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The law on Geographical Indications and the Common Agricultural Policy.

“I am convinced that the future of European agriculture lies not in quantity exports but in quality, the quality of the European trademark. That is why we are fighting to stop appropriation of the image of our products and improve protection.”

Pascal Lamy.¹

The law on Geographical Indications (GI) for a very long time had not received such strong attention as other branches of Intellectual Property rights.² In the European Community (EC), the GI world frontier, this situation has changed recently. The importance of GI is growing. The proactive Community’s GI lobbying is clearly visible on the World Trade Organisation (WTO) platform, where, in the course of negotiations, the EC with the support of Switzerland presented a number of suggestions to amend the law on Geographical Indications which included:

- extension of protection granted to limited category of products by the Article 23³ of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) to all categories of products;
- establishment of multilateral system of notification and registration of all GI’s;⁴

¹ Cited in B.A. Babcock ‘Geographical Indications, Property Rights, and Value-Added Agriculture’ Centre for Agricultural and Rural Development, Iowa State University http://www.card.iastate.edu/iowa_ag_review/fall_03/article1.aspx accessed 20 May 2008. In his paper B.A. Babcock recognized the potential of protected regional products for American agriculture by saying

“With luck, world prosperity will continue. If it does, then so too will the demand for food items that make up a diversified, high quality diet. One way to ensure that growth in demand for high-quality foods will benefit farmers is to give entrepreneurial farmers greater control over the quality and quantity of the food items they produce. Only then can they guard against imitators, who would overwhelm an otherwise profitable niche market. Increased protection of GI is just the type of support needed by farmers who want to move away from commodities. If we want a more diverse and less subsidized agricultural sector, we might have something to learn from European agricultural policy.”

² B O’Connor *The Law on Geographical Indications* (Cameron May, London 2004) 21

³ Currently at the strength of Article 23(1) of TRIPs Agreement the extended protection is granted to wines and spirits.

“Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by a geographical indication in question of identifying spirits not originating in the place indicated by a geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expression such as “kind”, “like”, “style”, “imitation” or the like.”

⁴ T Josling, ‘Presidential Address The War on *Terroir*: Geographical Indications as a Transatlantic Trade Conflict’ (2006) 57 *Journal of Agricultural Economics* 358

- preparation of a so-called 'claw-back' list which includes many European GI products the Community wishes to protect worldwide.⁵

Even though no record of any notable progress concerning the extension of the protection of GIs to products other than wines and spirits has been made,⁶ the Community seems to be determined to keep the issue alive.⁷ Not waiting for the outcome of the WTO talks the EC has negotiated bilateral treaties with Australia, Chile and South Africa, and by doing so strengthened its position in multilateral talks.⁸ Internally, in 1992, the law on GI became a part of the Common Agricultural Policy⁹, and supplementing sub-policies, e.g. From Farm to Fork.¹⁰

While tracing and reviewing the evolution in perception of the law on Geographical Indications in Europe it is important to embrace in discussion legal as well as extralegal factors which have influenced the process in question. The author claims that, in the case of GIs, it is not the law that has changed the reality, but that the law is used to institutionalize changes which in fact have already been taking place.

As a starting point for the discussion the author has chosen the Common Agricultural Policy, in order to provide the political background and framework for further deliberation circulating around the law on Geographical Indications in the European Community.

⁵ S Badoni, 'What's in a name' in 'WTO members set for showdown' [2004-2005] Managing Intellectual property 29

⁶ G E Evans and M Blakney, 'The protection of Geographical Indications after Doha: Quo Vadis?' [2006] Journal of International Economic Law 4

⁷ In the speech 'A changing European agricultural policy in a changing world', during an official visit to the Chinese Academy of Agricultural Sciences M.Fischer Boel, the member of the Commission responsible for agriculture, said:

"I am convinced that our agri-food sector could supply even more products that Chinese consumers could enjoy. Among these are high-quality items. Here I'm thinking in particular of 'geographical indications' – product names which refer to a particular place and signal special characteristics. 'Parma ham' and 'Champagne' are well-known examples. Chinese agriculture competes effectively thanks to a range of advantages. We want European agriculture to be able to play to its advantages, one of which is the generations of expertise and tradition which have gone into our food and drink. Clear recognition of the names of these products is essential to that strategy."

<<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/445&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 1 July 2008

⁸ T Josling, 'Presidential Address The War on *Terroir*: Geographical Indications...', loc. cit. 346

⁹ European Commission, Agriculture and Rural Development, 'The Common Agricultural Policy Explained' <http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf> accessed 20 May 2008

¹⁰ <http://ec.europa.eu/publications/booklets/move/46/en.pdf>

1. The Common Agricultural Policy

The policy regulating the sector of agricultural production was one of the first of the national policies subjected to Community regulations – from the Treaty of Rome, called the Common Agricultural Policy (CAP).¹¹ The basic assumptions of the early CAP were:

- better agricultural productivity securing stable access to affordable food;
- fair standard of living for farmers;
- improvement of agricultural productivity through technical progress and development of more rational production systems that would employ resources more effectively.¹²

The emphasis put on an increase in production expressed in points one and three was justified at that time by a difficult economic situation and a commodities undersupply in the post-war era. In order to improve the situation in the agricultural sector, the Community developed a very wide range of supportive measures to achieve a dynamic intensification of farming. New methods of production were introduced such as mechanised equipment and chemical fertilizing¹³ which were accompanied by intervention purchases, import tariffs, export subsidies and price support in almost all categories of produce.¹⁴

All factors mentioned above rendered the CAP very successful in meeting its objectives. The EC trading position has changed massively, from the world's largest importer of temperate-zone agricultural products to the world's second largest exporter of commodities.¹⁵ The increase in production was achieved and reached such a high level that the Community market became oversaturated. In order to sell

¹¹ European Commission, Agriculture and Rural Development, 'The Common Agricultural Policy Explained', loc. cit.

¹² Economic Research Service/USDA, 'The European's Union Common Agricultural Policy: Pressures for Change – and overview.' <<http://www.ers.usda.gov/publications/Wrs992/Overview.pdf> > accessed 20 May 2008

¹³ H Nilsson, 'What are the possible influences affecting the future environmental agricultural policy in the European Union? An investigation into the main factors' (2004) 12 Journal of Cleaner Production 462

¹⁴ S. Weyerbrok, 'Reform of the European Union's Common Agricultural Policy: How to reach GATT compatibility?' (1998) 42 European Economic Review 376

¹⁵ Economic Research Service/USDA, 'The European's Union Common Agricultural Policy: Pressures for Change – and overview.', loc. cit.

commodities abroad the EC had to subsidize agricultural production¹⁶ as to maintain competitive produce export prices¹⁷ and secure farmers' income.¹⁸ Moreover only certain types of commodities, e.g. milk, sugar, beef, were subsidized, therefore farmers stayed in those areas of production where demand had become stagnant what in consequence led to chronic surpluses followed by intervention purchasing. That is why constant expenditures on farming caused budgetary crisis.¹⁹ Additionally, the intensive production processes that were implemented severely impacted the natural environment.²⁰

For the Community's policy makers the need to redefine the European agriculture became clear. The rural areas could no longer be perceived as a productive space only but also as a consumptive space for all kinds of new demands. Contemporarily: water supply, natural habitats, tradition, recreation, culture and historical context of land use are perceived as equally important.²¹ Therefore the CAP has been reformed several times²² in light of the new direction - the so-called *European Model of Agriculture* according to which:

“European agriculture as an economic sector must be versatile, sustainable, competitive and spread throughout Europe (including less favourable

¹⁶ The CAP budget costs amounted to for about 70 percent of all EU expenditures in 1996. see: Economic Research Service/USDA, 'The European Union's Common Agricultural Policy...', loc. cit.

¹⁷ *ibid*

¹⁸ European Commission, Agriculture and Rural Development, 'The Common Agricultural Policy Explained', loc. cit.

¹⁹ Economic Research Service/USDA, 'The European Union's Common Agricultural Policy: Pressures for Change – and overview.' <<http://www.ers.usda.gov/publications/Wrs992/Overview.pdf> > accessed 20 May 2008

²⁰ According to Nilsson, agriculture predominantly caused: “the loss of biodiversity due to the degradation of habitats and the loss of genetic diversity with the spread of monoculture strains; soil degradation through erosion, loss of fertility, salinisation and desertification; air pollution from the use of fossil fuels and pesticide sprays; the effect on water quality and availability as aquifers are depleted, surface and groundwaters are contaminated by pesticide and fertiliser run-off, eutrophication and sediment pollution from soil erosion; and the effects on our own health through nitrate contamination of drinking water, pesticide residues in the environment (food, air, water), and bacterial contamination of meat.” H Nilsson, 'What are the possible influences affecting the future environmental agricultural policy...', loc. cit. 462

²¹ G Van Huylenbroeck and G Durand (ed.) *Multifunctional Agriculture: A New Paradigm for European Agriculture (Perspectives on Rural Policy and Planning)* (Ashgate, Hampshire 2003) 1-2

²² Currently farmers are receiving decoupled support payment, not production premiums as previously. They are encouraged to explore the market to satisfy consumer's expectations because their payments are not dependent, with certain exceptions on current production decisions. see: T Josling, 'Presidential Address The War on *Terroir*: Geographical Indications...', loc. cit. 359

To be eligible for payments, environmental, food safety, and animal health and welfare standards have to be met. Farmers who fail to do this will face reductions in their payments. see: E Schmid and F Sinabell, 'On the choice of farm management practices after the reform of the Common Agricultural Policy in 2003' *Journal of Environmental Management* 82 (2007) 332

mountainous regions). It must be capable of maintaining the countryside, conserving nature and making a key contribution to the vitality of rural life, and must be able to respond to consumer concerns and demands regarding food quality and safety, environmental protection and the safeguarding of animal welfare.”²³

The expectation to redefine the rules governing the agricultural sector also came from the EC citizens for whom the quality of products has become more and more important.²⁴ Consumers started demanding that products intended for consumption fulfil dietary, hygienic, and health standards, which is why much more attention has been paid to production methods and origin of food. The rising importance of high quality, renowned food has also proven to be beneficial for producers, who by aiming at qualitative production or diversified output have found the alternative for increasingly less profitable subsidies-based food production.²⁵

In order to help farmers meet new challenges the EC has introduced, into its legal system, voluntary food-quality schemes accompanied by ‘quality logos’, which constitute complementary elements of conducted reforms, i.e. organic farming and Geographical Indications. Thanks to this, farmers have been given the opportunity to maximise the value of agricultural output by capitalizing on established product reputation among consumers, and at the same time preserve: local traditions, diverse agricultural production, and respect for the environment.²⁶ It can be acknowledged that the GI regime has become a part of the Community’s strategy aimed at improvement of competitiveness of the agricultural sector. For the purpose of this article only the law on Geographical Indications will be discussed.

²³ H.J. Westhoeck, M van den Berg and J.A. Bakkes, ‘Scenario development to explore the future of Europe’s rural areas’ (2006) 114 *Agriculture, Ecosystems and Environment* 8

²⁴ The report published in 2008 revealed that for European consumers the social role of a farmer is to provide in the following order: healthy and safe food which is produced in an environmentally-friendly way, and is endowed with high quality. <http://ec.europa.eu/agriculture/survey/fullreport_en.pdf> accessed 19 May 2008

²⁵ H Nilsson, ‘What are the possible influences...’, loc. cit 465

²⁶ Fact Sheet, ‘European Policy for Quality of Agricultural Products’ <http://ec.europa.eu/agriculture/publi/fact/quality/2007_en.pdf> accessed 7 May 2008, see also: M Will, D Guenther ‘Food Quality and Safety Standards as Required by EU Law and the Private Industry’ *A Practitioners Reference Book*. 2nd edition 2007 <<http://www2.gtz.de/dokumente/bib/07-0800.pdf>> accessed 19 May 2008

2. Geographical Indications.

The system known as the law on Geographical Indications comprises three elements: Protected Designations of Origin, Protected Geographical Indications and Traditional Specialities Guaranteed.²⁷ It was inspired by existing national systems, e.g. the French *Appellation d'Origine Contrôlée* and the Italian *Denominazione d'Origine Controllata*,²⁸ and codified in two EEC regulations 2081/92 and 2082/92 which after a few years of legal existence were replaced by currently-binding law.

In March 2006 new Council regulations (EC) 509/2006 and 510/2006, related to GI protection, came into force. The major differences between those are as follows:

- the European Commission will not examine the whole application as before, but only its main elements²⁹; and
- producers from non-EU countries may lodge an application directly to the Commission, not via national government channels, as previously.

The change was the result of a dispute which took place in the WTO arena between the EC on one side and Australia with the United States on the other. According to representatives of those countries, previously binding EC regulations discriminated against non-EC producers by conditioning the registration of their products in the EC on the existence, in third country legal order, the equivalent GI protection to that granted by the European Community.

The fact that the EC regulations in point were challenged has proven that the EC has created the most elaborate system of GI protection, perceived by external actors as posing a threat to competition between agricultural producers. In fact, the EC introduced it because GI protection started to be perceived as an effective tool to make its agriculture more diversified and profitable, and to enhance its chances as a competitor in the international arena.

²⁷ <http://ec.europa.eu/agriculture/foodqual/quali1_en.htm> accessed 7 May 2008

²⁸ Fact Sheet, 'European Policy for Quality of Agricultural Products', loc. cit.

²⁹ Currently the Member State is responsible to give an application a vetting according to the EU guidelines in order to exempt the Commission to conduct all examination procedure again. see: Fact Sheet, 'European Policy...', loc. cit

However, thirty years ago, after the *Cassis de Dijon* case, the EC believed that there was no need to develop specific food regulations except those required for the protection of public health. This issue will be presented in more details in the next section of the paper.

a. Before 1992

Before regulations 2091/1992 and 2092/1992 came into force the EC food law had been concentrated on the obligations enshrined by Article 3³⁰ of the Treaty of Rome to ensure the free movement of foodstuffs throughout the common market.³¹ At the Community level, only the rules governing the sector of quality wines had been codified.³² However, after the *Cassis de Dijon*³³ case the need to discuss a future of the food law in the Community became evident. In this judgment the European Court of Justice stated that by introducing the fixed rules regulating food standards, in this case minimum alcohol content in a spirit, Germany rendered the sale of a well-known spirit from the other Member State impossible and by doing so Germany infringed the principle of free movement of goods.³⁴ In other words Member States were requested to recognize their food standards as equivalent to prevent creating trade barriers among them in the future.³⁵

The judgment resulted in issuance of the Commission's Communication presenting its stand on the future of food law. According to the wording of the Communication the Commission rejected the idea of developing very detailed regulations on the composition and characteristics of foods because:

³⁰ Article 3 of The Treaty of Rome:

” For the purpose set out in Article 2 [establishing a common market, emphasis added], the activities of the Community shall include, as provided by this Treaty and in accordance with a timetable set out therein:

• (a) the elimination as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect...”

³¹ R O'Rourke, *European Food Law* (Sweet & Maxwell London, 2005) 3

³² Council Regulations: 817/70 of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions, OJ L 99, no longer in force. 338/79 of 5 February 1979 laying down special provisions relating to quality wines produced in specified regions, OJ L 54, no longer in force. 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions, OJ L 84, no longer in force.

³³ Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649

³⁴ *ibid*

³⁵ B O'Connor, *The Law on Geographical Indications* (Cameron May, London 2004) 125

- it would be “neither possible nor desirable to confine in a legislative straightjacket the culinary richness of...European countries;
- legislative rigidity concerning product composition prevents the development of new products and is therefore an obstacle to innovation and commercial flexibility;
- the tastes and preferences of consumers should not be a matter for regulation.”³⁶

The only aspects of food law, which according to the Commission were worth regulating, were:

- protection of public health;
- consumers protection;
- fair trading; and
- public controls.³⁷

Although, the Commission was determined to narrow the scope of food legislation to the above mentioned issues, the strong pressure from small scale producers of typically local products to some form of protection from industrial farmers,³⁸ and consumers demand for safe, environmentally-friendly food³⁹ led to passing two regulations on the quality of food - EEC regulations 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and 2082/92 on certificates of specific character for agricultural products and foodstuffs.

b. After 1992

Currently the system is codified in the following: Council Regulation (EC) No 510/2006, 20th March, *on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*,⁴⁰ and Council Regulation (EC),

³⁶ Communication from the Commission to the Council and to the European Parliament of 8 November 1985 on the Completion of the internal market: Community legislation on foodstuffs. COM (85) 603, 9
³⁷ *ibid* 6

³⁸ B O'Connor, *The Law on Geographical Indications...*, loc. cit. 127

³⁹ The result of EU-wide public opinion poll showed that: 91% of EU citizens polled wanted EU agricultural policy to provide safe food, 89% wanted it to protect the environment and sustainability for 79% stable and fair farmers' income was important. See: R O'Rourke, *European Food Law* (Sweet & Maxwell, London 2005) 117

⁴⁰ Council Regulation (EC) No 510/2006, 20 March 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93/12

No 509/2006, 20th March, *on agricultural products and foodstuffs as traditional specialities guaranteed*.⁴¹ The above regulations however, are not applicable to wines and spirits except wine vinegar.⁴² Wines and spirits are covered by Council Regulation (CE) No 1493/1999, 17 May 1999, *on the common organisation of the market in wine*.⁴³

The EC system comprises three elements: Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) – Regulation 510/2006 and Traditional Speciality Guaranteed (TSG) – Regulation 509/2006. In accordance with Regulation 510/2006, PDO and PGI are the names of a region, a specific place or in limited cases the name of a country, with small exceptions,⁴⁴ used to describe an agricultural product and foodstuff.⁴⁵

The application for the GI protection ought to be lodged by a group of applicants which is understood as any association irrespective of its legal form. In exceptional situations a single natural or legal person can be treated as a group.⁴⁶ It shall include at least: the name and address of the applicant group, the specification of the product, any appropriate specific rules concerning packaging and labelling, and the description of the link between the product and its geographical environment or origin.⁴⁷ The application is addressed to the Member Country in which the geographical area is situated. The Member Country in question is responsible for scrutinizing whether the application is justified and meets the conditions of the Regulation. A successful document is forwarded to the Commission, which within twelve months shall decide either to publish it in the Official Journal of the European Communities or reject the application. After the publication anyone with a legitimate interest including other Member States or third countries is eligible to object the registration within a period

⁴¹ Council Regulation (EC) No 509/2006, 20 March, on agricultural products and foodstuffs as traditional specialities guaranteed. [2006] OJ L 93/1

⁴² Article 1, 510/2006, loc. cit.

⁴³ Council Regulation (CE) No 1493/1999, 17 May 1999, on the common organisation of the market in wine [1999] OJ L 179.

⁴⁴ The term can be registered even if it does not refer to a geographical region but is strongly associated with such, e.g. French Reblochon cheese. See: T. Josling, 'What's in a name? The economics, law and politics of Geographical Indications for food and beverages'

<<http://ideas.repec.org/p/iis/dispap/iisdp109.html>> accessed 4 February 2008

⁴⁵ Article 2, 510/2006, loc. cit.

⁴⁶ Council Regulation (EC) No 510/2006, loc. cit. Article 5(1)

⁴⁷ Article 5(2), 510/2006, loc. cit.

of six months.⁴⁸ If no objections are made the product is included on the register of Protected Designations of Origin and Protected Geographical Indications.⁴⁹

According to the regulation the product is protected against any practice liable to mislead the consumer as to the true origin of the product, for example: any direct or indirect use of the registered name by a product not covered by the registration or by any misuse or imitation not only in a language of the application but also in translation.⁵⁰

The final registration of a product does not mean that the whole struggle around the designation has ended. From the moment of registration producers are obliged to subject their product under controls conducted by certification bodies,⁵¹ which are entitled to verify the product compliance with the specification. Non fulfilment of the specification's requirements may lead to the cancellation of the registration.⁵² In principle, however, the designation should be protected as long as the link between a product and the geographical area exists.

Products affixed to the PDO sign have to be produced, prepared, and processed in designated geographical area and their quality should be determined by either natural/geographical factors such as climate, soil etc. or by human factors such as local know-how. Whereas, the PGI sign is for products produced in the indicated area but not necessarily prepared and processed there, additionally, the existence of a link between the quality and the place is not required.⁵³

As mentioned above, to be eligible for the protection a product must comply with specification. The specification shall include at least:

- the name of the product;
- detailed description of the product including the raw materials and if appropriate, its physical, chemical, microbiological or organoleptic characteristics;

⁴⁸ Article 6, 510/2006, loc. cit.

⁴⁹ Article 7(6), 510/2006, loc. cit.

⁵⁰ Article 13(1), 510/2006, loc. cit.

⁵¹ According to the Article 10, 510/2006, the Member State shall designate the competent product certification bodies, and make sure that any operator is entitled to be covered by a system of officials controls.

⁵² Article 12, 510/2006, loc. cit.

⁵³ L Bently and B Sherman, *Intellectual property* (OUP, Oxford 2001) 969

- the definition of geographical area and evidence that the product originates from there;
- a description of the method of obtaining, if necessary, packaging and labelling the product;
- a justification of the existence of the link between the defined geographical area and the quality of characteristics of the product (PDO) or the area and specific quality or reputation of the good (PGI)

Finally the specification ought to provide information on the name and addresses of the product certification bodies and any other requirements laid down by the Community or national provisions.⁵⁴

Generic names which have become common, even though they refer to a geographical region, cannot be registered either as PDO or PGI. There is an open list of generic names, i.e. new names are added whenever they become known. This happens predominantly during the application procedures.⁵⁵ The homonymous names cannot be registered unless they are unlikely to mislead the consumers as to the true identity of a product.⁵⁶

Regulation No 509/2006 states that as Traditional Speciality Guaranteed only products, which possess features that distinguish them clearly from other similar products in the same category can be registered. Additionally, the product can be registered as traditional only if its usage in the Community's market can be dated back 25 years.⁵⁷ Unlike PGO and PGI – TSG products do not have to possess a reputation attributable to the place of origin. They need to be made from traditional raw materials or possess a traditional composition or be produced and/or processed in a traditional way.⁵⁸ There is also a requirement for interested parties to produce the specification of a product. The specification's components are very similar to those set out in 510/2006 regulation except here operators shall define and prove the specific character of the product.⁵⁹ The registration procedure and post-registration

⁵⁴ Article 4, 510/2006, loc. cit.

⁵⁵ T Josling, 'What's in a name?...', loc. cit.

⁵⁶ Article 3, 510/2006, loc. cit.

⁵⁷ Article 2, 509/2006. loc cit.

⁵⁸ Article 4, 509/2006. loc cit.

⁵⁹ Article 6, 509/2006, loc. cit.

obligations remain similar to the one established for the purpose of PDO's and PGI's, with respect to specificity of Traditional Specialities.

3. The role of the European Court of Justice

Discussing the law on Geographical Indications in the European Union, one cannot forget about the role of the European Court of Justice (ECJ) in developing the concept of GIs and strengthening the protection over codified law. A number of vital judgments will be presented below in order to provide stronger evidence for growing importance of regional products in the Community.

a. Before 1992

Sekt/Winebrand

The European Court of Justice dealt with the issue of geographical indications for the first time in 1975.⁶⁰ This was the *Sekt/Winebrand*⁶¹ case, lodged by the Commission on the European Communities against Germany. The Commission claimed that the legislation reserving the names *Sekt* and *Winebrand* for sparkling wines and brandies originating exclusively in Germany or German-speaking countries was contrary to the EEC Treaty obligation, which prohibited the introduction of measures having equivalent effect to quantitative restrictions on imports. According to the Commission, the appellations *Sekt* and *Winebrand* had become generic and Germany had attempted to transform them, by means of legislation, into indirect indications of origin, thereby strengthening the position of domestic products on the market. The legislation, in fact, acted as a barrier to free trade within the Community and constituted a breach of the principle of free circulation of goods. The German government maintained that products covered by the appellation *Sekt* and *Winebrand* were distinct from those made by other producers thanks to the particular method of production used in Germany. The Court rejected the German argument concerning the specific method of production by saying that this as such did not determine the taste of the wine, as in this case the strain of grapes was equally important. Furthermore,

⁶⁰ <<http://oami.europa.eu/en/mark/aspects/ecj-2.htm>> accessed 30 April 2008

⁶¹ Case C 12/47 Commission of the European Communities v the Federal Republic of Germany ECR [1975] 181

the Court stated that a national territory or linguistic criterion could not justify the protection of geographical indication within the meaning of appellations of origin. However, it is worth noting that the Court acknowledged that ‘the protection accorded by the indication of origin is only justifiable if the products concerned actually possess characteristics which are capable of distinguishing them from the point of view of their geographical origin.’⁶² The necessity of existence of a link between a geographical area and the specific character of a product later became a basis of Community law regulating GI.

Rioja

A subsequent important judgment for the creation of GI law was issued in the *Rioja*⁶³ case, where the ECJ found a Spanish Royal Decree laying down the rules governing designations of origin contrary to EC law as it constituted measures having equivalent effect to quantitative restrictions on exports, prohibited by EEC Treaty.

The rules of the Decree limited the quantity of wine available for export in bulk, in contrast to the wine bottled by vineyards situated within the region of production, i.e. the wine bottled within the region could be sold abroad without any restrictions. Moreover, in the Court’s opinion, bottling of the wine in question within the area of production did not qualify as a condition *sine qua non* for endowing the wine with distinct characteristics. That is why the introduction of the specific provisions of the Royal Decree was contrary to Treaty rules on the free movement of goods among Member States.

b. After 1992

In 1992 new law on PDO’s and PGI’s came into force, and the agricultural sector had undergone number of reforms. A new quality-based agenda for farming was established. Therefore the ECJ itself redefined its conceptual approach to the issue in question.

Exportur

⁶² Case C 12/47 Commission of the European Communities v the Federal Republic of Germany, loc. cit. par.12.

⁶³ Case C 47/90 Etablissements Delhaize v Promalvin SA ECR [1992] I-3669

In the *Sekt* case, the ECJ suggested that GIs could be granted protection if they possessed specific characteristics thanks to the geographical area they came from. In *Exportur*⁶⁴ case, the Court went further. The background of the case was as follows: France and Spain had signed a bilateral agreement on the protection of geographical indications. That agreement provided for a prohibition on the use of the designations *Turróns de Alicante* and *Turróns de Jijona* for non-Spanish turrón products. Despite the regulation, French manufacturers continued to use those indications to mark their confectionery products, which led to the dispute between the two countries. Before the ECJ, the French side claimed that because the specific taste of *Turrón* products was not due to their geographical origin, the protection of the designations in question and the Spanish opposition to the use of these names by French producers, was unjustified. The ECJ rejected the French arguments. It acknowledged that GI products which did not owe particular characteristics to their land of origin could not be denied protection if they cherished a high reputation among customers, provided that they had not become generic. Currently, the prerequisite of the existence of a link between product uniqueness and the place of origin is required only in the case of one category of products which fall under GI regulation, i.e. Protected Designations of Origin. In the case of Protected Geographical Indications and Traditional Specialities Guaranteed the fact that a product enjoys a high reputation among customers, and therefore its name is associated with quality, is equally important and sufficient to grant protection.

Rioja II

For the second time, Spanish GI legislation was challenged before the ECJ in 1995.⁶⁵ The Kingdom of Belgium claimed that Spain had not annulled the Royal Decree according to which wine, in order to be marked with ‘denomination de origien callificada’, had to be bottled in cellars at the place of origin, which consequently forced importers to buy more expensive wine by the bottle rather than in bulk.

⁶⁴ *Exportur SA v LOR SA and Confiserie du Tech SA* ECR [1992] I-05529

⁶⁵ Case C-388/95 *Kingdom of Belgium v Kingdom of Spain*,

<<http://oami.europa.eu/en/mark/aspects/pdf/JJ950338.pdf>> accessed on 29 May 2008

Belgium supported by other states⁶⁶ engaged in the dispute, recalled the previous *Rioja* judgment, wherein the ECJ acknowledged that the Spanish regulation constituted measures having equivalent effect to restrictions on export, and demanded recognition that Spain had failed to fulfil its obligations under Article 5⁶⁷ of the Treaty. In this case, however, the ECJ concurred with Spain's argument, and stated that, not only was the requirement of the decree in question justified on grounds relating to the protection of industrial and commercial property referred to in Article 36 of the Treaty, but also that:

“Community legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through, *inter alia*, the use of designations of origin which enjoy special protection. The general tendency has become apparent in the quality wines sector (...). It has also emerged in relation to other agricultural products, in respect of which the Council adopted Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.”⁶⁸

Parma Ham

A subsequent important case dealing with the issue of GIs is *Consorzio del Prosciutto di Parma v. Asda Stores Ltd, Hygrade Food Ltd*.⁶⁹ Asda Store Ltd – the chain of supermarkets operating in the United Kingdom had been purchasing from Hygrade Foods Ltd, pre-sliced Parma Ham in packages which bore the sign ‘ASDA A taste of Italy PARMA HAM Genuine Italian Parma Ham’. The Hygrade company had bought the ham from an Italian producer – a member of the Consorzio, and then undertook slicing, packing and labelling and for Asda supermarkets.

⁶⁶ Denmark, Netherlands, Finland, United Kingdom, Case C-388/95 Kingdom of Belgium v Kingdom of Spain, loc. Cit.

⁶⁷ Article 5 “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.”

⁶⁸ Case C-388/95 Kingdom of Belgium v Kingdom of Spain, loc. cit.

⁶⁹ Case 108/01 Consorzio del Prosciutto di Parma Salumificio S.Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd <<http://oami.europa.eu/en/mark/aspects/pdf/JJ010108.pdf>> accessed 29 May 2008

The Consorzio brought proceedings against the defendants in the United Kingdom, seeking injunction to prohibit their activity on the ground that their activity infringed the product specification. According to the specification Parma Ham, registered as the PDO, had to be sliced and packed in the region of production in order to guarantee the best quality of the product. In the first and second instances the Consorzio's motion was dismissed. Thereafter the Consorzio appealed to the House of Lords. The House of Lords directed a preliminary question to the ECJ concerning the appellant's ability, under the EC Regulation, to restrain the retail sale of Parma Ham which had not been processed in accordance with the specification.

Answering the question the Court repeated after the second *Rioja* judgment:

“Community legislation displays general tendency to enhance the quality of products within the framework of common agricultural policy in order to promote the reputation of those products through *inter alia* the use of designations of origin which enjoy special protection. [This tendency] was also manifested ... in the adoption of Regulation No 2091/92, which according to its preamble, is intended *inter alia* ...to enable producers, in condition of fair competition, to secure higher incomes in return for a genuine effort to ensure quality.”⁷⁰

The Court continued that, in regard to the essence of Regulation 2091/92, the PDO sign might appear only on a product which complies with the specification, the function of which is to safeguard the quality and authenticity of the product. Therefore, the standards of production set out in the specification are binding not only for authorized producers but also for those from outside the designated area.

Feta

The dispute over *Feta* cheese revolves around the problem of assessing genericness mainly, however, it touches deeper problem that is the limit of protection granted by the GI legislation.

⁷⁰ Case 108/01 Consorzio del Prosciutto di Parma Salumificio S.Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd, loc. cit, par. 63

Greece, after eight years of soliciting for protection, finally registered the cheese under the Community regulation. The saga started in 1994 when Greece set up the *Feta* denomination of origin on its territory and at the same time applied for protection for the cheese as a PDO product, on the European level.⁷¹ In response the Commission said that there was a possibility that *Feta* had become generic and as such was unprotected by the EC regulation, which is why additional examination of the application was undertaken. The Commission conducted surveys in twelve Member States on the basis of which *Feta* was declared not to be generic.⁷² The decision of the Commission resulted in immediate application for annulment from Denmark, Germany and France – the biggest producers of *Feta* in the EC which was brought before the ECJ. Those countries requested not only to erase the name *Feta* from the PDO register but also to answer whether the name in question had become generic.⁷³

The Court did not give an answer concerning genericness, instead it annulled the registration on the basis of misconduct of the Commission while examining the application in the first place. Therefore the possibility to re-examine the application remained open. That is why the Commission scrutinized the request again, and again recognized the cheese as not generic. On October 14th 2002 *Feta* acquired the status of Protected Designations of Origin.⁷⁴

This judgment revealed that drawing a borderline between protectable and non-protectable products is almost impossible. Immediately a question arises: whether following this trend would render it possible to protect names such as *Gouda*, *Camembert*, *Dijon*, or even *Vodka*. All of them are probably still associated with a particular country, which might be possible to prove by using a carefully-designed sample of subjects polled.

⁷¹ B O'Connor and I Kireeva, 'What's in a Name? The "Feta" Cheese Saga (2003) 9 International Trade and Law Review 111

⁷² Regulation 1107/96 on the registration of geographical indications and designations of origin laid down in Article 17 of Council Regulation (EEC) No 2081/92

⁷³ Joined cases C-289/96, C-293/96, C-299/96 Kingdom of Denmark, Federal Republic of Germany, French Republic v Commission of the European Communities

<<http://oami.europa.eu/en/mark/aspects/pdf/JJ960289.pdf>> accessed 20 May 2008

⁷⁴ B O'Connor and I Kireeva, 'What's in a Name?...', loc. cit. 14

Altogether, it can be deduced from the presented judgments that the law on GIs has become a valuable complementary element of the CAP with the potential to support the implementation of the following agricultural principles: reduction of budgetary costs, reduction of production surpluses, greening of the agricultural agenda,⁷⁵ enhancing the high quality of food, maximising the value of agricultural output, enhancing sustainable rural development, supporting rural diversity and social cohesion, promoting new job opportunities in agriculture, preserving local culture and traditions.⁷⁶

Summary

The introduction of the GI system to internal legal orders has shifted the responsibility for ensuring its effectiveness to the Member States. Therefore Member States are obliged by legislative and financial means to create all necessary regulatory tools and procedures for recipients interested in participation in the GI.⁷⁷ Furthermore, the production of regional specialities activates producers from certain geographical areas who, thanks to joint entrepreneurship, are able to launch their products on to the market and capitalize on them, whereas acting alone they would not be able to do so. Moreover, protected products are predominantly sold at a higher premium than non-protected equivalents, e.g. *Toscana* oil is sold at a premium of 20%, French chicken - *Poulet de Bresse* - has a market price 4 times higher than regular. For countries such as France, Spain and Italy - leaders in the field - the GI products constitute a significant matter for their economies, for example in 2003, French GIs generated 19 billion euros in value, in Italy 12 billion, Spain 3.5 billion, and in Italy alone approximately 300,000 people were employed in this sector.⁷⁸ In most cases, GI production is not as intensive as industrial farming, which is why there is less risk of overproduction. Additionally successful enterprises have the potential to activate the local community and stimulate the interest of a diversified set of players.⁷⁹ These activities and interests may be focused on preserving attractive landscapes and developing recreation opportunities or agro-tourism, which consequently enhance

⁷⁵ H Nilsson, 'What are the possible influences...' loc. cit, 465

⁷⁶ Fact Sheet, 'European Policy for Quality of Agricultural Products', loc. cit.

⁷⁷ Guide to Community Regulations, 'Protection of Geographical Indications...', loc. cit

⁷⁸ <http://ec.europa.eu/trade/issues/sectoral/intell_property/argu_en.htm>

⁷⁹ G Van Huylenbroeck and G Durand (ed.) *Multifunctional Agriculture: A New Paradigm for European Agriculture (Perspectives on Rural Policy and Planning)* (Ashgate, Hampshire 2003) 74

affluence of the region concerned. Controls over production processes and final products ensure the preservation of food quality. Preparing an application for registration requires a historical enquiry in order to prove food origin and its traditional character. This kind of research broadens the knowledge of interested parties, who very often discover the richness and uniqueness of their locale and become able to pass this knowledge on to the next generation.

Because GIs are included in Rural Development policy for the period 2007-2013⁸⁰ as an element used to secure the main assumptions of the strategy, it can be said that GIs, from an almost neglected area of IP rights, have been converted into an indispensable tool for achieving major goals of future European Agriculture, which are as follows:

- improved competitiveness of the agricultural sector;
- improved environment and the countryside;
- improved quality of life in rural areas and diversification of the rural economy.⁸¹

The European Community put a lot of effort in positioning itself as the producer of added-value products in the international arena. Internally the ECJ elaborated and strengthened the law on GI, and the European Commission Agricultural Directorate undertook a three-year EC wide campaign under a central theme 'Products with a Story'. The aim of that campaign was to encourage producers to use the Community GI logo and to stimulate demand for GI products among consumers. Unfortunately the success of that undertaking was questionable. A survey of 1,000 people in five European countries revealed that only 17% of those who buy regional products had heard of GIs and understood the concept.⁸²

The future will show if the European GI strategy has a potential to change the shape of European agriculture. GIs are not free from weaknesses, which may impair the whole venture, for example:

- very often consumers do not know that GI products exist; a survey of almost 2,500 consumers conducted across six EC Member States (France, Spain, the

⁸⁰ Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L 277 1-40

⁸¹ http://ec.europa.eu/agriculture/rurdev/index_en.htm

⁸² N Parrot, N Wilson and J Murdoch, 'Spatializing Quality: Regional Protection and the Alternative Geography of Food' (2002) 9 European Urban and Regional Studies 254

United Kingdom, Ireland, Finland, Greece) revealed that only consumers in the first two countries mentioned were aware of, and ready to buy regional products, whereas consumers in the rest of the countries polled had very limited knowledge of typical regional products⁸³

- in countries with strong traditions in regional production consumers do not value European quality logos as much as the national ones⁸⁴
- except wines and spirits only a limited number of the most famous products are purchased by shops with the biggest sell capacity that is by supermarket chains⁸⁵
- the producers who registered products of limited market reach, may not benefit from the GI system at all because the premium they gain may prove to be insufficient to cover all expenses of registration and inspection⁸⁶

Nevertheless, growing consumers' interest with food with a reputable origin allows us to argue that GI products may enter the food market just like organic products have done. Ten years ago organic food was perceived as marginal in the market whereas now it has gained strong recognition.⁸⁷ Moreover, Geographical Indications by the very fact of entering into Community's and member States' political agendas have gained significant importance which is likely to further enhance their privileged position.

⁸³ *ibid* 253

⁸⁴ D Rangnekar, 'The Socio-Economics of Geographical Indications A review of Empirical Evidence from Europe' UNCTAD-ICTSD Project on IPRs and Sustainable Development <http://www.iprsonline.org/unctadictsd/docs/CS_Rangnekar2.pdf >accessed 20 June 2008, p. 15

⁸⁵ N Parrot, N Wilson and J Murdoch, 'Spatializing Quality: Regional Protection...', *loc. cit.* 255

⁸⁶ *ibid* 256

⁸⁷ *ibid* 254

