Food

This section aims at updating readers on the latest developments of risk-related aspects of food law at the EU level, giving information on legislation and case law on various matters, such as food safety, new diseases, animal health and welfare and food labelling.

Geographical indications, “Food Fraud” and the Fight Against “Italian sounding” Products

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I. Introduction

Food producers and consumers are confronted with ever-growing choices and increasing competition within the EU and around the world. This has already led to various cases of food fraud and a call for political and legal action. Food fraud can be defined as “the deliberate and intentional substitution, addition tampering or misrepresentation of food, food ingredients or food packaging, labelling, product information, or false or misleading statements made about a food product”\(^1\). Meanwhile, the issue of “food fraud”, by means of employing names, symbols and images of third countries and thereby inducing a false impression on the consumer, appears to have been neglected despite its increasing economic impact.

While the EU recently approved two new Geographical Indications (hereinafter, GIs) from third countries, the issue of the protection of Italian products against “rip-off Italian products” with Italian-sounding names has taken centre-stage again. Italian Members of the European Parliament (hereinafter, MEP) in February 2016 called on the EU to take action against this “odious and unfair commercial practice”\(^2\). Stating that the issue not only affects Italian producers and the entire European agro-food sector, but also the credibility and trust in the products sold on the internal market in general, it was underlined that national solutions and enforcement authorities may not be in the right position to adequately address this issue and that the EU should finally step in. This is obviously not limited to Italian products, though the high popularity of Italian specialty products and their reputation make them a popular target of like-products around the world.

II. Background

The delicate issue of protecting certain products through GIs plays a major role in the EU’s internal policies, as well as in ongoing trade negotiations. In the EU, Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs\(^3\) maintains the protection of GIs. This regulation designates two types of GIs: 1) a Protected Designation of Origin (hereinafter, PDO), which applies to foodstuffs that are produced, processed and prepared in a given geographical area using recognised “know-how”; and 2) a Protected Geographical Indication (hereinafter, PGI), which indicates a link with the area in at least one of the stages of production, processing or preparation. Additionally, names that have become generic (e.g., Dijon mustard) and names that conflict with the name of a plant variety or an animal breed and as a result are likely to mislead the consumer as to the true origin

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1 See Francesco Montanari, Cesare Valsallo, Daniele Pisanello, Food Fraud in the EU, 7 EJRR (2016), pp. 197 et sqq.


4 OJ 2012 L 343/1.
of the product may not be registered as GIs in the EU.\(^5\)

While the issue of “Italian sounding” products has been raised in the past,\(^6\) an increasing economic impact suggests that it may now be time for the European Commission to take action on such attacks on the reputation and competitiveness of European agricultural and food products. The continuous granting of GIs to products originating in third countries should, therefore, go hand-in-hand with the enhanced protection of products originating in the EU, be it in the internal market or beyond. The importance of the issue of GIs can be witnessed by the European Commission’s recent approval, on 18 February 2016, of two products from Cambodia and Turkey to the register of PDOs. Until now, only 23 geographical indications originating from third countries were approved for registration in the EU. Such products benefit from the same level of protection and added-value on the market as over 1,300 products originating in the EU that are already protected.\(^7\) More specifically, the recently added GIs include pepper berries from Cambodia and dried figs from Turkey. The “Mech Kam/ Poivre de Kam/” are pepper berries of the Kamchay and the Lampong varieties originating in southern Cambodia and are the first ever PGI from Cambodia to be registered. At the same time, the European Commission approved “Aydin Incir”, a variety of sun-dried fig that is produced in the Turkish province of Aydin. This is only the second Turkish product to be protected under the EU quality schemes after “Antep Baklava”/“Gaziantep Baklava” (PGI), which was registered in December 2013.

### III. Comment

#### 1. Geographical Indications

The term “geographical indications” emerged, within the context of the WTO, in the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (hereinafter, TRIPs Agreement). A standard level of protection for GIs for all products is provided in Article 22 of the TRIPs Agreement, where the concept is defined as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”. The definition of GIs used in the TRIPs Agreement actually merged several legal concepts. The concept of “indications of source” appears in the Paris Convention for the Protection of Industrial Property of 1883, while the concept of “appellations of origin” appears in the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 and the Lisbon Agreement for the Protection of Appellations of Origin of 1958. When the three concepts are considered together, “indications of source” cover the broadest area because they only require that the product originates in a certain geographical area. For example, a reference that does not imply a particular quality, reputation or characteristic of those products would be an indication of source, but not a GI. However, GIs still cover a broader range of references than appellations of origin because appellations of origin require the specific use of a geographic name.

Many businesses in the EU are harmed by competitors that, instead of using specific protected terms, include on their product labels or marketing material images of famous European landmarks, letters and symbols, general terms or proper names associated to European heritage and colour schemes or images of flags from certain European countries. Most commonly, geographical names are words or combinations of words. However, in certain countries, graphical representations of places, symbols and emblems are accepted as geographical indications.\(^8\) For example, the image of a famous mountain in Switzerland, the Matterhorn, is, under Swiss law, an “indirect geographical indication”, which identifies that a product comes from Switzerland.\(^9\) Thus, the protections afforded to GIs under the TRIPs
Agreement actually include indications other than specific text, such as letters, general text, symbols, images or colours that imply a particular country or place of origin. Nonetheless, in practice, it appears that such an interpretation is rarely, if ever, enforced. Under the protections afforded to GIs in most countries, the use of these terms is generally limited to producers from specific regions that use certain processing techniques.

2. GI protection in the US and apparent food fraud

Although there are similar instances in, inter alia, Australia, Canada and some Asian countries, this analysis focuses (just as a very prominent example and a major market for those kind of products) on the US, which follows a different approach than the EU regarding GIs and the necessary enforcement of the protection of traditional specialty products. This has led to significant confusion among consumers and puts European producers, in particular those offering Italian specialties, in a difficult position. In the US, GIs are recognised as a sub-category of trademarks (i.e., GIs may be registered as “collective” or “certification” marks). Like in the EU, names that have become generic (or names that have already been trademarked) may not receive GI-equivalent protection in the US. A decisive question is whether or not certain terms and names associated with food products are deemed “generic”. Parmesan cheese is a good example. In the EU, Parmigiano Reggiano was granted PDO status in 1996, and according to EU jurisprudence, “Parmesan” in Europe only refers to Parmigiano Reggiano and cannot be used for imitation Parmesan. However, cheese manufacturers in the US claim that parmesan is a generic name for a certain type of cheese, while consumers associate more specific traits with products labelled as such. According to a study commissioned by the Parmigiano Reggiano Consortium, presented in Rome in December 2015 and subsequently also presented in Brussels in early 2016, the use of Italian sounding elements (i.e., flag, monuments, works of art, national symbols) strongly deceives consumers. More specifically, the study surveyed American consumers showing them two distinct packs of “Parmesan” produced in the US. While one pack did not make any reference to Italy, the other pack showed a picture of the Italian flag. 38% of surveyed consumers stated that the product originated in Italy even with respect to the pack without any specific reference to Italy. This can be attributed to the fact that, for 66% of surveyed US consumers, the term “Parmesan” is not generic, but actually identifies a hard cheese with precise geographical origin, identified by 90% as Italian. However, even more notable and showcasing the relevance of Italian sounding elements and their high potential for deception of consumers, 67% of surveyed US consumers believed that the second pack with “Italian sounding” elements (in this case, the Italian flag) was an authentic Italian product.

3. Significant legal and economic impacts

These perceptions have significant consequences for Italian manufacturers and, more generally, affect all countries with traditional foods and regional specialities registered as GIs. Italian producers have been particularly outspoken regarding this issue. This is no surprise, as Italy holds by far the highest number of protected products in the EU. Italy has registered 283 products, followed by Spain with 192. These are staggering numbers, if compared for example to Denmark, which has registered only 6 to date or Latvia, which has registered 5. Some claim that this stark difference in the number of registrations may cause unfortunate differences in the legal protection provided by the courts of individual EU Member

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10 See the commentary available on the WTO website, Module IV, Geographical Indications, available on the Internet at <https://www.wto.org/english/tratop_e/trips_e/hta_docs_e/module4_e.pdf> (last accessed 5 May 2016).


12 According to Article 2 of Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation No 2081/92 (OJ 1996 L 148/1) and to Part A of the annex thereof, “Parmigiano Reggiano” is to be a PDO with effect from 21 June 1996.

13 Case C-132/05, Judgment of the Court (Grand Chamber) of 26 February 2008, Commission of the European Communities v Federal Republic of Germany.

States. The issue of Italian sounding (or any other origin, for that matter) products may not be adequately treated by courts outside of southern Europe, especially due to the unfamiliarity with the issue and the relevant legal frameworks. In fact, the legal framework laid down in Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the so-called “Unfair Commercial Practices Directive”) is quite clear: Article 6(1) states that commercial practice shall be regarded as misleading if it contains false information and is, therefore, untruthful or in any way, including in the overall presentation, thereby deceives or is likely to deceive the average consumer. The enumerated characteristics susceptible to deceive consumers include, in Article 6(1)(b) thereof, the geographical or commercial origin. Additionally, the Food Information Regulation clearly demonstrates the European approach to avoid this kind of “food fraud”. The Food Information Regulation provides that “the indication of the country of origin or of the place of provenance of a food should be provided whenever its absence is likely to mislead consumers as to the true country of origin or place of provenance of that product”. This approach, arguably, does not appear to be recognised in the US.

However, the European Commission repeatedly noted that the primary responsibility for enforcing food law rests with EU Member States. The financial and economic consequences for affected producers are significant. A recent study by the European Union Intellectual Property Office (EUIPO), concluded that counterfeit products covered by GIs in the EU were worth an estimated €4.3 billion in 2014, corresponding to 9% of the total market of GI products in the EU. The estimated negative commercial impact of Italian sounding products is much higher and, according to the Italian MEPS, amounts to €70 billion per year. Indeed, the Italian food industry federation Federalimentare estimated that the impact of this “food fraud” amounted to €18 billion during 2013 with respect to sales in the US alone. With respect to Parmigiano Reggiano, which is frequently the victim of Italian sounding “generics” labelled ‘Parmesan’, according to the Parmigiano Reggiano Consortium, 100,000 tonnes of products are sold in the US alone, which bear the name of ‘Parmesan’ and which include packaging that makes reference to Italy. At the same time, just 6,500 tonnes of legitimate Parmigiano Reggiano were exported from Italy to the US, which amounts to almost 20% of total Parmigiano Reggiano exports. Hence, due to the strong demand for Italian products, as the example of “Parmesan” illustrates, combatting Italian sounding products may lead to a strong boost in demand and may have a significant impact on trade.

Most recently, the issue of GIs has come up in the context of the revived talks about a preferential trade agreement between the EU and MERCOSUR. In particular, due to very close cultural ties, there are many products originally of Spanish origin, most notably Rioja wine and Serrano ham, that appear to be produced under the same name in South America. Therefore, Spain is likely to push for a strong EU approach regarding GIs in the future trade agreement. This especially aims at avoiding that foreign products with the same name enter the EU market, but also at ensuring a fair market access for European specialties. Thus, as this article intends to prove, negotiators should be aware of the anti-competitive situation, faced by European manufacturers of traditional products, when their products are being imported into MERCOSUR Member States. Potential customers must be able to easily distinguish between European and South American products.
4. Other legal concepts

Apart from GI s, there are various other legal frameworks that refer to products’ origin and quality, at various regulatory levels and pursuing specific objectives. These include, most notably, the concept of rules of origins, which is critical to establish the custom treatment and applicable tariffs to traded products, trademarks granted to specific products, as well as the concept of “made in”-labelling, which represents a marking and often a valuable marketing technique, and the more recent proliferation of country-of-origin-labelling (COOL). This diversity of frameworks concerns different aspects of products’ marketability, but the distinctions are not always obvious and may lead to increased confusion and insecurity for consumers. Thus, at least products covered by GI s should allow consumers to clearly and reliably determine the quality and origin of the respective product.

A more appropriate application of the concept of GI s, as articulated in the TRIPs Agreement, would enlarge the focus from the registered terms themselves to include the improper use of indications that reference geographical areas. Therefore, current negotiations for bilateral trade agreements need not only focus on GI s themselves, but also provide for enhanced implementation and protection of protected products. Still, while in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, the EU was able to secure protection for the term “Feta,” albeit only against new producers, it agreed to let those producers use terms such as “feta-like” or “feta-style,” leading to rather limited protection. Government officials and negotiators of future trade agreements should explore further strategies to better recognise the full range of issues and legal questions surrounding GI s. Such strategies may even extend to other legal areas, such as misleading advertising, rules of origin, “made-in”, etc. Another approach for countries, intending to protect and support their regional and national specialties, could be the introduction of an internationally registered trademark managed by a national government.

IV. Conclusion

Regardless of the means, a solution should prevent further “food fraud” by way of use of letters, general text, symbols, images or colours that mislead consumers as to the origin of certain food products. Although various trade agreements, most notably the Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the US and the EU, as well as negotiations between the EU and MERCOSUR, will likely remain in the negotiation stage for at least the remainder of 2016, this is a contentious issue that requires close monitoring from all interested parties. A balance needs to be struck between the too limited de jure protection through GI s and the de facto discrimination stemming from, e.g., Italian sounding products. Alas, a more inclusive approach will be the only way to deliver adequate protection and to boost trade in national/regional Specialty products. Creative approaches exist and can be structured, particularly in trade negotiation contexts. What is needed is a comprehensive strategy, but there is none in sight.