

Question B: What rules should govern claims by suppliers about the national or geographic origin of their goods or services?

AUSTRIAN REPORT

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Questions to National Rapporteurs

- 1. Do your jurisdiction's laws have provisions dealing with indications of origin that are used by manufacturers, distributors and service providers to commercialize their goods and services (e.g. passing off, unfair competition law, trademark law, sui generis law regulating the use of indications of source, geographical indications, or appellations of origin)? If yes, please provide the text of those provisions:**

Please note that in the areas of preferential arrangements concerning origin ("Ursprungsbezogene Präferenzregelungen" according to the EU Customs Law) and Food Safety Law as well as for geographical indications for food and wine (PDIs and PGOs) detailed provisions based on European Regulations and Directives apply. We tried to avoid too much to refer to these provisions as these are identical for all EU member states.

The Austrian law knows general provisions for protection for signs and respective indications of origin due to the Provisions of the Austrian Act Against Unfair Competition ("UWG").

Such protection is given to so-called "simple" as well as "qualified" indications of origin and sources (see "Made in Austria"¹ as an example for a "simple indication of origin).

¹ https://www.wko.at/Content.Node/service/Aussenwirtschaft/fhp/Ursprung/Made_in_....html

The general protection of Articles 1², 1a³ and 2⁴ of the UWG applies.

² Art 1 of the “UWG“ - Unfair Commercial Practices

- (1) Anyone who in the course of business
 1. resorts to an unfair commercial practice or another unfair practise which is likely to distort not only insignificantly [=materially] the competition to the detriment of enterprises or
 2. uses an unfair commercial practise contrary to the requirements of professional diligence and [which] is with regard to the respective product suitable to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, may be sued for a cease-and-desist order and in case of fault or payment of damages.
- (2) In case a commercial practise reverts to a group of consumers, the average member of such group will be deemed as the average consumer. Commercial practices against consumers which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity, have to be assessed from the perspective of the average member of that group.
- (3) Unfair commercial practices shall be in particular such, which are
 1. aggressive in the sense of § 1.a. or
- (4) misleading in the sense of § 2. For the purposes of this Code the meaning is [defined as follows]:
 1. "product": any goods or service including immovable property, rights and obligations;
 2. "commercial practice": any act, omission, course of conduct or representation, commercial communication including advertising and marketing of an enterprise, directly connected with the promotion, sale or supply of a product;
 3. "material distortion": of the economic behaviour of the consumer" means the use of a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;
 4. "code of conduct": an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State of the European Union and which defines the behaviour of enterprises who undertake to be bound by the code in relation to one or more particular commercial practices
 5. "invitation to purchase": any commercial communication which indicates the characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;
 6. "undue influence of a consumer": the exploitation of a position of power in relation to the consumer so as to apply pressure - even without using or threatening to use physical force - , whereby the consumer's ability to make an informed decision is significantly limited;
 7. "transactional decision of a consumer": any decision taken by such concerning whether, how and on what conditions he will undertake a purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, irrespective whether the consumer decides to act or to refrain from acting;
 8. "professional diligence": the standard of special skill and care of which one can reasonably presume that an entrepreneur may according to the honest market practice reasonably be expected to exercise in his field of activity.
- (5) In a procedure for a cease-and-desist order or for damages according to para 1-3 the entrepreneur has to prove the correctness of allegations of facts in connection with a commercial practice if such a claim seems under consideration of the justified interests of the entrepreneur and the other market participants due to the circumstances of the single case to be appropriate.

³ Art 1a of the “UWG“ - Aggressive Commercial Practices

- (1) A commercial practice shall be regarded as aggressive if it is able to significantly impair the market participant's freedom of choice or conduct with regard to the product by harassment, coercion or undue influence, and to cause him to take a transactional decision that he would not have taken otherwise.
- (2) In determining whether an aggressive commercial practice is given, any onerous or disproportionate non-contractual barriers have to be taken into consideration with which the entrepreneur tries to hinder the consumer to exercise his contractual rights – especially the right to terminate the contract or to switch to another product or another enterprise.
- (3) In any case the commercial practices mentioned in the annex under lit 24 to 31 are deemed to be aggressive.

⁴ Art 2 of the “UWG“ - Misleading Commercial Practices

- 1.1. Insofar as a “special designation” of an enterprise (Article 9 para 1 UWG) could also constitute an indication of origin, the provisions of Article 9 para 1 UWG and for packaging and marketing of the products also Article 9 para 3 UWG could apply (“secondary meaning” is required⁵).

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- (1) A commercial practice shall be regarded as misleading if it contains false information (§ 39) or otherwise is able to deceive a market participant in relation to the product on one or more of the following elements in such a way that he will be caused to take a transactional decision that he would not have taken otherwise:
1. the existence or nature of the product;
 2. the main characteristics of the product or the material features of tests or checks carried out on the product;
 3. the extent of the commitments of the enterprise, the motives for the commercial practice, the nature of the sales process, any statements or symbols in relation to direct or indirect sponsorship or approval of the enterprise or the product;
 4. the price or the manner in which the price is calculated, or the existence of a specific price advantage;
 5. the need for a service, spare part, replacement or repair;
 6. the person, the attributes or rights of the enterprise or his agent, such as his identity and assets, his qualifications, status, approval, memberships or relations as well as ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
 7. the rights of the consumer from warranty an guarantee or the risks he may face.
- (2) In any case the commercial practices mentioned in the annex under lit 1 to 23 are deemed to be misleading.
- (3) A commercial practice shall also be regarded as misleading if it is able to cause a market participant to take a transactional decision that he would not have taken otherwise, and which involves the following:
1. any marketing of a product, including comparative advertising, which creates a danger of confusion with a product or sign of enterprise of a competitor;
 2. non-compliance with commitments, which the entrepreneur has in the framework of a code of conduct undertaken to be bound, insofar as:
 - a. the commitment is not aspirational but is firm and is capable of being verified, and
 - b. the entrepreneur indicates in a commercial practice that he is bound by the code.
- (4) A commercial practice shall also be regarded as misleading if it, taking into account the limitations of the communication medium, omits material information that the market participant needs, to take an informed transactional decision and thereby is able to cause the market participant to take a transactional decision that he would not have taken otherwise.
- (5) In any case the requests for giving information laid down in the Community law with regard to commercial communication [forms] including publicity and marketing are deemed to be material information in the sense of para 4.
- (6) In the case of an invitation to purchase to consumers, the following information shall be regarded as material in the sense of para 4, if such information is not already apparent from the context:
1. the main characteristics of the product, to an extent appropriate to the medium and the product;
 2. name and geographical address of the enterprise and, if applicable, of the enterprise on whose behalf it is acting;
 3. the price inclusive all taxes and duties, or where such cannot reasonably be calculated in advance, the manner of its calculation;
 4. if applicable costs of freight, delivery and handling, or where such cannot reasonably be calculated in advance, the fact that such further costs may arise;
 5. the arrangements for payment, delivery, performance as well as the complaint handling policy, if they depart from the requirements of professional diligence;
 6. if they depart from the requirements of professional diligence.
- (7) The claim for damages against persons who as a trade deal with the circulation of public announcements may only be undertaken if they did know the incorrectness of the statements, [and] against media enterprises only if a duty to prove the announcements with regard to its truth was given (§ 4 para 2).

⁵ Wiltschek/Horak, UWG ⁸, § 9 UWG 5.3.;

- 1.2. For geographical indications according to Article 22 (1) TRIPS as “qualified indications of origin” **Art 8 of the Austrian Act Against Unfair Competition („Gesetz gegen den unlauteren Wettbewerb, “UWG”)**⁶ expressly intends to ensure the protection against unauthorized use of geographical indications beyond a registration complying with international standards through the adoption of the definitions of Article 22 TRIPS.^{7 8} Protected are therefore only qualified geographical indications.
- 1.3. Provisions of the Austrian Trademark Protection Law (Markenschutzgesetz, “MSchG”)

The former Regulation 2081/92 (now EU Regulation 1151/2012) established a special system for union-wide protection of geographical indications and appellations of origin for agricultural products and food products.

Registration can be applied through the relevant Member State (in Austria, the Austrian Patent Office, “ÖPA”). The register of protected names is maintained by the Commission of the European Union. The Austrian Trademark Law provides for different sanctions in case of infringements.

⁶Art 8 of the „UWG“

- (1) On the protection of geographical indications within the meaning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Federal Law Gazette no. 1/1995, Annex 1C as amended in Federal Law Gazette no. 379/1995, the sections 4 and 7 shall be applied - unless their protection is otherwise provided for Gazette no. 1/1995, Annex 1C as amended in Federal Law Gazette no. 379/1995, the sections 4 and 7 shall be applied - unless their protection is otherwise provided for pursuant to separate regulations - regardless of whether any actions referred to in such sections have been taken for competitive purposes.
- (2) Para 1 above shall be also applied to geographical indications to identify the origin of services.

⁷ Article 9 UWG: Misuse of Designations of an Enterprise

- (1) Any party who, in the course of business, uses any name, company name or special designation of an enterprise or publication not subject to § 80 of the Copyright Act in a manner that it is likely to be confused with a name, company name or special designation rightfully used by another party, may be sued by the latter party to cease and desist].
- (2) The user shall be liable to compensate the injured party for any damage if the user knew or was bound to know that the abusive use was likely to cause confusion.
- (3) The special designation of an enterprise shall also include such business signs and other facilities designed to distinguish the enterprise from other enterprises, including but not limited to the presentation of goods, their packaging or enveloping and of stationery, which are by the market participants involved perceived as designations of the enterprise.
- (4) Supplementary to any claims accruing from any violation of designation rights pursuant to paras 1 and 3 above of this Federal Act, § 150 (1) and (2) b (reasonable consideration and surrender of profit) as well as sections 151 (rendering of accounts) and 152 (2) (entrepreneur’s liability) of the 1970 Patent Act, Federal Law Gazette no. 259 as amended, shall apply mutatis mutandis. § 1489 of the Civil Code shall apply to all monetary claims and the claim for accounting. The limitation period for any and all such claims shall also be interrupted by an action for the rendering of accounts.
- (5) § 58 of the 1970 Trademark Act, Federal Law Gazette no. 260 as amended, shall apply mutatis mutandis with regard to the designations referred to in paras 1 and 3 above.

⁸ This includes protection according to Art 1 and 2 UWG, as formerly expressly mentioned in the law

Articles 68 -68 j of Austrian Trademark Protection Law therefore transform the prerequisites for protection according to European regulation into national Austrian law.

Articles 68, 68 a – e, regulate the procedure for applications.

Article 68 f gives certain associations promoting economic interests and the social partners, claims for injunctive relief, deletion and damages similar to trade mark owners according to article 52 para 2-6 of the Austrian Trademark Act. Preliminary injunctions, publication of judgment and statements of accounts can be obtained (Art 68g). Furthermore in case of intentional use of geographic indications monetary penalties in a criminal proceeding can be obtained. The criminal proceeding has to be applied for by the respective “party entitled” of the geographical indication only. The owner of the enterprise inflicting the geographical indication can also be punished (Art 68h, 68i).

For law suits in civil matters, including preliminary injunctions, the Commercial Court of Vienna, for criminal procedures, the Criminal Court of Vienna (LG für Strafsachen Wien) are exclusively competent.

- 1.4. Please note also the respective provisions on collective trademarks (“Verbandsmarke” bzw. “Kollektivmarke”) according to Art 62-67 of the Austrian Trademark Law that might apply in certain non-purely geographic designations.
- 1.5. Besides TRIPS and the Regulation there exist several bilateral agreements (e.g. with Italy, France, Greece, Spain and the Czech Republic) regarding geographical indications and the appellation of certain products. The protection provided by these bilateral agreements is based on a system of lists structured by specific groups of products (e.g. trade and industry, mining-products). The protocols of the respective agreements contain these lists stating protected geographical indications of the two contracting parties.

Nearly all of these agreements do not only provide for protection against identical indications of origin, but also for translations and similar indications which are obviously based on the original indication of origin. It therefore does not make any difference if the indication refers to the true origin or is accompanied by expressions such as "kind", "type" or "method". The use of these protected indications of origin is permitted when in accordance with the law of the country of origin. The bilateral agreements between Austria and other EU Member States may only apply insofar as they do not contradict EU law (especially against the Regulation for the protection of geographical Indications and indications of origin).

Consequently, agricultural products are excluded from bilateral agreements⁹.

2. What requirements in your jurisdiction must be met in order for goods to be marketed with an indication of origin? What are the requirements for services?

The specifications must be correct and in no way misleading (according to Art 2 UWG)¹⁰.

According to Article 8 paragraph 2 UWG the protection of the Article 22 TRIPS was extended to geographical indications identifying the origin of services. There do not exist specific requirements for services, such fall under the general protection described in 1.1. and 1.3. above¹¹.

3. Are there different provisions for different types of goods (e.g. for wines and spirits, foodstuffs, natural goods, industrial products, etc.)? If so, what are the respective requirements?

According to the Common Market Organization of Wine (EC Regulation 479/2008) the Austrian Wine Act¹² differs between wines without a geographic designation (which might mention the grape and the year, not a geographical indication) and such with a

⁹ 17 Ob 20/11g –BUD for beer produced in Budovice/Budweis

¹⁰ 4Ob121/15w – „smoked trouts“- misleading when on the labeling further to the words “smoked” in Austria a specific certification as “certified Austrian Family Enterprise” is mentioned;

¹¹ *E.g.* Wiener Opernball, Seefestspiele Mörbisch; 17 Ob 7/11w-Spanische Hofreitschule II, overriding 4 Ob 82/95 – Spanische Hofreitschule I/ Art 9 para 1 UWG;

¹² § 21 - Geographical indications of domestic wines

(1) Wine which has been prepared solely from Austrian grapes and produced in Austria must be placed on the market with a name that points to the Austrian origin, as "Austrian wine" or "wine from Austria". In the description of a wine with the name of a smaller geographical unit than "Austria" the following information shall be provided:

1. Wine regions,
2. Wine-growing areas (certain regions),
3. „Großlagen“ (large Vineyard area),
4. Municipalities,
5. vineyard or by federal state law envisaged viticulture corridors in connection with the name of the community, where the vineyard or the wine corridor located, provided that the community name is not apparent from the bottler indication.

[(2)...(7)]; see also <http://www.oesterreichwein.at/unsere-wein/dac-districtus-austriae-controllatus/dac-wein-was-ist-das/>

a) “Protected Geographical Indication”



or a

b) “Protected Designation of Origin”



Ad a) the “PGI” is generally „Landwein“ deriving from one of the three Austrian wine growing regions: “Weinland” (Lower Austria, Burgenland and Vienna), “Bergland” (Upper Austria, Salzburg, Carinthia, the Tyrol and Vorarlberg) or “Steirerland” (Styria).

Ad b) the denomination „Qualitätswein“ describes in general the PDO based on one or more of the 35 accepted quality grapes out of one of the 25 Austrian wine growing regions.

Specific emphasis is given for the 9 DAC (short for “Districtus Austriae Controllatus”) wine growing regions based on the so-called “roman system”. DAC wines are PDO protected, quality wines typical for a region, defined by an Ordinance of the Austrian Minister of Agriculture and certified according to specific rules of a regional committee.

Agricultural products obtain their protection through the provisions articles 68ff of the Austrian Trademark Law. Protection under the Regulation is exclusive for agricultural products.

4. Do the same provisions apply to domestic indications of origin as to foreign indications of origin? Does your jurisdiction for example apply the country-of-origin principle, according to which foreign indications of origin are judged according to the law of their country of origin?

All products which fall under the TRIPS-Agreement need to fulfill the same requirements. Austria is member of the TRIPS-Treaty since 1995. The country of origin principle applies.

5. Is there a special register for the registration of indications of origin for goods and/or services within your jurisdiction? If yes, what goods or services and what kind of indications of origin can be registered in this register? Please provide a brief description of the registration process and the effects of such a registration and the scope of protection of registered indications of origin. Is it

possible that a registered indication of origin becomes a non-protected generic term or are there specific rules that prevent a registered indication from becoming generic?

The EC-Regulation 2081/92/ EU-Regulation 1151/2012 has established a special system for union-wide protection of geographical indications and appellations of origin for agricultural products and food products.

Registration is effected through the relevant Member State (in Austria, the ÖPA for PGIs and PDOs and the Austrian Federal Ministry for Health for GTS).The register of protected names/origins is maintained by the EU Commission. Registration is mandatory

Registration process – Austrian national procedure:

- The application documents are submitted to the Austrian Patent Office. It first checks the eligibility of the applicant group and the specification submitted. If the latter is reasonable according to the Austrian Patent Office and a project description is available (which is not checked by the Austrian Patent Office), both will be forwarded to the Federal Ministry of Health to reach an agreement over control relevant provisions. Afterwards the examination of the "Single Document" is carried out by the Austrian Patent Office. Subsequently, the documents are published on the website of the Austrian Patent Office.
- Within three months from the day of the electronic publication anyone with a legitimate interest and domicile or headquarters / branch in Austria may then objections against the application of the designation in writing (appeal against an Austrian name).
- In case the application for registration complies with the national and international provisions, the Austrian Patent Office publishes the positive decision on its homepage (Article 68 a para 5 Austrian Trademark Protection Law). This decision is subject to appeal to the Upper Court of Vienna (OLG Wien).
- After finalization of the Austrian procedure the documents are forwarded to the European Commission which will continue with the Community law examination procedure.

Effect of the registration by the Commission:

- Once the indication is registered (as “g.g.A.” /“PDI”, or “g.U.”/“PDO”), the legitimate producers may of course particularly point out this fact in advertising. The protection of such protected indications broad, it also includes any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by expressions

such as "kind", "type", "method ", "forgery". Furthermore it hinders that such registered indication could become generic¹³.

Until now, only one “GTS” for “Heumilch” (=heymilk) was registered by the European Commission on March 4, 2016. The same effects for wines more or less apply.

6. Is the registration of certain indications of origin mandatory in order for them to be protected and their use to be regulated? If yes, to which indications of origin and for what kind of goods and services does such registration requirement apply?

For food products it is mandatory; no registration for other products and services. For DAC wines specific rules of the associations have to be followed.

7. Who is entitled to apply for the registration of an indication of origin (any market player, manufacturer organisations only, etc.)? Does the registration of an indication of origin confer property rights upon a specific owner?

An application for registration in the Community register of protected indications of origin can mainly be applied for by an association that

13 Liste der Bezeichnungen

EU Regulation indications from Austria:

Protected indications	Source of Law
<u>Pöllauer Hirschbirne - g.U.</u>	VO (EU) Nr. 582/2015, ABI. L 97/4/2015 vom 14.4.2015
<u>Wachauer Marille - g. U.</u>	VO 1107/96, ABI. L 148/1/96, zuletzt geändert durch VO 265/2013, ABI. C 140/18/2012, L 82/34/2013
<u>Tiroler Graukäse - g. U.</u>	VO 1263/96, ABI. L 163/19/96
<u>Steirisches Kürbiskernöl - g. g. A.</u>	VO 1263/96, ABI. L 163/19/96
<u>Marchfeldspargel - g. g. A.</u>	VO 1263/96, ABI. L 163/19/96, zuletzt geändert durch VO (EU) 255/2015, ABI. L 43/3/2015
<u>Gailtaler Almkäse - g. U.</u>	VO 123/97, ABI. L 22/19/97
<u>Tiroler Speck - g. g. A.</u>	VO 1065/97, ABI. L 156/6/97
<u>Tiroler Bergkäse - g. U.</u>	VO 1065/97, ABI. L 156/6/97
<u>Vorarlberger Alpkäse - g. U.</u>	VO 1065/97, ABI. L 156/6/97
<u>Vorarlberger Bergkäse - g. U.</u>	VO 1065/97, ABI. L 156/6/97
<u>Waldviertler Graumohn - g. U.</u>	VO 1065/97, ABI. L 156/6/97, geändert s. ABI. C 341/24/2015
<u>Tiroler Almkäse / Tiroler Alpkäse - g. U.</u>	VO 2325/97, ABI. L 322/33/97
<u>Gailtaler Speck - g. g. A.</u>	VO 1241/2002, ABI. L 181/4/2002
<u>Steirischer Kren - g. g. A.</u>	VO 1229/2008, ABI. L 333/3/2008
<u>Mostviertler Birnenmost - g. g. A.</u>	VO 237/2011, ABI. L 66/7/2011

works with the product whose name is to be registered. There is no requirement of legal form of this association, however the Commission requires proof of the legal existence of such an association (eg.: an excerpt of the commercial register/Firmenbuchauszug).

In exceptional cases, an individual person can apply for registration, in case only this person would be the only producer in the defined geographical area who intends to submit an application, and either the affected area has characteristics which are significantly different from the characteristics of neighboring areas, or different characteristics of the product from those of the products from neighboring areas.

The Austrian Patent Office provides a registration form with all the necessary information on its homepage.

- 8. If your jurisdiction provides for a registration of certain indications of origin, who defines the rules that have to be followed and the requirements that have to be met when using the registered indication for certain goods or services (the applicants, the lawmaker, a combination of both, others)? If the applicants are competent to define those rules and requirements (e.g. in specifications), are there any provisions or principles that limit the applicant's power and have to be considered by the applicants (e.g. antitrust law, free speech arguments, free movement of goods, etc.)?**

It is a combination of both, the law maker, the applicant association and of course the respective certification authority/controlling agency.

- 9. Is it possible that manufacturers, suppliers and distributors of goods or services which have lawfully advertised their goods or services with an indication of origin for a long time be excluded from using the indication of origin after the indication's registration (e.g. because they cannot comply with new use requirements that apply after the registration of the indication of origin)? Does your jurisdiction have any provisions which try to prevent such exclusions of previous legitimate users of indications of origin?**

If a product does not fulfill the requirement for registration anymore, the manufacturer may be excluded from using the indication, especially when the product is not produced anymore at the location indicated.

- 10. Do your country's laws provide for the registration of indications of origin as trademarks or service marks, i.e. as certification marks, collective marks or individual marks? If so, what are the requirements?**

No and Yes. According to **Article 4 para 1 lit 4** of the Austrian Trade

Mark Protection Act (“MSchG”) any signs are excluded from registration which contain exclusively sign or denominations which serve in trade as denominations of the kind, nature, quantity, selection, value, **geographical indication** or the time of production of goods or the rendering of services or as denominations of others features of the goods or services.

Service marks - as mentioned above – can as well as individual marks be registered also as Austrian trademarks. Of course there always can be an overlap of registrations containing geographical indications, especially in combined word-design-marks, as long as such are not seen to be “merely” descriptive.

11. How are conflicts between trademarks and non-registered indications of origin or indications of origin that are subject to sui generis protection resolved under your country’s laws? Are there specific rules or case law governing such conflicts?

The conflicts have to be decided on a case to case basis. The protection for not registered indications of origin is given according to Articles 1 and 2 “UWG”; protection according to Articles 8, 9 UWG possible. ¹⁴

12. If during the manufacturing process of a certain product a certain manufacturing step has taken place at a particular location or in a specific geographical area XY, but other steps have taken place in other geographical areas so that the conditions are not satisfied that the product as a whole can be considered to originate from XY, is it possible in your jurisdiction to highlight in the advertisement for this product that one specific manufacturing step took place in XY, e.g. by highlight for example” Research & Development in XY“ or “Filled in XY” if those activities actually took place in XY but the product as such does not originate from XY? Do your country’s laws have provisions which regulate the reference to the geographic origin of certain manufacturing steps? If so, can you please provide the wording of these provisions?

First of all, one has to mention, that the EU-regulations provide for a differentiation between PGIs and PDOs. For the latter the product must be completely be grown and produced in the respective region.

According to the recent decision of August 11, 2015, 4Ob121/15w of the Austrian Supreme Court concerning „smoked trouts“, the following labelling “trout filets smoked; + in Austria smoked over fine beech smoke, + unique gourmet recipe, + HACCP- and IFS-certified Austrian family business” was seen to be confusing with regard to the provision of **Article 2 “UWG”** insofar as the labelling of the food product contained

¹⁴ See inter alia: OGH 4 Ob 16/93 (Gorgonzola/Österzola), indication of origin upheld; 4 Ob 20/01g (Gorgonzola/Cambozola), trademark conflicting with indication of origin upheld;

a. a note to IFS “international featured standards” or similar certificates for which the defendant (the supermarket-chain, not the producer!¹⁵) had no permission and could not be examined by the consumer, or b. the referral to an Austrian family business, when the product itself does not come from Austria e.g. by marketing smoked fish with the indication “IFS-certified Austrian family business”.

13. Do your jurisdiction’s laws have specific provisions or is there any case law with regard to the requirements that have to be met to use of the indication “Made in XY” for goods?

There does not exist a specific case law on “made in Austria”, but referral can be undertaken to the above mentioned recent decision of the Austrian Supreme Court to the referral to an “Austrian family business” as well as to the decree of the German “Bundesgerichtshof” of November 27th, 2014(I ZR 16/14, referring to its judgment I ZR 33/72). According to this opinion only the view of the consumer shall be taken into consideration. One can also refer to the respective requests according to the toll-customs-regulations. These contain only “minimal” requirements for production in the respective member state. It is on the other hand clear, that only the design, planning, control, testing or combination of a delivery shall not be seen as being part of production and therefore cannot be labeled as “made in...” (Non-preferential indication).

The Austrian trademark (for “made in Austria”) is a word-design-mark of the WKO (Austrian Chamber of Commerce). It can be used by members, that are working in the interest of the Austrian economy in foreign countries according to the respective use requirements given.



One has to note, that this “Austrian” sign is a mere sign for orientation in marketing, not a quality sign and it is not allowed to be used on products/goods as well as on the products and packaging itself.

14. Do provisions in the laws of your jurisdiction provide that for certain goods or services the geographic origin must be indicated (mandatory labeling requirements for example in the legislation with respect to foodstuffs, cosmetics, pharmaceuticals or customs)? If so, what is the wording of these provisions? To which goods or services do these provisions apply? What kind of indications must be made? Are such mandatory labelling requirements considered to be trade restraints in your jurisdiction?

¹⁵ For better understanding: according to the certification rules of “IFS”, a certificate of the producer shall not be put on the packaging of the final product.

According to Article 32 para (1) lit 2 e of the Austrian Unfair Competition Act (“UWG”)¹⁶ an Ordinance may be issued to order that certain goods may be commercially offered for sale or otherwise marketed inter alia 2. only with the marking of **the geographical origin**. According to Art 33 para 1 of the UWG any person who violates the regulations of an ordinance passed under Section 32 shall be deemed to commit an administrative offence and shall be punished by a fine of up to € 2,900 imposed by the District Administrative Authority. There exist several ordinances e.g. for cleaning advices, textiles, household devices and others (all such do not seem to be applicable with regard to geographical origin).

- 15. If your jurisdiction has mandatory labelling requirements with respect to the geographic origin of certain goods or services is there a risk of conflicts between the mandatory labelling requirements and the provisions regarding the voluntary use of geographical indications? In other words, is it possible that the mandatory labeling requirements require that a product is labelled with a certain geographic origin while the provisions dealing with the voluntary use of indications of origin would not allow the use of this indication of origin, e.g. because the link between the product and the indicated geographic origin does not seem to be sufficient.**

No: In case of PGIs and PDOs according to the Regulation 1151/2012 the prerequisites of the respective registrations must be fulfilled to obtain the possibility to use the geographic indication.

- 16. What courts, authorities, or other bodies in your country have jurisdiction to hear cases concerning the protection of indications of origin or are entitled to take measures to protect indications of origin (e.g. civil courts, criminal courts, customs authorities, food safety authorities, chambers of commerce, etc.)?**

According to Articles 68j of the Austrian Trademark Protection Act for law suits in civil cases the Commercial Court of Vienna, and for criminal cases the Criminal Court of Vienna have exclusive jurisdiction for any infringement.

The provisions of the Austrian Wine Act (“Weingesetz”) include in its Articles 57-60 penalties for criminal acts and in Article 61 administrative penalties.

Within the scope of the Food Safety and Consumer Protection Act (“Lebensmittelsicherheits- und Verbraucherschutzgesetz”) the food

¹⁶ Text see under ris.bka.gv.at

safety authorities are entitled to take measures to protect indications of origin after the inspection of agricultural and food products. If the measures are not fulfilled or respected, administrative penalties according to Articles 90-94 can be inflicted. In case of serious infringements posing a risk to health the district courts have jurisdiction to impose penalties pursuant to Articles 81-89.

For any other infringements of non-registered geographical indications, the respective Austrian courts in Commercial cases or penal cases will have jurisdiction according to the place of infringement and/or the place of business of the infringer.

With regard to the import of “falsified products” (“Produktfälschungen”) the respective Regulation and Austrian laws following Austrian tax Authorities have jurisdiction;

Also geographical indications are rights of intellectual property, that are protected according to Regulation (EU) 608/2013 to enforce such by the European customs authorities. The Austrian customs authorities responsible for this enforcement are concentrated in the so-called “competence Center Zoll”¹⁷

17. In your personal opinion which rules and concepts of your jurisdiction with respect to the use of indications of source for goods and services do you particularly endorse? Which rules or concepts would you prefer to be amended or abandoned?

EU and even worldwide registration for wine and spirits/food and goods (see WTO negotiations on the articles 22, 23 TRIPS) are positively seen.

With respect to geographic indications for services, the problem always remains in the specifications of such services. A “link” between services rendered and the specific geographic circumstances often seem to be lacking (examples for such GIS could be: Wiener Opernball, Arlberger Skischule, Mörbischer Seefestspiele). A protection according to the standard provisions of the “UWG”¹⁸ is given.

¹⁷ <https://www.bmf.gv.at/zoll/competence-center-zoll.html>

¹⁸ See „Spanische Hofreitschule I“ 4 Ob 82/95 and „Spanische Hofreitschule II“ 17 Ob /11w – both refer to souvenir articles protected by a wordmark.