



SCIENTIFIC BACKGROUND

EU Health Claim Regulation

The continued use of the
Toothfriendly pictorial trademark



To claim or not to claim?

Dr. Albert Bär explains why the Toothfriendly quality seal may continue to be used in the EU until at least the 19th January 2022.

According to the 2006 EU Health Claim Regulation (EC) No 1924/2006, all health claims that are not specifically permitted or are still under evaluation, had to disappear from the food labels by December 2012. The use of the Toothfriendly mark as a registered trademark may, however, continue uninterrupted until at least the 19th January 2022 according to Article 28 (2) of this Regulation.

Use of the Toothfriendly mark

The Toothfriendly mark has first been registered as a trademark for confectionery in Switzerland in 1982. Corresponding registrations in several EU countries followed subsequently (e.g., Germany in 1986). Since that time the mark has been used continuously and has acquired a high notoriety among dentists and consumers of certain countries, such as Germany.

According to the HRC, trademarks in use prior to 2005 are exempt from the scope of the HCR until 19 January 2022 (Article 28(2), HCR). This exemption of trademarks is not limited to registered trademarks. Hence, the mere use of a word or device mark is a sufficient criterion for the application of Article 28(2).

Being exempt from the scope of the HCR, the HCR, none of the provisions of this Regulation applies to the use of the Toothfriendly mark until 19 January 2022. In particular, there is no need to describe the meaning of the Toothfriendly pictorial mark by a permitted health claim (as laid down



Toothfriendly quality seal may continue to be used on product labels uninterrupted at least until January 2022.

in Regulation (EU) No 432/2012 and to apply the additional labelling statements prescribed in Article 10.2 of the HCR.

However, Toothfriendly International strongly advises users of the Toothfriendly pictorial mark to always supplement this mark with the explanatory term „Toothfriendly“ or the

equivalent term in other languages. This combined use of the pictorial mark together with the corresponding explanatory word has been practiced from the start of the mark in 1982. Hence, we have lived up to the rationale of Article 1.3, HCR, for long before this Regulation was enacted. As a consequence of the persistent use of the term „toothfriendly“ (German:

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„Zahnfreundlich“) in conjunction with the Toothfriendly mark, this term has become an established element of the appearance of the Toothfriendly mark. In other words, the term „Toothfriendly“, if used in conjunction with the Toothfriendly device mark, has acquired the characteristic of a trademark and in such use may be considered to also fall in the scope of Article 28(2), HCR.

From this perspective, it becomes redundant of whether the term „Toothfriendly“, if used in conjunction with Toothfriendly mark, is an acceptable alternative wording of the specifically authorized but not very consumer-friendly health claim, namely *„Consumption of foods / drinks containing < name of sugar replacer > instead of sugar contributes to the maintenance of tooth mineralization“*.

In fact, the term „Toothfriendly“ is included under ID 1283 and ID 1167 in the Annex of the EFSA Opinion EFSA-Q-2008-1906 (EFSA Journal 2011; 9(6): 2229) on which the dental claim is based and it is, therefore, rather unlikely that this claim will appear in the list of explicitly not allowed health claims.

Not directly pertinent from a legal perspective, but nonetheless worth mentioning, is the fact that the use of the Toothfriendly mark (and the associated term „Toothfriendly“) is limited to foods which not only do not depress the pH of the dental plaque below 5.7 but which, moreover, do not have an erosive potential. While EFSA has referred to this additional restriction of use of the dental claim in its Opinion, this restriction has vanished from the approved health claim shown in Regulation (EU) No 432/2012.

The application of the Toothfriendly mark and the term „Toothfriendly“ as requested by our organisation is, therefore, fully in line with the respective EFSA Opinion and, moreover, complies better with Recital 9 and Article 13.1 (ii) HCR than the dental claim of Regulation (EU) No 432/2012.



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Use of the term „Toothfriendly“ in commercial communications to consumers

While the conditions of use of the Toothfriendly mark and the directly associated term „Toothfriendly“ (or equivalent description in other languages) on food labels and associated communications are specified in license agreements between our organisation and the licensees of the Toothfriendly mark, the use of the word „Toothfriendly“ as such cannot be controlled by our organisation.

The word „Toothfriendly“ is considered to be common language and as such cannot be registered as a trademark. If used in isolation, i.e. without a link to the Toothfriendly mark, it may, therefore, fall in the scope of the HCR. However, there exists some uncertainty in this regard because the term „Toothfriendly“ merely stands for „no harm to the teeth“ but does not signify, nor even imply, an active health promoting effect on the teeth.

The „Toothfriendly“ quality of a food is also not related to the presence of a specific substance or food component which would mediate this quality. Rather, the Toothfriendly quality is

the consequence of the absence of certain food components (including but not limited to sugars) which may adversely affect the integrity of the teeth. For this reason, the „Toothfriendly“ benefit can also not be tied to a minimum amount of Toothfriendly food that must be ingested for obtaining the benefit (Article 10.2 b) HCR).

Therefore, the term „Toothfriendly“ may be considered to not be a health claim in the sense of the HCR, nor a so-called comparative health claim, as it has been proposed by EFSA in the early phase of its assessment of health claims. However, in the absence of clarity on this question, it may be wise to use the term „Toothfriendly“ in communication to consumers only in conjunction with and in fact as a descriptor of the Toothfriendly mark.

Conclusion

In conclusion, it is our opinion that the use of the Toothfriendly mark and the associated term „Toothfriendly“ may continue uninterrupted until 19 January 2022. By then, experience with the application of the HCR will be collected and will likely show the way forward beyond this date.