

Understanding the Functioning of EU Geographical Indications

By Andrea Zappalaglio *

I. Introduction

The present contribution firstly provides an outline of the European Union (EU) *sui generis* Geographical Indication (GI) system for the protection of agricultural products and foodstuffs falling within the scope of European Union (EU) Regulation

1151/2012,¹ particularly regarding (1) the nature of this intellectual property right (IPR) and (2) the functioning of the EU registration system;² secondly, it summarises the findings of the “Study on the Functioning of the EU Geographical Indications System” of the Max Planck Institute for Innovation and Competition (MPI)

Abstract

This contribution investigates the functioning of the EU *sui generis* Geographical Indication (GI) system, with a specific focus on the regime for the protection of agricultural products and foodstuffs within the scope of EU Regulation 1151/2012. In particular, based on the results of the recent “Study on the Functioning of the EU Geographical Indications System” of the Max Planck Institute for Innovation and Competition (February 2022), this paper: (1) clarifies the nature of EU GIs as it emerges from an empirical assessment of the specifications of all the products that appear on the EU register; (2) comparatively analyses the national practices of the EU Member States and explores the discrepancies that exist among them to date; (3) provides an in-depth assessment of the structures of the specifications of EU GIs, highlighting the domestic specificities; (4) investigates the contents and functions of the amendments to the specifications of the registered products. It concludes by emphasizing the importance of the present research in light of the current EU international agenda, with a specific focus on the bilateral agreements recently or currently negotiated.

Esta contribución investiga el funcionamiento del sistema sui generis de Indicaciones Geográficas (IG) de la UE, centrándose específicamente en el régimen de protección de los productos agrícolas y alimenticios en el ámbito del Reglamento (UE) n° 1151/2012. En particular, basándose en los resultados del reciente "Estudio sobre el funcionamiento del sistema de indicaciones geográficas de la UE" del Instituto Max Planck para la Innovación y la Competencia (febrero de 2022), este documento (1) aclara la naturaleza de las IG de la UE tal y como se desprende de una evaluación empírica de las especificaciones de todos los productos que figuran en el registro de la UE; (2) analiza comparativamente las prácticas nacionales de los Estados miembros de la UE y explora las discrepancias que existen entre ellos hasta la fecha; (3) ofrece una evaluación en profundidad de las estructuras de las especificaciones de las IG de la UE, destacando las especificidades nacionales; (4) investiga los contenidos y las funciones de las modificaciones de las especificaciones de los productos registrados. Concluye destacando la importancia de la presente investigación a la luz de la actual agenda internacional de la UE, con especial atención a los acuerdos bilaterales negociados recientemente o en la actualidad.

Cette contribution étudie le fonctionnement du système sui generis d'indications géographiques (IG) de l'Union européenne (UE), en se concentrant spécifiquement sur le régime de protection des produits agricoles et des denrées alimentaires dans le cadre du règlement de l'UE 1151/2012. En particulier, sur la base des résultats de la récente " Étude sur le fonctionnement du système des indications géographiques de l'UE " de l'Institut Max Planck pour l'innovation et la concurrence (février 2022), ce document : (1) clarifie la nature des IG de l'UE telle qu'elle ressort d'une évaluation empirique des cahiers des charges de tous les produits figurant dans le registre de l'UE ; (2) analyse de manière comparative les pratiques nationales des États membres de l'UE et explore les divergences qui existent entre eux à ce jour ; (3) fournit une évaluation approfondie des structures des cahiers des charges des IG de l'UE, en soulignant les spécificités nationales ; (4) étudie le contenu et les fonctions des modifications apportées aux cahiers des charges des produits enregistrés. Il conclut en soulignant l'importance de la présente recherche à la lumière de l'agenda international actuel de l'UE, avec un accent particulier sur les accords bilatéraux négociés récemment ou en cours de négociation.

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February 2022;³ thirdly, and finally, it discusses the importance of this study for non-EU scholars, public officers and practitioners who wish to gain an in-depth insight of the nature and functioning of the EU *sui generis* GI regime.

2. Outline of EU *sui generis* GIs for agricultural products and foodstuffs

The EU registration-based mechanism was introduced in 1992, as a way to harmonise the national practices of the individual Member States. Since then, it has become an internationally influential model of *sui generis* GI protection.

This regime features two main systems of protection, called “Quality Schemes”: the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI). In particular, Article 5(1) Regulation 1151/2012 defines PDO as follows:

... ‘designation of origin’ is a name which identifies a product:

- (a) originating in a specific place, region or, in exceptional cases, a country;
- (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and
- (c) the production steps of which all take place in the defined geographical area.

Thus, PDO protects products: (1) featuring a substantive connection to a specific area, consisting of both natural and human factors, i.e., physical/environmental elements combined with the specific local know-how;⁴ (2) entirely produced in the designated area of origin.⁵

On the other hand, Article 5(2) Regulation 1151/2012 defines PGI as follows:

... ‘geographical indication’ is a name which identifies a product:

- (a) originating in a specific place, region or country;
- (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and
- (c) at least one of the production steps of which take place in the defined geographical area.

Thus, PGI, when compared to PDO, is a broader and more flexible quality scheme. In particular, PGI accommodates both a qualitative link, which basically corresponds to the link that characterises the PDO, and a reputational link. The latter makes it possible to prove the existence of a connection

between a product and a place in cases where the image of the good on the market is linked to a specific area, even in the lack of a physical/environmental link.⁶ Third country products protected in the EU as the result of a bilateral agreement are usually registered as PGIs.

Finally, for the sake of completeness, it must be mentioned that the EU *sui generis* GI regime for agrifood products also includes the Traditional Specialities Guaranteed (TSG). This is a narrower quality scheme – to date, only 78 TSGs have been registered – that protects goods produced following a traditional recipe/production method or using traditional ingredients.⁷

3. The nature of EU *sui generis* GI products

What is an EU GI product? An empirical assessment of the contents of all the registered Specifications, Single Documents⁸ and other materials retrievable via the official EU GI database, named “eAmbrosia”, and its predecessor, the now discontinued “DOOR”,⁹ shows the following:

1. The EU *sui generis* GI system for agrifood products increasingly tends towards the PGI quality scheme. Indeed, while wine still remains essentially a PDO product, various agrifood goods often feature a less intuitive connection with their area of origin, which is rather often based on “reputation”. This makes PGI a better option as it is more flexible; less demanding in terms of requirements and provides the same level of protection as PDO.

Furthermore, 43 per cent of PDOs were registered in the early days of the EU *sui generis* agrifood regime. Indeed, the old Regulation 2081/1992 featured a special “fast track” (known as the “Simplified Procedure”). This was a temporary measure that allowed the registration of indications of geographical origin, registered or unregistered at the domestic level, specifically indicated by the EU Member States. Through this procedure, these indications could be registered without the possibility for the other members to object to the registration. Hence, in the agrifood sector the PDO scheme has essentially been used as a “bridge” to transpose national indications into the new-born EU system. After this initial phase, however, the regime has become essentially based on PGI.¹⁰

2. The MPI study has demonstrated that, in general, EU GI products are entirely produced in the area designated by the specifications. This is particularly interesting considering that only one step of the production of a PGI product

must take place in the area in order to meet the legal requirements for registration. However, the size of the areas of production is on average very large: more than 1000m². This may, at least partially, explain these results.¹¹

3. The analysis of how the proof of the link between the product and its place of origin is provided in practice has shown that the distinction between the two quality schemes, PDO and PGI, has become partially blurred. In particular, the physical/environmental link that characterises PDO can often be found in PGI specifications, instead of or in addition to a reputational link, although the requirements for the registration of a PGI would be satisfied by evidence of a reputational link alone. In turn, proof of reputation can often be found in the specifications of PDO products, in addition to the necessary proof of physical/environmental elements and local know-how.¹²

4. Analysis of the national registration rules and of the structure and contents of the specifications (and discrepancies)

Even if the EU *sui generis* GI system is harmonised at the regional level, the registration process is divided into two phases: a national and an EU one. The first encompasses the truly substantive step, since it is where the producers come to an agreement as to the contents of the specification, usually with the support of local authorities but also advisors such as universities and research centres. In the second, instead, the EU Commission assesses the correctness of the process and, in particular, checks that the application does not contain “manifest errors”.¹³ At the end of the process, the geographical name is added to the EU GI register for the relevant class of products.

The EU Regulation provides for the structure of the registration process. This includes a set of requirements concerning various procedural aspects the Member States must comply with. However, the rules leave the members free to implement these general provisions in accordance with their domestic systems and to exceed the standards if they deem it expedient. For instance, art 8(1) stipulates that the content of the application for registration must include “at least” some specific requirements, thus leaving the members free to require more from the applicants.

4.1 Cross-national comparative analysis of procedural laws and practices in the EU Member States

A comparative analysis of the registration procedures applied at the domestic level by the different EU Member States found that discrepancies in national practices predominant in the areas where the EU Regulation leaves members more margin of manoeuvre. In particular, the requirements on the contents of the application file and those concerning the status and qualifications of the applicants were the two most interesting ones.

With regard to the former, the additional national requirements mainly consist in reports and other documents that must be prepared by the applicants and that are not listed in the Regulation. For instance, in France and Italy the applicants must submit a “socio-economic” report, describing the relationship and the impact of the product on the area. In Italy they must submit an “historical report” detailing, as the name itself suggests, the history of the good.

As to the requirements for the applicants, a more irregular pattern emerges. For instance, in Germany no additional formalities to those included in the Regulation are prescribed. Instead, in France the producers’ group must be certified as “ODG” (*Organisme de Défense et de Gestion*) before being able to apply. In Italy the system involves specific safeguards, such as the need to provide evidence on the producers’ groups ability to sustain the GI over time.

There are other kinds of differences, such as the number and nature of institutions involved in the procedure and the average duration of the registration process. In particular, although in most EU members less than 1 year is enough to get a GI on the register, in France, Germany, Italy and the Netherlands, the process can last longer.¹⁴

4.2. Qualitative assessment of the structure and contents of the specifications

An analysis of the structure and the contents of the specifications was conducted in order to identify possible national specificities on two product classes, potatoes and bakeware, taking into consideration both PDOs and PGIs. With regard to countries, the adopted sample has taken into consideration France, Germany, Italy, Portugal and Spain.

The investigation has led to various findings:

1. The research has shown that the quality of the specifications has generally improved. In particular, the most recent specifications seem to be more in line with the guidelines published by the European Commission and, in general, more detailed and better structured.
2. The German specifications stand out as the shortest and those with the structure most

similar to the Single Document. Instead, the specifications of the other sample countries are usually considerably longer – more than 10 pages on average – and are characterised by diverse structures, often substantively different from the model recommended by the EU. Interestingly, Germany is the only sample country where the registration process is administered at the national level not by the Ministry of Agriculture or a specialised *ad hoc* authority, like the French INAO (Institut national de l'origine et de la qualité), but by the Patents and Trade Marks Office (*Deutsches Patent und Markenamt*). Hence, the discrepancies identified may be due to the different nature and function of the national authority that manages the procedure.

3. The “method of production” section is generally the most detailed and uniform among the sample countries, thus confirming that the applicants usually consider this to be the core of the specification. Instead, the approach to the description of the link between the product and its place of origin is still rather diverse. Moreover, although the EU recommends the adoption of a tripartite structure to present this – (1) natural and human specificities of the area of production; (2) specificities of the product; (3) description of the link between the two – this is often not followed, especially in the older applications.¹⁵

5. Amendments to Single Documents and analysis of the evolution of EU GIs

The amendments to the specifications of registered EU GIs is an important but under-researched topic that can contribute to shed light on the evolution of the system. In the EU, producers must provide an explicit justification for why they want to amend a specification. The analysis of these documents is interesting as it allows to assess not just what the amendment has practically changed but also why, thus clarifying how EU GIs are evolving and for what reasons.

In particular, the analysis focused on PGI registered for “Meat Products” (Class 1.2 of the EU classification). The contents of the amendments were classified depending on their stated justification and, subsequently, by the practical effect that they had on the Single Document: e.g., on the structure and/or contents of the method of production or of the link section; on the delimitation of the geographical area and so on.

The research has found that, setting aside merely formal justifications/effects, e.g., mere clarifications to the text etc., most amendments are justified by the need to implement new legal or policy-related provisions, or to update / introduce practices that can preserve the traditional qualities of the products. With regard to the effects of the amendments, most of them impact on the structure and on the contents of the “Method of Production” section of the Single Document; on the kind and sources of the raw materials or ingredients used to make the product and on the rules on packaging and labelling.

Furthermore, the study has found that the sections that are most frequently subject to amendments are those concerning the “description of the product” and the “method of production”. These results coincide with the findings described above, and confirm that these are the sections where most part of the evolution of EU GIs takes place.

Finally, another relevant result of the analysis is that 9.4 per cent of the amendments are justified by the need to introduce new technological advancements / production practices or to implement the results of new research in the field. However, in spite of this, no amendment is explicitly justified by the will to promote sustainable, environmental-friendly and/or other related practices.¹⁶

6. Implications for non-EU countries

The protection and enforcement of GIs at international level is ranked among the top priorities of the EU Trade Agenda.¹⁷ This is why this IPR has been playing an increasingly significant role in the bilateral relations of the EU and in particular in the Free Trade Agreements (FTAs) that it has recently negotiated. GIs have often proved a complex topic to discuss for a variety of reasons, usually related to the impact that such exclusive right may have on the possibility to use a given name on the market of a third country.¹⁸

The following are examples of FTAs that are currently being, or have just been, negotiated by the EU and in which GIs are playing a relevant and sometimes controversial role.

1. EU and Australia started discussing an FTA in 2018. To date, the negotiations are not concluded yet.
 - a) The EU has asked Australia to protect 234 spirit and 166 agricultural and other food-stuff names.
 - b) In particular, Australia has been requested to provide a level of protection particularly high, in line with the EU practice. More specifically, the EU GIs should be protected against: (a) any direct or indirect

commercial use; (b) any misuse, imitation or evocation even if the true origin of the product is indicated or if the protected name is translated, transcribed, transliterated or accompanied by an expression such as "style", "type", "method" and so on; (c) any other false or misleading use of the indication as to the origin, nature or essential qualities etc. of the products; (d) any other practice liable to mislead the consumer as to the true origin of the product.

- c) The Australian Government has voiced its concern about the risk that the protection of GIs will create a monopoly on names commonly used by Australian producers. Hence, it has not yet made any commitment to protect those EU GIs.¹⁹
2. EU and Mercosur States (Brazil, Argentina, Uruguay and Paraguay) reached an agreement on an FTA in 2019 which has not yet come into effect. This includes one of the largest bilateral agreements on the protection of GIs ever concluded. In particular, Mercosur will protect 355 EU products in return for the protection of 220 goods in the EU, plus 9 Brazilian and 8 Paraguayan non-agricultural GIs.²⁰ Various sources state that the intransigent position on GIs adopted by the EU during the negotiations constituted a challenge for the Mercosur countries.²¹
 3. EU and India relaunched negotiations for an FTA in June 2022. This includes a specific separate agreement on the protection of GIs. Indeed, India is strongly interested in ensuring a high level of protection for GIs. In particular, among other things, it requested to include in the agreement the protection of non-agricultural GIs. Instead, the EU has asked to extend the absolute level of protection also to products different from wines and spirits, thus adopting a TRIPS-plus standard in favour of agrifood and non-agricultural GIs.

7. Conclusion

The EU has developed over time a *sui generis* regime for GIs that aims at supporting producers of agricultural products and foodstuffs through a special category of IPRs.

The EU considers the protection of GIs a key component of its international agenda. This is why almost every FTA that it is currently negotiating and that features a chapter on intellectual property also

includes the protection of GIs. In the evolving context described above, the MPI Study can be useful to non-EU producers, professionals and policymakers as it provides an unprecedented view on the nature of EU GI products and on what to expect when interacting with the European Commission on this topic. At the same time, it provides a complete picture of what elements are usually included by the producers in the specifications and how the essential requirements for registration are met in practice. Hence, it can be a useful guide for anyone who would like to apply for GI protection in the EU. It can also prove to be a valuable source of information for non-EU governmental officers, practitioners and professionals who would like to gain a better understanding of the functioning and the practical nature of EU *sui generis* GIs regime.

Endnotes:

¹ Regulation (EU) 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2021] OJEU L343, 1. This Regulation, as well as the EU *sui generis* GI system as a whole, is currently undergoing a process of Reform. In particular, on 2 May 2022, the EU Commission published the final version of a "Proposal for a Regulation of the European Parliament and of the Council on European Union geographical indications for wine, spirit drinks and agricultural products, and quality schemes for agricultural products, amending Regulations (EU) No 1308/2013, (EU) 2017/1001 and (EU) 2019/787 and repealing Regulation (EU) No 1151/2012", (COM(2022) 134 final/2, 2022).

² The EU system features two more major *sui generis* GI regimes: one for Wines and one for Spirits. These fall respectively within the scope of Regulation 1308/2013 and Regulation 2019/787.

³ Zappalaglio A, Guerrieri F, Carls S, Gocci A, Knaak R, Kur A, "Study on the Functioning of the EU GI System", (Max Planck Institute for Innovation and Competition, February 2022). The research is available at: < https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung/Study_on_the_Functioning_of_the_EU_GI_System.pdf >.

⁴ This kind of link is often indicated with the French term *Terroir*.

⁵ This system is based on the model of the "Appellation of Origin". This was introduced at international level by the "Lisbon Agreement for the Protection of Appellations of Origin and their International Registration" (1958).

⁶ For an in-depth analysis of the concept of "reputation" in the history of EU *sui generis* GIs see Andrea Zappalaglio, *The Transformation of EU Geographical Indications Law: The Present, Past, and Future of the Origin Link* (Routledge 2021).

⁷ Despite being relatively few, TSG have raised the interest of some non-EU jurisdictions thanks to their focus on the concept of "tradition" that is often found easier to understand than that of "origin link". For more on this topic, see Andrea Zappalaglio, "Anatomy of Traditional Specialities

Guaranteed: Analysis of the Functioning, Limitations and (Possible) Future of the Forgotten EU Quality Scheme" [2022] GRUR International <<https://academic.oup.com/grurint/advance-article/doi/10.1093/grurint/ikac091/6760284>>.

⁸ The Single Document is the short version of the specification of a product. In spite of being a summary, it is considered self-sufficient and, contrary to the full specification, it is the result of the EU registration phase and, once completed, it is translated into all the languages of the EU.

⁹ Until 2020, DOOR was the EU database for registered agrifood products. Today, this has been replaced by "eAmbrosia", a unified database that combines information on all the three EU registers on agrifood products; wines and spirits. Recently, the EU Commission has introduced a new database, "GIView". This is presented as a "showcase" for EU GI products. It is particularly useful because, among the other things, it indicates all the bilateral/multilateral agreements through which a given good is protected in non-EU countries. "eAmbrosia" is accessible here: <<https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/>>; "GIView" is accessible here: <<https://www.tmdn.org/giview/>>.

¹⁰ Max Planck Institute (n 5) 40.

¹¹ Ibid., 41.

¹² Ibid.

¹³ Art. 50(1) Regulation 1151/2012.

¹⁴ Max Planck Institute (n 1) 77-83.

¹⁵ Ibid., 108-110.

¹⁶ Ibid., 127.

¹⁷ EU Commission, "Geographical Indications" (*Trade*) <https://policy.trade.ec.europa.eu/enforcement-and-protection/protecting-eu-creations-inventions-and-designs/geographical-indications_en> .

¹⁸ Mark Davison, Caroline Henckels and Patrick Emerton, "In Vino Veritas? The Dubious Legality of the EU's Claims to Exclusive Use of the Term 'Prosecco'" (2019) 29 Australian Intellectual Property Journal 110.

¹⁹ For details, see Australian Government, "European Union request for protection of geographical indications in Australia" (*Australia-European Union Free Trade Agreement*) <<https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/geographical-indications>>.

²⁰ Trade part of the EU-Mercosur Association Agreement, "Annex I", "Appendix to Annex II" (2019) <https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158330.pdf>.

²¹ Roxana Blasetti, "Geographical Indications: A Major Challenge for MERCOSUR" (2020) 69 GRUR International 1113.



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