

Kluwer Trademark Blog

No trademark protection for “Emmentaler” – General Court (European Union)

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Trademarks can evoke ideas and provide information about the quality of goods and services. The same is true for geographical indications, which are designations of geographical places and areas that indicate the geographical origin of goods or services, such as “Champagne” and “Parmigiano Reggiano”. Products with recognized geographical indications have a considerable market value.

However, a geographical name of a product is no longer eligible for the protection as a geographical indication if it has become **generic**, i.e. is no longer associated with the geographical origin but with a particular product type or recipe.

This is what happened with “Emmentaler”.



(Source: <https://pixabay.com/de/photos/k%C3%A4se-fr%C3%BChst%C3%BCck-essen-1972744/>)

“Emmentaler” is not included in the list of geographical indications protected by the agreement between Switzerland and the European Union as the EU Commission considered “Emmentaler” to be a generic term for cheese (see General Court (GC), judgment of 24 May 2023 – T-2/21 [EMMENTALER] para. 67, 68).

Now, it also appears that the protection of “Emmentaler” as a trademark for cheese will be refused. The GC has ruled in the judgment just mentioned that “Emmentaler” is not eligible for protection as a trademark, even as an EU collective mark, because of its descriptive character for the designated goods.

The GC agreed with the Board of Appeal of the EUIPO, which found that trademark protection of “Emmentaler” for “*Cheeses with the protected designation of origin ‘Emmentaler’*” was to be refused in particular on the absolute grounds for refusal laid down in Article 7(1)(c) EUTMR. This provides that “*trademarks which consist exclusively of signs [...] which may serve, in trade, to designate the kind, quality, quantity, [...] of the goods*” must not be registered.

The Board of Appeal found that the sign “Emmentaler” for “*Cheeses with the protected designation of origin ‘Emmentaler’*” would be immediately perceived by the relevant public as designating a certain type of hard cheese with holes. The GC endorsed this argumentation.

This argumentation is particularly justified by the acknowledged definition of the term “Emmentaler”. In the Duden dictionary, a standard German dictionary, “Emmentaler” is defined as “full-fat Swiss cheese with cherry-sized holes and a taste of walnut kernels”.

According to case-law, the production and marketing of a product under a particular name, without that name being used in a way which refers to the origin of that product, may constitute a relevant indication of whether that name has become generic or descriptive (see GC, EMMENTALER – T?2/21 para. 49, 50 with citations). In the present case, it was established that 135 000 tons of Emmentaler cheese were produced in Germany in 2016 and a large quantity of this was placed on the German market under the name “Emmentaler”. Taking into account that a number of economic operators produce and market cheese in Germany and call it “Emmentaler”, the GC held that the relevant public would perceive “Emmentaler” as a generic term for a specific type of cheese and, therefore, that “Emmentaler” was descriptive.

According to the GC, it is the perception of the relevant part of the public is decisive for the assessment on the descriptiveness of a trademark. Therefore, the GC considered the allegedly unlawful placing on the market of Emmentaler cheese in Germany under the Swiss-German Agreement to be irrelevant.

With “Emmentaler” being descriptive for a type of cheese, also protection as an EU collective mark was denied. A term that is geographically descriptive can in principle be registered as a collective mark, according to Art. 74(2) EUTMR. However, a term that is descriptive of the nature or type of the products, or other characteristics that are not related specifically to the geographic origin, cannot be registered even as a collective mark. Therefore, Emmentaler Switzerland, the Consortium behind the Swiss appellation of origin Emmentaler for cheese, was denied protection for term “Emmentaler” as an EUTM. This is not altered by the fact that objectively, Emmental is a geographical term, Emme being a river in the Swiss canon of Berne, and Tal meaning Valley, or that the term has been used for cheese at least since the 16th century.

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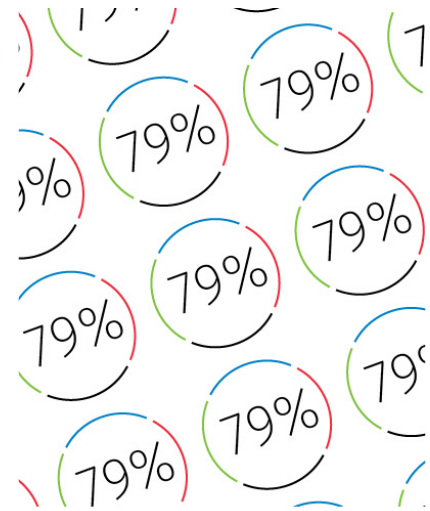
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