

## Minutes of the Round Table on Geographical Indications on « The *ex officio* protection »

Con contributo Mipaaf D.M. 2032 del 07/04/2008  
In collaboration with OriGIn

Brussels, 9 June 2009

- **David Thual, Managing Director of Insight Consulting**

David Thual welcomed the participants and thanked the Italian Ministry of Agriculture for sponsoring the Round Table, oriGIn for its collaboration and the speakers for agreeing to take part in the discussion. He underlined that the Round Table was part of a series of meetings organised by Insight Consulting and O'Connor & Company on the topic of the future of geographical indications.

- **Georges Vassilakis, lawyer, DG Agriculture, European Commission**

Georges Vassilakis presented the legal framework of the *ex officio* protection of GIs in the European Union. He stressed that when the Commission first thought about protecting GIs, it wanted to protect them against counterfeiting and fraud.

The first concrete problem encountered was the one related to the fake Parmesan cheeses produced in Germany. The European Commission opened an infringement procedure against Germany and the case was eventually referred to the European Court of Justice (ECJ). The Commission argued that the term "Parmesan" used by the German cheese makers was alluding to a specific cheese – the Protected Denomination of Origin Parmigiano Reggiano - and that the Member State had to act in order to stop the infringement. The ECJ concluded that the Commission was right when it stated that the Parmesan is protected and that the German producers could not use the name. However, it stated that, based on Regulation 2081/92, Germany was not obliged to act against the infringers as long as legal means were available to producers of GIs to seek act against infringements. This interpretation caused concerns within the Commission as it would not have allowed small GI producers to go before Member States' courts due to a lack of resources.

However, the EU framework for the protection of PDOs and PGIs had been modified before the publication by the ECJ of its decision on the Parmesan case. The new EC Regulation 510/2006, in its article 10 states that the Member States have to perform controls in accordance with EC Regulation 882/2004. The practical details are left to the Member States, but it is clear that they have to take the necessary measures to stop the infringements of GIs. Articles 54 and 55 of EC Regulation 882/2004 refer to enforcement actions and state that the measures adopted by the Member State must be appropriate and proportionate. Most of the time, a modification of the labelling would be sufficient but the destruction of the products could be decided.

In conclusion, the current EC legislation protects GIs and asks Member States to act and apply the *ex officio* protection.

- **Gianluca Frinzi, DG Health and consumers, European Commission**

Gianluca Frinzi presented the EC Regulation 882/2004 which deals with official controls and covers GIs. The management of this Regulation falls within the scope of the competence of DG Health and Consumers (DG SANCO).

Regulation 882/2004 aims at:

- Improving the Community's system of official controls to ensure the verification of compliance with EU legislation;

- Introducing operational criteria for the performance of official controls;
- Better defining the tasks of the Member States and the common tasks of the Member States and the EU;
- Harmonising the role of control services and integration of controls across the entire food chain.

Member States have to set up integrated multi-annual national control plans. Member States have to set up effective, proportionate and dissuasive penalties/sanctions as well as administrative measures (corrective measures, restrictions on feed and food, recall, destruction, closure etc.). The plans aim at having an updated, comprehensive and integrated approach of official controls. The Commission set up guidelines regarding the implementation of regulation 882/2004. Decision 2007/363 on integrated multi-annual national control plans make it clear that Member States have to include in their national plan controls regarding GIs.

Annual reports on the implementation of the plans also have to be prepared and send to the European Commission. The report for 2008 should be arriving at DG SANCO in June.

- **Irina Kireeva, attorney, O'Connor & Company**

Irina Kireeva explained that in most WTO Members where a *sui generis* legal framework for the protection of GIs has been established, the protection is only provided *ex parte*, i.e. at the request of an interested party (producers or users of GIs).

Few countries have *ex officio* protection, that-is-to-say a protection where the public authorities can intervene without being asked to. The countries with an *ex officio* protection are geographically closed to the EU (ex: Switzerland and Croatia). Some countries have an *ex officio* protection but with a limited scope, for example Japan offers *ex officio* protection for liquors, Chile for wines and spirits GIs, as a result of the bilateral agreement signed with the EU. Finally, some countries, as Algeria, Tunisia and Mauritius, protect *ex parte* and *ex officio*. The protection is available at the request of the competent authorities, for example governmental bodies, and GI groups. It is however difficult to know how often and how well the controls are made. Finally China has a legal framework similar to the EU one and promotes the concept towards the farmers. However, farmers are not keen in participating in the advertised scheme because of the controls it implies, even though the GI are often free of charge.

In general, the EU legislation is perceived as the model for the protection of GIs by third countries. The scope of the protection offered in the EU, in particular the *ex officio* protection, is therefore of high importance to these countries.

- **Discussion**

**Felix S. Pérez Alvarez** (Spanish Lawyer, member of the International Wine Law Association - AIDV) asked what happens if a Member State considers that there is no infringement while another Member State thinks that a GI name is abused.

**Georges Vassilakis** said that the Commission does not act when there are usurpations because it is the competence of the Member States and the Commission does not intervene at the national level. Most of the issues are resolved at the national level. Nonetheless, the Commission has so far received six complaints, including the one regarding the Parmesan case. If the Commission is not satisfied with the action of a Member State, it can open an infringement procedure which can go all the way to the ECJ. Finally, the ECJ will decide.

**Aziz ALLAM** (Directeur juridique du Bureau National Interprofessionnel du Cognac) stressed that beyond EC Regulations 510/2006 and 882/2004, the *ex officio* protection of GIs is available under Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. This Regulation sets out a procedure which allows right owners to make a request for action to the EU customs services.

**Gianluca Frinzi** said that this is a possibility and that the Member States could insert this in their national plans.

**Georges Vassilakis** affirmed that the Member States have to act but the right holder can have reasons to act too and both can work in partnership.

**Tozzi Luigi** (Confagricoltura) asked whether the Commission could provide an example of a risk analysis that has to be carried out under regulation 882/2004.

**Gianluca Frinzi** said stated that regulation 882/2004 is risk based. Member States do not have to prepare a risk analysis for all products. They must have data and analysis to demonstrate that the controls are efficient.

**Irina Kireeva** added that GI producers are subject to controls according to the specification before the product is distributed, meaning that the one using the name is its rightful owner.

**Angela Crescenzi** (Region Tuscany) asked if the multi-annual controls plans, which are being sent to the Commission, showed differences in the implementation of the controls.

**Gianluca Frinzi** replied that the regulation entered into force in 2006 and that 2007 was the first year of implementation and thus the first reports will be those of 2008 that will be received soon. The Commission does not check the plan but the analysis of the Member States. Some of the control plans are published online by the member States which have the obligation to make them public under Regulation 882/2004.

- **Riccardo Deserti, Director, Ministry of agriculture and forestry politics, Italy**

Since the Parmesan case, Italy worked a lot on the issue of the *ex officio* protection. Following a political assessment of the practices in Italy, it asked, at the end of 2008, for the adoption of provisions at the EU level in order to make the system more comprehensive.

The interpretative note 2009-01 of the Commission provided useful explanations regarding the obligations of the Member States. This note is important because it requires further legislative interventions to make the *ex officio* protection more efficient. Italy will work in this direction.

Italy thinks that a more technical discussion is needed at the EU level to:

- Identify the public sector actors who should be given the information regarding the GIs;
- Identify who should act;
- Develop a procedure on the dispatching of the information: a fact sheet should be created to avoid a new Parmesan case;
- Develop at the EU level minimum standards common to all Member States;
- Create a database which could be used by Member States to access the technical information related to the specification;
- Invest in training programs to help Member States to exchange best practices;
- Share simple information between Member States so that they know which GIs is concerned by a piece of legislation;
- Develop the cooperation between the Member States' control bodies, notably through bilateral agreements;
- Make a shortlist of the most important national GIs and their characteristics to launch this cooperation.

The Commission should coordinate the Member States' actions.

- **Chantal Mayer, Inspectrice Principale, General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), France**

Mrs. Mayer presented the role and competences of her Directorate and the articulation of its competences with the other French authorities. With regard to GI protection, the DGCCRF works with the Ministry for agriculture, the Customs authorities and the Institut national de l'origine et de la qualité (INAO). Since the adoption of Regulation 510/2006, a protocol was signed between these administrations to increase the exchange of information between them. More specifically,

the DGCCRF controls the European PDO/PGI at all stages (production, importation, processing, distribution...) in the framework of programmed controls, complaints or controls in the company. It controls the conformity with the specification and the labelling, and also controls the accreditation bodies. The French law provides for several penal offences and contraventions, but administrative sanctions are also possible (ex: rectification of the labelling). The DGCCRF can also control directly the restaurants and shops.

Mrs. Mayer presented concrete examples of the work of DGCCRF in the framework of the GI *ex officio* protection. After the Feta was protected, DGCCRF informed the French producers of the change of legislation and controlled the good application of the law. The DGCCRF is also informed directly by the GI representative, as it has been the case with the French representative of the Parmigiano-Reggiano. It follows up on the complaints that it receives.

Mrs. Mayer argued in favour of the creation of a coordination system, as the one in the organic sector, which will help the Member States to know the names and the specifications of the European GIs in order to treat faster the complaints. The coordination could also be reinforced in the GI Regulatory Committee, with notably the use of a file signalling the complaints under examination and their progress.

- **Simon Johnson, Policy Adviser on Regional and Local Food, Food Policy Unit, Department for Environment, Food and Rural Affairs, United Kingdom**

As the number of GI registered at the EU level is increasing, the UK government welcomed the DOOR database which introduces more transparency.

The first national control plan (2007-2011) was defined by the food agencies in England, Scotland, Wales and Northern Ireland.<sup>1</sup> An audit of performance of the authorities in place in the UK was conducted. The progresses are monitored and reported. Under regulation 510/2006, the national control plans are the framework to assess the controls. Concerning GIs, the Department for environmental, food and rural affairs (DEFRA) is competent. The enforcement of the legislation is made at the production and at the retail levels. The Member States have to ensure that the inspections are in place and that the private bodies are accredited. The products are inspected on regular basis and the costs are paid by the producers using the protected name. There is no specific legislation on the enforcement of GI in the UK but the general Food Safety Act provides for sanctions.

Mr Johnson gave some examples of unlawful use of a GI name. In the 1<sup>st</sup> case, the French Embassy complained that lentils imported from Canada were sold under the name "Lentille vert du Puy". This case was administratively dealt with and the labelling was changed. The 2<sup>nd</sup> case concerned the packaging of Budwar beers. The DEFRA did as France did in the Feta case: it informed the producers of the change of legislation during the transition period.

The UK welcomed the interpretative note of the Commission on the Parmesan case because it makes things clearer. It underlines three important points:

- the controls must be regular,
- the controls must cover GIs and
- the Member States must penalise the infringer and make sure the situation is dealt with.

The UK is reviewing its measures to make it complies with this note.

- **Magdalena Glodek, acting head of geographical indication unit department of agricultural markets, Ministry of agriculture and rural development, Poland**

The Polish authorities competent in the *ex officio* protection are the Agricultural and Food Quality Inspection (AFQI), the Office of Competition and Consumer Protection (Trade Inspection

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<sup>1</sup> <http://www.food.gov.uk/news/newsarchive/2009/jan/ncpupdate3>

Department) and the Ministry of Agriculture and Rural Development. The Ministry of Agriculture is not involved directly in the controls but is in charge of the information. The AFQI undertakes the controls at the production and first distribution levels. The AFQI conducts border controls of agricultural and food products entering the Polish custom area. It cooperates with the authorities conducting such controls in other EU Member States.

Official controls are carried out to ensure that registered names are protected against the use for commercial purposes, appropriation, imitation or allusion, as well as all other practices that could mislead consumers as to the product's true origin. Official controls of the GI products are included in multi-annual national control plan within sector specific controls (i.e. the dairy sector) and include:

- Checking documents in order to identify the food and agricultural product, quality certificates, results of laboratory analyses and other documents that confirm the quality of the product;
- Checking the packaging, labelling, presentation of agricultural and food products and transport and storage conditions;
- Examining agricultural and food products;
- Sampling and laboratory analyses;
- Determining the category of agricultural and food products;
- Controlling the way of production or correctness of the processing.

The AFQI can impose sanctions against the infringement of the law, notably it can order to withdraw the product from the market, to destroy it on expense of its owner, to prohibit storing a product in inappropriate conditions or transporting it in inappropriate means of transport and it can fine the infringer. Mrs Glodek also explained that the Polish authorities dealt with a case relating to a counterfeited Feta product.

- **Discussion**

**Crescenzi Angela** (Region Tuscany) said that the Commission's websites must be clearer so that the information is easily accessible. **Gianluca Frinzi** answered that DG SANCO is currently working on guidelines on this point.

**Christophe Derrien** (COPA-COGECA) asked if it would be possible to ensure that the legal action is not reserved to the right holder but accessible to consumer associations and competitors. **Simon Johnson** replied that it is probably possible.



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

Directorate M. Agricultural legislation  
**M.1. Agricultural law, simplification**

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### **INTERPRETATIVE NOTE No 2009-01**

This interpretation is without prejudice to any decision on the matter by the Court of Justice, which has sole jurisdiction to issue legally binding rulings on the validity and interpretation of acts adopted by the Community institutions.

<b>SECTOR:</b>	Quality policy
<b>MECHANISM / MEASURE:</b>	Protection of geographical indications and designations of origin for agricultural products and foodstuffs
<b>Subject:</b>	Administrative protection of names registered under Regulation (EC) No 510/2006 by the competent control authorities of the Member States
<b>PROVISIONS CONCERNED:</b>	Council Regulation (EC) No 510/2006. Regulation (EC) No 882/2004 of the European Parliament and of the Council. Commission Decision 2007/363/EC.

#### **TEXT OF THE INTERPRETATION:**

1. Article 10(1) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs stipulates that "*Member States shall designate the competent authority or authorities responsible for controls in respect of the obligations established by this Regulation in conformity with Regulation (EC) No 882/2004*".<sup>2</sup>
2. The objective here is for the competent authorities in question to ensure that the use, on their territory, of a name registered as a protected geographical indication or a protected designation of origin pursuant to Regulation (EC) No 510/2006, complies with the relevant binding product specifications as set out in Community legislation, and to penalise any infringements, if necessary.

<sup>2</sup> Pursuant to Article 10(3) of Regulation (EC) No 510/2006, the Commission must make public and periodically update the names and addresses of these authorities.

3. As cited earlier, Article 10(1) of Regulation (EC) No 510/2006 expressly stipulates that the relevant controls carried out by the national competent authorities are governed by the substantial and procedural rules established under Regulation (EC) No 882/2004 of the European Parliament and of the Council, in force since 1 January 2006, notably on official controls performed to ensure the verification of compliance with feed and food law.
4. Article 1(b) of Regulation (EC) No 882/2004 states that the controls carried out must, in particular "*guarantee fair practices in feed and food trade and protect consumer interests, including feed and food labelling and other forms of consumer information*".<sup>3</sup>
5. Article 3 of this Regulation stipulates that the Member States must carry out official controls regularly, in principle without prior warning, and with appropriate frequency, so as to achieve the objectives of this Regulation. Article 3(3) further emphasises that the official controls must also be carried out regularly at the **distribution** stage and refers explicitly to controls on feed and food businesses, which covers all retail sales points for feed and food.
6. The specific modalities governing how the various controls are carried out on their territory remains at the discretion of the competent control authorities - based on an appropriate risk analysis they have conducted in advance - in accordance with the criteria set out in Article 3(1) of Regulation (EC) No 882/2004. It must nonetheless be emphasised that Article 3(1)(d) requires that due consideration must be given to "*any information that might indicate non-compliance*". Consequently, in the event of a complaint from a natural or legal person who considers that the use of a given name could infringe a protected geographical indication or a protected designation of origin pursuant to Regulation (EC) No 510/2006, the relevant national competent authority must, in principle, examine the complaint and take any action it deems necessary.<sup>4</sup>
7. It must also be noted that Regulation (EC) No 882/2004 specifies that the Member States must implement integrated multi-annual national control plans. In this context, Commission Decision 2007/363/EC of 21 May 2007<sup>5</sup> established guidelines to assist the Member States in preparing this type of control plan. Point 3.1.2.1 of the Annex to this Decision specifically states that national control plans should cover the full legislative scope of Regulation (EC) No 882/2004. It stipulates that these control plans "*should cover all feed and food law including, for example, (...) quality and compositional requirements (...), labelling, (...) and protection of geographical indications and designations of origin for agricultural products and foodstuffs*"<sup>6</sup>. Similarly, point 5 of this Annex on "*guidance on the scope of single integrated multi-annual national control plans*" makes an express reference, in the corresponding section, to the legislation on geographical indications and designations of origin for agricultural products and foodstuffs.
8. Regulation (EC) No 882/2004 also refers to the correlated need for the national competent control authorities to penalise any specific infringements they find.

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<sup>3</sup> Article 10(2)(b) of the Regulation in question also makes a similar stipulation, emphasising in point (vi) controls on "labelling, presentation and advertising".

<sup>4</sup> The above administrative control procedure is, however, without prejudice to any – additional or alternative – litigious procedure which the abovementioned natural or legal person may bring before the competent national courts.

<sup>5</sup> OJ L 138, p. 24.

<sup>6</sup> A footnote here refers back to Regulation (EC) No 510/2006, cited.

9. In this context, Article 54 of Regulation (EC) No 882/2004 on enforcement action to be taken in case of non-compliance states that when the competent authority identifies non-compliance, it shall take action to ensure that the operator remedies the situation, taking account of the nature of the non-compliance and that operator's past record with regard to non-compliance. This Article 54 also refers *inter alia* to the prohibition of the placing on the market, import or export of the feed or food concerned, its withdrawal or destruction, and, more generally, the possibility to taking "*any other measure the competent authority deems appropriate*". *It must be borne in mind that action taken by the competent authorities in this respect must be proportionate.*
10. While it is probable in this context that amending the label at issue could, in almost all cases, constitute an adequate solution in terms of ending the infringement identified, this does not rule out the use of more drastic measures as a last resort, particularly in cases where the operator concerned refuses to comply with the injunctions of the control authorities, even where the agricultural product or foodstuff in question is perishable.
11. Lastly, Article 55 of Regulation (EC) No 882/2004 provides that Member States must lay down the rules on sanctions applicable to infringements of feed and food law and asks that they take all measures necessary to ensure that these sanctions, which must be "*effective, proportionate and dissuasive*" are implemented.