU rules on advertising as well as on unfair commercial practices are implemented in Belgium by the Law of 6 April 2010 on market practices and consumer protection (hereafter the "*Law on market practices*" or the "*Law*"). This Law lays down the same conditions as established in the EU legislation for comparative advertising (Article 19, Articles 88 to 91 and Article 96 of the Law) or for unfair commercial practices (Chapter 4, Articles 83 to 103 of the Law).

In line with Article 5(1) of the EU Advertising Directive, the Law on market practices also provides for remedies against unlawful comparative advertising. These include a possibility to request an immediate injunction (cessation order) (Article 110 of the Law) or a warning (Article 123 of the Law). There are no criminal penalties foreseen. A request for an injunction is also subject to the Law of 6 April 2010 concerning the settlement of certain procedures provided for in the Law on market practices and consumer protection.

In accordance with Article 13 of the EU Unfair Business-to-Consumer Practices Directive, remedies for such unfair practices are provided for under national implementing legislation. They may include a warning (Article 123 of the Law), criminal fines (Article 124 of the Law) or imprisonment (Article 127 of the Law).

A warning can be issued where it is established that a business operator has infringed the provisions of the Law on market practices. The warning may be issued by an official of the Ministry of Economic Affairs but it may also be issued by officials from other competent ministries, for example the Ministry of Public Health, Safety of the Food Chain and Environment, in the case of foodstuffs. A warning obliges the business operator concerned to cease the relevant illegal practice (for example misleading comparative advertising or unfair commercial practice) within a certain term. Where this timeframe is not respected, it may lead to a request for an injunction filed by the Ministry or, alternatively, trigger legal action by a public prosecutor.

According to Article 110 of the Law, a request for a court injunction could be filed against the advertiser of the disputed advertising, for example a food manufacturer or another food business operator. As regards the persons authorised to file such a request, these include, according to Article 113 of the Law, any interested party, the Minister of Economic Affairs or the Director of DG Enforcement and Mediation in the Ministry of Economic Affairs, a professional or inter-professional group having legal personality, or an accredited consumer organisation having legal personality and represented in the Consumers Council. "Any interested party" would also comprise consumers and undertakings (including competitors). Article 2 of the Law defines an undertaking as "any natural or legal person durably pursuing economic objectives". It also includes associations of undertakings.

A request for an injunction is presumed urgent and therefore follows an accelerated procedure ("*procédure en référé*") which obliges the adverse party to appear in court within 2 days from the date of filing of the request. Timing of the next steps of the procedure is agreed between the parties before a judge. The procedure concerning the injunction may last a period of between six months to one year.

Common modes of proof apply such as testimony, investigation, and bailiff. The judge may order measures of inquiry, such as the designation of an expert. In that context a consumer survey could demonstrate the misleading or ambiguous effect of the "no palm oil" claim. It could constitute proof of the fact that a consumer's purchasing choice was influenced by a claim that was not scientifically substantiated. It should be noted that an injunction does not require proof of actual damage.

A judge that finds the request for an injunction founded, issues a judgement that requires the incriminated practice to cease. Usually this judgement is accompanied by a fine established per day of delay in executing the judgement.

According to established jurisprudence, the judge competent to issue an injunction is not competent to grant the relief from material damage suffered by the applicant.

France

- (a) Implementation and enforcement of food labelling and nutrition and health claims rules

Under the purview of the Ministry of Economy, Finance and Industry, the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control ("*DGCCRF*") is responsible for ensuring open and fair trade of consumer goods and services, and

consumer protection. It is also responsible for the enforcement of food labelling legislation. The DGCCRF carries out controls and investigates the labelling of foodstuffs and use of claims. The departmental directorate for the protection of the public (hereafter “DDPP”), as authorised agents of the DGCCRF, enforces the rules laid out in the French Consumer Code.

The EU rules on labelling of foodstuffs have been incorporated into the Consumer Code (Articles R112-1 to R112-31). The EU Regulation on nutrition and health claims made on foods is directly applicable in France and does not require transposition into national law. Enforcement of this legislation is also subject to rules of the Consumer Code. According to Article L214-1 to L214-3 of the Consumer Code, any violations concerning the labelling, presentation and markings of a product shall be subject to a civil penalty under the third class of petty offences. The investigations are carried out by DDPP who also establish penalties where required.

(b) Implementation and enforcement of advertising rules and unfair commercial practices rules

EU rules on misleading and comparative advertising are incorporated in the Consumer Code (Articles L121-1 – L121-7). EU rules on unfair commercial practices are also implemented in the Consumer Code. Articles 6 and 7 of the EU Unfair Business-to-Consumer Practices Directive on misleading practices are laid down in Articles L 121-1 to L 121-7 of the Consumer Code, and the provisions implementing Articles 8 and 9 on aggressive commercial practices are contained in Articles L 122-11 to L 122-15 of the Consumer Code.

Sworn agents of the DDPP may make enquiries and establish offences under the Consumer Code. Subject to prior authorisation by the Ministry of Economy or a judge, these agents can carry out inspections, be granted access to and read all relevant documents, place under seals, carry out seizures, ask the authorities to designate an expert and summon individuals where necessary (Articles L. 450-1 to L. 450-4 of the Commercial Code). They can also file statements with the public prosecutor (“*Procureur de la République*”).

The DDPP may also sign settlements with offenders, as long as legal action (“*action publique*”) has not been initiated.

Pursuant to Article L. 141-1 VI of the Consumer Code, the DDPP, having instructed the public prosecutor, can take legal action before the civil courts petitioning the judge to order any measure likely to put an end to the illicit conduct.

French law does not specifically prohibit or enable competitors to initiate proceedings before the civil or criminal courts in connection with advertising and unfair commercial practices legislation. Therefore, competitors may initiate proceedings before the civil or criminal courts once a legitimate interest is demonstrated (Cour de cassation, Chambre commerciale, 25 April 2001, N° 98-12.874).

Private undertakings that have demonstrated a legitimate interest can apply to join criminal proceedings initiated by the public prosecutor as civil parties, or, they may also file complaints with the public prosecutor, following which there may be a preliminary investigation, followed by criminal charges. Private undertakings can thereafter file a complaint with the investigating magistrate and become civil parties. Pursuant to Article L. 121-3 of the Consumer Code, the Court or the investigating magistrate can specifically issue an order to stop misleading or aggressive commercial practices.

Consumers may also bring proceedings before the civil or criminal courts. They can also apply to join criminal proceedings initiated by the public prosecutor as civil parties. Consumers may also file complaints with the public prosecutor, after which there may be a preliminary investigation, followed by criminal charges. Similar to private undertakings, consumers can then file complaints with the investigating magistrate and become civil parties. Pursuant to Article L. 121-3 of the Consumer Code, the Court or the investigating magistrate can specifically issue an order to stop misleading or aggressive commercial practices.

Natural persons who are found guilty of misleading commercial practices may be punished by up to 2 years imprisonment and/or a fine up to €37,500 or up to 50% of the cost of the advertising or the practice constituting the offence. Penalties incurred by legal entities are: a fine up to €187,500; and/or a prohibition on exercising a professional or non-profit activity for a maximum period of five years. Publication of the decision may be made in the written press or using any form of communication to the public by electronic means. In addition, publication may be ordered at the expense of the perpetrator.