

CONDITION REGARDING PROTECTION BY INDICATIVE SIGNS

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Abstract

The study aims to highlight the conditions that a product must meet in order to be protected by an indicative sign as well as the advantages conferred by means of protection through the prism of Community legislation and the CJEU jurisprudence.

Indicative signs are marketing tools that contribute to the effective promotion of the product protected by a European and national quality system, intended to protect consumers against misleading practices aimed at misleading them about the geographical origin or production methods of the product, as well as producers against acts of unfair competition.

Geographical indications, designations of origin and names of guaranteed traditional specialties allow consumers to trust and distinguish quality products, also helping producers in their marketing, in the case of the former, the connection between the specific geographical region and the name of the product being highlighted, in case a certain quality, reputation or other characteristic can be attributed essentially or exclusively to its geographical origin, as regards traditional specialties guaranteed, the link referring to the production method used over time in the determined geographical region with the quality and characteristics of the product protected by indicative sign.

The protection of indicative signs is an effective tool to prevent the use of a name on the market, but this protection does not aim to limit the range of products available on the market, but to reserve a specific name for products that comply with the requirements of the specifications and that have a link clear geographical connection with a certain place, region or, as we have seen, in some cases, with the territory of a country, which does not prevent other producers from marketing the same type of product under a different name.

It is unanimously accepted that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by the indicative sign are maintained for the entire duration of the protection period.

Keywords: *geographical indication, designation of origin, guaranteed traditional specialty designation, protection, know-how, indicative sign, deceptive practices, unfair competition.*

1. Introduction

Indicative signs are marketing tools that contribute to the effective promotion of the product protected by a European and national quality system, intended to protect consumers against misleading practices aimed at misleading them regarding the geographical origin or production methods of the product, as well as producers against acts of unfair competition.

The protection of indicative signs is an effective tool to prevent the use of a name on the market, but this protection does not aim to limit the range of products available on the market, but to reserve a specific name for products that comply with the requirements of the specifications and that have a link clear geographical connection with a certain place, region or, as we have seen, in some cases, with the territory of a country, which does not prevent other producers from marketing the same type of product under a different name.

The regulation on designations of origin and geographical indications does not aim to protect the appearance of a product or its characteristics described in its specifications, but its name, so that it does not prohibit the manufacture of a product according to the same techniques and that, in the absence of a proprietary right, the reproduction appearance of a product does not constitute a culpable act but belongs to the freedom of trade.

The protection of an appellation of origin, geographical indications or guaranteed traditional specialty designations is based on regulations that combat deception, the fight against fraud, unfair competition and parasitism, mean benefiting from the notoriety or reputation issued by indicative signs.

The purpose of the sign protection system is to provide consumers with the opportunity to make informed and fully informed decisions when purchasing, in a context where labelling and advertising help them identify

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and distinguish quality products on the market from those of lower quality.

By establishing a system of protection of geographical indications and designations of origin, the EU legislator intended to intervene in supporting the rural economy, especially in disadvantaged or remote areas by promoting products with specific characteristics and at the same time to preserve „the quality and diversity of agricultural production from Union, considered to be one of its strengths, representing a competitive advantage for Union producers and contributing significantly to its current cultural and gastronomic heritage.”¹

2. Conditions regarding protection by indicative signs

Indicative signs promote the diversity of products and identify their characteristics, as well as their method of production or their origin, and by protecting them, the fraudulent use of product names is prevented and the good reputation of European food products and beverages is maintained.

As we have seen, indicative signs can contribute to the development of rural areas, as the products protected by indicative signs are sold at a high price they contribute to the creation of intensive production at the local or regional level and thus prevent the rural exodus in the context where, against the background of the development of production and implicitly the creation of jobs, the locals choose to stay in the region.

That is why it can be said that indicative signs can add value to a region, in other words they can contribute to the creation of a „regional brand” with an impact on the development of tourism and gastronomy in the community where the products with added value come from.

But the simple fact of obtaining a protection by indicative sign for a product is not a guarantee of success, nor does it lead to local development; in order to contribute to this, several conditions must be met regarding the link between the product and its characteristics due to the geographical origin or the production method that are the basis for creating an effective protection system that guarantees the consumer that the products are safe, healthy and qualitative.

An essential characteristic of the quality system in the European Union is that products with a protected geographical indication or a protected designation of origin comply with the product specification, a requirement that could not be met without official controls or monitoring mechanisms.

In its jurisprudence, the CJEU highlighted the function of designations of origin and geographical indications, namely that of informing and guaranteeing the fact that the protected product has qualities and characteristics due to its geographical location, likely to individualise it compared to other products and that to the extent where these names are legally protected, they must meet the objectives of this protection, in particular the need to ensure not only the protection of the interests of the producers concerned against unfair competition, but also of consumers against information that may mislead them. The protection granted by the geographical indication or designation of origin cannot be legitimate unless the product in question really possesses the characteristics that individualise it from the point of view of geographical origin, in the absence of such a condition this protection cannot be justified based on the consumer's opinion.²

More extensive protection, such as that resulting from legal protection regimes, appears to be more effective, but has not won the support of a larger number of countries, so its scope is geographically limited.

The protection of these names depends primarily on whether their misuse misleads the public or whether the public considers the name to be generic. It is the case of „Hollande” cheese, a name reserved for the cheese that actually comes from Holland (currently the Netherlands after the adoption of the new name of the country), while „Camembert” became a generic name over time.

It was considered³ that the specific objectives of the protection of designations of origin and geographical indications ensure that farmers and producers obtain a fair profit for the qualities and characteristics of a particular product or its production method and provide clear information on products with specific characteristics related to geographic origin, thus allowing consumers to make a more informed decision related to the request.

By protecting products that offer „added value”, the consumer is primarily protected, guaranteeing the authenticity of the product as well as the distinctive quality, so that he does not buy products that do not have the quality and characteristics that he expects and for which he would be willing to pay a higher amount in relation to the price of lower quality products, but at the same time the manufacturer is also protected against deceptive practices or unfair competition.

That is why it is necessary that the protection by indicative sign also applies to products that enter the customs territory of the European Union without being put into free circulation in this territory, as well as to

¹ See reasons 1 and 4 of Regulation (EU) no. 1151/2012.

² CJEU, judgment from 20.02.1975, Commission of the European Communities/Germany, „Sekt-Weinbrand”, C-12/74, para. 7 and 12.

³ See reason 18 of Regulation (EU) no. 1151/2012.

goods sold in the online system.

A product with „added value” brings with it reputation, tradition, history, authenticity and therefore it is imperative that it be protected by an indicative sign, protection that can promote tourism in the geographical area of origin, the tourist will thus want to know the area of production, local gastronomic practices and traditions.

The purpose of protecting indicative signs is to ensure fair competition between producers and to provide the consumer with precise information about the place, production method and quality of the protected product, therefore, it can be said that their protection is essential for protecting traditional products of high quality and local know-how.

Also, thanks to a product protected by an indicative sign, the newly created jobs for the purpose of production development, in principle, cannot be moved to other geographical areas, this fact is due to the inherent link between the product and the region from which it originates, which it can only be beneficial, in the context in which jobs are maintained and the development of less economically developed areas can be ensured in this way.

It should be noted that in the context where consumers are informed about the qualities or characteristics of a product and are aware of their importance, producers are stimulated to invest in the manufacture of quality products and will invest in production technology, which will generate them in future high earnings due, in particular, to the reputation of the products they produce.

The product protected by an indicative sign can be representative of the culture and history of a country, a geographical region, its existence being closely linked to the knowledge, traditions and competence of the local population that gave birth to a unique and typical product for these areas and becomes part of the structure social and economic of the area, an integral part of the culinary tradition as well as a source of income for different producers.

Geographical indications, designations of origin and names of guaranteed traditional specialties allow consumers to trust and distinguish quality products, also helping producers in their marketing, in the case of the former, the connection between the specific geographical region and the name of the product being highlighted, in case a certain quality, reputation or other characteristic can be attributed essentially or exclusively to its geographical origin, as regards traditional specialties guaranteed, the link referring to the production method used over time in the determined geographical region with the quality and characteristics of the product protected by indicative sign.

As such, stating that the main characteristic to be expected from a geographical sign is that of being purely geographical would be equivalent to evading the quality of a product that has its origin in a certain geographical area.⁴

Starting from the definition given to geographical indications by art. 5 para. 2 of Regulation (EU) no. 1151/2012⁵, it can be established that in order to be eligible to benefit from the protection conferred by the geographical indication, a product must cumulatively meet three criteria: the product must originate in a certain place, region, locality or country; at least one of the production steps should take place in this geographical area, and the quality, reputation or other characteristic of the product can be mainly attributed to this geographical origin. As such, it must be demonstrated that the geographical origin is an essential factor for the quality, reputation or other characteristic of the product.

Compliance with geographical indications protected by a legal text is facilitated by strict definitions of the object of protection, namely the production area, the production standards (if any) and the persons authorised to use the protected geographical indications.

In this context, protection must be approached as the right to use an indicative sign as well as the right to prevent their illegal use, the main purpose being that of protecting the consumer against products that may mislead him about its true geographical origin or the method of processing, as well as protecting producers against unfair competition.

An indicative sign represents a commitment to consumers regarding the quality of a product, and for producers it is a guarantee of conditions of fair competition.

The name to be protected as a geographical indication or designation of origin can be a geographical name of the place of production of a specific product or a name used in commercial exchanges or in common language to describe the specific product in the delimited geographical area.

The reputation of designations of origin depends on the image they enjoy among consumers, an image that

⁴ N. Olszak, *Law of designations of origin and indications of source*, Tec&Doc Lavoisier, Paris, 2001, p. 16.

⁵ Regulation (EU) no. 1151/2012 of the European Parliament and of the Council of 21.11.2012 regarding systems in the field of agricultural and food quality, OJ L 343/14.12.2012.

depends in particular on essential characteristics and, in general, on the quality of the product.⁶

As such, with regard to geographical indications and designations of origin, all the technical information necessary to describe a product and the production area, and in the case of guaranteed traditional specialties, the production methods, must be provided by the producers at the time of submitting the application for registration of indicative sign. And this aspect is important because the product specifications are a determining factor in the registration procedure and guarantee the stability of the product quality, without imposing a certain level of quality.

At the same time, it is obvious that when the consumer notices the PDO, PGI or TSG sign on the product label, he trusts that the product is of quality and that it cannot be counterfeited, imitated and cannot be misled about the true geographical origin of the product. or the traditional method of production.

That is why the label of the products protected by an indicative sign may include graphic representations of the geographical area of origin and which must have a correspondent in the specifications, a text, graphic representations or symbols that refer to the member states or the region in which they are located the geographical area of origin of the protected product.

The fact that the food product originates from the delimited geographical area is proven by the existence of a traceability system implemented from the entry of the raw material into the factory until the finished product (the traceability tracking sheet, the equipment sheet, the raw material concentration monitoring sheet are drawn up), as well as by the agreement between the amount of products sold under the protected name and the amount of raw material transformed.

When considering a product traceability can refer to: the origin of materials and components, the history of processing and the distribution and location of the product after delivery.

In other words, the production conditions must ensure maintaining the link of the product with the geographical environment; in the case of PDO the animal feed and supplementary basic food products must come entirely from the defined geographical area, but in the situation where it is not possible to be procured from the defined geographical area, the feed can come from outside it, provided that the product obtained to have qualities or characteristics due to the geographical environment, while for PGI or TSG there is no such requirement regarding the origin of the animal feed, any restrictions that could be established by the specifications must be justified in terms of the specificity of the product.

The protection through indicative signs is extended in the situation where the raw materials come from a geographical area that does not coincide with the processing area, provided that the production area of the raw material represents a defined place, there are special conditions for the production of the raw material such as and effective control to guarantee compliance with production conditions. This is the case of the product „Stilton cheese”, the production of which began in the English town of Stilton and then was transferred to a nearby place, but keeping the name by which it was traditionally known, this being a product protected by a designation of origin that does not comes from the indicated place.

In the CJEU jurisprudence⁷ it was shown that the registration of a protected geographical indication or a protected designation of origin aims, among other things, to avoid the abusive use of a name by third parties who seek to profit from the reputation acquired by this name and , so as to avoid its disappearance due to vulgarization through general use outside either its geographical area or the specific quality, notoriety or other characteristic which can be attributed to that origin and which justifies the registration.

The indisputable reputation of a product on the national market, as well as on foreign markets, is proven by its use in numerous culinary recipes in many member states, as well as by its frequent mention on the Internet, in the press and in the mass media, which makes fulfil the inherent condition that the product bearing this name has its own reputation.

It is unanimously accepted that the added value conferred by indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by an indicative sign are maintained for the entire duration of the protection period.

It should be specified that the right to indicative signs is acquired and protected by their registration under the conditions provided by the legislation in force at the level of each state, in the case of national protection, as well as by their registration under Regulation (EU) no. 1151/2012, in the case of protection at the community level.

Thus, in order to register the geographical indication or the appellation of origin, applications for the registration of the names within the quality system established by Regulation (EU) no. 1151/2012 can be

⁶ CJEU, C-388/95, Case *Kingdom of Belgium v. Kingdom of Spain*, judgment from 16.05.2000, para. 56.

⁷ CJEU, C-343/07, Case *Bavaria NV, Bavaria Italia Srl/Bayerischer Brauerbund eV*, judgment from 02.07.2009, para. 106.

submitted only by groups working with products whose name is to be registered, and in the case of a protected designation of origin or a protected geographical indication designating a cross-border geographical area, several groups from different Member States or third countries may submit a joint application for registration.⁸

Receiving the application for registration, the member state examines it by appropriate means to ensure that it is justified and that it meets the conditions of the quality system that is requested to be registered, in which context it initiates a national opposition procedure through which it ensures the publication of the application and establishes a reasonable period in which any natural or legal person having a legitimate interest and who is established or resides in its territory can submit an opposition to the registration application and evaluates the admissibility of the oppositions received from the perspective of meeting the criteria provided by the quality systems for which request registration.⁹

If it considers, after evaluating the opposition received, that the requirements set out in Regulation (EU) no. 1151/2012 are met, the member state can adopt a favorable decision and submit an application file to the Commission and inform it about the admissible oppositions received from the person physical or legal entity that has legally marketed the products in question through the continuous use of the names in question for a period of at least five years before the date of publication of the application at national level, which coincides with the completion of the national phase.

It should be noted that during the period between the date of submission of the application to the Commission and the date of adoption of a decision on registration, on a provisional basis, the member state may grant protection to a name, transitional national protection that ends on the date on which a decision on registration is taken, in under this regulation, or when the application is withdrawn. As such, the measures adopted by the member states during the period of provisional national protection only produce effects at the national level and do not affect trade within the Union or international trade.¹⁰

The provisional protection must work like this only on the national territory, recognizing the use of the names submitted for registration only to producers who meet the requirements of the specification and does not give the right to use terms or symbols PDO, PGI or TSG.

However, it is possible that, at the national level, the name of a food product that includes geographical references will be „rejected“ or in any case the transmission of an application for registration as PDO or PGI to the Commission will be blocked, in which case the question arises as to whether this name must be considered generic at least during the entire period in which this rejection or blocking takes effect.

Under this aspect, it was shown that the name of a food product that includes geographical references and that was the subject of an application for registration as a PDO or PGI cannot be considered generic until the eventual transmission of the application for registration to the Commission by the national authorities.

In arguing this point of view, three situations were taken into account, namely that of registered names, of generic names and respectively of names that were not the subject of an examination by the Commission.¹¹

Thus, with regard to a name examined by the Commission and entered in the register provided by the regulation, the use of such a name may be limited, and if it is used without meeting the legal requirements, it may be likely to mislead the consumer, especially regarding the characteristics, of the origin or provenance of the food product.

When a name has been examined and found to be generic within the meaning of the Regulation, the consumer could effectively be misled by the indication of a geographical name on the label of a product such as a food product labelled with a generic name but not presenting none of the characteristics usually associated with this name in the consumer's perception.

Finally, in the case of a name that has not been examined by the Commission, it cannot be considered generic within the meaning of the Regulation, but until a decision is taken by the Commission, the name is not protected by the Regulation, unless in which the member state chooses to resort to the possibility of granting temporary protection, and in the absence of transitory protection, it must be assessed only if the indication of the name on the label is likely to mislead the consumer as to the origin of the product.

The presumption of being generic, due to the simple introduction of an application for registration of a name which in the end would not prove to be generic, would risk compromising the achievement of the objectives regarding consumer protection and maintaining a fair competition between producers, in the context in which the recognition of the generic nature of of a name cannot be considered as a certain fact during the

⁸ See art. 49 para. 1 of Regulation (EU) no. 1151/2012.

⁹ See art. 49 para. 3 of Regulation (EU) no. 1151/2012.

¹⁰ See art. 9 of Regulation (EU) no. 1151/2012.

¹¹ See the Opinion of Advocate General Eleanor Sharpston in Case C-446/07, *Alberto Severi v. Regione Emilia Romagna*, ECLI:EU:C:2009:289, para. 49, 51, 53 and 58.

period preceding the decision of the Commission by which it pronounces on the application for registration.¹²

There is no basis for assuming that a geographical name is generic until it is established that it is not generic, in other words, a name cannot be presumed to be generic as long as the application for protection of the name has not been rejected by the Commission for the reason that the name has become generic, in many cases such a name will be strictly indicative.¹³

The „European” phase of the registration procedure begins with the examination that the Commission must carry out after receiving the decision of the national authority, in which it examines the registration applications it receives, whether they contain the requested information and do not contain obvious errors, taking into account the result of the examination carried out by the state that sent the request as well as the result of the opposition procedure carried out before the member state.

As such, the decision to register as a protected appellation of origin or as a protected geographical indication of a name can only be adopted by the Commission if the Member State concerned has sent it a request to that effect and that such a request can only be made if the Member State verified that it is justified. This system of shared competence is explained in particular by the fact that registration involves verifying the fulfilment of a certain number of conditions, which requires, to a large extent, in-depth knowledge of certain elements specific to the member state concerned, elements that the competent authorities of this state are best able to verify them.¹⁴

In this system of shared competence, the Commission has the obligation to verify, before registering a name, that, on the one hand, the specification accompanying the application complies with art. 7 of Regulation (EU) no. 1151/2012, namely that it contains the necessary elements and that these elements are not affected by obvious errors and, on the other hand, to verify based on the elements contained in the specification that the name meets the requirements set out in art. 5 para. 1 letter a) and b) of Regulations.

When, following the examination carried out, the Commission considers that the conditions regarding the registration of a geographical indication or designation of origin are met, it publishes in the Official Journal of the European Union, among others, the name of the product, the single document and the reference to the publication of the specifications, and in the case in which it assesses that the conditions for the registration of a guaranteed traditional specialty are met, it will order the publication of the specifications.

As such, the protection of the geographical indication, the designation of origin and, respectively, the guaranteed traditional specialty designation, essentially aims to guarantee consumers that the agricultural products bearing a protected indicative sign present, due to their origin in a determined geographical area or the traditional production method, certain specific characteristics, and therefore offer a quality guarantee, in order to allow operators who have agreed to make real quality efforts to obtain in return increased income and to prevent third parties from taking abusive advantage of the reputation arising from the quality of these products.

3. Conclusions

It is obvious that the sign symbolising the geographical origin or the production method has a considerable impact on the purchase of a product, so it is necessary to protect it by establishing a quality system with strict rules in terms of registration, marketing and protection of products that offer own qualities and characteristics due to the geographical environment from which it originates or to local traditions related to the manufacturing method.

It can thus be concluded that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by the indicative sign are maintained for the entire duration of the protection period and that in this context the name proposed for registration does not increase the risk of confusion regarding the true origin of the product, the qualities or characteristics due to its origin or the production methods used.

Referring to the benefits of protecting indications, Commissioner for Agriculture, Janusz Wojciechowski said that „European Geographical Indications reflect the richness and diversity of products that our agricultural sector offers. The benefits for producers are clear. They can sell products at a higher value consumers who are looking for authentic regional products. GIs are an essential aspect of our trade agreements.”

¹² CJEU, C-446/07, Case *Alberto Severi v. Regione Emilia Romagna*, judgment from 10.09.2009, ECLI:EU:C:2009:530, para. 53 and 54.

¹³ See the Opinion of Advocate General Eleanor Sharpston in Case C-446/07, *Alberto Severi v. Regione Emilia Romagna*, ECLI:EU:C:2009:289, para. 37.

¹⁴ CJEU, C-269/99, Case *Carl Kuhne GmbH & Co. KG and others v. Jutro Konservenfabrik GmbH & Co. KG*, judgment from 06.12.2001, ECLI:EU:C:2001:659, para. 53.

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