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Abstract

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Keywords

food indications, intellectual property law, jurisprudence, legal information, European law

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THE EUROPEAN OBSESSION WITH FOOD INDICATIONS

RADIM POLČÁK*

Besides trademarks, there are a number of different legal instruments protecting food indications in Europe. By their very nature, these food indications act like intellectual property, while their primary purpose, it is claimed, is to protect consumers. The paper focuses on the theoretical teleology of food indication law and compares it to the actual local, European and international legal, economic and technical effects. It analyses these types of indications that are specifically implemented in European law, i.e. Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialties Guaranteed (TSG).

INFORMATION THEORY OF FOOD INDICATIONS

To understand the function of food indications, it is useful to start by making a few observations about information theory.

Legal informatics is based on the assumption that law can be understood and treated as a type of information system. It uses not just standard methods of jurisprudence, but it also borrows methodological instruments from theoretical and applied cybernetics (discussed below). Its primary aim is to find the most efficient ways of creating and processing legal information, regardless of actual content.

Similarly, the information theory of law uses an analogical methodology background. Its object, however, is not the formal representation of legal rules (statutes, precedents, legal writings, for instance) but rather the actual substance of the applicable law. Consequently, the information theory of law takes mathematically and statistically-based scientific methods and uses them to critically analyse the ways in which legal frameworks are developed and used.

Today, we see cybernetics in its applied forms: informatics; robotics; or mechatronics. Originally, cybernetics was meant by its founder, Norbert Wiener, to be a complex philosophical system, whereas its object of interest was nothing smaller than life itself.¹

While there has been an on-going philosophical quest to understand how life works or how humankind could imitate its unique features, this was a different way to approach these questions through a newly proposed distinct feature of life that could be concisely termed as the ability to counter entropy.² Although individual living organisms have the ability to counter the universal disorganising tendency limited by time, life as such, proved itself able to sustain and develop endlessly. Wiener laid down the foundations of one of most important scientific disciplines on the very simple understanding of the fact that the key factor in countering entropy is information.

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¹ See Wiener, N *Cybernetics: Or the Control and Communication in the Animal and the Machine*. Cambridge: MIT Press, 1961, p 11.

² See for example Schrödinger, E *What is Life*. Cambridge: Cambridge University Press, 1992.

Though information science (or information theory) later developed even more sophisticated meanings of terms like ‘information’, ‘entropy’ or ‘chaos,’ jurisprudence could happily live with the fundamental understanding of information as the opposite of entropy. If information is present in a system, regardless of whether we speak about a hotel room, a piece of meat or a society, the system is organised; that is, resistant to entropy. If anything is left without information, it disorganises in time and tends to result in chaos.

The aim of food indications (and of food indication laws) is simply to provide information to the consumer. Information about the origin of foods is intended to represent the system of production and distribution of food, to allow consumers to make informed choices about food products.

In this respect, food is no different from any other product information. For example, information on food products usually contains information about the source of the foodstuff and the conditions under which it was grown. Product information is based on human involvement in producing the foodstuff. For example, it typically matters to consumers where a winemaker chooses to plant their vines or what fertilisers a farmer decides to use to produce a healthy crop. In addition, product information often contains details relating to human involvement in food production, typically in the phase of final processing of food for consumption.³

The question posed in this paper is to what extent there should be a legal link between information describing the origin of food stuffs and information under which the resulting product is marketed to its potential consumers? In other words, we try to answer the question of whether specific European food indications do (any) good through an examination of the way in which information representing the foodstuff is legally relevant to information describing its origin and production.⁴

THE SYSTEM OF FOOD INDICATIONS IN THE EU

The basic set of legal instruments that are available for food indications is similar in Europe to other parts of the world. From trademarks to appellations of origin to package designs, there are no significant differences between EU Member States and Australia or the U.S. There are also three more sorts of specific food indications more or less unique to the EU and that we chose for particular examination, i.e.:

- Protected Designations of Origin (PDOs);
- Protected Geographical Indication (PGIs); and
- Traditional Speciality Guaranteed (TSGs).

The grounds for the protection of geographical indications and designations of origin were laid down in the EU by Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of

³ Italian cuisine is then typical by focusing on techniques of inserting information into the food at earlier stages of its creation (ie on the quality of ingredients), while eg French cuisine more relies on the ability of a cook to create edible art out of nothing.

⁴ For a comprehensive description of the issue, see for example Moskowitz, H Packaging Research in Food Product Design and Development, Ames: Wiley-Blackwell, 2009, pp 137-210.

geographical indications and designations of origin for agricultural products and foodstuffs.⁵ It contained directly applicable provisions that framed the scope and regime of legal protection of PDOs and PGIs, while it completely excluded wine products⁶ and spirit drinks.⁷ The declared main purpose of this Regulation was primarily to protect consumers namely because:

In view of the wide variety of products marketed and of the abundance of information concerning them provided, consumers must, in order to be able to make the best choice, be given clear and succinct information regarding the origin of the product.⁸

Subsequent desired effects of the Regulation were the limitation of unfairly competitive marking of agricultural goods and foodstuffs, as well as the promotion of diversity in European agricultural production.⁹

The second legislative landmark in the development of the aforementioned indications was Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The Council Regulation further unified the regulatory regime of PDOs and PGIs, together with Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed as the newly introduced and quite unique instrument of TSGs.

Both Regulations were then merged and partly amended in 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. The Regulation aimed to unify the regime of use and registration of PDOs, PGIs and TSGs, including their mutual relations and their relations to other indications used in food industries (e.g. trademarks). The text also reacted on particular problems in the implementation of the aforementioned Regulations caused, namely, by perverting creativity in circumventing respective legal limitations or in parasitical use of protected

⁵ This Regulation was later amended by Council Regulation No 535/97 of 17 March 1997 and Council Regulation 692/2003 of 8 April 2003.

⁶ Product designations and geographic indications of wines and spirits were subject to specific extensive legislation within the EU - product designations were commonly regulated since 1970, while the common system of designations of origins was introduced in 2008. Recently, the grounds for wine indications are laid down in Commission Regulation (EC) No 753/2002 of 29 April 2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products, while indications of spirit drinks are mostly regulated in Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89.

⁷ See Article 1(1) of the Directive No 2081/92. It is a bit paradoxical that the development of this legislation was mostly motivated by circumstances of a landmark case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, better known by the indication of the disputed product as Cassis de Dijon.

⁸ See Para 8 of the Recital to the Directive No 2081/92.

⁹ For complex analysis of the purpose and functioning of the EU system of food indications, see MacMaoláin, C EU Food Law, Protecting Consumers and Health in a Common Market, Oxford: Hart Publishing, 2007, pp 74 - 121.

indications.¹⁰ The implementation of this regulation is made possible thanks also to the DOOR¹¹ database that was originally created in order to implement Regulations No 2081/92 and 208L.2/92. These regulations currently contains freely accessible data about applications and registered PDOs, PGIs and TSGs.

All three instruments, as laid down in Regulation No 1151/2012, technically work as protected indications. Once registered, the respective names can be used only in connection to products that meet some specific criteria i.e. in a similar manner like other forms of name-based intellectual property. The only significant difference compared to trademarks is that the exclusivity in the use of protected indications is not subjective i.e. linked with a particular subject. Instead, the exclusivity of rights arising from the registration of PDOs, PGIs and TSGs is based on objective criteria linked namely to specific place of origin, place of production, composition and/or method of production.

PROTECTED DESIGNATIONS OF ORIGIN

Designations of origin are defined in Art 5(1a) of the Regulation No 1151/2012 as names that identify products 'originating in a specific place, region or, in exceptional cases, a country, whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors and the production steps of which all take place in the defined geographical area.' If taken from the information legal theory point of view, the law requires a substantial proportion of information to be implemented into the substance in provable connection with the place where it is produced. In other words, there needs to be proven a link between the place and the amount and quality of information that leads to specific organisation of the final product.¹²

It is to be noted that all requirements i.e. identification of a particular place, specific resulting quality of the final product and all-local production, need to be met cumulatively. It is also important that no prior reputation or other historical features are required for a new designation of origin to be registered. In result, the aim of a PDO is to inform a consumer that the respective product was all produced in a specific location and that it has, thanks to the locality of the production, some distinct qualitative features.

In the case of PDOs, there is a legally grounded direct link between information organising the substance and information indicating it. The law in this case requires a firm connection between information on and in the respective product.

Besides protecting consumers' justified expectations, PDOs also economically motivate producers or local authorities to either search for specific products that qualitatively depend on

¹⁰ Typical examples included cases when protected indications were declared to be used not for goods but rather for services, or cases in which protected indications were used on products in which the respective substance was used only in symbolic proportion.

¹¹ Full indication of the database is The Database of Origin & Registration and it can be found at <http://ec.europa.eu/agriculture/quality/door/>. Similar database for wine indications is called e-bacchus and can be found at <http://ec.europa.eu/agriculture/markets/wine/e-bacchus>.

¹² For exhaustive technological explanation, see de la Guardia, M González, A Food Protected Designation of Origin - Methodologies and Applications, Comprehensive Analytical Chemistry, vol 60, 2013.

local conditions or even to invent new ones. Such investment then pays off through the PDO, as the registration clearly has its consumer value (its distinct value is also visually indicated by its red colour).

Disputable cases that were brought to the Court of Justice of the EU (CJEU or formerly the European Court of Justice - ECJ) do not indicate so far any serious systematic failures of PDOs. The ECJ only had to cope with transitional issues arising from conflicts between either existing national rules or bilateral treaties and newly adopted EU regulatory regime, as well as to interpret some uncertain provisions as to the scope and relations of PDOs to other protected indications. Symptomatic examples of typical issues that needed to be resolved by references to preliminary rulings include disputes about whether cutting, slicing or packaging of protected products outside their place of production disqualifies their processors from using PDOs.¹³

PROTECTED GEOGRAPHICAL INDICATIONS

PGIs can be registered for products ‘originating in a specific place, region or country whose given quality, reputation or other characteristic is essentially attributable to its geographical origin and at least one of the production steps of which take place in the defined geographical area’. The first important difference between PDOs and PGIs is in the strictness of the size of geographical areas that might be considered specific enough. While PDOs can be registered only in relation to particular places or regions (while registration for a country might be granted only in exceptional cases), PGIs can be regularly registered even for countries. In some cases, this difference might even induce a dilemma over whether to register some product for a smaller area as a PDO or for a larger area as a PGI.¹⁴

The second, and from an perspective information theory even more important, the difference between PGIs and PDOs is in quality requirements. While actual quality, moreover linked with local environment, represents an essential requirement for the registration of a PDO, a PGI might be registered even in a case when geographical origin of the respective product does not give it any qualitatively relevant features but only a reputation or ‘other characteristics.’¹⁵

One might argue that a reputation (meaning here historically grounded consumer renown) might be gained only upon at least some qualitative distinctiveness, and so ‘reputation or other characteristics’ can actually serve the purpose of subsidiary qualitative criteria for a case when primary criteria, i.e. direct link between a place and the quality of the product, cannot be

¹³ See for example cases C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* or C-469/00 *Ravil SARM v Bellon import SARM and Biraghi SpA*.

¹⁴ See for example the case of *Spreewälder Gurken* (the Spreewald gherkins) referred to as C-269/99, *Carl Kühne GmbH & Co KG, Rich. Hengstenberg GmbH & Co. and Ernst Nowka GmbH & Co KG v Jütro Konservenfabrik GmbH & Co KG*.

¹⁵ It is to be noted that the definition of a PGI was not made up for the purpose of the Regulation No 1151/2012 or its predecessors but was taken from Art 22(1) of TRIPS Agreement that reads as follows: ‘Geographical indications are, for the purposes of this Agreement, 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.’ For the role of TRIPS in EU food law, see MacMaoláin, *C EU Food Law, Protecting Consumers and Health in a Common Market*, Oxford: Hart Publishing, 2007, pp 135 - 145.

sufficiently proved.¹⁶ However, this subsidiarity might in that sense work only if the way in which the product is actually manufactured, including its sources or production methods, corresponded to the way of making it at the time when the reputation or ‘other characteristics’ were established.

In result, the PGI does not have to inform a consumer about the quality of the respective product (it actually does so extremely rarely because, if quality is at stake, the indication would be in most cases registered as a PDO), but only about the fact that it has some publicly acknowledged reputation or, to put it simply, that it has been famous for a while.

As far as information theory is concerned, we might state that there is, with one exception, no direct information link between the substance and its indication. It is then a bit disputable whether the said exception should matter in the light of the teleology of the Regulation,¹⁷ because it has nothing to do with the objective quality of the product. Rather it is only based on subjective feelings that consumers might have about it (if we should name that exceptional informational element that is somewhat contained in the product, it would probably be ‘a narrative’ or maybe better ‘a story’).¹⁸

In the case of PDOs, we tried also to briefly discuss above their motivating impact.¹⁹ In short, we concluded that the existence of legal protection of PDOs can actually lead into the following chain of motivation:

- in a case of a product with already established link between the locality of the produce and its quality:
 1. to find out about the existence of that product,
 2. to have its name registered as PDO,
 3. to benefit from added value of EU-wide protection of the indication and consumer awareness of the PDO,
 4. in a case of a new product,
 5. to develop new local product that would qualitatively benefit from the locality of its production,
 6. to have its name registered as PDO, and

¹⁶ See Breeman, G, Termeer, C From Food Security to Food Quality: Spreading Standards, Eroding Trust? in Hospes, O Hadiprayitno, I Governing Food Security, Wageningen: Wageningen Academic Publishers, 2010, pp 185-198.

¹⁷ See namely Para 18 of the recital to the Regulation No 1151/2012 that reads as follows: ‘The specific objectives of protecting designations of origin and geographical indications are securing a fair return for farmers and producers for the qualities and characteristics of a given product, or of its mode of production, and providing clear information on products with specific characteristics linked to geographical origin, thereby enabling consumers to make more informed purchasing choices.’

¹⁸ It is still true that the story is regularly understood by consumers as integral part of the overall quality of the product - see for example the results of highly interesting research published as van Ittersum K., Candel, M J J M, Meulenberg, M T G. The influence of the image of a product’s region of origin on product evaluation, *Journal of Business Research*, vol 56, 2003, pp 215 - 226.

¹⁹ For proper economical analysis of different labelling standards, see van der Meulen, B Reconciling food law to competitiveness, Wageningen: Wageningen Academic Publishers, 2009, pp 69 - 73.

7. to benefit from added value of EU-wide protection of the indication and consumer awareness of the PDO.

Comparatively, the chain of business motivation created by legal protection of PGIs might look like:

- in a case of a product with already established link between the locality of the produce and its reputation:
 1. to find out about the existence of that product,
 2. to have its name registered as PGI,
 3. to maximally cut costs of production (typically by using cheaper imported ingredients or industrial manufacturing techniques), and
 4. to benefit from added value of EU-wide protection of the indication and consumer awareness of the PGI as long as possible.
- in a case of a new product
 1. to develop new local product that would be distinct in its quality and will be able to establish a reputation or 'other characteristics',
 2. to have its name registered as PGI,
 3. to maximally cut costs of production (typically by using cheaper imported ingredients or industrial manufacturing techniques), and
 4. to benefit from added value of EU-wide protection of the indication and consumer awareness of the PGI as long as possible.

One could argue that if the quality of the respective product declines, it will lose its traditional customers anyway and the news about the loss of quality will spread. If, however, the product gets its name registered as a PGI, it can substantially slow down this process because the indication considerably improves consumer credibility of the product. In short, PGIs can, besides their wanted effects, also very well motivate investments into fast economic exploitation of names of renown local products by parasitically appropriating locals' stories while making their content actual garbage (whereas PGIs can substantially help to slow down consumer disgust in that case and extend the period of profitability of such practice).

When introduced, the PGIs also partly brought another unwanted and quite interesting effect. Despite being designed as global instruments that should provide for protection around the EU, PGI registrations started a number of rather local conflicts between neighbouring villages, towns or regions. This was because, in practice, local products or products with local reputations that would be eligible for PGI registration often do not have a clearly delimited place of origin. It also happens that a product known by some local name has multiple forms in different parts of Europe merely because of historical migration.

It is not entirely rare that one historical name bearing a geographic component refers with similarly important reputation to a variety of entirely different products that are made in different parts of Europe (while it might even happen that there is no more relevant production in the place itself that is referred to by the product indication). Locals then had a reason to inform about

PGI registrations in favour of some region or country as if it was some great conquest of a hostile territory.

Despite the fact that there are provisions in the Regulation that aim to mitigate such conflicts, there remains a question whether the place of production should really matter that much to the consumer (and to the law) if the only benefit it can bring is just a reference to historical renown without having any relation to actual quality of respective products. This is more salient given the fact that European history is to very large extent driven by various kinds of migration and cultural exchange.

TRADITIONAL SPECIALTIES GUARANTEED

TSGs are substantially different from both aforementioned indications, namely by the fact that they have no local or geographic elements. A TSG might become a name of a product or foodstuff that ‘results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff or is produced from raw materials or ingredients that are those traditionally used’.²⁰ It implies that TSGs protect indications that actually refer to traditional recipes, which means that this mechanism establishes, similar to other forms of intellectual property,²¹ exclusivity in the use of certain information in relation to a specific process or composition of ingredients.

The overall aim of TSGs basically is to defend consumer confidence in traditional food indications, so that if these names are used, everybody can be certain about what they are eating or how it was made. In that sense, TSGs might have similar problem as PGIs, as the method of production or the composition of the ingredients can say very little about the actual origin or overall quality of the final product (unless e.g. PDO-protected ingredients are required).

TSGs have somewhat worked well namely in areas where the registration at least fixed minimum proportions of key ingredients.²² However, it is disputable whether the effect of consumer credibility of certain indications as to minimum proportions of key ingredients is to be considered a proper effect of an intellectual-property-like legal instrument. Namely, in a situation when EU Member States already have extensive experience with the development and implementation of administrative legal provisions in the area of consumer protection.²³

²⁰ See Art 18(1) of the Regulation No 1151/2012.

²¹ See, for example, Gangjee D S Property in Brands: The Commodification of Conversation, in H Howe, H, Griffiths, J (eds), Property Concepts in Intellectual Property Law, Cambridge: Cambridge University Press, 2013.

²² Typically in meat production, certain TSGs guarantee at least the fact that respective products contain certain minimum proportion of real meat or of meat of some sort (eg pork or beef). Although this still does not provide per se for much of a guarantee of the overall quality of the produce, it still seems better than nothing.

²³ Extensive part of consumer protection legislation already deals with labelling, although namely as to quality indicators - see Goodburn, K (ed) EU Food Law, Cambridge: Woodhead Publishing, pp 119 - 133.

As the Commission even noted in the recital to the Regulation No 1151/2012, TSGs have not been very successful so far.²⁴ This is probably due to problematic motivation of food societies or guilds to engage in TSG registrations. Under normal circumstances, intellectual property instruments should motivate investment in creation of new useful information, whereas legal protection normally provides for limited exclusivity of economic exploitation of such inventions or creations.

In the case of TSGs, we hardly find anybody motivated to create anything - any newly created recipe, in order to be eligible for a TSG protection, would have to become traditional first.²⁵ Even if that happens, consequent registration would bring no benefits at all to the inventor. It would rather bring the opposite effect because anybody would be able to find and use the recipe as well as sell the respective product under the same name (which actually is exactly the opposite of exclusive economic exploitation).

If TSGs should motivate producers at least to look for already existing traditional recipes and to promote them, the effect of their registration would again bring practically no benefits to those who would like to exploit them by developing them further. That is because the registration actually prevents not just the faking of respective products by e.g. substituting key ingredients but also the making of them in any significantly different way. TSG simply fixes the recipe that provides for consumer certainty as well as the inability of a producer to (positively) surprise consumers with its different interpretations and/or further development.

Consequently, the only parties motivated to go after TSG registrations are those producer associations or consumer protective bodies that see some actual erosion of the content of food indications and would like to at least somewhat save the remaining reputation of these indications for future use. The question again is whether an intellectual-property-like legal instrument is well fit for that purpose.

CONCLUSIONS

In this paper, we tried to use the method of information theory of law to critically examine three specific instruments of EU food law: Protected Designations of Origin, Protected Geographical Indications and Traditional Specialties Guaranteed. We concluded that only the first of these can actually offer some informational balance between the indication and content while providing for teleologically well-reasoned motivation of the target group. We also argued that the other two protective instruments, PGIs and TSGs, suffer from some substantial information defects or logical contradictions.

While examining these three protected food indications, we focused solely on their internal structures and substantive features. It means we entirely omitted at this time their systematic relations out of which the most important is the relation to the principle of free movement of

²⁴ See namely Para 34 of the Regulation No 1151/2012 that reads as follows: 'The specific objective of the scheme for traditional specialities guaranteed is to help the producers of traditional products to communicate to consumers the value-adding attributes of their product. However, as only a few names have been registered, the current scheme for traditional specialities guaranteed has failed to realise its potential. Current provisions should therefore be improved, clarified and sharpened in order to make the scheme more understandable, operational and attractive to potential applicants.'

²⁵ See Art 18(1b) and 18(2b) of the Regulation No 1151/2012.

goods. The existence and strength of this principle often turns legal considerations about the three protective instruments upside down. Especially in the case of PGIs and TSGs, registrations are often not motivated by any good causes but rather by fears that local markets where certain indications have some renown can be flooded, thanks to the free movement of goods,²⁶ with cheap imported produce. It is then better to register a PGI than to wait for courts to consider that some indication is able to ‘mislead the average reasonably well informed, observant and circumspect consumer.’²⁷

Similarly, PGIs are relatively often used also to undermine the existing exclusivities in food indications, namely those established by historic trademarks with some geographical elements. Despite transitional and other protective provisions in the Regulation²⁸, such attempts repeatedly occur and, even if not directly legally dangerous, they at least require traditional producers to invest in legal defence.²⁹

²⁶ See Mahy, A (ed) *Advertising Food in Europe*, Brussels: lexion, 2014, pp 14 - 20.

²⁷ See for example case C-446/07, *Alberto Severi, Grandi Salumifici Italiani SpA v Regione Emilia-Romagna*.

²⁸ Inadmissibility of applications for conflict with existing trademarks is in this case neither form, nor automatic, because it depends, besides time priority of the trademark, also on its actual renown - see Art 6(4) of the Regulation No 1151/2012 that reads as follows: ‘A name proposed for registration as a designation of origin or geographical indication shall not be registered where, in the light of a trade mark’s reputation and renown and the length of time it has been used, registration of the name proposed as the designation of origin or geographical indication would be liable to mislead the consumer as to the true identity of the product.’

²⁹ This is typical in cases where historically renown product has a name that is directly derived from the place it was originally made. A whole saga of disputes around the ‘Budweiser’ and associated trademarks might serve as a good example.