Governing governance

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by

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SUMMARY

Geographical Indications ('GIs') identify a product whose reputation, characteristics and quality are essentially due to their geographical origin. As such, they are identifiers of 'origin products', immersed in a specific local natural and socio-cultural ecosystem. Local tangible and intangible assets and the associated reputation are nurtured over time, but they are also vulnerable to erosion. GIs encourage stakeholders to codify arrangements as a response to this problem.

The importance of collective action issues in GIs has been demonstrated by interdisciplinary scholarship. However, it is mostly considered extraneous in the legal discourse and in policy prescriptions at the EU level. I identify legally relevant collective action issues, that characterise the pre-application and application phases of GI registration. I highlight their importance for the applicants, for external supporting actors (including national authorities) and for policy makers.

Through a transdisciplinary approach I combine comparative legal analysis and case study analysis, illustrating the diversity of the protection and valorisation strategies of French and Italian agricultural and non-agricultural origin products. My approach is heavily inspired by the theory and diagnostic frameworks of Elinor Ostrom's and colleagues, used for analysing human cooperation for the sustainable governance of tangible and intangible commons. I explore the potential of the conceptual proximity between GIs and the commons and reframe key aspects of GI legal theory to embrace the collective action perspective. Then, I provide simplified diagnostic tools to facilitate interdisciplinary dialogue.

I show that national legal rules, their interpretation, and their implementation are not harmonised. In particular my work highlights that discrepancies between the French and Italian systems exist regarding the role of producers and external actors involved in the GI initiative, how rulemaking process for product specification design unfolds and how its outcomes (i.e., codified arrangements) are operationalised after the GI registration.

Through my work I aim to inform policymaking with empirically grounded findings. To this end, I provide some suggestions on how to address the legal relevance of governance issues in GIs settings.

This research has received the financial support of the Max Planck Institute for Innovation and Competition in the form of a Fellowship Contract (from March 2019 until September 2020) and in the form of a Research Scholarship (from October 2020 until September 2021). In 2022, this research was awarded a scholarship from the *Association Française des Femmes Diplomées des Universités* (AFFDU), the French section of the Graduate Women International (GWI).

ACKNOWLEDGMENTS

The first time I heard about the commons was in a Philosophy of Law lecture during my Master's studies at Bocconi University in Milan. That was my first encounter with Elinor Ostrom's theory on the management of common-pool resources. At the time, I could not have imagined that her teachings would become such a powerful driver in my future academic journey.

This research has been developed across countries: at the Max Planck Institute for Innovation and Competition in Munich, where I spent three years, first as a Junior Research Fellow and member of the Research Team on geographical indications and then as a scholarship holder; at the Institute for Information Law in Amsterdam where this research has 'found a home', at CIRAD in Montpellier, where I first spent few months as a guest researcher, and then continued the collaboration as affiliated PhD candidate.

At the Max Planck Institute, Prof Annette Kur was the very first person to believe in this research project. I will always be grateful to her for agreeing to co-supervise this work, for her trust and constant support, for being an example of scientific rigour and integrity, and for encouraging me to think outside the box.

At the Institute for Information Law of the University of Amsterdam, Prof Martin Senftleben accepted to supervise this research. He opened my eyes to the many challenges of interdisciplinarity and pushed me to find my own way to give a coherent structure to this work. I would like to thank him for having allowed me the privilege of academic freedom to explore uncommon paths.

At CIRAD, Dr Delphine Marie-Vivien whom I met almost as a coincidence at the Max Planck Institute back 2019 and later welcomed me for a research stay in Montpellier. She joined the co-supervision of this work, and thought me to follow my intuition, to overcome obstacles, and to ask the right questions. I am grateful to her for having given me the opportunity to find in Montpellier a sense of belonging.

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My curiosity to understand the connections between GIs and the commons was over time nurtured by a series of inspiring encounters.

In Geneva, back in 2015, I had the opportunity to assist to the Diplomatic Conference for the adoption of the Geneva Act of the Lisbon Agreement as a trainee for the Permanent Mission of Italy to the World Intellectual Property Organisation. I will always be grateful to Vincenzo Carrozzino of the Italian Ministry of Agriculture, Tiberio Schmidlin at that time First Secretary at the Permanent Mission, Massimo Vittori and Ida Puzone from OriGIn, and Dr Felipe Ferreira Catalán for awakening my curiosity for geographical indications.

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I am extremely grateful to Dr François Casabianca, Prof Giovanni Belletti, Dr Barbara Pick and Prof Stephane Fournier not only for the rich discussions, but also for reassuring me, confronting me, and encouraging me to ask questions, some of which I have tried to answer in this work.

This work represents the starting point of a quest to find my identity as a young academic. It would probably sound *cliché* (but it is true!) saying that it has been hard, and it is far from being over. Certainly, it would not have been the same without the precious encounters made at the International Association for the Study of the Commons (IASC). I would like to thank Prof Insa Theesfeld, Prof Edella Schlager, Prof Marty Anderies for answering my numerous questions around the commons and institutions, for alimenting my motivation to deepen my knowledge outside the comfort zone of my disciplinary boundaries. I would like to thank Prof Marco Janssen for having given me the opportunity to represent the Early Career Network during the IASC Knowledge Commons Conference in 2021. At the Early Career Network of the IASC, I found a safe space for connection and exchange. I would like to thank Corrie Hannah for sharing reflections, many of which have been further developed in this book, Beril Ocaklı, Eve Castille, Hita Unnikrishnan and Maria Gerullis for the early morning conversations and the invaluable opportunities of putting many ideas into form, for sharing the joy (normalising the struggles) of navigating interdisciplinarity.

I dedicate this work to Hugo, much more than a partner, a colleague, a teammate, my rock. He inspires me to be a better human and scientist. Endlessly and tirelessly, he always walks by my side. Thank you for your love, questions, and confutations.

To Mamma and Papà, my first supporters, and at times fieldwork companions and external brain, who also walked hand in hand with me through this journey. Without your support, I would not be where I am, and this research simply would not have existed.

To Nonna who, despite her physical absence, continues to teach me resilience and helps my messy thoughts to find 'their place in the right drawers'. She would have been proud of how this research turned out.

To my French family, Bibi, Richard, Lucile, Lucas, Mel, Ezio&Eneo. They always reminded me that I was never alone. To Chiara, who is the uncontested pillar of my mental health since 2014. To Veronica, Elodie, and Coline, for always having a bed ready and a warm hug. To Bruno whose help as a practitioner and friend was key to understand on-field challenges of Italian producers.

To all the participants who accepted to share their experience and time in this research and who opened their doors to me. I would like to express my immense gratitude to all of them. Every contribution was priceless and irreplaceable, and contributed to make this work *alive*.

'The most important lesson for public policy analysis derived from the intellectual journey I have outlined here is that humans have a more complex motivational structure and more capability to solve social dilemmas than posited in earlier rational-choice theory. Designing institutions to force (or nudge) entirely self-interested individuals to achieve better outcomes has been the major goal posited by policy analysts for governments to accomplish for much of the past half century. Extensive empirical research leads me to argue that instead, a core goal of public policy should be to facilitate the development of institutions that bring out the best in humans.'

Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems', American Economic Review 100 (June 100)

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LIST OF ABBREVIATIONS

AiCC	*Associazione italiana Città della Ceramica*
A-P-O	Actors-Process-Outcomes
AREPO	*Association des régions européennes des produits d'origine*
CASS	*Cour de Cassation*
CAT	*Ceramica Artistica Tradizionale*
CE	*Conseil d'Etat*
CNAOL	*Conseil National des Appellations d'Origine Laitières*
COFRAC	*Comité Français d'Accreditation*
CTM	Collective Trademark
DGCCRF	*Direction générale de la Concurrence, de la Consommation et de la Répression des fraudes*
ECJ	European Court of Justice
ECTA	European Communities Trade Mark Association
EU	European Union
EUIPO	European Intellectual Property Office
FTA	Fair Trade Agreement
GI	Geographical Indication
GKC	Governing Knowledge Commons
IAD	Institutional Analysis and Development
ICH	Intangible Cultural Heritage
ICQRF	*Ispettorato Centrale Repressione Frodi*
IGO	Indication of Geographical Origin
IGPIA	*Indications Géographiques pour les Produits Industriels et Artisanaux*
INAO	*Institut national de l'origine et de la qualité*
INPI	*Institut National de la Propriété Intellectuelle*
IP	Intellectual Property
IPRs	Intellectual Property Rights
MASAF	*Ministero dell'Agricultura della Sovranità Alimentare e delle Foreste*
OAPI	*Organisation Africaine de la Propriété Intellectuelle*
oriGIn	Organization for an International Geographical Indications Network
PDMO	Producer Management Organisation
PDO	Protected Designation of Origin
PGI	Protected Geographical Indications
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSG	Traditional Specialities Guaranteed
USPTO	United States Patent and Trademark Office
WTO	World Trade Organisation

PREAMBLE: THIS RESEARCH AT A GLANCE

Geographical Indications (GIs) are considered, from the perspective of the EU *sui generis* system, as distinctive signs aimed to convey to consumers that a product has specific characteristics and qualities due to its geographical origin. As such, they are names identifiers of origin products and they able to perform market-related functions linking producers to consumers (i.e., the guarantee, distinctive, consumer protection, communication, investment, and advertising functions). These functions are implicitly or explicitly recognised in the objectives of the registered signs, and regulated by national, EU and international law. However, it has been widely demonstrated in the interdisciplinary literature that GIs are complex multifunctional tools, also able to perform important non-market related functions (i.e., local development and resource production functions) which generate positive externalities benefiting a larger community than producer groups. The theoretical functional approach is useful to have a clear view of the potential performance of the name, once registered. However, collective action, i.e., the ensemble of individual and collective choices and initiatives made by producers as a group for a common objective, is the main driver for the operationalisation of these functions. Despite its pivotal importance for the GI registration and for the sustainable management of the sign, collective action is little regulated at the EU level. This can expose GIs to various risks (e.g., power imbalances, ambiguities, or misuses of the tool) impacting on their well-functioning and, in some cases, deviating their performance from its original legal and policy rationales. The envisaged reforms of both the protection of agri-food GIs[1] and the extension of the protection to industrial products and crafts (i.e., non-agricultural products)[2] seem to make some steps forward in the recognition of the importance of collective action. However, these proposals do not currently provide the operational tools to address important issues such as the role of heterogeneous actors during the pre-application and application processes, nor they specify the basic principles which should govern an equitable, non-discriminatory, and democratic rulemaking. This process, happening at the pre-application and application for GI registration (eventually, at the amendment phase), sets (or modifies) the boundaries for the access and use of the name. The content of the product specifications, statutes and control plan set the 'rules of the game' for the governance and control configuration of the GIs after registration. These outcomes are shaped by who participates in the process, and by how rulemaking is conducted.

1 EU Commission Proposal of 31 March 2022 amending Regulations (EU) No 1308/2013, (EU) 2017/1001 and (EU) 2019/787 and repealing Regulation (EU) No 1151/2012.

2 EU Commission Proposal of 13 April 2022 on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754.

In this work, I investigate on how stakeholders manage (or would manage) the pre-application and application process for the construction of the application file for non-agricultural GIs in France and Italy, with a particular focus on product specification design. Building from well-established experience on GI protection for agricultural products and foodstuffs in Italy and France, I provide insights on some factors influencing the sustainable (meaning 'enduring') governance of non-agricultural GIs. I give political recommendations derived from the legal analysis of national and EU legal rules and empirically grounded findings.

Understanding the impact of the legal framework on collective action dynamics requires a shift in prospective from the classical legal analysis. In Chapter 1, I trace disciplinary boundaries: I focus on the legal nature and functioning of GIs as multifunctional tools, I highlight the limits of this configuration introducing the importance of collective action problems, and I describe the theoretical and methodological tools provided by institutional economics, given the conceptual proximity between GIs and the commons**.** I recognise that the contribution of legal scholarship is still limited in this regard, and I position my investigation as a possible response to this gap. I justify the adoption of this approach, highlighting its usefulness. On the one hand, non-legal scholarship would benefit from incorporating the legal perspective in the knowledge emerging from the interdisciplinary research on GIs; on the other hand, the interdisciplinary scholarship on GIs would give to legal scholars and policymakers, the necessary tools to really understand the functioning of such a multifaceted tool. I identify this transdisciplinary approach to prevent, through appropriate legal mechanisms, possible inefficiencies capable of jeopardising the sustainable management of the sign after registration. In this preliminary stage of the research, I trace disciplinary boundaries concluding that:

- the conceptual proximity between GIs and the commons is justified, although some clarifications are needed from a legal perspective, including framing the role of the registered name in relation to the protected intangible resource (which I identify with the place-based reputation);
- some key factors influencing the sustainable management of the sign after registration emerge in the pre-application and application phases, intended as a rulemaking process happening at the local level, and involving stakeholders at a higher level, who interpret and implement the existing legal rules to meet the necessary requirements.

In Chapter 2, I cross and navigate these disciplinary boundaries in the attempt of facilitating transdisciplinary dialogue between legal studies and institutional economics. I decode the diagnostic tools used in the commons scholarship, namely the Institutional Analysis and Development (IAD) framework for the study of tangible commons and the Governing the Knowledge Commons (GKC) framework for the study of intangible commons. To this end, I propose a simplified approach, which I call the 'Actors-Process-Outcomes' approach ('A-P-O approach') to target relevant legal rules and practices involving:

- the 'actors' intervening at various levels, roles and degrees in the pre-application and application phases for GI registration;
- the 'process', meaning the governance mechanisms for rulemaking, including multi-level stakeholders' interactions for compromise building;
- the 'outcomes', focused more specifically on the content of the product specification as main constituent of the application file and its impact on the future management of the sign. I consider the control plan and the statutes design as the object of the adjacent interaction fora, complementary and instrumental to understand the genesis and implications of product specification design.

The A-P-O approach guides the analysis of the applicable legal rules at the EU and national levels and their interpretation and operationalisation by the relevant stakeholders in the Italian and French context.

I firstly test the A-P-O approach on well-established agri-food GI experiences using, as a baseline, insights and principles embedded in the literature on tangible and intangible commons and the interdisciplinary literature on agri-food GIs. Data collected through targeted interviews explore more in depth some critical elements of collective action during the GI pre-application and application phases. At the end of the chapter, for each component of the A-P-O approach, I derive axes of inquiry characterising some aspects of sustainable GI governance and suggest a harmonised approach to evaluate agricultural and non-agricultural GIs. Then, I contextualise the A-P-O approach to the GI-GKC diagnostic framework, which I adapt to case study analysis on GIs. This allows me to reinforce the theoretical grounding of my methodology, positioning this inquiry in continuity with the commons and legal scholarship.

In Chapter 3, I use the GKC framework applied to GIs and the A-P-O approach to analyse and compare case studies related to experiences in the legal protection of names of non-agricultural origin products and the related national legal contexts. For this purpose, I adopt an *ex post* approach for analysing French cases (namely the GIs *Absolue Pays de Grasse*, *Poterie d'Alsace*, *Couteau Laguiole*, *Siège de Liffol*), since the GI protection has already been extended, at the

national level, to industrial products and crafts. I use an *ex ante* approach for analysing Italian case studies involving collective trademarks (*Vetro artistico di Murano*, *Ceramica Artistica Tradizionale*, *Corallium Rubrum ad Alghero*), as the GI protection is still lacking at the national level. The axes of inquiry generated in chapter 2 will facilitate the comparative analysis.

In Chapter 4, I analyse the content of the proposals and frame recommendations aimed to inspire future policymaking. My suggestions are addressed to:

(a) policymakers: I propose empirically grounded models to address the forthcoming policy reforms (especially the future legal framework governing the GI application for registration of non-agricultural GIs). These models are inspired from the operational insights arising from the application of the A-P-O approach within the GKC applied to GIs and the analysis of the EU and national legal frameworks on agricultural and non-agricultural GIs;
(b) practitioners (applicants and national/regional authorities): I identify best practices occurring in the pre-application and application phases, based on empirically grounded findings;
(c) researchers: I propose a diagnostic tool for future case-study driven legal research on GIs, including a frame for semi-structured interview protocols and analysis.

Chapter 1

TRACING DISCIPLINARY BOUNDARIES

1.1 A multi-level nested rule system

The characterisation of Geographical Indications (GIs) as Intellectual Property (IP) tools alimented for long time the international debate on their nature, legal regime, rationales, and scope of protection, and made particularly challenging their positioning in the IP legal framework.[3] In-depth research showed the complexity of the evolutive path of the GI system at the national, European, and international levels and its determinants, not neutral to incompatible political visions and different legal traditions. These studies highlighted that defining the nature and role of GIs within the Indications of Geographical Origin (IGO) galaxy,[4] their rationale, and their functions was for long time dominated by definitory uncertainty, opposing views and political divergencies.

The GI system is currently structured as a multi-level rule system. At the international level, the minimum level of protection defined by art 22-24 TRIPS constitutes the overarching framework. It binds all World Trade Organisation (WTO) Member States to implement GI protection although preserving heterogeneous national specificities and approaches. This has over time originated a fragmentation (or divide) between countries (led by the United States) who implemented GI protection through trademark law 'which embeds a system of private rights and proprietary interests'.[5] Other countries (i.e., the EU) attach to the GI protection the collective dimension of local community engagement and territorial development. These concepts are the baseline of the vision characterising the EU *sui generis* legal framework and imply a certain degree of State involvement. Some States are members of the Lisbon Agreement, which grants international protection of all registered GIs in the legal system of the signatory countries.[6] The Geneva Act of the Lisbon Agreement improved the Lisbon System by establishing a single registration procedure and a register of Appellations of Origin (AOs) and Geographical Indications (GIs), which covers all kinds of goods, without distinction.[7] Moreover, the international landscape is rich of

3 Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press 2012) 295.

4 This expression was adopted by the WTO Secretariat as a 'common denominator' to avoid terminological confusion: as reported by Gangjee 'the IGO refers to a category of sign denoting the geographical origin of the associated product and that category has previously figured within the IP discourse' See ibid 4.

5 ibid 12.

6 Estelle Biénabe and Delphine Marie-Vivien, 'Institutionalizing Geographical Indications in Southern Countries: Lessons Learned from Basmati and Rooibos' (2017) 98 World Development 58, 4 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X15000881> accessed 28 March 2023.

7 WIPO, 'Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications' (2015) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_239.pdf>. Notwithstanding the novelties provided by the Geneva Act, some controversial point remain unsolved. Gervais and Slider define the Geneva Act as a missed opportunity to building bridges to reconcile opposing views on GI protection, which engendered shifts from 'open-door' multilateral negotiation fora to 'closed-door' bilateral and multilateral negotiations such as the Transpacific Partnership Agreement (TPP) and Transatlantic Trade and Investment Partnership (TTIP). See Daniel J Gervais and Matthew Slider, 'The Geneva Act of the Lisbon Agreement: Controversial Negotiations and Controversial Results' in William van Caenegem and Jen Cleary (eds), *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development*, vol 58

heterogeneous dynamics either federating some States in specific arrangements (e.g., OAPI and EU) or establishing targeted cooperation for the recognition of specific GIs, through free-trade agreements (FTAs). The governance and drivers of these negotiation fora are outside of the scope of this research.

At the EU level, the current legal framework for agri-food GIs consists in Regulation (UE) 1151/2012 (hereinafter 'Reg 1151/2012') and the Implementing Regulation 668/2014 of 13 June 2014, while GIs for wines and spirit drinks are currently the object of a separate legislation.[8] On 3 March 2022, the EU Commission released a proposal for a regulation unifying and simplifying the EU GI regulatory framework for wine, spirit drinks and agricultural products (hereinafter 'agri-Proposal').[9] Soon after, on 13 April 2022, followed another proposal aimed to extend the GI protection to crafts and industrial products (hereinafter 'non-agri Proposal').[10] The debate on the extension of the protection to products other than agricultural products and foodstuffs, was long discussed at the EU level. Here below the main highlights:

- In 2011, the document released by the Commission entitled 'Single market for intellectual property rights: boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in Europe' recognised the legal fragmentation at the national level and its negative impact on the functioning of internal market, as well as on bilateral and multilateral trade agreements.[11]

(Springer International Publishing 2017) 38–42 <http://link.springer.com/10.1007/978-3-319-53073-4_2> accessed 13 April 2023.

8 Main sources: for wines, Regulation (EU) 2021/2117 of 2 December 2021; Commission Delegated Regulation (EU) 2019/33 of 17 October 2018; Commission Implementing Regulation (EU) 2019/34 of 17 October 2018 for spirit drinks: Commission Delegated Regulation (EU) 2021/1235 of 12 May 2021; Commission Delegated Regulation (EU) 2021/1465 of 6 July 2021; Commission Implementing Regulation (EU) 2021/1236 of 12 May 2021.

9 European Commission (2022) Proposal for a regulation of the European Parliament and of the Council on EU Geographical indications for wine, spirit drinks and agricultural products, and quality schemes for agricultural products, 30 March 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0134 R%2801%29>

10 European Commission (2022) Proposal for a regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0174>

11 European Commission (2011) A single market for intellectual property rights: boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in Europe, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0287>. The negative consequences of the absence of a EU-wide regime for non-agricultural GIs have also been stressed by Marie-Vivien: 'Due to the absence of a uniform framework for all types of goods, negotiations in bilateral agreements are less smooth and international trade is hampered while European artisans cannot obtain protection for their handicraft's GIs'. Delphine Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime? Insights from Worldwide Law and Practice' in William van Caenegem and Jen Cleary (eds), The Importance of Place: *Geographical Indications as a Tool for Local and Regional Development*, vol 58 (Springer International Publishing 2017) 222 <http://link.springer.com/10.1007/978-3-319-53073-4_9> accessed 12 April 2023.

- In 2014, the 'Study on Geographical Indication Protection for Non-agricultural Products in the Internal Market'[12] explored national specificities and started to investigate on available harmonisation options. In parallel, was published the 'Opinion of the European Economic and Social Committee on the Green Paper "Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products"'.[13]
- In 2015, the results of the public consultation on the possibility of the extension were released.
- In 2019, the publication of a report aimed to quantify the economic impact of the lack of an EU-wide GI system of protection of non-agricultural GIs concluded that the introduction of the extension would 'have an overall positive effect on trade, employment, and local development'.[14]
- In 2020, the study entitled 'Economic aspects of geographical indication protection at EU level for non-agricultural products in the EU' was published. The study involved empirical methods such as mystery shopping, behavioural experiments, interviews with producers and workshops with the stakeholders to measure the impact on consumers of a possible GI protection of non-agricultural products.[15]
- In 2021, the publication of the 'Study on the Control and Enforcement Rules for Geographical Indication protection for non-agricultural products in the EU' identified possible models for implementation of a monitoring and enforcement system of EU non-agricultural GIs, taking into account the aggregated and producer-specific costs and benefits of each envisaged option.[16]

12 InSight REDD, OriGIn (2013) Study on Geographical Indications Protection for Non-Agricultural Products in the Internal Market <https://ec.europa.eu/docsroom/documents/14897>

13 EU Commission (2014) Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0469>; EESC (2014) Opinion of the European Economic and Social Committee on the Green Paper, Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014AE5991>

14 European Parliament. Directorate General for Parliamentary Research Services., Cost of Non-Europe on Geographical Indications for Non-Agricultural Products: Cost of Non-Europe Report. (Publications Office 2019) <https://data.europa.eu/doi/10.2861/057346> accessed 20 June 2023.

15 Julia Rzepecka and others, Economic Aspects of Geographical Indication Protection at EU Level for Non-Agricultural Products in the EU (Publications Office of the European Union 2020).

16 Frithjof Michaelsen and others, Study on Control and Enforcement Rules for Geographical Indication (GI) Protection for Non-Agricultural Products in the EU (Publications Office of the European Union 2021).

The diversity and complexity that for long time has dominated the institutionalisation process of GI protection, especially at the international level, leaves some questions unsolved, often rooted in political motivations more than in legal justifications and public policy considerations.

My research explores the current functioning of the *sui generis* GI system at the European and national level, with a specific focus on Reg 1151/2012 for agricultural products and foodstuffs and its imminent reforms. I will often be referring to the GI framework as a multi-level rule system, focusing specifically on the French and Italian national legislations and their impact at producer level.

According to the EU definition provided by Reg 1151/2012, GIs regroup two different types of signs, which correspond to two different quality schemes: Protected Designations of Origin (PDOs) and Protected Geographical Indications (PGIs). According to art 5 (1) and (2) Reg 1151/2012,

- A PDO '*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'.

- A PGI '*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'.

The definitions of PDO and PGI reflect the provision of art 22.1 TRIPS, according to which GIs are 'indications which identify a good as originating in the territory of a Member, or a region, or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'.

The Geneva Act of the Lisbon Agreement (art 2) identifies the subject matter as:

> 'any *denomination* protected in the Contracting Party of Origin *consisting of or containing the name of a geographical area, or another denomination known as referring to such area*, which serves to designate a good as originating in that geographical area, where the quality or characteristics of the good are due exclusively or essentially to the geographical environment, including natural and human factors, and which has given the good its reputation; as well as

> any *indication* protected in the Contracting Party of Origin *consisting of or containing the name of a geographical area, or another indication known as referring to such area*, which identifies a good as originating in that geographical area, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'.

By reading the GI definitions transversally across the different levels (European, and international), it clearly emerges that GIs are *names*, *identifiers*, in the marketplace, *of products having specific characteristics due to their geographical origin*.

1.2 The legal implications of collective action in origin products

Belletti and Marescotti name the products identified through the names eligible for GI protection as 'origin products'.[17] Rooted in a specific ecosystem, they derive their typicity from a complex combination of factors: the presence and use, by local producers, of specific tangible resources in the production process, a shared knowledge, a history in local production and consumption. The authors affirm that 'what clearly makes a difference between an OP [origin product] and other specific quality products is that the link with the territorial area has been created, consolidated, and modified over time, within a community of producers and consumers, in such a way that the OP becomes part of the common local patrimony, something that cannot be individually owned or managed. The process of knowledge acquisition (often contextual and non-codified), accumulation and sedimentation make an OP the expression of a community of producers and often of the overall local community organization, values, traditions and habits'.[18]

However, not all origin products are potential GI products. While the local natural and cultural ecosystems in origin products constitute the substrate for producers' collective identity and awareness, the repeated interactions between local actors aimed to product differentiation in the marketplace are key to 'shape the identity of OPs by tying its specific quality attributes to the territory *where it is produced, rather than to a single firm*, and bringing it under a geographical name, or a GI, rather than a private trademark'.[19] When the process of valorisation of origin products 'proves to be successful', these distinctive attributes are identified by consumers, through

17 Giovanni Belletti and Andrea Marescotti, 'Origin Products, Geographical Indications and Rural Development.' in Elizabeth Barham and Bertil Sylvander (eds), Labels of origin for food: local development, global recognition (1st edn, CAB International 2011) <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0075> accessed 20 June 2023; G Allaire, F Casabianca and E Thévenod-Mottet, 'Geographical Origin: A Complex Feature of Agro-Food Products.' in E Barham and B Sylvander (eds), *Labels of origin for food: local development, global recognition* (1st edn, CAB International 2011) <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0001> accessed 6 July 2023.

18 Belletti and Marescotti (n 17) 76.

19 Giovanni Belletti, Andrea Marescotti and Jean-Marc Touzard, 'Geographical Indications, Public Goods, and Sustainable Development: The Roles of Actors' Strategies and Public Policies' (2017) 98 World Development 45, 1 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X15001138> accessed 08 June 2022.

the name, as elements for quality differentiation compared to 'generic products' and the name of the product acquires a specific reputation over time. In other words, an origin product has the 'potential' to become a GI product, but this can only happen under specific circumstances.[20]

The concept of origin product is a good starting point to understand the complex nature of GIs as legal tools, to draw the necessary conceptual links between the name and the protected local tangible and intangible resources, and to identify the legal consequences of this characterisation. Specifying the characteristics of origin products can also be useful to envisage the potential of GI protection beyond agri-food products, namely for crafts and industrial products.

The communicative paradigm traditionally characterises GIs as distinctive signs conveying to consumers information on the origin and quality of the identified products.[21] However, as it will be shown later, the ability to convey a specific meaning to consumers involving the origin-quality correlation (and other close functions such as consumer protection, investment and advertising) highlights only one set of functional aspects of the tool. The identification of GI exclusively as distinctive signs leads to inadequate models as it represents one facet of a much complex instrument. To really understand GIs, this ontological complexity cannot be overlooked, especially when they are observed and analysed in real-world situations.

The approach adopted in this research involves a **multidimensional and multifunctional** notion of GIs.[22] The baseline for this characterisation is grounded in two main determinants: (1) the complex

20 ibid. See also Louis Augustin-Jean, 'Standardisation vs. Products of Origins: What Kinds of Agricultural Products Have the Potential to Become a Protected Geographical Indication', in Louis Augustin-Jean, Hélène Ilbert and Neantro Saavedra-Rivano (eds), *Geographical Indications and International Agricultural Trade* (Palgrave Macmillan UK 2012) <http://link.springer.com/10.1057/9781137031907> accessed 8 June 2022. The construction of quality differentiation as opposed to standardisation is per se complex as it has to be contextualised to an evolving socio-cultural and technical environment. For more insights see Raphael Belmin, François Casabianca and Jean-Marc Meynard, 'Contribution of Transition Theory to the Study of Geographical Indications' (2018) 27 Environmental Innovation and Societal Transitions 32 <https://linkinghub.elsevier.com/retrieve/pii/S2210422417300011> accessed 8 June 2022.

21 The origin-quality correlation is a core attribute of GIs, compared to other distinctive signs, such as quality labels. Andrea Zappalaglio, *The Transformation of EU Geographical Indications Law: The Present, Past, and Future of the Origin Link* (Routledge 2021) 5. The legal basis for the protection of a name as a GI is the presence of an objectively verifiable link between the characteristics of the product and its geographical origin.

22 The notion of multifunctionality of origin products derives from the attributes of rural activities. Giovanni Belletti, Andrea Marescotti and Alessandro Brazzini, 'Old World Case Study: The Role of Protected Geographical Indications to Foster Rural Development Dynamics: The Case of Sorana Bean PGI' in William Van Caenegem and Jen Cleary (eds), *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development*, vol 58 (Springer International Publishing 2017) <http://link.springer.com/10.1007/978-3-319-53073-4_10> accessed 20 June 2023. Dev Gangjee, recalling the content of OECD report in 2001, had already identified the roots of this multi-functionality in the multifunctional connotation of agriculture: 'the key elements of multifunctionality are i) the existence of multiple commodity and non-commodity outputs that are jointly produced by agriculture; (ii) the fact that some of the non-commodity outputs exhibit the characteristics of externalities or public goods, with the result that markets for these goods do not exist or function poorly' Gangjee, *Relocating the Law of Geographical Indications* (n 3) 298.

synergy between the territory and community characterising origin product productions, and (2) the collective dimension, represented by the continual engagement of the local community to define, valorise, aliment product quality and express the potential of local resources.

The *sui generis* GI system is built on the notion of the origin link, meaning the objective and verifiable causal relation between a territory and the specific characteristics of the product. According to Zappalaglio 'the origin link is a set of rules that identify the elements whose presence must be proved in order to establish a connection between a product and a place'. [23] Therefore, the word 'place' embeds the ensemble of the conditions characterising the localised cultural and natural ecosystems, where community members interact among themselves *and* with the surrounding environment developing specific practices to harvest or transform raw materials into produce or crafts. Origin products are the tangible outcomes of inter-generational and infra-generational exchanges on local practices, occurring in a specific place, over time. The name used to identify them for the purpose of the commercialisation, conveys to consumers the information on the specific qualities of these products, becoming progressively a differentiation marketing tool. Beyond the traditional functions of distinctive signs with a collective dimension (e.g., collective and certification marks) EU GIs communicate on commoning, identity, and collective (semi-public) participation. They also communicate on the evolutive processes involving human interactions and the interaction between humans and the surrounding ecosystem. The semi-public dimension inherent to GIs embedded in the *sui generis* system, stems from the EU approach to the protection and valorisation of the correlation origin-quality. Delphine Marie-Vivien and Estelle Biénabe define this approach as 'heritage-based', whose rationale is 'protecting a collective asset represented by a product reputation embedded in and derived from a localized cultural heritage'.[24] Through the GI registration, the name becomes a marketing tool and at the same time it empowers local producers who define its *meaning* through formal rules, included in the product specification. Aimed at product characterisation, the product specification constitutes the legal basis for GI registration. According to Marie-Vivien and Biénabe, in GI contexts producers join the group 'as standard *makers*, not only as standard *takers*',[25] they agree on common rules, commit to compliance adhering to a specific control system. According to their perspective, the GI system can be considered as a 'multi-level governance system' where complex decision-making processes having specific rules as outcomes occur at the national, European and international level, but also

23 Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 21) 30.

24 Delphine Marie-Vivien and Estelle Biénabe, 'The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review' (2017) 98 World Development 1, 3 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X17301584> accessed 23 October 2018; Benedetta Ubertazzi, 'EU Geographical Indications and Intangible Cultural Heritage' (2017) 48 IIC - International Review of Intellectual Property and Competition Law 562 <http://link.springer.com/10.1007/s40319-017-0603-0> accessed 17 June 2022.

25 Marie-Vivien and Biénabe (n 24) 4.

at producer level. Depending on national specificities, the interactions between the national and local level (i.e., between the competent authorities and the applicants) might have considerable impact on how the process unfolds and which results it generates.

This introductory Chapter is developed along two major parts. Firstly, I focus on the nature of GIs as multifunctional and multidimensional tools and identifiers of origin products. I highlight the capacity of GIs to channel specific information in market and non-market contexts. Secondly, I explain why a stronger and more coherent positioning of legal scholarship is needed to formally acknowledge all these functions and the role of collective action as main driver for generating outcomes.

1.3 GIs as multidimensional and multifunctional tools

The main justifications of GI protection are the need to prevent or correct specific market and non-market related issues. Market-related justifications of GI protection are the response to market-related problems. In particular, from a consumer perspective, the presence of products directly or indirectly revendicating quality attributes because of their geographical origin, increases the risk of information asymmetries as to the true origin and quality of a product.[26] This element becomes even more significant when the geographical name explicitly triggers in the consumers' mind, the image of a product well-known for its specific characteristics and qualities and its geographical origin (i.e., the product has a specific reputation due to its geographical origin). From a producer perspective, when an origin product has a specific reputation because of its characteristics and qualities, exclusively or essentially due to the geographical origin, the risk for producers to be subjected to unfair competition behaviours by unauthorised third parties is higher. In these circumstances, competitors tend to take advantage of a specific reputation attached to a geographical name, by making direct or indirect reference to the name, despite not being compliant with the product specification.

Non-market related problems that could be addressed through the GI protection are cultural heritage and natural resources preservation, as well as issues related to the suboptimal level of local development in specific areas (e.g., rural areas).[27] As recalled at the beginning of this chapter, one of the essential attributes of origin products is 'the process of knowledge acquisition, accumulation and sedimentation'.[28] The practices passed down from generation to generation and constituting the human component of the origin link risk to disappear, if not alimented

26 Dwijen Rangnekar, 'The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe' (International Centre for Trade and Sustainable Development 2004) 10–16 <http://ictsd.org/i/publications/12218/> accessed 8 November 2022.

27 ibid 16–17.

28 Belletti and Marescotti (n 17).

through consistent knowledge production and appropriate remuneration of producers' efforts. This erosion of intellectual resources (i.e., local traditional practices) might be a common baseline for both agri-food and non-agricultural non-food products. Likewise, independently from the sector, if specific conditions occur, natural resources (i.e., resources used as raw materials, but also resources shaping landscapes and ensuring biodiversity) might be eroded because of the high demand and innovation exigencies typical of large-scale standardised productions. Moreover, some areas are more subjected to the risk of depopulation, particularly due to the migration of younger generations. This phenomenon can limit or extinguish the inter-generational and infra-generational exchanges on traditional local know-how. Consequently, it can jeopardise its preservation, also affecting adjacent activities key for local development, such as tourism.

The coexistence of market and non-market related justifications and rationales for GI protection are acknowledged by Gangjee who identifies: '(1) the consumer interest in accurate labelling and reducing search costs; (2) the producer interest in protecting a collectively developed reputation with the accompanying incentive to invest in quality; (3) acknowledging that aspects of local or national cultural heritage are associated with GI production or sometimes even consumption; (4) recognising the *savoir faire* or traditional knowledge which has sustained and improved these products over time; (5) emphasising their role in achieving agricultural policy goals; (6) environmental benefits associated with GI protection, such as preservation of biodiversity by incentivising the use of non-mainstream or ancient plant varieties or animal breeds; (7) stressing their potential for rural development or the economies of developing countries; (8) responding to a growing consumer demand for regional produce which is often perceived as more desirable on a qualitative basis'.[29] In the same vein, Barjolle et al. identify the justifications for GI protection as belonging to four groups: (1) justification by market rules (i.e., preventing unfair competition among suppliers on the market and consumer protection against frauds); (2) justification by control of market supply (i.e., encouraging quality differentiation as opposed to generic markets for agricultural commodities); (3) justification by rural development (positive impact on rural areas, *inter alia* encouraging tourism and avoiding depopulation); (4) justification by heritage, protection of traditional know-how and resources (indirectly sustaining the preservation of biodiversity and 'individual and collective human knowledge').[30] According to Marie-Vivien, there are 'multiple

29 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 294–295. As highlighted by the author, the positions of all TRIPs members on these justifications might diverge. See also E Thévenod-Mottet and D Marie-Vivien, 'Legal Debates Surrounding Geographical Indications.' in E Barham and B Sylvander (eds), *Labels of origin for food: local development, global recognition* (1st edn, CAB International 2011) <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0013> accessed 20 June 2023.

30 Dominique Barjolle, Bertil Sylvander and Erik Thévenod-Mottet, 'Public Policies and Geographical Indications.' in Elisabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (1st edn, CAB International 2011) <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0092> accessed 20 June 2023.

objectives behind the GI protection: first, protection of consumers against fraud; second protection of the producer of the good; third, territorial, local, regional and rural development; and, fourth, conservation of the biological resources, biodiversity and cultural diversity'.[31] All these functions can be activated by ensuring economic adequate rewards for producers.

The rationales identify the policy objectives of GIs. However, they can also be useful to map the functions that the registered name is supposed to perform in practice. These functions can be market or non-market related and they can be fully or partially operational in real-world cases, depending on specific economic and socio-cultural conditions (including stakeholders' expectations and engagement) occurring at the local level.[32] The market-related functions of GIs coincide with the classical function of guaranteeing to consumers the geographical origin and quality of the product, but also include the communication, investment and advertising functions. The effective performance of these market-related functions is tied to a rule-crafting process happening at producers' level in the registration phase. Efficient monitoring and control systems ensure the compliance to these rules by the stakeholders involved, which can contribute to aliment local tangible and intangible resources (resource production function) and foster local development (local development function).[33]

A functional similarity can indeed be retraced between GIs and trademarks (in particular, collective and certification trademarks), but the differences between them deserve to be identified and analysed carefully. These two IP tools will be the object of a deeper comparison in Chapter 3, Section II. For now, it is important to highlight that a functional overlap might exist at first glance. The essential function of guaranteeing, in the GI context, the origin and quality of the goods (and distinguishing these products in the marketplace from homogeneous products) necessary implies that 'origin' stands for '*geographical* origin' (rather than '*commercial* origin')[34] and 'quality'

31 Delphine Marie-Vivien, 'The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India' (2010) 13 The Journal of World Intellectual Property 121 <https://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2009.00375.x> accessed 11 April 2023.

32 Sophie Réviron and Jean-Marc Chappuis, 'Geographical Indications: Collective Organization and management.' in Elisabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (1st edn, CAB International 2011) <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0045> accessed 20 June 2023.

33 See also Barbara Pick, *Intellectual Property and Development: Geographical Indications in Practice* (Routledge 2022). IP enforcement is traditionally considered as the main objective of the GI protection. However, interviews involving actors of the value chain confirmed that the promotional function is also important, and present where the product reputation is not so developed or developed only within the geographical area (see infra Chapter 2 Section II and Chapter 3 Section I). The function of valorisation and protection is mentioned as one of the activities carried out by the producer groups after the GI registration. See, for example, in the French context, the INAO Directive 1 July 2009 as modified on 24 November 2011.

34 Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar 2013) 200–206.

means the 'quality or characteristics essentially or exclusively due to a particular geographical environment with its inherent natural and human factors' (art 5, Reg 1151/2012). The notion of quality is accompanied, in the Regulation, by the concepts of reputation and other characteristics due to the geographical environment.[35] Moreover, both GIs and trademarks perform accessory functions, such as the communication, investment and advertising functions, which embed the right to protect and control the information channels enabled by the registered sign. However, in GIs compared to trademarks, the concept of 'exclusive right' should be contextualised to the need of ensuring access to the use of the name (and the enjoyment of the attached reputation) to anyone who proves to be compliant with the product specification and accepts to maintain this commitment over time. The semi-public interest embedded in the EU *sui generis* GI legal framework emerges from the absence of a formal identification of a 'GI owner', and from the individuation of the significant of non-market related functions along with market-related functions. The non-market related functions (i.e., resource production and local development), which *de facto* characterise the economic and social perspective of GIs, still occupy a secondary role in the legal field, and they are not even mentioned in art 1 Reg 1151/2012. However, they reflect the justification and rationales of State involvement in the GI registration process and explain why a specific approach should be adopted to qualify the right to exclude and the principles regulating GI governance.[36] Therefore, reserving the legal conceptualisation of GIs exclusively to the market-related functions is limitative: GIs need to be perceived, at the theoretical *and* policy level, as complex multifunctional tools.[37] The justifications for legal protection are not monoliths, but they are inter-related.

1.3.1 Market-related functions

When a name is registered as a GI, the information flows between the producer group and consumers is formalised, the proximity between these two actors is increased and information asymmetries are reduced. The GI function of guarantee (i.e., guarantee of the origin and quality of the product) allows to identify the nature of the message conveyed by producers to consumers. In this context, if the name meets specific legal requirements, it can work as an exclusive channel of information for communicating on the product reputation. This channel can be reserved,

35 To simplify, I refer here to both quality schemes (PDOs and PGIs), without distinctions.

36 According to Marie-Vivien, '[State] intervention is driven by the fact that GIs are geographical names that identify territories under state control. There is, therefore, public concern that all legitimate operators have the right to use these names and that the state should avoid any unlawful or unfair exclusion from the use of geographical names, and should preserve common heritage, both of which are public goods […]. GIs can indeed be considered as public-private partnerships' See Delphine Marie-Vivien, 'Protection of Geographical Indications in ASEAN Countries: Convergences and Challenges to Awakening Sleeping Geographical Indications' [2020] The Journal of World Intellectual Property jwip.12155, 341 <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12155> accessed 21 May 2020; Belletti, Marescotti and Touzard (n 19); Marie-Vivien and Biénabe (n 24).

37 Belletti, Marescotti and Brazzini (n 22) 278; Daniele Giovannucci, *Guide to Geographical Indications: Linking Products and Their Origins* (International Trade Centre 2009).

valorised, and protected by the 'legitimate' producer group to ensure fair competition and allow the enforcement of IP rights. Thus, the **guarantee and distinctive functions,** ensured by an adequate system of controls, especially on the compliance with the product specifications (before commercialisation), qualify the nature of the information flows between producers and consumers (i.e., the message conveyed). The **communication function** ensures that the channel reserved to the producer group by virtue of the registration is preserved and operational. The c**onsumer protection function** ensures the truthfulness of the message conveyed, and prevents information asymmetries, reducing the risk for the consumer to be misled as to the provenance and quality of the GI product.[38] The **investment and advertising functions** complement the communication function as they identify the investments made by producers to build or reinforce the reputation attached to the product and to the name. All the GI functions are able to generate spillovers (or 'externalities'). In market-related functions the spillovers are to the benefit of the producer group, in non-market related functions the spillovers are addressed to the local community of stakeholders at large.

1.3.1.1 Communication, consumer protection, guarantee and distinctive functions

Registering a GI implies reserving the use of an already existing name (a geographical name or a non-geographical name used in trade or common language, see art 7 Reg 1151/2012) to an identified group of applicants, who can use it as channel of communication in the marketplace. According to Gangjee, 'a GI is a sign indicating a product's specific geographical origin and information associated with its origin. Under the communicative paradigm, legal protection rests on its ability to perform this function'.[39]

To 'function' like a channel of communication between producers and consumers, the name eligible for GI registration should have the following characteristics:

(1) **non-genericness:** 'a name becomes generic only if the direct link between, on the one hand, the geographical origin of the product and, on the other hand, a specific quality of the product, its reputation or another characteristic of the product, attributable to that origin, has disappeared, and that the name does no more than describe a style or type of product'.[40] If, for repeated

38 Regulation 1151/2012, Recital 3: 'Producers can only continue to produce a diverse range of quality products if they are rewarded fairly for their effort. This requires that they are able to communicate to buyers and consumers the characteristics of their product under conditions of fair competition. It also requires them to be able to correctly identify their products on the marketplace'.

39 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 244.

40 C-343/07 *Bavaria NV, Bavaria Italia Srl v. Bayerischer Brauerbund eV* [2009] ECR I-5491. See also Vadim Mantrov, *EU Law on Indications of Geographical Origin: Theory and Practice* (Springer International Publishing 2014) 101–107 <https://link.springer.com/10.1007/978-3-319-05690-6> accessed 17 April 2023.One can argue to which extent the quality, reputation and/or other characteristics should be, alternatively or cumulatively, present. This issue will be further analysed in this work.

use, the name is no longer capable of performing its 'communication function', it means that it has become generic and therefore it is not eligible for GI protection and can be ground for oppositions during the application for registration by the producer group (art 6 Reg 1151/2012 and art 10 Reg 1151/2012). In practice, the assessment on generic use is not straightforward as it can be subjected to bias derived from competing interests. The introduction of the rule, at art 13(3) Reg 1151/2012 according to which the registered name shall be secured from the risk of becoming generic has been described as the sign of the 'helplessness to prevent meaning erosion beyond the limits of territorial rights'.[41] Art 41 Reg 1151/2012 specifies that 'to establish whether or not a term has become generic, account shall be taken of all relevant factors, in particular: (a) the existing situation in areas of consumption; (b) the relevant national or Union legal acts. The assessment on genericness is often benchmarked with the notion of 'EU consumer' or 'relevant public'.[42]

(2) **The communication function needs to be interpreted in relation to the name in its entirety** even though it is composed by terms that, individually, would be considered generic.[43]

(3) **The wording of art 7 Reg 1151/2012** ('the name to be protected as a designation of origin or geographical indication, as it is used, whether in trade or in common language, and only in the languages which are or were *historically used* to describe the specific product in the defined geographical area') **suggests that the denomination should have established a connection**

41 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 247.

42 For example, in most recent case *Syndicat Interprofessionnel Du Gruyere vs U.S. Dairy Export Council; Atalanta Corporation; Intercibus, Inc.*, No. 22-1041 (4th Cir. Mar. 3, 2023) which followed the denial of USPTO to the application for registration of name *Gruyère* as a certification trademark in the United States by the *Interprofession* by reason of the genericness of the term. The Court of Appeal confirms the assessment made by the USPTO and identifies the relevant public as the American consumer ('the relevant public consists of members of the general public who purchase or consume cheese; evidence of numerous websites specifically describing gruyere as originating in places other than Switzerland and France, including Wisconsin and Austria, which supports a finding that the primary significance of the term to the relevant public is a type of cheese that can be produced anywhere'). This argument is far from being original as shown, for example, by the cases of *Parmigiano Reggiano PDO* and *Feta*. In one of the chapters of the 'Feta saga' (Joined Cases C-465/02 and C-466/02 *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities* EU:C:2005:276 [2005] ECR I-09115, paras 86-87) the assessment has been benchmarked with the notion of EU consumers, and commercial purchasers (e.g., restaurants. For more insights see Dev Gangjee, 'Say Cheese: A Sharper Image of Generic Use Through the Lens of Feta' (2007) 5 E.I.P.R. In *Commission vs Germany* for Parmigiano Reggiano PDO (Case C-132/05 *Commission of the European Communities v Germany* EU:C:2008:117 [2008] ECR I-00957) the ECJ precises that 'when assessing the generic character of a name, it is necessary, under Article 3(1) of Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, to take into account the *places of production of the product concerned both inside and outside the Member State which obtained the registration of the name at issue, the consumption of that product and how it is perceived by consumers inside and outside that Member State, the existence of national legislation specifically relating to that product, and the way in which the name has been used in Community law*' (emphasis added).

43 One example is described in the Balsamico case, (Case C-432/18 C*onsorzio Aceto Balsamico di Modena v Balema Gmbh* EU:C:2019:1045) where the use of the non-geographical common term 'balsamico' is not considered, individually, as bearing the communication function. For more insights see Flavia Guerrieri, 'Authorised Use of the Non-Geographical Term "Balsamico"' [2020] GRUR International <https://doi.org/10.1093/grurint/ikaa037> accessed 14 May 2020.

with the origin product for a sufficient period of time. This rule has given the input for the development of national practices of requiring evidence of the prior use of the name and/or the evidence of long-standing production in the geographical area (see *infra* Chapter 2 Section II and Chapter 3 Section I).

(4) The **communication function should be considered as attached to the *name*. However, it might be interesting to point out that, from the consumers' perspective, logos might play a relevant informative role.** In the EU, the labels identifying the PDOs and PGIs for agricultural products and foodstuffs are compulsory ('the Union symbols associated with [PDOs and PGIs] shall appear on the labelling. In addition, the registered name of the product should appear in the same field of vision' art 12 Reg 1151/2012). The EU Commission Staff Document on the Evaluation of GIs and TSGs in the EU, released in 2021, recalls that 'the awareness of EU quality schemes (indications, acronyms, and symbols) differs widely across Member States'. It is higher in Member States with long-standing tradition in GI protection 'but in most Member States generally lower than the recognition of national/regional schemes'. Moreover, 'the effectiveness and relevance of the communication method is questionable, as awareness and understanding of EU schemes and logos remain limited'.[44] Beyond the issue of recognisability of the labels and the distinction between PDO and PGI, it can be discussed whether consumers nowadays are aware on the effective informative function of the logo of the GI and if the name (and attached reputation) is perceived as the real object of the protection. Building on the experience at national level in non-EU countries, Marie-Vivien and Casabianca point out the danger originating from the national and local practices informally shifting the targets of protection, valorisation, and controls from the name to the label. They also mention the consequences of the consolidation of these practices, increasing the risk of favouring restrictive access and use of the label to the benefit of a small group of producers.[45]

A corollary of the communication paradigm is the 'need to preserve the communicative integrity of such signs' by prohibiting misuses by unauthorized third parties.[46] When unauthorized users, through phonetic and/or conceptual proximity, directly or indirectly refer to the registered name, the integrity of the communication channel and its embedded message (guarantee of origin-based

44 European Commission, 'Evaluation of Geographical Indications and Traditional Specialities Guaranteed Protected in the EU (Commission Staff Working Document)' (2021) 35–40.

45 'While the aim of the logo is to raise awareness among consumers, it might cause confusion about the object of the protection, which remains the name itself and not only the logo'. See Marie-Vivien (n 36) 339; Delphine Marie-Vivien and François Casabianca, 'Geographical Indications: Protection of a Name or a Logo? A Risky Shift', *Worldwide Perspectives on Geographical Indications* (Centre de Coopération Internationale en Recherche Agronomique pour le Développement [Cirad] 2022) <https://hal.archives-ouvertes.fr/hal-03791200> accessed 5 November 2022. It is interesting to note that national systems for the protection of denominations identifying products other than agricultural, the use of the official logo is not compulsory (for example, in the frame of the French GI system for industrial products and crafts) see art Article R721-8 Code de la Propriété Intellectuelle.

46 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 165.

quality) reserved with the GI registration, is jeopardised and the consumer misled (consumer protection function). Art 13 Reg 1151/2012 identifies the scope of protection granted by the GI registration as providing safeguards against:

'(a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient;

(b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar, including when those products are used as an ingredient;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product'.

Recital 29 Reg 1151/2012 affirms that 'protection should be granted to names included in the register with the aim of ensuring that they are used fairly and in order to prevent practices liable to mislead consumers'. The consumer protection function involves the capability of the sign to serve reliable information transmission, to remedy to information imbalance and, ultimately avoiding consumers being misled.

Focusing on the definition of 'unauthorised users' opens some interesting questions, for example the legitimacy of GI holders to 'exclude others from the use' and the qualification of illicit use. The first concept is not always explicitly codified, but it represents an essential component and consequence of GI registration. I will tackle more specifically this point in the following paragraphs. The second point flags the important (and still unsolved) issue of clearly defining the limits of the GI protection, especially given the enforceability of rights in case of indirect uses. An interesting way of looking at both these aspects for our purposes is to focus on the concept of evocation.

While 'evocation' has been defined by the European Court of Justice (ECJ) in relation to the generic and non-geographic terms composing registered denominations through a restrictive approach, the Court's approach concerning the indirect reference to intrinsic (physical) characteristics of the product (e.g., the shape of the product) is way more expansive. [47] The meaning of evocation

47 Zappalaglio gives a helpful overview of the evolution of the concept of evocation over time grouping the ECJ case law in three main 'periods' or 'phases': the early phase is devoted to decoding the concept of evocation with the cases ***Cambozola*** (Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH &*

is currently tied to the conceptual proximity, or chain of associations,[48] or 'psychological and emotional reactions'[49] triggered in the consumer's mind, by a series of elements going beyond the indirect misuse of the name (phonetic and visual similarity). As a result, this concept remains rather nebulous, and it constitutes a sensitive topic, especially from the perspective of granting freedom of establishment and expression to stakeholders based in the same geographical area of the PDO/PGI.[50] For assessing evocation, the benchmark is the 'average consumer', meaning the European consumer, 'reasonably observant and circumspect'. This model, which is, by definition, an abstract and generalisable construction, encounters in this specific feature its pragmatic intrinsic limits.[51]

If the communication function focuses on the suitability of the name to convey a specific and truthful message to consumers, the **guarantee and distinctive function** qualifies the nature of

Co. KG and Eduard Bracharz GmbH EU:C:1999:115 [1999] ECR I-01301) and ***Parmesan*** (Case C-132/05 *Commission of the European Communities v Germany* EU:C:2008:117 [2008] ECR I-00957). The intermediate phase, according to the author, is devoted to the clarification of its rationales and limitation of its scope with the cases ***Cognac*** (Joined Cases C-4/10 and C-27/10 *Bureau National Interprofessionnel du Cognac v Gust. Ranin Oy* [2011] ECR I-06131); ***Verlados*** (Case C-75/15 Viiniverla Oy v Sosiaali- ja terveysalan lupa- ja valvontavirasto EU:C:2016:35); ***Port Charlotte*** (Case C-56/16 P EUIPO v Instituto dos Vinhos do Douro e do Porto EU:C:2017:693); ***Champagne Sorbet*** (Case C-393/16 *Comité Interprofessionnel du Vin de Champagne v Aldi Süd Dienstleistungs-GmbH G* EU:C:2017:991). I would add to this list the case ***Balsamico*** (Case C-432/18 *Consorzio Aceto Balsamico di Modena v Balema Gmbh* EU:C:2019:1045). The more recent phase of 'over-expansion' coincides with the cases ***Scotch Whisky*** (Case C-44/17 *Scotch Whisky Association v Klotz* EU:C:2018:415); ***Manchego*** (Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL e Juan Ramón Cuquerella Montagud* EU:C:2019:344); ***Morbier*** (Case C-490/19 *Syndicat interprofessionnel de défense du fromage Morbier v Société Fromagère du Livradois SA*S EU:C:2020:1043); ***Champanillo*** (Case C-783/19 *Comité Interprofessionnel du Vin de Champagne v GB* EU:C:2021:713). See Andrea Zappalaglio, 'EU Geographical Indications and the Protection of Producers and Their Investments' in Enrico Bonadio and Patrick Goold (eds), *The Cambridge Handbook of Investment-Driven Intellectual Property* (1st edn, Cambridge University Press 2023) <https://www.cambridge.org/core/product/identifier/9781108989527%23CN-bp-18/type/book_part> accessed 19 April 2023; Guerrieri, 'Authorised Use of the Non-Geographical Term "Balsamico"' (n 43).

48 Annette Kur and others, 'The Need for Measures to Safeguard Undistorted Competition and Freedom of Expression in Geographical Indications Law – Opinion on the EU Commission's Proposals for Broader Protection' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4358989> accessed 27 February 2023. Morbier is a landmark decision recognising the existence of evocation for the replication of specific characteristics of the shape of the product. In Manchego 'the illustrations of a character resembling Don Quixote de La Mancha, a bony horse and landscapes with windmills and sheep, are capable of creating conceptual proximity with the PDO "queso manchego" so that the image triggered directly in the consumer's mind is that of the product protected by that PDO' (Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL e Juan Ramón Cuquerella Montagud* EU:C:2019:344, para 7). See also Fausto Capelli and Barbara Klaus, 'Protection of Geographic Indications and Designations of Origin in the Queso Manchego' (2019) 14 453 <https://www.jstor.org/stable/26900841> accessed 19 April 2023.

49 Vito Rubino, 'From "Cambozola" to "Toscoro": The Difficult Distinction between "Evocation" of a Protected Geographical Indication, "Product Affinity" and Misleading Commercial Practices' (2017) 12 European Food and Feed Law Review 326 <https://www.jstor.org/stable/90013432> accessed 19 April 2023.

50 See Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH* EU:C:1999:115 [1999] ECR I-01301 (Cambozola); Case C-132/05 Commission of the European Communities v Germany EU:C:2008:117 [2008] ECR I-00957 (Parmesan).

51 See also Rubino (n 49).

the message that GIs are supposed to communicate. The name needs to be considered in both its 'denotative and connotative dimension':[52] it identifies products whose characteristics and quality make them recognisable (i.e., distinctive) compared to products of the same kind. The GI product characterisation is defined in the product specification. Differently from trademarks, the attribute of distinctiveness is therefore not related to the name itself, but also and indirectly, to the qualities and characteristics of the origin product. The registered **name guarantees to consumers: (a) geographical provenance**, meaning that the production steps, in whole for PDOs or in part for PGIs, are performed in a specific area, characterised by a unique local natural and cultural environment; **(b) quality**, meaning that the localisation of the production steps is articulated in specific rules which identify place-based characteristics and quality standards. The registered name also guarantees producers' compliance to agreed standards verified through ongoing inspections and controls. Moreover, it implies producers' engagement to sustain higher costs.[53] The guarantee function performed by the registered name necessarily embeds 'a dual connection, both spatial and qualitative',[54] which justifies that GIs are considered as an exception to the principle of restriction of the free movement of goods (art 28 TFEU). The registered name (especially for agri-food products, which are classified by economists as experience and credence goods)[55] can avoid information asymmetries, reduce search costs, and contribute to reinforce product reputation, which is justified by the specific characteristics, quality, and provenance.[56]

1.3.1.2 Advertising and investment functions

The **advertising and investment functions** refer to the potential of GIs to capitalise the communication made by the producer group to aliment and reinforce local reputation. This is a function that directly impacts on the capacity of the producer group, to reinforce, through appropriate investments, the message conveyed to consumers on the maintenance of origin and quality over time. The higher objective pursued by the sign through this function relies mostly on ensuring fair returns for producers (through price premiums), reinforcing the producers' position in the marketplace, building competitive advantage, and entering new markets. This function is mainly related to the management of the sign after registration, even though it also impacts on the reputation built by the producer group around the name and/or the production. In some national

52 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 246–265.

53 See *inter alia*, Case C-44/17 *Scotch Whisky Association v Klotz* EU:C:2018:415, para 69; Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* EU:C:2002:267 [2003] ECR I-05121 Opinion of AG Alber. See also Alberto Francisco Ribeiro de Almeida, 'The Legal Nature of Geographical Indications and Designations of Origin' (2014) n°10-36 European intellectual property review 640.

54 Joined Cases C-465/02 and C-466/02 *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities* EU:C:2005:276 [2005] ECR I-09115 Opinion of AG Ruiz-Jarabo Colomer, para 67.

55 Rangnekar (n 26) 13–14.

56 Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* EU:C:2003:296 [2003] para 64.

systems (such as the Italian and French ones) it coincides with the capacity of the producer group to ensure that the name is sufficiently known to consumers *and* is the object of a consolidated use before the GI registration.[57] It is interesting to note how nowadays environmental and local development around origin products can play a role in the advertising strategy of GI producers and increase the commercial value of the GI labelled products.[58]

1.3.2 Non-market related functions

This group of functions summarises the 'heritage-local development dimension' of GIs which raises considerable interest in extra-legal fields, but which is little addressed in the legal scholarship.[59] Specific insights are needed, especially considering that non-market related functions recently regained importance in the political debate, both in the declared objectives of GI protection and in the general frame of 'sustainability' potentials associated with GIs. The concept of **sustainability** has become mainstream nowadays. Even though this is a topic that I will tackle more specifically later and throughout this work, it is important to draw here some brief and preliminary observations.

The EU and international narratives currently include the objective of 'sustainability' which is observed and measured using the 'pillars paradigm', namely the social, economic, and environmental sustainability pillars. This conceptualisation aims to guide the analysis and assessment from disciplinary angles. However, it might result as excessively compartmentalised and misleading, especially when the inquiry is focused on investigating the interrelations between these facets of the GI complex eco-system.

To avoid this 'fragmentation', I choose to adopt Elinor Ostrom's and colleagues' approach to sustainability, intended as the capacity of a (socio-ecological) system to manage resources overtime to avoid depletion. Compared to the 'pillars paradigm' cited above, Ostrom's and colleagues' adopt a more holistic perspective to sustainability, centred on collective action. Coherently with this approach, I consider sustainable (e.g., 'enduring') governance as an essential prerequisite to reach sustainable social, environmental, and economic outcomes.

Yet, the outcomes produced by GI management affect the group's capacity to devise appropriate rules and strategies and maintain the intangible good associated with the name (i.e., the

57 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 209.

58 Maria Cecilia Mancini and others, 'Geographical Indications and Public Good Relationships: Evidence and Policy Implications' (2022) 21 EuroChoices 66 <https://onlinelibrary.wiley.com/doi/10.1111/1746-692X.12360> accessed 28 October 2022; Rangnekar (n 26) 33.

59 Marianne Penker and others, 'Polycentric Structures Nurturing Adaptive Food Quality Governance - Lessons Learned from Geographical Indications in the European Union' (2022) 89 Journal of Rural Studies 208 <https://linkinghub.elsevier.com/retrieve/pii/S0743016721003570> accessed 18 July 2022.

reputation). Through the legal protection of the name, GI holders are remunerated of their investments perceiving adequate benefits deriving from the market-related expected functions. However, the positive effects of sustainable governance also involve the capacity of the GI of generating public goods (i.e., positive externalities able to benefit the community at large). I identify these consequences as non-market related functions. Some of these positive externalities regenerate localised freely accessible intangible resources, such as cultural heritage (i.e., the cultural environment specific of a place). Other externalities affect the conservation of the natural environment (i.e., raw materials, biodiversity, landscape) specific to a place.

Sylvander, Isla, and Wallet affirm that 'the contribution of GIs to sustainable development means to introduce the idea that the mechanisms of negotiation and learning are needed to understand how their regulation and definition, and their management (promotion schemes and control of production practices) are entering the convergence (or not) with the environmental, social, economic and cultural project of the territory in which they extend'.[60] The authors attribute specific significance to the criterion of eligibility and access to GIs, of technical standard, of equality in treatment, and transparency as possible variables shaping the conditions for 'GIs to be considered as public goods'. The perspective adopted in my research is in line with this approach. However, a clarification is needed and derives from the GI legal theory: GIs are names identifiers of localised tangible and intangible resources which can be subjected to specific type of management. These types of management are defined by specific rules and describe a certain level of excludability which can favour (or limit) public good production.

1.3.2.1 Resource production function

Belletti, Marescotti and Touzard clearly recognise the GI potential to aliment public goods, and the ability of the sign to deliver environmental sustainability outcomes.[61] Later this specific discourse has been analysed more in depth by Quinoñes Ruiz and Marescotti.[62] Along the same lines,

60 See Bertil Sylvander, Anne Isla and Frédéric Wallet, 'Under What Conditions Geographical Indications Protection Schemes Can Be Considered as Public Goods for Sustainable Development?' in André Torre and Jean-Baptiste Traversac (eds), *Territorial Governance* (Physica-Verlag HD 2011) <https://link.springer.com/10.1007/978-3-7908-2422-3_10> accessed 13 April 2023. See also Anne Isla and Frederic Wallet, 'Innovations institutionnelles dans les dispositifs d'Indications Géographiques et intégration des principes de développement durable' (2009) 4 Revue de l'Economie Méridionale 9 <https://hal.science/hal-01198035> accessed 19 May 2023.

61 Belletti, Marescotti and Touzard (n 19).

62 Xiomara Fernanda Quiñones Ruiz and others, 'How Are Food Geographical Indications Evolving? – An Analysis of EU GI Amendments' (2018) 120 British Food Journal 1876 <https://www.emerald.com/insight/content/doi/10.1108/BFJ-02-2018-0087/full/html> accessed 19 November 2020; Andrea Marescotti and others, 'Are Protected Geographical Indications Evolving Due to Environmentally Related Justifications? An Analysis of Amendments in the Fruit and Vegetable Sector in the European Union' (2020) 12 Sustainability 3571 <https://www.mdpi.com/2071-1050/12/9/3571> accessed 20 May 2020. See also Flavia Guerrieri, 'The Farm to Fork Strategy as an External Driver for Change: Possible Impacts on Nested GI Rule Systems' (2021) 16 Journal of Intellectual Property Law & Practice 331 <https://doi.org/10.1093/jiplp/jpab018> accessed 26 October 2022.

Mancini et al. explicitly identify and measure, in four different types of GI value chains and in five EU countries, the GI contribution to cultural heritage preservation and sustainable use of natural resources.[63]

GI registration and management can also affect the maintenance of intangible resources. The creation of public goods related to intangible resources affects cultural heritage conservation. In this regard, Calboli attributes to the sign the capacity of 'holding producers accountable for their products based on the additional information they convey to the market'. As such they 'could contribute to preserving cultural heritage and existing traditions, making them known nationally and internationally'. I add to this argument, that the registered name and the intangible resource identified and protected through the GI are subjected to specific types of management. Consequently, the GI performance depends on which type of management is described by the rules.[64] The connections between GIs and cultural heritage have also been explored by Ubertazzi, who affirms that positive externalities link GIs to International Cultural Heritage (ICH), identified as expressed in a community-based practice and the artifacts derived by this practice.[65]

The EU Commission Staff Working Document on the evaluation of GIs and Traditional Specialties Guaranteed (TSGs) affirms that 'GIs/TSGs also are regarded as an important tool for promoting regional identity, in particular in countries with a history of GI protection. Economic operators, especially from southern EU countries, are generally convinced of their role in terms of maintaining and promoting the local cultural heritage.'[66]

63 Mancini and others (n 58). The authors include, in the sustainable use of natural resources, 'balancing technology and traditional practices to preserve natural resources, landscape and biodiversity'; 'adopting carbon footprint control and management; developing research systems for monitoring sustainability issues'; 'communicating the benefits of environmental public goods to citizens'. See also Stéphane Fournier and others, 'Les indications géographiques au regard de la théorie des communs' (2018) 233 Revue internationale des études du développement 139 <http://www.cairn.info/revue-internationale-des-etudes-du-developpement-2018-1-page-139.htm> accessed 17 June 2022; Sarah Bowen and Ana Valenzuela Zapata, 'Geographical Indications, Terroir, and Socioeconomic and Ecological Sustainability: The Case of Tequila' (2009) 25 Journal of Rural Studies 108 <https://linkinghub.elsevier.com/retrieve/pii/S0743016708000454> accessed 14 April 2023.\\uc0\\u8216{}Geographical Indications, Terroir, and Socioeconomic and Ecological Sustainability: The Case of Tequila\\uc0\\u8217{} (2009

64 Irene Calboli, 'Geographical Indications of Origin, Economic Development, and Cultural Heritage: Good Match or Mismatch?' (2020) 11 Indian Journal of Intellectual Property Law 11 <https://scholarship.law.tamu.edu/facscholar/1511>.

65 Ubertazzi (n 24). See also Barbara Pick, 'Geographical Indications and the Commons. What Matters?', *The Commons, Plant Breeding and Agricultural Research – Oxford Talks* <https://talks.ox.ac.uk/talks/id/f4c325c9-0276-4306-9385-ee760ef73f0c/?format=txt> accessed 21 September 2020.

66 European Commission (n 44) 44.

1.3.2.2 Local development function

The local development function attached to GIs is one of the positive consequences of the diversification strategies and the embeddedness of the origin product in a larger (but still localised) ecosystem.

Gangjee recognises that 'the successful branding of origin and quality, coupled with the depth of prescriptive regulatory oversight, could facilitate a range of policy agendas relating to regional development strategies'.[67] The collective dimension of GIs as tools valorising and protecting origin products, in principle, favours the development of networks and trust and a proportional repartition of economic benefits among the GI holders. According to Belletti and Marescotti, 'development is conceived as the result of complex social dynamics as well as shared cognitive paradigm that guides stakeholders in the use of the resource of the rural community. The multiple values of territories are rediscovered by local stakeholders, who share them and build individual and collective identities'.[68] It seems important to clarify that the intangible and tangible resource production function might be considered as a specificity of the broader local development function, meaning that the 'active' maintenance of intangible and tangible resources as local assets can, in turn, foster virtuous and cross-sectorial collective action dynamics, including the improvement of employment in rural areas, and tourism. [69]

67 Dev S Gangjee, 'Proving Provenance? Geographical Indications Certification and Its Ambiguities' (2017) 98 World Development 12, 14 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X15000935> accessed 14 April 2023.

68 Belletti and Marescotti (n 17) 78.The scholarship on local development is extremely rich. For the purposes of this analysis, it suffices to point out the importance of endogenous ('bottom-up') dynamics in a given territory, conceived as 'a set of tangible and intangible factors which, because of proximity and reduced transaction costs, act upon the productivity and innovativeness of firms. Moreover, the territory is conceived as a system of local governance which unites a community, a set of private actors, and a set of local institutions. Finally, the territory is a system of economic and social relations constituting the relational or social capital of a particular geographical space'. See Roberta Capello, 'Regional Growth and Local Development Theories: Conceptual Evolution over Fifty Years of Regional Science' (2009) 11 Géographie, économie, société 9 <https://www.cairn.info/revue-geographie-economie-societe-2009-1-page-9.htm>. According to Coffey and Polèse, 'the term "local" can also indicate an event, action, or process, the impetus for which is found principally within the region in question, as opposed to being provided from external areas. Interpreted in this manner, the adjective "local" suggests terms such as "endogenous" or "native." This view of "local" within the development process thus necessitates the elaboration of a model which specifies the role of endogenous elements, and which can be applied to large regions as well as to microregions. One often finds expressions such as "development from below" or "bottom-up development" used to express similar processes. See William J Coffey and Mario Polèse, 'The Concept of Local Development: A Stages Model of Endogenous Regional Growth' (1984) 55 Papers of the Regional Science Association 1 <http://link.springer.com/10.1007/BF01939840> accessed 14 April 2023.

69 Georges Benko and Bernard Pecqueur, 'Les ressources de territoires et les territoires de ressources' [2012] Finisterra 36 n.º 71 (2001) <https://revistas.rcaap.pt/finisterra/article/view/1644> accessed 14 April 2023. See also Sarah Bowen, 'Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy: Embedding Local Places in Global Spaces' (2010) 75 Rural Sociology 209 <https://onlinelibrary.wiley.com/doi/10.1111/j.1549-0831.2009.00007.x> accessed 17 June 2022.

The baseline for all GI functions is *allowing information channels to targeted ends*: concerning the market-related functions, the objective of information on origin and quality is differentiating the product in the marketplace. Concerning the non-market related functions, the information shared and created by stakeholders is aimed at alimenting and preserving the intangible and tangible resources, fostering network creation and cooperation for knowledge sharing at the local and regional level. The valorisation of rural areas might foster virtuous dynamics, such as landscape, biodiversity and natural resources conservation, and the preservation of cultural heritage. The importance of these functions, also from a legal perspective, should not be underestimated because they anchor the GI to local tangible and intangible resources. These localised resources, that should remain available and accessible to all, can become 'active assets' *if sustained by appropriate coordinated actions*. State involvement is crucial to preserve the focus of these actions towards the general interest. This aspect is central for understanding differences between the management of collective trademarks (CTMs) and GIs and their expected outcomes (see *infra* Chapter 3 Section II).

1.4 Limits of the theoretical functional approach

The functional theoretical approach has its limits, as there can be a real shift between expectations at policy level and the operationalisation of the GI in national and local contexts. In practice, the GI registration does not ensure the actual capacity of the sign to perform the communication function, nor producer groups' capacity to capitalise investments in advertising to aliment and promote the local reputation attached to the sign. Similarly, the registration does not say anything on the (inevitable) consequences on inclusivity or exclusivity, equity and justice of the applicants' choices in delimiting the geographical and virtual boundaries of the sign; nor about the actual need or capacity of enforcing IP rights at the national, European, and international markets. Finally, it does not ensure that all registered GIs are equally performant in reducing information asymmetries between producers and consumers on the origin and quality of the product; nor it grants that all GI producers comply with the formal rules, as stated in the product specification. The same can be said concerning the capacity of the GI to aliment and preserve local resources and enhance local development. In other words, 'registration is designed to verify information relating to provenance, quality and potentially authenticity, which facilitates the signalling function of GIs'.[70] But the existence itself of the GI in the legal universe, after the assessment undertaken by the national authority on the eligibility for registration, does not grant *per se* that all the functions that the GI is supposed to perform will be fully operational and effective in practice. This aspect qualifies the 'success' or 'failure'[71] of the GI management, which is the result

70 Gangjee, 'Proving Provenance?' (n 67) 2.

71 Kizos and others refer to 'Success' in GI contexts as 'the registration of the product as a GI and the use of the GI label by the local producers.' Later in this study, this concept of success, will be further clarified and put in relation with the concept of efficiencies, inefficiencies, and failure. For the time being, it is important to note that, from a legal

of strategic stakeholders' decisions, but also of external actors intervention and context-based conditions. Weak signs of virtuosity or fragility might appear at the beginning of the GI initiative and application process, and affect rule-crafting for the design of the product specification, of the statutes of the producer association, and of the control plan.

Therefore, even though the functional approach allows to understand what the GI is supposed to do in relation to its rationales and policy objectives, it needs to be understood as a mere theoretical model. Empirical observation reveals a much complex set of nuances, given by different degrees of operationalisation and/or awareness of the functions of the sign at the local level. In other words, 'these systems do not "end" with the registration, but in order to ensure "success", GIs require constant management, possibly involving re-definition of production quality or geographical boundaries to adapt to market, climate or technological change. This collective management is shaped by the blend of internal and external actors involved and it is important to realize the complex dynamics of this heterogeneous social network'.[72] According to Gangjee, 'the certification capabilities of such *sui generis* GI regimes are limited because they can only scrutinize the materials presented before them. They have significant blind spots. Therefore, it would be a mistake to assume that formal legal recognition as a GI inevitably ensures provenance and authenticity to the extent necessary in order to achieve developmental goals or satisfy consumer expectations. In many cases something more is required'.[73] This crucial aspect is sometimes overlooked by national authorities in charge of GI examination. It will be the object of specific insights throughout this work and emerge more clearly from the comparison between agricultural and non-agricultural GI experiences.

1.5 Embedded links between collective action and the GI functions

Collective action is the driving force behind the formation of the producer groups, and it sustains their functioning over time. However, as the law stands now, multiple governance combinations can be envisaged: its composition can be more or less 'inclusive'; it can qualify producer groups as 'legitimate' to exercise their tasks and responsibilities based on a strict or loose, permanent or evolving, concept of representativeness; it can function based on a more or less rigours application of democratic mechanisms. The combination of these factors affects considerably the decision-making processes leading to the operationalisation of the GI functions.

perspective, the GI is a success when it is capable to perform its functions (i.e., to meet its overarching objectives). See Thanasis Kizos and others, 'The Governance of Geographical Indications: Experiences of Practical Implementation of Selected Case Studies in Austria, Italy, Greece and Japan' (2017) 119 British Food Journal 2863 <https://www.emerald.com/insight/content/doi/10.1108/BFJ-01-2017-0037/full/html> accessed 22 March 2023.

72 ibid 2875–2876

73 Gangjee, 'Proving Provenance?' (n 67) 20.

The GI system is structured to provide better information to consumers on the added value of GI products. However, the distinctive characteristics of GI origin products are maintained and preserved through the necessary compliance of GI producers to specific rules defining methods of production, which preserve the origin link, guarantee a certain level of quality, and consequently aliment product reputation in the marketplace. To allow the guarantee function to be effective, some conditions should be set by producers, before and after the GI registration. In particular, the producer group, synthetising the interests and needs of all actors of the value chain, should be able to devise rules in a way that compliance can be effectively monitored over time. The control plan is the result of the cooperation between the producer group and the control body, which intervenes as an external actor during the application phase. The role of producer groups is however essential for expressing the monitoring and control practices already in place, and in formalising *collectively* the producers' engagement to be subjected to controls, distributed all along the value chain through specific criteria. Despite these general principles, the legal framework at national level is not harmonised, even among the Member States with a more long-standing tradition in GI protection. These differences consist in the roles given to producer groups in the design of the control plan and control management, the type of control (external, internal, self-control), its specific targets (compliance with the product specifications and/or governance) and occurrence. All these conditions are shaped and, in the meantime, have impacts on collective action at producer level.

The **guarantee and communication functions** are deeply interlinked with the consumer protection function. Efficient and reliable information can protect consumers from the risk of being misled if the rules codified in the product specification are effectively implemented by GI producers and if appropriate mechanisms are enacted to preserve the authenticity of the information flows on the origin and quality. Collective action is the driver for (i) defining and operationalising efficient control mechanisms and graduated enforceable sanctions in case of non-compliance with the product specification[74]; (ii) setting reliable traceability requirements for all the actors of the value chain bound by the product specification; (iii) reaching a compromise on product specification amendments, when the conditions determining the product typicity change because of external or internal drivers (e.g., climate change for the natural factors and innovation for the local traditional know-how, but also consumer preferences);[75] (iv) allowing the definition of commonly agreed rules on labelling for maximising transparency (e.g., in case of GIs used as ingredients).

74 Flavia Guerrieri and Delphine Marie-Vivien, 'The control plan of agricultural and non-agricultural GIs: the Cinderella of collective action?' <http://publications.cirad.fr/une_notice.php?dk=602384> accessed 1 November 2022.

75 See Quiñones Ruiz and others (n 62); Hanna Edelmann and others, 'Social Learning in Food Quality Governance – Evidences from Geographical Indications Amendments' (2020) 14 International Journal of the Commons 108 <https://www.thecommonsjournal.org/articles/10.5334/ijc.968/> accessed 20 May 2020; Marescotti and others (n 62); Guerrieri, 'The Farm to Fork Strategy as an External Driver for Change' (n 62); Barbara Pick and Delphine Marie-Vivien, 'Representativeness in Geographical Indications: A Comparison between the State-Driven and Producer-Driven Systems

The **consumer protection function** is involved when, in the early phases of the product specification design, the applicant makes a choice on the type of product to be identified by the name. In this context, the objective of avoiding consumers to be misled as to the characteristics and quality essentially attributable to the geographical origin, intercepts issues of the legitimacy and inclusion or exclusion of producers outside the producer group. The challenges faced by the applicants in this regard should imply finding, collectively, appropriate solutions and avoid arbitrary exclusions.

As to the **communication, investment and advertising functions,** collective action is a catalyst for producers' investment initiatives when their efforts in differentiation are adequately remunerated. The price premium is defined as the difference between the price of the GI product compared to comparable products. The EU Commission highlights that conditions for ensuring price premiums of GI products can vary on a case-by-case basis and that recent surveys show that an increment of prices after the GI registration affected more than a half of the participants. Moreover, the distribution of the price premium can vary depending on the complexity of the value chain and the adopted strategies (i.e., it can involve the product at the commercialisation or at the 'agricultural stage'). However, price premiums are not always equal to a higher profitability, as the effective income should be contextualised to the investments made by the operators to craft, operationalise and comply with the product specification. Often, the price premium covers the extra expenses linked to the specific methods of production. Another profile of complexity is represented by the effective distribution of the economic benefits derived from the commercialisation of the GI product, equitably, among all the actors of the value chain.[76]

Producers' engagement in 'giving meaning' to GIs is crucial (i) before the GI registration, especially when the product is not known outside the area or region of production; (ii) after the GI registration to maintain, reinforce or further develop the place-based reputation both in national and international markets. Also, the narrative embedded in the communication resulting from advertising can, from an internal perspective to the producer group, reveal different patterns of social engagement. From an external perspective the narrative used to promote GI products can shape the relationship producers-consumers and its link to their collective dimension.[77] When these conditions are not fully operational because of a fragilized, weakened or absent collective

in Vietnam and France' (2021) 13 Sustainability 5056 <https://www.mdpi.com/2071-1050/13/9/5056> accessed 17 June 2022; Penker and others (n 59).

76 For more insights in this regard see European Commission (n 44) 29.

77 Enric Castelló, Daniel Lövgren and Göran Svensson, 'The Narratives of Geographical Indications as Commons: A Study on Catalan and Swedish Cases' [2022] Food, Culture & Society 1 <https://www.tandfonline.com/doi/full/10.1080/15528014.2022.2054504> accessed 17 June 2022.

action, there are chances that GI holders loose motivation in alimenting product reputation. In some cases, they might cease to use the registered sign.[78]

Under specific conditions, collective action can impact positively on the preservation of intangible cultural heritage, or of natural resources (**resource production and maintenance function**).[79] For example, the members of the producer group might agree in devising specific rules to preserve localised raw materials at risk of erosion. This function, often associated to larger-scope effects such as biodiversity conservation, is an important facet of the natural factors qualifying of the origin link.[80]

Concerning the **local development function,** many studies[81] show that collective action can impact on employment generation and provide equal benefit distribution along the production chain, boosting tourism and, more generally, network building. Questions can be raised on the effectiveness of this function when collective dynamics imply exclusionary effects, when the benefits are 'exclusive' or 'selective', it is reasonable to assume that the local development function embedded in GIs is fragilized.

This excursus was aimed to show that collective action is profoundly embedded, in various ways, in GIs: GIs are tools which, in order to be effective and *meaningful*, should imply a certain level of self-organisation and endogenous governance. Thus, at the theoretical and political levels, making the GI functions explicit might only reflect the 'ideal' performance of the sign. Instead, in real-world cases, the functions might be more or less optimised, depending on how producer groups manage to self-organise. Due to its pivotal importance in defining both virtuous and distortive mechanisms in GIs, collective action should be targeted in a systematic way by policymakers. At present, the legal framework, especially at the EU level, does not prove to be sensitive to collective action issues, and it does not address the aspects that might be more exposed to inefficiencies.

78 Pick (n 33) 154; Marie-Vivien (n 36); Andrea Zappalaglio, Giovanni Belletti and Andrea Marescotti, 'Silent Registered GIs in the EU: What Is at Stake? – Archive Ouverte HAL' <https://hal.archives-ouvertes.fr/hal-03791624> accessed 9 November 2022.

79 Genevieve Nguyen and others, 'French Quality and Eco-Labelling Schemes: Do They Also Benefit the Environment?' (2004) 2 International Journal of Agricultural Sustainability 167 <https://www.tandfonline.com/doi/full/10.1080/14735903.2004.9684576> accessed 6 July 2023.

80 See *inter alia Pick* (n 33) 197; Gangjee, *Relocating the Law of Geographical Indications* (n 3) 272; Dev Gangjee (n 42).

81 Among them: Pick (n 33) 186–211; Belletti and Marescotti (n 17); Emilie Vandecandelaere and others, *Linking People, Places and Products: A Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications* (FAO, SinerGI 2010); Bowen (n 69). In particular, Belletti and Marescotti and Vandecandelaere et al. attribute particular significance to the local development function through the 'theory of the virtuous cycle'. This theory, by putting the accent of the outcomes originating from GI settings (i.e., creation of public goods) strengthens the aspect of inter-relation between the heterogeneous functions of GIs, market, and non-market related. See also Belletti, Marescotti and Touzard (n 19).

Through my research I want to show that collective action issues cannot be overlooked at policy level as 'governance context can make certifications more or less valuable'.[82]

1.6 The problem

The connection between collective action and GIs is not a hot topic in the legal scholarship. Only very recently the role of producer group has started to occupy the policy debate. The reform of the PDO/PGI system and the extension of the GI protection to craft and industrial products represent an opportunity to focus on collective action. Nevertheless, the proposed novelties might (still) not be enough to prevent (or correct) inefficiencies at the local level for all potential applicants in all EU countries. Until now, legal policies do not offer a harmonised and clear overview of the necessary tools available to stakeholders to prevent inefficiencies arising from GI governance, even though these inefficiencies can heavily impact the well-functioning of the sign.

At the EU level, Reg 1151/2012 does not give any indication on how collective action should be structured and regulated, though Recital 57 identifies the need to clarify and recognise the role of groups, who play 'an essential role in the application process for the registration of names of designations of origin and geographical indications and traditional specialties guaranteed'. Echoes of this general principle can be found in the rules defining the role of producers' groups (art 45 Reg 1151/2012) which is limited to the valorisation, protection, and promotion of the GI. The requirement on the composition of the group is also generally defined in art 3, and there is no legal mechanism to ensure an effective and efficient management of the sign (i.e., a management coherent with the objectives of the tool).

At the national level, the legal framework on collective action is fragmented. As shown by the Max Planck Institute 'Study on the Functioning of the EU GI system', some countries (e.g., Italy, France, but also Portugal and Cyprus) set additional requirements concerning the nature of the applicant, while other countries (e.g., Germany) simply implement the rules contained in the Regulation. In the countries belonging to the first group (i.e., countries with a longer tradition in GI protection), national rules are not harmonised. Specific rules on collective action can be observed in France and, to some extent, in Italy but the legal framework is far from being homogeneous and exhaustive.[83] In the countries belonging to the second group, the deficiencies of the EU legal framework are

82 Susana López-Bayón and others, 'Governance Decisions in the Supply Chain and Quality Performance: The Synergistic Effect of Geographical Indications and Ownership Structure' (2018) 197 International Journal of Production Economics 1 <https://linkinghub.elsevier.com/retrieve/pii/S0925527317304280> accessed 17 June 2022.

83 Flavia Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' in Andrea Zappalaglio and others, *Study on the Functioning of the EU GI System* (Max Planck Institute for Innovation and Competition).

directly transposed at the national level, potentially creating situations of uncertainty and informal divergences.

At present, the applicants can adopt the solution which best fits their strategic objectives, compatibly with the input given by the national authority and, eventually, the presence of additional national requirements. Consequently, during the pre-registration phase various situations could emerge. In some cases, the management of local resources identified through the name is reserved to the producers who contribute or invest the most to give the product its characteristics and qualities. In other cases, the name could be revendicated by a sub-group of legitimate producers who might set (strict) boundaries to maximise *their* needs and strategic objectives, indirectly preventing others from accessing the right to use the name.[84] It might also happen that the decision-making power for rule-crafting is taken over by actors different from producers and external to the value chain (e.g., state actors, regional authorities). Collective action happening during the construction of the application is handled differently in the EU Member States and might lead to more or less structured (sometimes even absent) governance configurations. This can impact on the 'rules of the game' governing the post-registration phase and the operationalisation of the GI functions. Only recently, the EU Commission has recognised the essential role of groups, while acknowledging national discrepancies: 'GI producer groups play an essential role in applying to register a GI, proposing amendments to the product specifications and submitting cancellation requests. However, not all GIs are systematically managed by structured producer groups. In practice, producers join forces as a group to submit the application to register a GI, but they often *stop acting together* when it comes to marketing the product or enforcing the GI rights'.[85] (emphasis added)

The Farm to Fork Strategy released by the EU Commission in 2020 also recentres the focus on the role of groups, by highlighting the positive impact of stakeholders' decisions on environmental sustainability.[86] As anticipated earlier, the contribution of GIs to the environmental, economic, and social facets of sustainability has been explored in the interdisciplinary scholarship.[87] Recently, researchers have been focusing on devising methods to evaluate these dimensions of sustainability in GI value chains.[88] These studies show that the GI initiative should be contextualised in a much

84 Giovanni Belletti, Didier Chabrol and Greta Spinsanti, 'Échapper Au Piège « qualité–Exclusion » Dans Les Indications Géographiques : Réflexions Sur Le Cas Du Poivre de Penja' (2016) 25 Cahiers Agricultures 55002 <http://www.cahiersagricultures.fr/10.1051/cagri/2016034> accessed 14 November 2022.

85 European Commission (n 44) 33.

86 European Commission, 'Farm to Fork Strategy' <https://ec.europa.eu/food/farm2fork_en>; Guerrieri, 'The Farm to Fork Strategy as an External Driver for Change' (n 62).

87 See supra Chapter 1, non-market related functions.

88 Giovanni Belletti and Andrea Marescotti, *Evaluating Geographical Indications* (FAO 2021) <http://www.fao.org/documents/card/en/c/cb6511en> accessed 20 June 2022; Filippo Arfini and Valentin Bellassen (eds), *Sustainability of European Food Quality Schemes: Multi-Performance, Structure, and Governance of PDO, PGI, and Organic Agri-Food*

more complex context, and that the choices made at the first stages are susceptible to create various types of outcomes, which affect localised resources.

Elinor Ostrom's work was essential to frame problems of sustainability (availability over time) affecting the 'commons' or 'common-pool resources', meaning groundwater basins, fisheries, lakes, etc. but also information. Her work is a landmark in the construction of empirically grounded diagnostic frameworks for addressing policy concerns related to resource depletion. Ostrom's approach to sustainability is not compartmentalised to specific dimensions or facets. Rather, it is focused on the idea that human interactions generate different types of outcomes and, through collective action leading to specific formal or informal arrangements, humans might be able to provide solutions to avoid resource disruption.

I use her approach to understand GIs. My work is developed as a response to the policy concern[89] of the extension of agricultural GI protection to industrial and craft products. Moreover, it aims to identify the factors affecting collective action during and before the application for GI registration, in the agricultural and non-agricultural sectors. My objective is to identify the inefficiencies and efficiencies arising from the implementation of the legal rules beyond the 'success' of the GI application, and affecting the sustainable governance of the sign. To this end, I assume, from a theoretical standpoint that:

(a) the evoked proximity between GIs and the commons can offer valuable tools to resolve definitory ambiguities and navigate transdisciplinarity;
(b) the operationalisation of the functions post-registration depends on how the GI is constructed during the pre-application and application phases, both in agricultural and non-agricultural GIs;
(c) the degree of collective action at the local level, before and during the application process is influenced by how the EU and national rules governing the application for registration are received, interpreted and operationalised by the actors concerned;
(d) comparing experiences of valorisation and protection of denominations of origin products in the French and Italian agricultural and non-agricultural sector can be useful to: (i) identify if, during the application phase, two countries with a long standing tradition in GI protection manage differently the application process; (ii) understand if differences are due to the nature of the products involved, to the characteristics of the legal framework and/or, more generally,

Systems (Springer International Publishing 2019) <http://link.springer.com/10.1007/978-3-030-27508-2> accessed 19 November 2020; Nadia Scialabba, Food and Agriculture Organization of the United Nations and Food and Agriculture Organization of the United Nations (eds), SAFA Guidelines: Sustainability Assessment of Food and Agriculture Systems (Version 30, Food and Agriculture Organization of the United Nations 2014).

89 Michael D. McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons', in Daniel H. Cole and Michael D. McGinnis, *Elinor Ostrom and the Bloomington School of Political Economy: a framework for policy analysis*, pp 87-108.

to collective action issues; (iii) help inform policy prescriptions, avoiding one-fits-all solutions and recentring the debate on the crucial role of sustainable governance as main driving force for environmental, social, and economic outcomes.

These assumptions lead me to choose a case-study driven comparative approach and to craft a methodological framework inspired from common scholarship. This approach will allow me to understand the nature of the resource object of valorisation and protection initiatives, the nature of the rights conferred by the registration of the name and the effects of current legal requirements on product specification design, intended as a compromise between heterogeneous actors.

I consider the following building-blocks as the foundations for my diagnostic approach:

(a) The commons scholarship identifies empirically grounded structural variables affecting the sustainable management of shared tangible and intangible resources. The conceptual proximity of GIs with the commons suggests that a similar approach can be useful to decode collective action experiences in PDO/PGI contexts, to distinguish the conditions affecting the outcomes of the GI registration process and, consequently, the governance of the sign.

(b) It is reasonable to envisage that structural variables (later summarised in the 'axes of inquiry') grounded in well-established experiences in the registration and management of agricultural GIs, can be used as benchmarks for evaluating GI initiatives (or potential GI initiative) in the industrial and craft sector.

(c) In agricultural and non-agricultural GIs, efficiencies and inefficiencies emerging during the pre-application and application phases, deriving from the actors' interpretation and application of substantial and procedural legal rules at the EU and national levels, can impact, positively or negatively, on the subsequent management of the sign.

(d) This diagnostic approach can be used to identify legally relevant issues involving GI governance which should be taken into account by policymakers, in view of the future reforms of the GI system, in particular the extension of the GI protection to industrial and craft products.

1.7 Methodological challenges

1.7.1 Challenge 1 – Embracing complexity and the challenge of generalisation

Studying GIs as Intellectual Property Rights (IPRs), paves the way to various possibilities of inquiry. From a legal perspective, choosing a traditional doctrinal method would mean, quoting Calboli and Montagnani, 'investigating into legal notions, their values and principles, as well as existing legal measures such as statutes, court judgments, and other secondary rules' to 'reveal a statement of the law that is pertinent to the matter under investigation'. Choosing the classical doctrinal approach means therefore diving deep into legal rules and principles, tracing the

relationship between them, spotting coherences and gaps and finding a way to fill these gaps.[90] This can be done using a variety of methodologies, to cite one of them, the comparative legal analysis. The same authors mention how legal IP researchers are increasingly abandoning the 'safe walls' of the classical doctrinal approach, to study IP topics, borrowing methods used in other disciplines (e.g., law and economics, statistics, sociology, etc.), which inspired alternative ways to design data collection and/or approaching legal reasoning. This shift towards interdisciplinarity and multidisciplinarity was inspired by the acknowledgment of the complexity and disciplinary intersections in IP topics, that the sole use of the traditional legal analysis and methods were not able to cover.[91]

The study of GIs is a perfect example of the complexity generated by interdisciplinary interactions and can represent an interesting opportunity for innovative perspectives. Their multi-faceted nature makes it necessary, once defined the starting disciplinary field and its limits, to cross disciplinary boundaries and find alternative approaches to uncover the blind spots, often lying at the intersections of different disciplines. The Max Planck Institute 'Study on the functioning of EU GI system' focused on the visible outcomes of processes happening at producers' level (interactions between producers and national and European authorities) to identify general trends. It showed that the use of quantitative and qualitative empirical methods could be of interest for the legal scholarship.[92] However, this approach had its limits, as the conclusions which could be drawn remained, for the most part, 'at the surface' of the documental analysis. Instead, collective action can explain: (a) which problems pushed producers to apply for registrations; (b) who was involved in the decision-making process (including the role of national authorities and other actors external to the value chain) and how it unfolded; (c) the consequences of this process on the capacity of GIs to perform their expected functions. This angle of inquiry is still unexplored for most legal scholars, although pioneer research anticipated the exigence to investigate collective action dynamics in GIs: Marie-Vivien and Pick looked at the role of national authorities and producers in shaping the product specifications and the legal implications of this process, prevalently using empirical qualitative approaches (case-study driven research).[93]

I follow this path of inquiry, starting with the legal analysis of the EU *sui generis* framework and a comparative analysis of the French and Italian national legal systems. Then, I discuss the

90 Irene Calboli and Maria Lilla Montagnani, *Handbook of Intellectual Property Research* (Oxford University Press 2020) 4.

91 ibid 5–6.

92 Andrea Zappalaglio and others, *Study on the Functioning of the EU GI System* (Max Planck Institute for Innovation and Competition) <https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung/Study_on_the_Functioning_of_the_EU_GI_System.pdf>.

93 See, *inter alia*, Delphine Marie-Vivien, *The Protection of Geographical Indications in India: A New Perspective on the French and European Experience* (Sage Publications India Pvt Ltd 2015); Pick (n 33).

legal implications of collective action on the functioning of the *sui generis* GI system. Building on conceptual similarities between GIs and the commons, I cross legal disciplinary boundaries to explore the diagnostic approaches belonging to other social sciences, including institutional analysis for the study of collective action. The aim is (a) promoting a holistic transdisciplinary approach, enriched with the legal perspective, adapting existing diagnostic frameworks to the study of GIs; (b) using this diagnostic approach to identify empirically-grounded targets for intervention at policy level to prevent or correct efficiencies and inefficiencies emerging from real-world situations; (c) avoiding the trap of promoting at the EU or national levels one-size-fits-all solutions to govern collective action, while at the same time considering generalisable guiding principles; (d) crafting recommendations inspired by harmonisation exigencies and by the need of ensuring realistic and coherent transitions from heterogeneous national traditions to a EU-wide regulatory framework.

1.7.2 Challenge 2 – Using collective action as a platform to build transdisciplinary dialogue on GIs

Analysing collective action at producer level means identifying theoretical and practical issues, essential to the GI functioning. For lawyers it would mean exploring how the legal framework inspires stakeholders' arrangements and governance structures at the local level and how this operationalisation impacts on the nature of the GI as a multifunctional tool. For 'non-legal' disciplines it would mean disposing of a clear overview of the legal rules playing determining collective action dynamics**.** As Gangjee pointed out: 'lawyers cannot afford to ignore the significant contribution made by those from other disciplines who are exploring the issues surrounding origin-labelled products, while the latter would do well to appreciate the historical inertia as well as constraints of legal reasoning, interpretation and justification'.[94]

The challenge in fostering transdisciplinary dialogue is creating a permeability of disciplinary boundaries and a conceptual osmosis between the different perspectives, methodologies, and findings. Through this research, I aim to find a common understanding on the key issues involved, a mutually understandable set of variables of analysis, clear linkages between the disciplines involved and the added value of integrating heterogeneous approaches on common issues.

1.7.3 Challenge 3 – Positioning the legal scholarship into the debate on GIs and the commons

Analysing collective action issues in the context of GIs registration and management means focusing on (a) the coordination efforts made by stakeholders for registering the name (including standard setting and a solid governance structure) and the motivations driving these efforts; (b)

94 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 302.

the capacity of the stakeholders to reach outcomes compliant to quality standards and sustain an efficient governance structure over time; (c) the effects of these efforts and outcomes on the capacity of the sign to perform its functions.

The collective dimension embedded in origin products and in the EU vision of GIs has often suggested, especially in the field of social sciences, the proximity of GIs with the commons. More specifically, conceptual ties between the GIs and the commons have been identified by various scholars for many reasons: because GI management is 'similar to the management of the commons' embedding collective social learning processes,[95] because 'the reputation they incorporate is comparable with common-pool resources',[96] because of the management issues related to the 'GI brand',[97] because 'GI firms manage common food reputation to avoid free riding',[98] or, more generally, recognising that rights conferred through the GIs imply a collective dimension.[99] Castelló et al. identify a proximity of GIs to the commons by looking at the recurrent formulation patterns reminding to collective heritage and community exchanges, embedded in the product specifications and in promotional channels. This two-fold perspective emerging from the GI narrative is seen by the authors as an indicator of social engagement at producer level and as a communication strategy (information both internal to producer groups and channelled through the name between producers and consumers).[100] Pick identifies a connection between GIs and the commons through their contribution to preserving traditional knowledge.[101] Some scholars[102] recognise the importance of the profiles of 'publicness' in GIs referring to them as tools to aliment and sustain public goods. Even without explicitly referring to the commons, the authors highlight the impact of collective action embedded in GI registration and management on local

95 Edelmann and others (n 75) 109.

96 Xiomara F Quiñones-Ruiz and others, 'Why Early Collective Action Pays off: Evidence from Setting Protected Geographical Indications' (2017) 32 Renewable Agriculture and Food Systems 179, 2 <https://www.cambridge.org/core/product/identifier/S1742170516000168/type/journal_article> accessed 14 November 2019."plainCitation":"Xiomara F Quiñones-Ruiz and others, 'Why Early Collective Action Pays off: Evidence from Setting Protected Geographical Indications' (2017

97 Marta Fernández-Barcala, Manuel González-Díaz and Emmanuel Raynaud, 'Contrasting the Governance of Supply Chains with and without Geographical Indications: Complementarity between Levels' (2017) 22 Supply Chain Management: An International Journal 305 <https://www.emerald.com/insight/content/doi/10.1108/SCM-05-2016-0161/full/html> accessed 21 June 2023.

98 Xiomara F Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (2016) 57 Land Use Policy 103, 104 <https://linkinghub.elsevier.com/retrieve/pii/S0264837716300771> accessed 14 November 2019.

99 Marie-Vivien and Biénabe (n 24).

100 Castelló, Lövgren and Svensson (n 77).

101 Pick (n 65).

102 Belletti, Marescotti and Touzard (n 19); Filippo Sgroi, 'Territorial Development Models: A New Strategic Vision to Analyze the Relationship between the Environment, Public Goods and Geographical Indications' (2021) 787 Science of The Total Environment 147585 <https://linkinghub.elsevier.com/retrieve/pii/S0048969721026565> accessed 17 June 2022.

development processes, and the protection of natural and cultural resources. This aspect has been further developed and inspired the creation of the 'virtuous cycle' model.[103]

Other scholars preferred to adopt different approaches. According to Torre and Benavente, GIs embed a collective reputation which has the characteristics of club goods rather than common goods.[104] This position seems to be shared by Rangnekar, who at the same time recognises the presence of a semi-public interest embedded in GIs.[105] Réviron and Chappuis, explicitly reject this characterisation, as 'PDO-PGI registration does not permit operators to run the organisation as a private club; it obliges current partners to accept new operators who are located in the geographical area and respect the common code of practice, but who were not part of the initiators' group'.[106]

Fournier et al.[107] are more cautious as to the qualification of 'GIs as a common or club goods' and adopt a more nuanced approach, based on comparative case-study analysis in the Global South. According to the authors, contextual elements and stakeholders' motivations, determine specific choices qualifying the type of management of the sign. This management strategies and choices, in some circumstances are comparable to the management of club goods, in other circumstances to the management of common-pool resources. Earlier, Poméon and Fournier had recognised the 'commons' nature of GIs through the process leading to the compromise between heterogeneous actors and interests.[108] My research is in line with this configuration and some aspects will be further discussed.

The re-conceptualisation by Mazé, published in February 2023, of 'GIs as global knowledge commons' is much more in line with the theoretical baseline used in my work. She recognised the positioning of GIs in-between public and private 'porous' dichotomy and embraces a dynamic approach to GIs, which 'can be interpreted' as commons or club, qualifying collective action as 'the endogenous solution to the CPR [common-pool resources] dilemma'.[109] My analysis, although with

103 Vandecandelaere and others (n 81); Belletti and Marescotti (n 88).

104 André Torre, 'Les AOC sont-elles des clubs ? Réflexions sur les conditions de l'action collective localisée, entre coopération et règles formelles' (2002) 100 Revue d'économie industrielle 39 <https://www.persee.fr/doc/rei_0154-3229_2002_num_100_1_984> accessed 29 May 2020; Daniela Benavente, *The Economics of Geographical Indications* (Graduate Institute Publications 2013) <http://books.openedition.org/iheid/525> accessed 17 June 2022.

105 Rangnekar (n 26) 4.

106 Réviron and Chappuis (n 32) 51.

107 Fournier and others (n 63).

108 Thomas Poméon and Stéphane Fournier, 'La Construction Sociale Des Labels Liés à l'origine Des Produits Agroalimentaires: Une Conciliation Entre Des Interets Contradictoires? Etudes de Cas Au Mexique et Indonesie' [2010] ISDA, Cirad-Inra-SupAgro.

109 Armelle Mazé, 'Geographical Indications as Global Knowledge Commons: Ostrom's Law on Common Intellectual Property and Collective Action' [2023] Journal of Institutional Economics 1 <https://www.cambridge.org/core/product/identifier/S1744137423000036/type/journal_article> accessed 24 March 2023.

some variations and additions, starts from a similar theoretical construction, and operationalises a coherent diagnostic tool for case study analysis.

All these attempts show that there might be a conceptual proximity between GIs and the commons, although the precise conceptualisation originating from this proximity is far from being consensual. One should not forget that GIs are recognised as IP legal tools. They are *names* having the capacity to convey information to consumers as to place-based distinctive attributes of a product and its specific reputation. Producers are entitled to reserve the 'exclusive' use of the name through registration only when this capacity is verified by the national authority. A restriction in the access to the use of the name is however granted under specific conditions, one being the duty of ensuring access to anyone who complies with the product specification. Thus, on the one hand it is essential that the use of the name registered as a GI remains accessible to anyone who complies with the conditions set in the product specification. On the other hand, the restrictions set out in the product specification should be adequately justified as *de facto* they deny access to those who do not comply with the rules.

The legal perspective on the collective action dimension of the GI protection and, more generally, on the interdisciplinary debate on GIs and the commons is little developed. This mitigated interest might originate, in the first place, from the difficulty to match the traditional legal approach to the classification of the protected goods with the theory of goods proposed by economists, more focused on the management issues arising from appropriation and resource conservation. Lawyers' contribution however is crucial for the study of GIs for targeting core issues embedded in the legal rationale and functioning of the *sui generis* system. Among these issues, the commons perspective on GIs highlights the nature of the protected name and its relationships to the local resources affected (positively or negatively) by collective action, non-ownership and inalienability, and the relevance of ensuring a type of management coherent with national and EU legal principles. Le Goffic mentions the proximity between GIs and the commons highlighting the difference between the public logic shaping the conditions to access the use of the name and denying the right to alienate in GIs, opposed to the private initiative and management characterising collective and certification marks.[110] As pointed out by Marie-Vivien 'place names are common things, that is to say, things that belong to no one and whose use is common to all such as air or sea'. She points out that in the French Civil code, the enjoyment of the '*choses communes*' is regulated by mandatory rules.[111] Their approach is pioneer in highlighting, from a legal perspective, salient attributes of the sign having significant connections to the theoretical configuration of the commons, such as

110 Caroline Le Goffic, La Protection Des Indications Géographiques: France, Union Européenne, États-Unis (Litec 2010) 259–272.

111 Marie-Vivien, The Protection of Geographical Indications in India (n 93) 254.

inalienability, collective use 'under the restriction' and the distinction between ownership and 'right to use'. More specifically, Marie-Vivien focused on the importance of collective action as leading to the empowerment of producer groups during the GI application and management. All these aspects deserve to be further discussed.

1.7.4 Challenge 4 – Building shared understanding on intangible and tangible commons

The theories of the commons originate in the field of economics. Scholars used to define goods as public or private,[112] but this categorisation was revised over time. In real-world situations, the phenomena of resource underuse or overuse is much more complex, and could not be reduced to a binary distinction. Yet, they included a third category of goods (club goods) and later Elinor Ostrom and colleagues added the notion of common-pool resources (or commons).[113] Ostrom defines them as types of shared goods that face specific collective action problems.[114] Commons (or common-pool resources) is a name used to identify the type of management of goods involving an interaction of a group (or community) with a specific ecosystem (socio-ecological system), such as forests, water systems, fisheries, land, etc (see Figure 1). In a common-pool resources or commons situation:

'(1) it is costly to exclude individuals from using the good either through physical barriers or legal instruments and (2) the benefits consumed by one individual subtract from the benefits available to others […] Common-pool resources share with public goods the difficulty of developing physical or institutional means of excluding beneficiaries. […] The products or resource units from common-pool resources share with private goods the attribute that one person's consumption subtracts from the quantity available to others. Thus, common-pool resources are subject to problems of congestion, overuse and potential destruction unless harvesting or use limits are devised and enforced'.[115]

112 Howard R Bowen, 'The Interpretation of Voting in the Allocation of Economic Resources' (1943) 58 The Quarterly Journal of Economics 27 <https://academic.oup.com/qje/article-lookup/doi/10.2307/1885754> accessed 3 July 2023; Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 The Review of Economics and Statistics 387.

113 Vincent Ostrom and Elinor Ostrom, 'Public Goods and Public Choices' in Emanuel S Savas (ed), *Alternatives for delivering public services toward improved performance* (Routledge 1979); Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* (2nd edn, Cambridge University Press 1996) <https://www.cambridge.org/core/product/identifier/9781139174312/type/book> accessed 3 July 2023.

114 The Late Elinor Ostrom, *Governing the Commons* (Cambridge Univ Press 2015) 30–38.

115 The identification of common-pool resources was an innovation compared to the classical division between public and private goods, theorized by Samuelson in 1954. This division echoed the traditional approach which sees the dichotomy between privately owned and state-owned goods. Identifying another type of goods beyond private and public goods, was the expression of the limited definitory capacity of Samuelson's basic division. See Elinor Ostrom and Charlotte Hess, 'Private and Common Property Rights' in Boudewijn Bouckaert (ed), *Property law and economics* (Edward Elgar 2010) 57–58.

Figure 1: 'Four types of goods'. Source: E. Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' American Economic Review 100 (June 2010), 645.

		Substractability of Use	
		High	Low
Difficulty of excluding potential beneficiaries	High	*Common-pool resources:* groundwater basins, lakes, irrigation systems, fisheries, forests, etc.	*Public goods:* peace and security of a community, national defense, knowledge, fire protection, weather forecasts, etc.
	Low	*Private goods:* food, clothing, automobiles, etc.	*Toll goods:* theaters, private clubs, daycare centers

This definition of 'common-pool resources' was first applied to tangible goods. For these resources, it is relatively easy to imagine that, being accessible to multiple individuals, 'finite quantities of resource units [are generated by the resource system] and one person's use subtracts from the quantity of resource units available to others'.[116] Common-pool resources situations imply two conditions. Firstly, the resource is **highly valued** by stakeholders (meaning that stakeholders can potentially perceive a benefit in subtracting resource units) and they can be **simultaneously appropriated** by multiple actors. The appropriation by some might affect the availability of the resources for others (attribute of subtractability of use). Secondly, when the access to the resource is unregulated it can be difficult or costly to (physically or virtually, i.e., through rules or 'institutional means') exclude stakeholders from accessing the resource (attribute of non-excludability). Differently from the legal perspective, the criteria for the definition of goods or resources are to be understood *in relation to* the problems they might face when exposed to collective action problems (such as depletion), prior to and independently from any choice concerning the property regime. In other words, the nature of the good is defined according to the actors' expected attitude *towards* the resource and *towards* each other. When the resource is freely available for access and use and it is 'owned by no one', the subtraction of resource units by some precludes the enjoyment of the same resource units by others.[117]

However, the interpretation and use of the commons approach in various contexts and for different types of resources was not always consistent. Ostrom highlighted in more than one occasion that a terminological confusion often exists between the concepts of 'common-pool resources',

116 Elinor Ostrom, 'Reformulating the Commons' (2000) 6 Swiss Political Science Review 29, 30 <https://onlinelibrary.wiley.com/doi/10.1002/j.1662-6370.2000.tb00285.x> accessed 21 June 2023.

117 See also Alberto Lucarelli and others, 'Biens communs. Contribution à une théorie juridique' (2018) N° 98 Droit et société 141 <http://www.cairn.info/revue-droit-et-societe-2018-1-page-141.htm?ref=doi> accessed 21 June 2023.

'common-property' and 'open-access'.[118] Common-pool resources 'may be owned by national, regional, or local governments, by communal groups, by private individuals or corporations or used as open access resources by whomever can gain access'.[119] Thus, the property regime is defined by an ensemble of specific rules, setting rights and duties upon the stakeholders involved, which affect the access, use and management of the resource. These rules can create efficiencies or inefficiencies, but in principle do not affect the conceptual identification of the good as a common-pool resource, or a club, or a public good, or a private good, in economic terms. The property regime is *one* among multiple *solutions* to respond to social dilemmas, and the classification of goods reflects the type of management.

Ostrom challenges the presumption set forth by Hardin, that individuals are 'endlessly trapped' in the tragedy of resource depletion when resources are not private or State-owned, as an open pasture accessible to all.[120] Her work empirically showed that Hardin's theory was a universal non-verified presumption and that a 'third way' exists 'beyond the firm and the state' to preserve these types of resources, 'owned by no one'.[121] This alternative way resides in the capacity of communities to self-organise to manage shared resources, in the first place, autonomously, meaning without or with limited assistance of external actors (e.g. state officials).[122] According to Ostrom: 'when analysts perceive the human beings they model as being trapped inside perverse situations, they then assume that other human beings external to those involved – scholars and public officials – are able to analyze the situation, ascertain why counterproductive outcomes are reached and posit what changes in the rules-in-use will enable participants to improve outcomes. Then, external officials are expected to impose an optimal set of rules on those individuals involved. It is assumed that the momentum for change must come from outside the situation rather than from the self-reflection and creativity of those within a situation to restructure their own patterns of interaction'.[123]

Ostrom's contribution has sometimes been misunderstood as proposing community-based management as 'the solution' for every type of situations involving resource-management issues

118 Ostrom and Hess (n 115); Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100 American Economic Review 641 <https://pubs.aeaweb.org/doi/10.1257/aer.100.3.641> accessed 8 August 2022.

119 Ostrom and Hess in Ostrom and Hess (n 115).

120 Garrett Hardin, 'The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality.' (1968) 162 Science 1243. <https://www.science.org/doi/10.1126/science.162.3859.1243> accessed 21 June 2022.

121 Xavier Basurto and Elinor Ostrom, 'Beyond the Tragedy of the Commons' (1 October 2009) <https://papers.ssrn.com/abstract=1304688> accessed 26 October 2022.

122 Ostrom, *Governing the Commons* (n 114) 8–21.

123 Ostrom, 'Beyond Markets and States' (n 118) 648.

('social dilemmas'). On the contrary, she repeatedly affirmed that one-size-fits-all solutions are no panaceas and encouraged multidisciplinary dialogue as the main tool to craft a multi-dimensional diagnostic approach to diagnose complex processes involving socio-ecological systems.[124]

Ostrom's approach to complexity is key to understand her legacy. The classification of goods itself has been first conceived to unpack the diversity of collective action issues involved in resource appropriation and management, but it remains a simplification of complex on-the-ground situations. Thus, it may happen in real-world cases that the resource involved has *some* attributes of common-pool resources management and *some* attributes of club goods management. This trait justifies the choice to approach subtractability of use and excludability as a range going from high to low rather than considering them 'present or absent'.[125] In other words, the definitory boundaries between the types of goods are nuanced in practice. This aspect started to emerge more prominently once the interest in the commons perspective increased.[126]

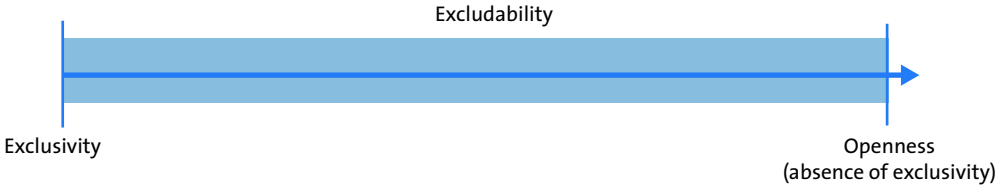
Before going any further, it is important to clarify the distinction between the concepts of excludability, exclusivity, subtractability, appropriation and property. Subtractability and excludability are attributes that goods have independently from any property (or absence of property) regime, meaning that ontologically these goods can be subtracted, and this subtraction can be followed by the exclusion of others at a low or high cost. I consider appropriation as the action aimed to enjoy the benefits derived from the availability or use of the good, independently from the 'legitimacy' of the appropriation. Exclusivity (of the enjoyment and use) is one possible response to the social dilemmas of overuse or underuse. Depending on actors' choices and the type of resources at stake, rules and arrangements on the resource management can define a degree of exclusivity or openness, especially in relation to the access to the use of the name and the decision on who legitimately has the right to access. It can be helpful to visualise (full) openness and (full) exclusivity as the two extremes of a spectrum (see Figure 2). Furthermore, exclusivity or openness are two possible declinations of excludability, the former corresponding to full excludability, the latter to the absence of excludability, and this is valid especially for intangible commons.

124 Elinor Ostrom, Marco A Janssen and John M Anderies, 'Going beyond Panaceas' (2007) 104 Proceedings of the National Academy of Sciences 15176, 15177 <https://www.pnas.org/content/104/39/15176> accessed 19 November 2020. This point is particularly challenging as it open interesting methodological questions, involving the need, embedded in the logic of a legal system, to provide generalizable solutions to similar problems. These issues will be tackled in the next chapter.

125 Ostrom, 'Beyond Markets and States' (n 118) 644.

126 Benjamin Coriat, 'From Natural-Resource Commons to Knowledge Commons: Common Traits and Differences' (2013).

Figure 2: Excludability gradient defining exclusivity or openness based on the rules defining access to the use of the name.



1.7.4.1 Why the commons theory is useful to understand GIs: an approach through the rules

The heterogeneity of the multiple interpretations on the nature of GIs shows the complexity of this topic. At the same time, it challenges further investigations to explore the conceptual proximity between GIs and the commons. The first step to solve this puzzle is clarifying what 'commons' are. The second step is reflecting on why this approach is useful to explain dynamics involved in the GI registration and management, taking into account legally sensitive targets.

The capacity of a group to self-organise to respond and overcome dilemmas arising by uncontrolled accessibility and appropriability of tangible and intangible resources (i.e., resource depletion) can be observed looking at the capacity of the resource-users to craft rules. However, the concept of rules in the commons scholarship is not straightforward, and can be puzzling for the conceptual theoretical mindset of legal scholars. Most of the times, scholars approaching the study of rules in commons settings use non-uniform terminology to the detriment of definitory clarity and transdisciplinary dialogue.

Firstly, it is important to highlight that institutionalists often identify rules as 'institutions', or 'institutional arrangements'. I would like to spend a few words on how the notion of 'legal rules' and 'legal system' as intended by legal scholars could efficiently combine with the 'ostromian' definition of rules. Giving a universal definition of 'legal rule' from a legal perspective can be difficult, as it would impose to consider numerous and heterogeneous elements, which can be reconducted to the type of legal system and tradition. We could define a legal rule as a prescriptive statement and as a 'component' of a rule-system, which has been 'produced' by the actors vested of the rule-making power, according to specific procedures and in coherence with higher-level rules and principles (i.e., Constitutions of sovereign States). In other words, according to the legal perspective, the rules of a legal system are the emanation of the power of the State (or supra-national bodies whose functions include rulemaking). As such, they are formally binding. The sanctions provided in case of breaches to codified rules are administered by judges, vested of the judicial power. This definition can, for some, be too general or simplistic, as it does not consider

the nuances and specificities embedded in common law, civil law, or mixed systems. Others may argue that this definition is limited because it does not highlight the importance of the complex web of interconnected principles embedded in legal provisions. Principles might not be codified, but they are important because they guide interpreters in the process of operationalisation of legal rules and they ensure the maintenance of an underlying coherence of the legal system as a whole. Sacco identified these non-codified elements as 'legal formants', meaning operational units formed by uncodified 'justifications given for (codified) rules' used for interpreting and enforcing the codified rules themselves. Other types of unspoken component of legal rules are the 'cryptotypes' ('rules that exist and are relevant but that the [stakeholder concerned] does not express and, even if he wants, it would not be able to express').[127] More generally, there is a whole sedimented substrate of 'mute acts and sources', or customs, 'created by long repetition of conforming behaviors; once created [they are] binding'.[128] Some customs are the heritage of the past, they are often community-based, can persist 'unspoken' and nonetheless can be perceived as binding as State-driven 'spoken' (formal) rules.

Finding an 'entry door' is necessary to establish a dialogue between the legal and institutional approaches. To this aim, it might be useful to differentiate according to the (1) type of rulemaking centre, (2) type of rule-making process and (3) scope of rights and duties. Legal rules are created by State-actors through a specific process to respond to general needs, defining concepts, rights and duties 'in relation to the related ideas expressed by the spoken law'.[129] Instead, community-based rules interesting for institutionalists are arrangements resulting from the compromise between the members of a group to solve a problem affecting them directly, 'on their own, without external rules and enforcement imposed from the outside'.[130] These arrangements are context specific and even though they are formed at stakeholders' level, they might be regulated or influenced by other arrangements at various scales. The binding force of these arrangements or rules depends on the willingness of the members to recognise the rule, to comply with it, but also from their capacity to self-organise, conceive, and operationalise monitoring and enforcement mechanisms.[131]

In *Governing the Commons*, Ostrom refers to the rules distinguishing between the 'rule of law' (i.e., formal, codified laws) and 'working rules' (i.e., not necessarily codified, used by stakeholders

127 Rodolfo Sacco, Un cryptotype en droit français, la remise abstraite, in Etude Rodière, 1981, 273.

128 Rodolfo Sacco, 'Mute Law' (1995) 43 The American Journal of Comparative Law 455 <https://academic.oup.com/ajcl/article-lookup/doi/10.2307/840648> accessed 21 June 2023.

129 ibid 467.

130 Elinor Ostrom, 'Analyzing Collective Action' (2010) 41 Agricultural Economics 155 <http://doi.wiley.com/10.1111/j.1574-0862.2010.00497.x> accessed 25 June 2020.

131 Arild Vatn, *Institutions and the Environment* (Edward Elgar Pub 2005).

in practice and which might or might not be aligned with the codified legal framework).[132] The working rules are context-specific, community based and define, for example, the conditions to allow the right to access, withdrawal but also management, exclusion, and alienation of resource units constituting the resource system.[133] According to Ostrom: 'all rules contain prescriptions that forbid, permit, or require some action or outcome. Working rules are those actually used, monitored, and enforced when individuals make choices about the actions they will take.'[134] Moreover, 'the difference between working rules and formal laws may involve no more than filling in the lacunae left in a general system of law. More radically, operational rules may assign *de facto* rights and duties that are contrary to the *de jure* rights and duties of a formal legal system.'[135]

The concept of working rules can be found under the expressions '*de facto* rules' and 'law-in-action'. Similarly, the meaning of 'rule of law' can also be found in expressions such as 'rules-in books', 'rules-in-form', 'rules-on-paper'. Rules-on-paper are explicitly associated with formal rules, 'in contrast to the rules that tend to be used in actual settings'.[136] The underlying rationale of this differentiation is clarifying the contraposition between one type of rules, codified and formally contextualised in a legal framework, and endogenous rules, not necessarily codified, generated and implemented by the stakeholders themselves. This opposition is also shown by the expression 'background legal environment' as opposed to the 'rules-in-use' embedded in a specific setting.[137] The use of multiple expressions to identify similar concepts inevitably leads to terminological confusion.

To enhance clarity, I will go back to Ostrom's definition of 'rules-in-use' that identify all the codified or non-codified prescriptions that affect, directly or indirectly, the stakeholders' interactions in a specific situation. As such, the rules-in-use involve both exogenous laws and regulations, which normally maintain a level of generality (beyond the specific resource), and endogenous rules which originate from local actors' initiatives and are specifically aimed at ensuring the sustainable management of the resource at stake. I will remain coherent to this definition of the 'rules-in-use' throughout my analysis.

132 Elinor Ostrom and Xavier Basurto, 'Crafting Analytical Tools to Study Institutional Change' (2011) 7 Journal of Institutional Economics 317, 318 <https://www.cambridge.org/core/product/identifier/S1744137410000305/type/journal_article> accessed 17 June 2022.

133 Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68 Land Economics 249, 251 <http://www.jstor.org/stable/3146375?origin=crossref> accessed 21 May 2020.

134 Ostrom, *Governing the Commons* (n 114) 51.

135 ibid.

136 Michael D McGinnis, 'Updated Guide to IAD and the Language of the Ostrom Workshop: A Simplified Overview of a Complex Framework for the Analysis of Institutions and Their Development' 15 <https://ostromworkshop.indiana.edu/courses-teaching/teaching-tools/iad-framework/index.html>.

137 See the definition of 'background legal environment' as identified in Madelyn R Sanfilippo, Brett M Frischmann and Katherine Jo Strandburg, *Governing Privacy in Knowledge Commons* (Cambridge University Press 2021) 14–17.

Cole seems to implicitly share the same view on attributing this meaning to the 'rules-in-use', building on the traditional distinction between law-in-books and law-in-action (which seems to be mirrored in the distinction between 'rules-in-form' and 'rules-in-use' provided by Ostrom and Crowford). He highlights that social scientists tend to consider the 'rules-on-paper' (i.e., law-in-books) as less relevant than the 'rules-in-use' (i.e., law-in-action). He overcomes the binary distinction by recalling the notion of 'working rules' as the rules (legal or non-legal) enforced, in practice, in a specific context or situation. As long as the legal working rule plays a role in determining human behaviour in a specific context, it is relevant to shape collective action.[138] Cole recognises that the limits of the Ostrom's approach in explicitly recognising and investigating the role of formal legal rules for the study of the governance of common-pool resources are indeed only apparent: 'she might not have been as interested in formal legal systems as was her husband, who was by inclination (if not by training) a constitutional law scholar. Elinor Ostrom did, however, write about formal legal rules in explicating various types of rules […] Most tellingly, the very structure of the IAD framework, which is designed to work at different levels of social choice, suggests that formal legal rules often (if not always) are expected to play a significant role. The framework's differentiation of constitutional and collective level choices presupposes that the outputs of those processes – constitutional and legal rules and regulations – must somehow or other affect operational-level choices'.[139]

In the same vein, Rose stresses the importance of bridging communication and epistemological gaps between legal academics and institutionalists: 'Governing the Commons was a very welcome reminder of the virtues of self-generated community-based property regimes for common pool management. But if there is any way that the legal academics can be helpful in bridging the gap to more modernist conceptions of property, it is in their mindfulness that modernist rights have virtues too – notably equal treatment, openness to the world, voluntariness, adaptability – and in their insistence that those virtues be weighed in the balance, even, or perhaps especially, in governing the commons'.[140]

138 Daniel H Cole, 'Formal Institutions and the IAD Framework: Bringing the Law Back In' [2014] SSRN Electronic Journal <http://www.ssrn.com/abstract=2471040> accessed 21 June 2022. Cole's approach does not specifically focus on the distinction between formal and informal rules, a vocabulary which is present in institutional analysis and Ostrom approach and that will be used in this research. In this work, I consider 'formal' rules as 'codified' rules, and 'informal' rules as 'non-codified practices' which have binding force. This topic can be particularly complex, depending on the meaning attributed to formality and informality. Digging deeper in this specific aspect would exceed the scope of this work.

139 ibid 15.

140 Carol M Rose, 'Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy' (2011) 5 International Journal of the Commons 28 <https://www.thecommonsjournal.org/article/10.18352/ijc.254/> accessed 28 June 2022.

The insights provided by Cole and Rose show that institutional analysis (in particular, Ostrom's approach)[141] and the legal approaches are not incompatible but complementary. Ostrom's approach to collective action can give legal scholars the diagnostic tools to supplement legal reasoning. More generally, the Economics approach can shape the development of IP law by (1) introducing factually supported arguments for suggesting specific corrections or modifications of the existing legal regime to avoid observed inefficiencies (or implement, to a larger scale, observed efficiencies); (2) 'framing and examining logical arguments about the relationship between the legal doctrine and certain desirable ends'.[142] This factual dimension can be useful to derive legal rules grounded from practical experiences.[143]

My research is an attempt to avoid compartmentalised disciplinary approaches to the study of GIs, contextualising the legal analysis findings and perspectives belonging to other disciplines. My main goal is investigating how legal rules-in-use (intended as those formally prescribed at the national and EU level) are understood, implemented, and enforced by stakeholders involved in the GI initiative, and how this understanding, implementation, and enforcement impacts on their behaviour during the pre-application and application for GI registration. The core assumption in this regard is considering legal rules as 'determining and influencing' stakeholders' behaviour at the local level to preserve, manage and protect tangible and intangible resources. It is critical to identify the drivers and principles governing the rulemaking process for product specification design, embracing its complexity and its systemic outcomes.

Bringing together institutional theory and the legal IP approach to GIs means investigating how the diversity of governance structures of producer groups affects the collective rulemaking process. This process influences the access to the use the GI, and can play a role on the information flows channelled through the sign, in market and non-market environments. This type of inquiry necessarily involves (1) adding a sub-national level of observation, the 'product or local level';[144] (2) understanding how the GI application process works, as a mix of interactions between heterogeneous (institutional and non-institutional) stakeholders; (3) exploring the outcomes

141 Ostrom's approach to institutional theory is not mainstream in its own, refusing one-size fits all approaches and theoretical prescriptive modelling, focusing on adding nuances in the understanding of a specific situation, interaction between actors, looking into the black box of collective action and decision-making. I borrow from her approach the idea that the observation and understanding of real-world stakeholders' experiences can be a valuable tool to inspire public policies, avoiding, as much as possible, harmful one-fits-all approaches. Her theoretical approach to the study of the commons, and the Institutional Analysis and Development Framework (IADF) are the bedrock and main source of inspiration for the elaboration of the diagnostic framework and methodology used in this research.

142 Shubha Ghosh, 'Consequentialist Thinking and Economic Analysis in Intellectual Property', in Calboli and Montagnani (n 90) 417.

143 'Given certain ends, economics can be useful in assessing the consequences of certain legal choices in reaching the desired ends'. Ibid.

144 Marie-Vivien and Biénabe (n 24); Gangjee, 'Proving Provenance?' (n 67).

arising from the black box of decision-making processes occurring at the local level; and (4) deriving from this factual inquiry general considerations, e.g., on the nature of the GI as IP tool, on its performance in practice, and on the efficiencies and inefficiencies linked to governance.

Building from the knowledge commons scholarship, my reconstruction of GI settings implies that the resource at stake is nested and complex, and that resource management needs to be contextualised to both the name (registered or eligible for GI registration) and the local reputation. In the absence of explicit indications emerging from national and EU law, the 'intangibles' involved in GIs can be managed in various ways by the GI holders, depending on the content of the product specification and the process carried out to devise it. The statutes of the producer management organisation and the control plan can give some hints to retrace this process and, indirectly, they can contribute to shed light on the capacity of the GI to perform its functions in compliance to its legal rationales and objectives.

On the one hand, the legal approach to the study of GIs can benefit from 'non-legal' disciplinary perspectives by encompassing more awareness on the complex dynamics embedded in GI governance at the local level, and by inspiring policy through empirically grounded arguments. On the other hand, the non-legal disciplines involved in the study of GIs can consider legal and policy issues as intrinsic determinant of stakeholders' choices and interactions at the local level.

1.7.4.2 Intangible commons

The influential scholarship initiated by Ostrom has crossed disciplinary boundaries and has been applied to other type of situations, including those involving intangible goods (i.e., 'knowledge commons'). In principle, these goods do not suffer from physical depletion due to unregulated appropriation. Ostrom and Hess approached the study of knowledge 'as a shared resource, a complex ecosystem that is a *commons* – a resource shared by a group of people that is subject to social dilemmas'. Extending commons theory to the world of intangibles encouraged the participation of legal scholars. From the earliest phases of this experiments, empirical analysis confirmed the importance of studying collective action as a complementary perspective to traditional legal analysis to understand knowledge commons governance.[145] Later, Madison, Frischmann and Strandburg extended the theories, models and diagnostic frameworks for studying tangible commons, to intellectual resources. This exercise implied the need to 'adapt, distinguish her approach to account for important differences between constructed cultural commons and natural resource commons'. Practically, it implied re-thinking key concepts such as resource boundaries, resource appropriation, the definition itself of the attributes of non-rivalry and non-

145 Charlotte Hess, 'The Unfolding of the Knowledge Commons' [2012] St. Anthony's International Review 13, 14 <https://surface.syr.edu/sul/111>.

excludability.[146] Their work, culminating in the proposition of an analytical diagnostic framework to study knowledge commons ('GKC Framework'), is the backdrop of this research.

Intangible (or intellectual) goods are constituted by information deriving from a transformative human effort (e.g., knowledge). For this reason, it is considered by stakeholders as an asset. Under these circumstances, it can be affirmed that information is a valuable resource, perceived as a 'human need and an economic good'.[147] Studying intangible commons requires adjusting the traditional attributes of subtractability of use and excludability to fit their peculiar immaterial nature. According to Madison: 'a fishery has fish; a forest has trees; a patent pool has patents. Knowledge commons studies to date suggest that knowledge commons involve multiple pooled knowledge and information resources, usually intangible and immaterial, but often with links to or overlaps with material objects and systems.'[148]

The first difference of intangible commons from traditional natural commons is the **absence of physical boundaries**, **which makes defining access difficult**. As stated by Madison et al., 'the boundary of the community sharing a resource tend to be coextensive with the boundaries of commons self-governance. Thus, in many cases the [tangible] commons is open to members and closed to everyone else, and that is the end of the story. Intellectual resources, by contrast, are not subject to the same natural constraints and are naturally shareable without a risk of congestion or overconsumption.'[149]

The second difference is that information '**must be created before [it] can be shared**'.[150] Therefore, the dimensions of 'production' and 'management' are deeply interrelated, and the resource users are also resource producers. The 'production' of new information implies a process of continuous re-elaboration of what stakeholders 'inherit' from the past, what they 'experience' during a given timeframe. This dynamic process of production is also accompanied by management strategies as 'resources [meaning information] are created *within* and transferred *outside* of the community'.[151] It is important to clarify that the 'transferability' of information-resources in this context does

146 Michael J Madison, Brett M Frischmann and Katherine Jo Strandburg, 'Constructing Commons in the Cultural Environment' (2010) 95 Cornell Law Review 657, 660 <https://ssrn.com/abstract=1265793>.

147 Charlotte Hess and Elinor Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice* (1st MIT Press pbk. ed, MIT Press 2011) 8.

148 Michael J Madison, 'The Republic of Letters and the Origins of Scientific Knowledge Commons' in Madelyn Rose Sanfilippo, Brett M Frischmann and Katherine J Strandburg (eds), *Governing Privacy in Knowledge Commons* (1st edn, Cambridge University Press 2021) 160 <https://www.cambridge.org/core/product/identifier/ 9781108749978%23CN-bp-6/type/book_part> accessed 21 June 2023.

149 Madison, Frischmann and Strandburg (n 146) 693–694.

150 ibid 672.

151 ibid 673.

not necessarily imply the right to transfer (i.e., alienate), but rather it refers to the ability of the commons to 'produce benefits for a wider audience'.[152] Therefore, the characterisation of goods as commons is performed on a different level than the legal theory of goods. Commons status is detected prior to the establishment of rights.[153] Conceptualizing the commons implies considering the attributes of the good in relation to its *type of management*, meaning accessibility, subtractability of use, and its implications (a modulation of different degrees of exclusion or openness).

According to the economic theory, information (or knowledge) is considered as a pure '**public good'**. It means that intellectual resources are **non-subtractable** (the enjoyment/use of information, ideas, knowledge by one person does not impede the enjoyment/use of the same resource by others). Moreover, it is costly to exclude others from access.[154] As explained earlier, tangible commons are, by definition, *subtractable*. To imagine the attribute of subtractability of use of goods which are by nature non-subtractable, a shift in perspective is necessary: under specific conditions intangibles can share some attributes of subtractable goods and they can be 'treated' or collectively managed as commons, to protect them from the risk of depletion.

Whether tangible or intangible, resources have specific characteristics, which influence the type of dilemma they face and rule-crafting as a response to these dilemmas. As intangibles can be 'treated' or **managed as commons**, they can be exposed to collective action issues, meaning that negative externalities can jeopardise the sustainability of the resource system. In the absence of adequate rules regulating stakeholders' access and management of intangible goods, they can be subject to issues of free-riding, or underinvestment. It could be affirmed that the ultimate consequence of these issues is resource disruption (i.e., intangible goods can become at some point unavailable for all stakeholders).[155] However, disruption in the world of intangibles, is not to be framed as the classic overconsumption issue affecting tangible commons resources, but as underproduction and coordination issues ('unregulated appropriation or misuse' and 'underproduction or underuse').[156] The unregulated appropriation or misuse of the name in GIs impacts on consumer protection, but also on producers' benefits, from legitimate users-producers to illegitimate free-riders (actors who did not contribute to the creation and maintenance of the intangible but take advantage from it). Instead, underproduction or underuse affects users-producers and is a consequence of a

152 ibid 693–694.

153 Ostrom and Hess (n 115) 55–59.

154 Hess and Ostrom (n 147) 8–9.

155 Madison, Frischmann and Strandburg (n 146) 666–669; Brett M Frischmann, Michael J Madison and Katherine Jo Strandburg (eds), *Governing Knowledge Commons* (Oxford University Press 2014); Kur and Dreier (n 34) 6.

156 Michael J Madison, 'Commons at the Intersection of Peer Production, Citizen Science, and Big Data' in Frischmann, Madison and Strandburg (n 155) 219.

diminished interest in investing in the activities of resource production and maintenance. In GIs, it impacts the resource production and local development, as well as the generation of economic benefits.

Madison et al. identify three 'types' of 'facets' of commons based on their core purposes: (1) commons intended to solve collective action, coordination and transaction cost problems that exist because of the existence of IP rights (these situations normally lead to the tragedy of the anticommons). This is the case of the occurrence of specific arrangements of 'mutual nonaggression' as a 'defence against potential privatisation of commonly used resources'; (2) commons created to 'mediate among communities with different default norms', or rule implying common standards. On a closer look, these types of commons shall be interpreted as 'facets' or 'profiles', rather than as stand-alone categories: in practice, given the difficulty of sharply defining commons,[157] one type of good might have more of these attributes. They share the attribute of representing a type of management arising as a problem-driven collective response to a collectively detrimental situation. In GIs, it is possible to identify both 'types of commons', or rather, both types of reasons justifying commons types of management.

Following Ostrom's reasoning, the tragedy of the commons is a presumption (individuals are not endlessly 'trapped into destroying their own resources').[158] As mentioned by Madison et al., 'commons regimes are defined by the degree of openness and control that they exhibit with respect to contributors, users, and resources, and by the assignment of control or custody of the power to administer access. The rules in use of a structured cultural commons will delineate its degree of openness, particularly with respect to the use of the resources by outsiders who do not contribute to the resource creation'.[159] Multiple combinations are available to stakeholders to manage efficiently intellectual resources: these combinations connotate the degree of exclusivity (or openness). Thus, these rules generate a configuration nuanced in practice, which might 'fall somewhere in between' the two extremes of full exclusivity and openness. The positioning on the 'excludability gradient' will depend on the type of resources and stakeholders' interest and capacity to cooperate and agree on specific rules for protecting the good from underuse or overuse. Privatised commons or centrally managed commons are not the only possible ways to avoid the tragedy: Ostrom shows that user-managed commons can be a valid alternative to avoid the tragedy, in some circumstances.[160]

157 Madison, Frischmann and Strandburg (n 146) 694.

158 Ostrom, *Governing the Commons* (n 114) 21.

159 Madison, Frischmann and Strandburg (n 146) 693–694.

160 McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons' (n 89) 92.

1.7.4.3 GIs and the commons: reputation as a complex and nested resource

At the beginning of this work, I described the collective dimension of origin products based on their anchorage to localised traditional know-how and other local tangible and intangible resources. I also mentioned that *the* intangible resource valorised and protected through the name registered as a GI is valuable for stakeholders and, potentially exposed to collective action issues.

The registration of the name grants the protection and valorisation of the reputation of the name or the product whose quality and characteristics are essentially due to the place of origin. Gangjee inquires on the role of reputation, concluding that Art 22.1 TRIPs is ambiguous being 'layered upon the geographical origin and quality message' or as 'independently sufficient criterion'. However, he reports the World Intellectual Property Organisation (WIPO) approach in this regard specifying that: 'it is important that the product derives its qualities and reputation from that place. Since those qualities depend on the place of production, a specific "link" exists between the products and their original place of production'.[161] Elsewhere, he explores the factors that make reputation as 'essentially attributable' to the geographical origin, recognising that 'despite the justificatory significance of the link, scholars working in this field have noticed a countervailing trend – a general loosening of the link requirement accompanied by less demanding scrutiny. Driven by the desire to reach strategic multilateral compromises and develop an international consensus in favour of GI protection, proponents of GIs have been relaxing definitional criteria and overlooking enduring ambiguity for decades.'[162]

Biénabe and Marie-Vivien explored the same questions and affirm that: 'the reputation attached to GI products is connected with the skills of their producers or processors as well as with the history, customs, and culture of local communities' arguing that 'it should per se constitute an essential criterion for the decision to grant a GI'.[163]

Building on these insights, I propose a new conceptualisation where GI reputation is *necessarily place-based* as it is anchored, to various degrees, to the local ecosystem constituted by natural and human components of the origin link. Yet, I consider place-based reputation as a complex and nested resource because it embeds other intangible and tangible resources, which can be

161 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 207–208.

162 Dev S Gangjee, 'From Geography to History: Geographical Indications and the Reputational Link' in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture* (1st edn, Cambridge University Press 2017) 38. <https://www.cambridge.org/core/product/identifier/9781316711002%23CN-bp-2/type/book_part> accessed 28 March 2023.

163 The authors refer to 'heritage-based reputation' which is 'built over years with *savoir-faire* passed down through generations of producers belonging to the local community, constitutes a common heritage for this community, and GI protects a name which became reputed thanks to this local creation'. See Biénabe and Marie-Vivien (n 6). The ECTA position paper on reputation in GIs seems to be aligned with this characterisation.

ascribable to human and natural factors characterising the ecosystem where the origin product is produced and evolves.[164]

As the tip of an iceberg (see Figure 3), the place-based reputation is grounded in the geographical provenance of the product characterised by a specific local and natural substrate, which determine its characteristics and quality (distinctiveness, or typicity).[165] The distinctive characteristics and quality of the product are the outcome of producers' localised sedimented practices and choices. Being the result of inter-generational and infra-generational exchanges, knowledge creation is at the same time the *heritage* and the *experience* of the community on how to take advantage of specific local tangible resources (e.g., raw materials), given a specific socio-economic and cultural context. The maintenance of the place-based reputation of GI products is a dynamic process which results in product differentiation of a niche production. However, it should not be seen as incompatible with innovation, or neutral towards inputs derived from the standardised production.[166] Bertacchini and colleagues associate to this collective dimension, the concept of 'cultural district',[167] namely 'an agglomeration of cultural resources and activities with a symbolic and intellectual link to a specific local community and territory'. Being the 'accumulation of localised cultural capital', they preserve a strong 'connection to a social context, and its historic evolution' as 'the basis of competitive advantage'.[168] This concept of cultural district will be later discussed to extend the notion of 'origin products' from agri-food products to crafts and industrial products.

164 The presence, in GI systems, of a nested complex resource, rooted in place, constituted by local-ecological knowledge and collectively managed is recognised by Mariani et al. as 'cultural biodiversity'. See Mariagiulia Mariani, Claire Cerdan and Iuri Peri, 'Cultural Biodiversity Unpacked, Separating Discourse from Practice' (2022) 39 Agriculture and Human Values 773 <https://link.springer.com/10.1007/s10460-021-10286-y> accessed 31 January 2023.

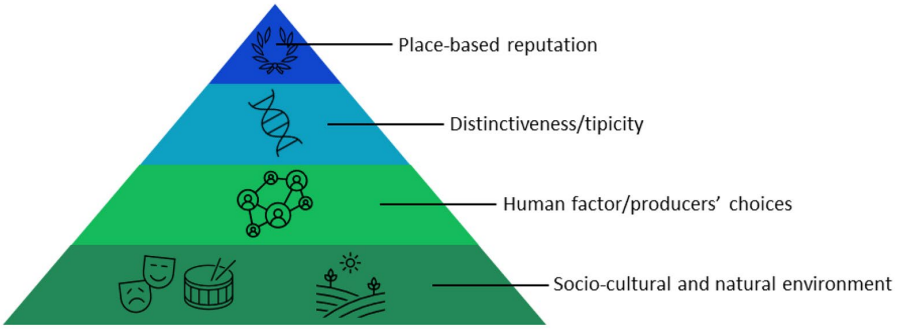
165 'The reputation of designations of origin depends on their image in the minds of consumers. That image in turn depends essentially on particular characteristics and, more generally, on the quality of the product. It is on the latter, ultimately, that the product's reputation is based. For consumers, the link between the reputation and the quality of the products also depends on their being assured that products sold under the designation of origin are authentic'. (*Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* EU:C:2009:521 [2009] ECR I-07721 para 110).

166 Raphael Belmin and others, 'Sociotechnical Controversies as Warning Signs for Niche Governance' (2018) 38 Agronomy for Sustainable Development 44 <http://link.springer.com/10.1007/s13593-018-0521-7> accessed 17 June 2022.

167 Enrico Bertacchini and others (eds), *Cultural Commons: A New Perspective on the Production and Evolution of Cultures* (Edward Elgar 2012) 4.

168 Enrico Bertacchini and others, 'Defining Cultural Commons' in Enrico Bertacchini and others (eds), *Cultural Commons* (Edward Elgar Publishing 2012) <https://china.elgaronline.com/view/edcoll/9781781000052/9781781000052. 00009.xml> accessed 21 June 2023.

Figure 3: The place-based reputation as a complex and nested resource.



The place-based reputation is to be considered as *the* 'resource' and treated as an intangible commons in GI settings for the following reasons: (1) it can generate collective relevant benefits; (2) it must be created before it can be shared; (3) it is difficult to define its boundaries; (4) a form of restricted access (enclosure) to the place-based reputation is necessary to counteract depletion, but a certain degree of openness should be ensured.

Firstly, **place-based reputation can generate collectively relevant benefits** so that various stakeholders are interested in appropriation, independently from an effective contribution to the establishment and maintenance of the resource over time.[169] When stakeholders use the name despite not being compliant with the product specification (i.e., free riders), their behaviour exposes the resource to depletion. In particular, the depletion of the place-based reputation may occur in the hypotheses described in art 13 Reg 1151/2012, namely in situations 'in which the marketing of a product is accompanied by an explicit or implicit reference to a geographic indication or denomination in circumstances liable to mislead the public as to the origin of the product or, at the very least, to set in train in the mind of the public an association of ideas regarding that origin, or to enable the trader to take unfair advantage of the reputation of the geographical indication or denomination concerned'.[170] In practical terms, taking unfair advantage of the GI reputation leads to its depletion for dilution when free riders appropriate the channel of communication represented by the registered name. In this way, they affect the communication function of the sign and identify a product which does not have the certified attributes of origin and quality (i.e., that it is not produced in compliance with the rules laid down in the specification). This conduct has also repercussions on the guarantee and distinctive functions of the GI. The depletion due to dilution of place-based reputation impacts both on the communicative capacity of the sign and on

169 In line with this approach, the AREPO, The Protection of Geographical Indications on the Internet, 2023, pp. 17-19 <https://www.arepoquality.eu/wp-content/uploads/2023/03/protection-of-gis-on-the-internet_arepo-practical-guide_en.pdf>.

170 Case C-432/18 Consorzio Aceto Balsamico di Modena v Balema Gmbh EU:C:2019:1045 Opinion AG Hogan, para 25.

the content of the message conveyed, having consequences on consumer protection and unfair competition. Another cause of resource depletion can be the non-use of the name, which occurs when producers have weak interest (or progressively loose interest) in agreeing or complying to common standards, i.e., they do not have the interest (or progressively loose the interest) in using the name. When the resource depletion due to non-use affects registered GIs, it determines the phenomenon of the 'sleeping GIs', 'silent GIs' or 'dormant GIs'.[171] As a consequence of depletion due to non-use, the authentic place-based reputation associated to the name or to the product is progressively weakened, until becoming unavailable for exploitation by all potentially legitimate actors. Reputation depletion due to non-use for dilution can also be cumulative. As it is relatively easy for anyone to use the name, place-based reputation is 'highly subtractable' and certainly sensitive to collective management issues.

Secondly, place-based reputation **must be 'created before it can be shared'**.[172] As generally mentioned for intangible commons, in the GI context the resource users are also resource-producers. The knowledge production happens in two ways: through the sedimentation of traditional local know-how and through the stakeholders' agreement on the rules contained in the product specification.[173] The **component of active creation** of the place-based reputation is not prominent in case law, while it is more defined in the in practice of some national authorities (in Italy and France). According to the ECJ, reputation is something that GI products 'bearing the geographical indication registered according to the regulation have acquired by their quality'.[174] The specific quality and characteristics result from 'a *collective knowledge of production*' ('*savoir collectif de production*')[175] established in a delimited geographical area by a group. This collective knowledge is 'based on a system of interactions between a physical and biological environment and a set of human factors'.[176] From the definition of *terroir* provided by Casabianca et al., it clearly emerges that place-based reputation is an outcome of this process of creation, namely

171 This expression was used by Marie-Vivien referring to Asian GIs recognising one possible determinant in the non-correspondence between the producers and participants of rule-crafting. According to the author, 'it seems that in Asia, GIs are still the Sleeping Beauties of the intellectual property world despite their legal existence. In our opinion, GIs are not used because producers are not involved in drafting the GI specifications, and sometimes do not even know a GI has been registered for their product by the state'. Zappalaglio et al. recognise that this phenomenon exists also in Europe. Building from case study analysis, I provide further nuance on this topic in Chapter 2 of this work. See Marie-Vivien (n 36); Andrea Zappalaglio, Belletti and Marescotti (n 78). Barbara Pick refers to 'dormant GIs' in her comparative analysis of the Vietnamese and French context. See Pick (n 33) 154.

172 Madison, Frischmann and Strandburg (n 146) 672.

173 Fournier and others (n 63); Aurélie Carimentrand and others, 'L'enregistrement Des Indications Géographiques : Pour Une Éthique Du Compromis' [2019] Éthique publique <http://journals.openedition.org/ethiquepublique/4541> accessed 20 May 2020.

174 Case C-783/19 *Comité Interprofessionnel du Vin de Champagne v GB* EU:C:2021:350 [2021] Opinion AG Pitruzzella.

175 François Casabianca and others, 'Terroir et Typicité : Deux Concepts-Clés Des Appellations d'origine Contrôlées. Essai de Définitions Scientifiques et Opérationnelles'.

176 ibid.

of 'the socio-technical itineraries [which] reveal an originality, confer a typicality, **and result in a reputation**, for a good originating in this geographical area'.[177] The same structural components can be (more implicitly) found in the notion of 'origin product' provided by Belletti et al. and (more extensively) in the model of the 'virtuous cycle'. The recognition cannot logically take place without a previous creation process, especially when this creation justifies the added value (i.e., the distinctiveness) attributed to the origin product through the registration of the name. The recognition of this 'creative effort' represented by producers' knowledge sharing, elaboration and inter and infra generational transmission, coupled with the maintenance of this process over time and the capacity of the name to identify and differentiate, 'allows the attribution of certain advantages in order to promote and protect investments' and the ascription of GIs in the intellectual property canon.[178] It is important to highlight that the creation of the added value embedded in the origin product and the place-based reputation involves primarily information, which is channelled to consumers through the name. The communication function (combined with the guarantee and distinctive function, and to some extent the investment and advertising functions) enables the process of recognition by consumers of the added value of the GI product due to typicality.[179] This is an important feature, which allows to conceptualise the role of the name

177 ibid. Translation provided by this author.

178 Ribeiro de Almeida (n 26).

179 Despite a definition of evocation is still lacking at the EU and national level, and its definitory boundaries are blurred, it seems uncontested that free-riders' interest relies in taking advantage of the reputation/goodwill attached to the product directly or indirectly allude to the distinctive characteristics and qualities of the GI product. In ***Morbier*** this concept is expressed as follows: ''it is clear from the Court's case-law that the system of protection of PDOs and PGIs is essentially intended to assure consumers that agricultural products with a registered name *have, because of their provenance from a particular geographical area, certain specific characteristics and, accordingly, offer a guarantee of quality due to their geographical provenance,* with the aim of enabling agricultural operators to secure higher incomes in return for a genuine effort to improve quality, and of preventing improper use of those designations by third parties *seeking to profit from the reputation which those products have acquired by their quality'* (Case C-490/19 *Syndicat interprofessionnel de défense du fromage Morbier v Société Fromagère du Livradois SAS* EU:C:2020:1043, para 35). The same logic in ***Manchego*** seems to lie behind the concept of 'image triggered in the consumer's mind' which indirectly refers to the *'[the image] of the product whose geographical indication is protected'* (Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL e Juan Ramón Cuquerella Montagud* EU:C:2019:344). The new developments concerning the expanding scope of evocation embracing the shape/visual characteristics of the product seem to indirectly confirm the contested importance of product characteristics and qualities as grounding factors of place-based reputation. However, case law has not always been univocal in this regard. Emblematic of these opposing views, the '***Sekt/Weinbrandt***' and '***Exportur***' decisions, where the court hovers between the two extremes of considering the geographical area of origin as indispensable to conferring specific quality and specific distinctive characteristics to designated products and recognising the presence of a high reputation among consumers as disjoint from specific characteristics and qualities. See Case C-12/74 *Commission of the European Communities v Federal Republic of Germany* EU:C:1975:23 [1975] ECR 181; Case C-3/91 Exportur SA v LOR SA and Confiserie du Tech SA EU:C:1992:420 [1992] ECR I-5529. As highlighted by Gangjee, the Exportur decision would eventually represent the 'judicial recognition of both the *terroir* and reputation approaches' as separate criteria to define to the origin link. For more insights on the role of reputation as 'essentially due' to the place of origin see Gangjee, 'From Geography to History' (n 162) 49. Similarly, and more explicitly, in the ***Piadina Romagnola*** case, where 'the reputation of Piadina Romagna attributable to its geographical origin can only result, for the purposes of registration of the PGI at issue, *from the presence of human factors, that is to say cultural or social factors*. Those factors therefore constitute,

in relation to the nested intangible resources managed as commons. This aspect will be analysed more in detail in the following paragraphs. Yet, the establishment of place-based reputation implies, beyond the active creation component of the suitable conditions for the establishment of place-based reputation (by producers). Furthermore, it involves a **component of recognition** by consumers of the product distinctiveness due to quality and origin. Consumer recognition depends on the communicative ability of the sign to convey this message. Therefore, the recognition of the place-based reputation should be considered as subsequent and complementary to its creation by the community members concerned, where 'community' includes both producers and consumers. Following this reasoning, the 'creation' itself justifies the attribution of (legal and economic) benefits to the actors contributing to the creation-maintenance of this asset and the choice of preferring a fluid identification of the 'GI users' or 'holders' to an identifiable 'GI owner'.[180]

A third reason justifying the conceptual proximity between GI place-based reputation and intangible commons, is that **it is difficult to define its boundaries.** In other words, the process of defining the attribute of the legitimate users of the GI is costly and should involve the stakeholders directly concerned by the rules. The definition of the boundaries of the resource coincides with the definition of the content of the product specification. And as this process of negotiation and compromise is costly, the place-based reputation, if not protected, is considered 'highly excludable'. Therefore, it is exposed to the risk of depletion. As a response to the vulnerability of the resource to this 'tragedy', stakeholders as a group can decide to make the name unavailable for 'outsiders' through GI registration, by setting specific restrictions for its use. GIs, as identifiers of origin products, are characterised by a collective dimension. This means that there is a **collective interest** in **the social, cultural, economic, and environmental benefits** (or spillovers) arising from these productions.[181] Because of this semi-public interest, and prior to the legal protection, it would be difficult or costly to exclude others from the use of the name and the enjoyment of the intangible resource(s) embedded in origin product systems. Therefore, authorised stakeholders' margin of manoeuvre in crafting arrangements to avoid unregulated appropriation is limited by this specific attribute of the good. GI holders, who are 'standard makers *and* standard takers'[182]

as the applicant acknowledges, in essence, *the decisive factors in establishing the reputation of the product covered by the PGI at issue'.* Particularly significative is also the identification of replication of the methods of production outside the area as confirming that *'the reputation of the product in question,* has led to the diffusion of its method of obtaining it and, therefore, *rather constitute indications which make it possible to justify that there is a direct link between the reputation of the product and the region'* (Case T-43/15 CRM Srl v European Commission EU:T:2018:208 [2018]**,** paras 48-49)

180 Kur and Dreier (n 34) 323.

181 See also Mariani, Cerdan and Peri (n 164).

182 Marie-Vivien and Biénabe (n 24).

should grant access to anyone who is compliant with the rules.[183] Yet, GI applicants should solve **boundary issues** through a collective participatory process in the aim of preserving an open-door system, to avoid exclusions based on discriminatory basis and the appropriation of the resource by some producers. Metaphorically speaking, the rules contained in the product specification (paired with those of the statutes of the producer association or organisation) can be seen as a fence, built by the applicant producer group to protect the place-based reputation. The higher is the fence, the more difficult is for 'outsiders' to join the group, use the name and enjoy the benefits of the place-based reputation. For this reason, it could be affirmed that **the decisions taken by the producer group concerning the content of the product specification face, by default, a risk of 'enclosure'.** I identify with this expression the producer group's choice to devise *arbitrary and strict rules* as a reaction to the dilemmas arising from unconditional or unrestricted access to the use of the name (and the enjoyment of place-based reputation). The possible occurrence of the risk of enclosure shows that no restrictions are currently provided by law on the applicant's power to generate arbitrary rules producing restrictive effects on access.[184]

In principle, one could find common elements between product specification design and the design of the regulations of use of CTMs. However, this comparison should be taken carefully: in CTMs, owners have the unconditional power to decide the content of the regulations of use. Instead, in GIs national authorities should verify that producers' choices are adequately grounded on collective compromise and on verifiable evidence, such as historical and anthropological proof justifying the geographical delimitation and the local anchorage of know-how. Depending on the product class, scientific evidence should be provided on the causality relationship between the geological and pedo-climatic conditions and product characteristics, and between the quality of the raw materials and the locality requirement. Consequently, GI applicants are not free to decide the content of the rules, and (at least theoretically) should avoid arbitrary (i.e., non-grounded) claims. This discourse does not exclude that specific commercial strategies can be embedded in the rules. According to Belletti et al., 'two solutions are therefore common: establishing weak rules [in the product specification] that allow producers to continue producing and marketing as they used to,

183 'Where geographical indications differ is in the specific way in which reputational benefits accrue to all producers in the region. In contrast, the benefits of collective trademarks or certification marks accrue only to those producers that are a member of the organisation that has registered the collective trade mark or respectively issued the certification mark'. (EU Commission, Economic impact non-agri GIs, 26)

184 Belletti et al. indirectly recognise the risk of enclosure, which they define as the 'trap of quality-exclusion', and derive from the analysis of the case study on 'Penja Pepper', the following conditions to avoid exclusionary effects of weaker actors of the value chain: 'the gap between the specifications and the existing producers' practices must be addressed through training and dissemination of appropriate techniques; the degree of precision and reliability of the control and traceability systems and must be carefully chosen, bearing in mind that stricter controls imply greater efforts and higher certification costs, and thus a risk of exclusion of weaker actors; the provision of technical assistance services and support for investments of collective interest, by the state or inter-professional organisations, which can enable small producers to use the GI' (translation provided by this author). Belletti, Chabrol and Spinsanti (n 84) 8.

or write a strict specification but not implement an effective control system' (translation provided by this author).[185] Depending on how the rules are written, they can impact on the preservation of the nature of the place-based reputation as a community-based, geographically anchored resource, and on the performance of certain functions of the sign; it can restraint the profitability of the benefits derived from the use of the sign to some stakeholders to the detriment of others. The degree of flexibility (too strict or too wide) of the rules can signal potential criticalities in the decision-making process and management of the GI, although this is not the only indicator for identifying strengths or fragilities.

The commons type of management 'offers a way of responding to the challenge posed by enclosure' intended here as 'monopolisation of some to the detriment of other, equally legitimate stakeholders'.[186] Since the GI initiative is a bottom-up producer-driven process, multiple combinations exist in operationalising a governance structure based on rules more or less close to openness, despite the mandatory content of the specification, defined by law. In other words, '[stakeholders] at the same time are vulnerable if they fail to adopt appropriate governance structures, rules, and management techniques in order to defend themselves against rival alternatives, influence democratic discourse and avoid the anarchy that can result in the tragedy of the commons as described by Hardin'.[187] Thus, I share Dusollier's point that commons are 'situations where exclusivity is absent', but with two cautions.[188] The first is that the distinction between commons and private goods is not dichotomous. Rather, 'commons' identifies a type of resource management where *a certain degree of inclusivity and openness prevails on exclusivity*.[189]

185 ibid.

186 Nancy Kranich, 'Countering Enclosure: Reclaiming the Knowledge Commons' in Hess Charlotte and Ostrom Elinor (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (MIT Press 2006) 85 <https://scholarship.libraries.rutgers.edu/esploro/outputs/bookChapter/991031549877504646> accessed 22 June 2023.

187 ibid 95.

188 Séverine Dusollier, 'The Commons as a Reverse Intellectual Property – from Exclusivity to Inclusivity' in Helena Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (1st edn, Cambridge University Press 2013) <https://www.cambridge.org/core/product/identifier/9781107300880%23c04182-11-1/type/book_part> accessed 30 March 2023.

189 Brett M Frischmann, *Infrastructure: The Social Value of Shared Resources* (Oxford University Press 2012) 91. Dusollier herself, in a later contribution, investigates on the nature of (intellectual) property affirming that 'without denying that exclusivity is an important feature of property, I *would argue that this exclusivity is a matter of degree that can be modulated differently depending on the property institution and across the specific bundle that it consists of.* […] In a nutshell, I would say that exclusivity is not a stick in the bundle, but a quality of each entitlement enjoyed by the owner. And it inevitably varies both in degree and in kind. This is particularly relevant in IP, where exclusivity of access to and use of an IP asset is sometimes reserved to the IP holder, sometimes shared with a specifically defined category of users, sometimes shared with anyone'. It seems to me that this paradigm of nuances necessarily implies a nuanced conceptualisation of commons way of management and openness. Séverine Dusollier, 'Intellectual Property and the Bundle-of-Rights Metaphor' in Peter Drahos, Gustavo Ghidini and Hanns Ullrich, Kritika: Essays on Intellectual Property (Edward Elgar Publishing 2020) <https://www.elgaronline.com/view/edcoll/9781839101335/9781839101335.00013.xml> accessed 21 May 2020.

Exclusivity as a response to the problem of unregulated appropriation might be fully present, but can also be low or subjected to specific conditions; it can therefore be described as a gradient and nuanced depending on the stakeholders' sensitivity to the problem of enclosure, exogenous constraints, and contextual elements embedded in the origin product ecosystem. The second is that intangible goods are treated as commons if they are subject to subtractability and excludability. How the 'community' of users responds to those challenges (crafting rules giving to stakeholders' rights under specific conditions) qualifies the type of management of the resources. Identifying commons management as a situation of complete absence of exclusivity risks to relocate *de facto* the characterisation of the good to the property regime, while 'there is no automatic association of common-pool resources with common-property regimes – *or with any particular type of property regime* […] they may be owned by national, regional or local governments; by communal groups; by private individuals or corporations; or used as open access resources *by whomever can gain access*'.[190]

Another characteristic of the commons nature of the place-based reputation involves the consequences of rule-crafting on exclusion and openness. In GIs, **a form of restricted access (enclosure) to the place-based reputation is necessary to counteract depletion,**[191] **but a certain degree of openness should be ensured**. GIs are tools which perform specific functions, targeted to respond to widespread and recurrent types of social dilemmas affecting the availability of tangible and intangible localised resources. The ensemble of these assets could be conceptualized as a complex nested resource system, where the place-based reputation is the ultimate expression. Using Ostrom's vocabulary, we could say that origin products are the artifacts of specific socio-ecological systems; they are unique *because they are immersed* in these systems.

The previous arguments show that it is virtually possible to exclude others from the enjoyment of an intangible good through IPRs. In cases where the enjoyment of the good, originally fully available to anyone and non-excludable (i.e., having the attributes of public goods) is fully restricted to an identified individual or collective actor, this actor 'subtracts' the good from the appropriation of others, and the intangible resource is managed as a private good (rival and highly excludable). For example, the registration of a (individual or collective) trademark grants exclusive rights to

190 Ostrom and Hess (n 115) 58.

191 Since the benefits of enjoying collective goods or common-pool resources cannot be easily limited to the individuals who invest their time and resources in providing those goods, some kind of authority is critical for solving the problems of free riding typically associated with the production of collective goods' Mark Stephan, Graham Marshall and Michael McGinnis, 'An Introduction to Polycentricity and Governance' in Andreas Thiel, Dustin E Garrick and William A Blomquist (eds), Governing Complexity: Analyzing and Applying Polycentricity (Cambridge University Press 2019) 27 <https://www.cambridge.org/core/books/governing-complexity/an-introduction-to-polycentricity-and-governance/A5A779D631FAD9BCEF0BA4CBF390BED8> accessed 7 October 2022.

its owner(s), and virtually removes the availability of the sign to others.[192] This means that the legal system offers the possibility for the owner to set the rules for exclusion. As pointed out by Dusollier, 'an exclusive right is a legal prerogative to perform an action or enjoy a resource and to deny others the same privilege. Exclusivity is the *power to exclude*, *but it does not intrinsically lead to exclusion*, *as property is rather conceived as a power to decide to engage in exclusion or not*'.[193] Full exclusivity through IP rights is a possible remedy to social dilemmas. However, in some cases, it can be more or less 'mitigated' by mechanisms of openness.

In the GI *sui generis* system, it is clear that the registration of the name reserves its use to a group of producers. However, the applicant group is not considered as 'the owner' of the GI. Rather, the status of GI holder is attributed to the applicant producer group *in an 'impersonal way' and independently from the identity of the applicants at the moment of the registration*.[194] Le Goffic recalls this peculiarity of applicants producer groups referring to the '*collectivité evolutive*': at least theoretically, any producer compliant with the rules is free to join and leave the group. In practice, this choice might be influenced by contextual constraints.[195] Moreover, producer groups should not manage the sign 'exclusively in their own interest'. Allowing the protection and maintenance of localised assets, they perform tasks and responsibilities of public interest; conversely it would be 'unjust' to deprive local community members from the possibility to participate, contribute, and enjoy the related benefits. This mission of the producer group in some EU Member States is attributed after a formal recognition process. This recognition targets the composition and functioning of the applicant producer group as representative, reflecting the complexity of the value chain, and ensuring democratic decision-making processes. The applicant producer group establishes the conditions of access to the use of the name, and at the same time excludes those who do not respect these conditions. In this sense, the 'appropriation' of the name (and the attached place-based reputation) by the GI holders leads to its unavailability to those who are not compliant to the specifications.

In France and Italy, the GI registration is (more or less explicitly) considered as a 'recognition of something that already exists'. Digging deeper into the meaning of this expression reveals a need to justify the restrictions to the use of the name through the existing collective heritage of the communities concerned. This justification is represented by the duty to provide evidence of established and traditional localised productions. I will show in Chapters 2 and 3 that in practice,

192 Some conditions allow the participation of others to the benefits derived from the exploitation of the intangible goods concerned (e.g., transferability). The enjoyment of the benefits derived from the good is essentially attributable to a decision of the owner.

193 Dusollier (n 188) 261.

194 Felix Addor, Alexandra Grazioli, 'Geographical Indications beyond wines and spirits: a Roadmap for a Better Protection of Geographical Indications in WTO TRIPS Agreement', 2002, 5 Journal of World Intellectual Property 870.

195 See infra Chapter 4, Part I, General, Outsider issue. See Le Goffic (n 110) 251.

this rule is not always strictly applied at the national level. Origin products designated through GIs belong to a 'virtual' intergenerational and intragenerational community of producers, identifiable through 'objectively verifiable criteria'. [196]

Gangjee reflects upon the meaning of the expression defining the product characteristics and quality as 'exclusively and essentially attributable to the geographical area'. According to the author, this expression does not necessarily imply the inimitability of the product. He suggests that '"exclusive or essential" was never intended to require that the physical commodity was uniquely available in the designated place. Instead, this expression refers to a demonstrable connection between the human and natural geography, which essentially accounts for the product's characteristic or distinctive qualities'.[197] This argument is core in this research and represents the grounding of what I call the 'evidence-based approach' used by national authorities to assess GI applications.

When the applicant producer group has the power to choose the name to be registered and the product designated by the name, defined by specific characteristics and qualities, the obligation to prove the origin link through objectively verifiable evidence, is the only meaningful safeguard to avoid arbitrary exclusion. In addition, access to the use of the name should always be granted on a non-discriminatory basis to anyone who complies with the specifications. Moreover, the rules governing the functioning of the producer group should not establish, directly or indirectly, barriers to the enjoyment of the place-based reputation, even when mandatory membership is a national requirement for being considered a GI holder. Therefore, the difficulty to exclude others (high 'excludability') in GIs should not automatically lead to rules granting 'full exclusion' (as it happens with private goods). On the contrary, the system seems to encourage a commons type of management of place-based reputation. On the one hand, it grants a sufficient level of openness to allow the maximisation of the public interest and, on the other hand, it regulates access to preserve localised tangible and intangible resources.

196 The expression 'objectively verifiable evidence' or 'criteria', key in this work, has been used by Gangjee. See Gangjee, *Relocating the Law of Geographical Indications* (n 3). Elsewhere, he finds coherences in the French and WIPO approach as to the qualification of the origin link. The WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, makes clear that 'it is important for the justification of the elements of the definition to be made in the most *objective manner possible* with a view to giving the link a precise and specific form, since this constitutes the basis for the protection of a [GI]. The grant of an exclusive right to a denomination is made only insofar as this right is justified by objective elements and forms of proof. These elements and proof help to make the subject matter for which protection is sought and the reason for such protection understandable, while using, for example, specifications containing these elements in methodological and concrete terms.' See Gangjee, 'From Geography to History' (n 162). The same approach, as it will be shown later, is assumed by the Italian national authorities and here summarised with the expression 'evidence-based approach'. In the same vein, Calboli evokes a more 'selective' approach to GI protection, which 'should be limited to those that accurately identify geographical origin'. See Irene Calboli, 'In Territorio Veritas? Bringing Geographical Coherence into the Ambiguous Definition of Geographical Indications of Origin' [2014] WIPO J 57 <https://scholarship.law.tamu.edu/facscholar/609>.

197 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 141.

1.7.4.4 A bundle of rights?

Answering the question 'who is the GI owner?', from the perspective of the EU legislator, has always proven challenging. Marie-Vivien pointed out that the right to use a GI would be 'dismembered', meaning that the rights conferred by the registered sign can be dissociated in the 'right in' and the 'right to' the GI.[198] Moreover, she highlighted that applicants-holders and the national authority hold different positions as to the attribution and acquisition of rights. She also distinguished between the 'collective right to use' (and to sue) and the 'individual exercise of the right to use'.[199] The concept of 'dismemberment of the right to use' might not be resolutive, but it shows the need of conceptualising the rights conferred as multifaceted, literally meaning 'constituted by multiple facets'. Marie-Vivien also affirms that the rights conferred are 'tinted with public law', meaning that they are connotated by a public nuance, anchored to inalienability and a degree of State intervention.[200] This qualification is interesting because it summarises the semi-public interests embedded in the GI registration and management, as well as the nature of the tasks and responsibilities attributed to producer groups and national authorities.[201] I add to these remarks that full exclusion as a consequence of registration would ontologically be incompatible with (a) the fact that the benefits of the legal protection are not exclusively limited to the producer group (as it would happen with private CTMs) but they are widespread to the local community at large (these benefits qualify as public goods);[202] (b) the attributes of the place-based reputation result from localised assets 'owned by no one', inalienable, and which should remain accessible to all.[203]

There is no correlation between the commons type of management and the property regime and that the ambiguous use of those concepts have, according to Ostrom and Schlager, 'blurred analytical and prescriptive clarity'.[204] They affirmed that efficient property regimes can be detected in commons settings by looking at property rights as a bundle of rights (i.e., the right to access, withdrawal, management, exclusion and alienation, cumulatively or solely attributed to specific

198 In the same vein see Le Goffic (n 110) 263–272.

199 Delphine Marie-Vivien, *La protection des indications géographiques: France, Europe, Inde* (Éditions Quæ 2012) 211–218 <http://public.eblib.com/choice/publicfullrecord.aspx?p=3398790> accessed 23 October 2018.

200 ibid.

201 We will see that national authorities are not aligned on this matter. I consider this non-alignment as the cause of some fragilities leading to inefficiencies in the GI management (after the registration).

202 We will see later that this might *not always* happen in practice depending on how national legal rules on governance are framed.

203 This point can also be controversial in practice, depending on the specific context and power asymmetries at the local level, specification design can lead to arbitrary exclusions and disproportionate prohibitions (outsider issue and evocation). The signalled inefficiencies emerging from practice seem challenge theoretical attempt: yet, they result from an inadequate regulation of management issues at the national and EU level. The favour for a non-full ownership configuration would be in line with Ostrom and Schlager statement that 'assigning full ownership rights does not guarantee an avoidance of resource degradation and overinvestment' Schlager and Ostrom (n 133) 256

204 Schlager and Ostrom (n 133).

holders, Table 1).[205] This conceptualisation was new compared to the classical interpretation of property being the emanation of sole right to alienation, and departed from the assumption that 'property-rights systems that do not contain the right to alienation are considered to be ill-defined',[206] or better, 'unless users possessed alienation rights they did not have any property right'.[207] According to Coriat, 'property rights define actions that individuals can take in relation to other individuals regarding some "thing"'[208] and 'between the "exclusive right" attached to private property and the "public good" that is open to everyone, there is a wide variety of situations in which "bundles of rights" are distributed between different partners associated in the sharing of a resource'.[209]

Table 1: Operational level rights in natural common-pool resources systems. Source: Schlager and Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis', Land Economics, Vol. 68, No. 3 (Aug., 1992), pp. 249-262.

Type of right	Definition
Access	The right to enter a defined physical property.
Withdrawal	The right to obtain the "products" of a resource (e.g., catch fish, appropriate water, etc.).
Management	The right to regulate internal use patterns and transform the resource by making improvements.
Exclusion	The right to determine who will have an access right, and how that right may be transferred.
Alienation	The right to sell or lease either or both of the above collective- choice rights

Conceiving the rights conferred through the GI as a bundle of rights would imply attributing to GI holders, individually, the right to access and to 'appropriate and use' (i.e., use the denomination and appropriate the benefits). The right to manage is collectively attributed to producers as a group, together with a 'mitigated' right to exclude. No right of alienation is provided.[210] The right to access and appropriate the benefits has already been described as affecting not only producers but a larger group of community members. It is important to note that national legal systems

205 Owners, proprietors, claimants, and authorised users are categories derived from various empirical settings, including the Maine lobster industry. For analysing knowledge commons from the legal perspective, appropriate adjustments, are needed. One of them is re-phrasing the concept of 'withdrawal' with 'virtual appropriation', meaning its subtractability from others' use. Subtractability has its premises in excludability (a resource is subtractable because it is excludable) and its consequence in different degrees of exclusions.

206 Ostrom and Hess (n 115) 59.

207 Ostrom, 'Beyond Markets and States' (n 118) 650.

208 Elinor Ostrom, 'How Types of Goods and Property Rights Jointly Affect Collective Action' (2003) 15 Journal of Theoretical Politics 239 <http://journals.sagepub.com/doi/10.1177/0951692803015003002> accessed 20 May 2020.

209 Coriat (n 126) 3.

210 As highlighted by Le Goffic, the inalienability and non-transferability of GIs would allow to preserve their 'guarantee function of local typicity'. See Le Goffic (n 110) 244.

(e.g., France) can further specify the right to access by providing compulsory membership to the producer association.[211] Generally speaking, access to membership to the producer organisation or association should always be granted to individual producers established in the geographical area, in compliance with the 'open-door' principle. This principle stands when membership to the producer group is considered as compulsory or optional to use the sign.[212] In parallel, individual producers alone cannot decide who is included or excluded from the use of the sign and cannot take action, autonomously and independently, in case of infringement.[213] The right of management and exclude is collectively assigned to the producers as a group and is pivotal in influencing the evolution of the product specifications, statutes, and control plan. I consider the right to exclude as 'mitigated' because limited by the obligation to provide sufficient (evidence-based) justifications for the 'appropriation' of the name.[214] This should limit the risk of arbitrary enclosure especially when rulemaking is supervised by national authorities. The right to alienate (i.e., transfer) is limited to preserve the guarantee function of the sign, justified by the product typicity, meaning the anchorage of reputation to local assets. Further empirically grounded inquiry is needed to assess how these rights are distributed, in practice, among the actors of the value chain.

Table 2: Distribution of rights in EU GIs according to the bundle of rights approach (inspired by Schlager and Ostrom 1992).

Type of right	GI applicant (collective)	operator (individual)
Access (right to 'enter' the boundaries because compliance with the product specification and membership, where required)		x
Management (e.g., product specification, statutes and control plan amendments, decisions on legal actions, and sometimes control activities)	x	
Appropriation/use (equivalent to 'withdrawal' in natural-resource contexts)	x	x
'Mitigated' exclusion (right to determine who has access to the use of the name and enjoy of the place-based reputation)	x	
Alienation (transferability)		

211 The specification of the right of access through compulsory membership to the producer association is a French specificity.

212 The Italian system does not require compulsory membership after the GI registration. However, it will be shown later that producers should be members of the 'applicant association'.

213 Le Goffic (n 110) 249–250.

214 This seems to be suggested by the wording of Reg 1151/2012 Recital (40) which states: 'In order to protect registered names from misuse, or from practices that might mislead consumers, their use should be reserved'. This Recital does not specify that the 'reservation' is 'exclusive', neither in this paragraph nor elsewhere. Other references to 'exclusivity' throughout the GI narrative should be put in relation with the open door principle and the duty to provide evidence.

Two concluding remarks deserve further attention: the first relates to the theorical implications of considering (intellectual) 'property' a bundle of rights and if a bundle deprived from alienation can still be considered as property in GIs.[215] The second remark is referred to the relationship between the name and place-based reputation.

As to the first remark, scholars have for long debated on the nature of property and elaborated various theoretical approaches. Di Robilant has described in considerable detail the origin and implications of the 'bundle of rights' paradigm, explaining that it connotates property theory in common law systems. It is characterised by the lack of a fixed structure and a strong focus on the relation between resource users-owners, more than the relations of the owner towards the resource.[216] Being a fluid model, it is highly subjected to the variability of contextual elements. Dusollier also explores the question of the theory of bundle of rights concluding that it could be useful to explain some flexibilities in intellectual property systems.[217] It is opposed to the ownership model, characterising civil law systems, 'monolithic', and much more centred on the owner's right to exclude.

Di Robilant also focuses on a third model, the 'tree model', elaborated by EU jurists, and which 'accommodates the complexity of property mediating between the bundle of rights concept and the ownership model. It acknowledges that property has a structure but emphasises the complexity of this structure'.[218] The tree paradigm is an attempt to depart from the 'too simplistic' ownership model, but it is not much impacted by the 'social values of a specific context', which is a characteristic of the theory of the bundle. Within this frame, Dagan developed the theory of the structural pluralism, which implies 'a set of property institutions bearing a family resemblance but taking on different forms in different social settings'.[219] He focuses prevalently on the 'governance strategy' as a characterising element of property. The author affirms that this notion is more responsive to social values, not completely rejecting, as the theorists of the bundle, the idea of a structural paradigm which can serve as a benchmark to compare and assess real-life situations, which can also be affected by the nature of the resource.[220]

215 Le Goffic (n 110) 243–252.

216 Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?' (2013) 66 Vanderbilt Law Review 869 <https://scholarship.law.vanderbilt.edu/vlr/vol66/iss3/3>.

217 Dusollier (n 189).

218 di Robilant (n 216) 922. According to the tree model, the trunk is owner's control over the resource: 'it acknowledges that the core of property is more than exclusion. It is use governance. By outlining many branches of the property tree, it accounts for the fact that both the common law and the civil law accommodate a variety of resource-specific property regimes, tailored to the characteristics and interests implicated by specific resources.' See ibid.

219 di Robilant (n 216) 922.

220 'Property institutions also vary according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive use. Thus, for example, the fact that information consumption

The conceptualisation set forth by Ostrom and Schlager used above to describe the GI functioning accommodates case-by-case specificities, but at the same time, it provides a structural paradigm (an 'umbrella') for further analysis and comparisons. Considering di Robilant's interpretation of Dagan's theory, one could affirm that Ostrom's approach seems to be more oriented towards Dagan's structural pluralism than the US conception of bundle of rights, while keeping a certain degree of flexibility.[221]

Without the ambition of being exhaustive here, describing the nature of the rights conferred by GIs should consider two elements: one is that alienation and (full) exclusion are not the main qualifying rights conferred, although management, as a full prerogative of the producer group, *definitely* is. Collective action as driver of the GI initiative is problem-driven, meaning that it arises from the need of 'defending' the shared resource from the risk of erosion, and pushes producers to choose a type of management while dealing with rule-crafting. The type of management defined by the product specification (and statutes of the producer association or organisation), allows to detect some inefficiencies which might move the use of the tool away from its genuine legal rationales.

Another consideration is that Dagan's structural pluralism (whose 'progenitor' is the tree model, according to di Robilant) conveys more effectively the prevalence of ownership-governance on alienation and full exclusion, without renouncing to the identification of a 'form of property', despite a more blurred qualification of the rights attributed to the 'owner'. He admits that every property regime 'involves *some* power to exclude. Given property's characteristics as an umbrella for a diverse set of property institutions, however, neither the right to exclude nor indeed any other feature typical of property can be property's sole essence'. Moreover, he states that 'conceptualizing exclusion as the core of property, I argue, is not only descriptively reductive; it is also normatively disappointing. The reason for this is twofold. The morality of exclusion is limited and, in any event, limiting property to those property institutions that are and should indeed be typified by exclusion marginalizes some other property institutions that facilitate important

is generally non rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion.' Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press 2011) 42.

221 'Property is an umbrella for a set of institutions – property institutions – bearing family resemblances. Each such property institution entails a specific composition of entitlements that constitute the contents of an owner's rights vis-à-vis others, or a certain type of others, with respect to a given resource. The particular configuration of these entitlements is, or at least should be, determined by its character, namely, by the unique balance of property values characterizing the institution at issue' See ibid. It is interesting to note that Dagan makes indirect reference to 'regulated access' as follows: '*limitations on entry* are even more restricted and justified only insofar as they prevent inclusion of "bad cooperators" likely to jeopardize the success of the commons property, or enhance shared cooperative values that are a necessary condition of such success.' See ibid 47.

spheres of human interaction and flourishing'.[222] This configuration might be suited for GI settings, even though it would deserve a deeper empirically grounded investigation.

As to the second concluding remark, the right to access refers to the use of the name, the right to appropriate the benefits is indirectly tied to the use of the name, the right of management involves the use of the name, the right to exclude refers to the exclusion from the use of the name. The role of the name in this general frame will be the object of a specific analysis in the next paragraphs.

1.7.4.5 The name as infrastructure

Toponyms are generally not considered as distinctive, therefore they are not eligible for IP protection and access and use are granted to all.[223] But when names[224] can convey the authenticity and typicity of the product (i.e., when the origin link requirement is satisfied), they 'virtually escape' from genericide and are eligible for GI registration. Those names identify a resource subjected to erosion ('social dilemma') and should be the 'object of commercial significance'.[225]

The name should be considered jointly with the place-based reputation, as it identifies the resource, and *vice versa*. In other words, to effectively function as a channel of communication (communication function) and convey information on the specific origin-based attributes of the product (guarantee function), the name should be *known* to the relevant public (in perspective, investment and advertising functions).[226] Later I will show that, in practice, the reputation attached

222 Dagan (n 220) xiii.

223 From a management perspective, these (generic) names face the same issues as public goods, namely it is difficult or costly to exclude stakeholders from use and the consumption of one does not affect or limit the consumption of others.

224 'Direct' when they are geographical names, 'indirect' when they are not geographical names but refer to product typical of a specific geographical area.

225 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 8.

226 The combination between reputation and denomination emerges clearly from case law on evocation where making direct or indirect use of the name is *instrumental* for taking advantage of place-based reputation. The wording of art 16(a) Reg 110/2008 make clear that GI protection covers *'any direct or indirect commercial use* in respect of products not covered by the registration in so far as those products are comparable to the spirit drink registered under that geographical indication *or in so far as such use exploits the reputation of the registered geographical indication* (in Case C-44/17 *Scotch Whisky Association v Klotz* EU:C:2018:415). Similarly, as recalled in ***Manchego*** 'the wording of Article 13(1)(b) of Regulation No 510/2006 does not provide that a producer established in a geographical area corresponding to the PDO and whose products are not protected by the PDO but are similar or comparable to those protected by it is to be excluded from that provision. Alternatively, if such a producer were excluded, such an exclusion would have the effect of authorising a producer to use figurative signs which *evoke the geographical area whose name is part of a designation of origin* covering an identical or similar product to that of that producer and, accordingly, of *allowing him to take unfair advantage of the reputation of that designation'* (see Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL e Juan Ramón Cuquerella Montagud* EU:C:2019:344). Further insights come from the decision on the ***Aceto Balsamico di Modena*** where the ECJ attributes the presence of a reputation embedded in the name as a justification for its registration ('the name "Aceto Balsamico di Modena" that has an *undeniable reputation on the national and international market* and that it is therefore that compound name as a whole which meets the inherent condition for the product *having a specific*

to the name might be impacted by the commercial strategies of the producer group (whether, prior to the application, they commercialised the product *using the name for a considerable amount of time* or sold the product 'informally' and within the geographical area).

Two consequences derive from this characterisation: (1) a minimum degree of openness should be granted because the reputation is necessarily 'place-based', therefore anchored to freely accessible localised tangible and intangible assets; (2) the name absorbs the same management choices undertaken for the valorisation and protection of place-based reputation, meaning that it is affected by the same rules regulating access and management. Therefore, the name should not be considered as a commons *per se* but *can be managed as a commons*, as long as place-based reputation is subjected to this type of management.

When place-based reputation and the registered name are managed as a commons, the name becomes vehicle of information to consumers in the marketplace and it is able to redirect commercial benefits to the GI holders. Outside the marketplace, it can produce public goods as positive externalities. Belletti, Marescotti and Touzard highlight that GIs might not always replicate the paradigm of the 'virtuous cycle' (which is revealed, *inter alia*, by the production of public goods as positive externalities). In particular, negative externalities can be generated when the GI is managed as negatively impacting on the natural environment (e.g., the development of monoculture, the increasing use of pesticides, soil transformation and erosion of biodiversity).[227] It is reasonable to deduce that negative externalities can affect as well cultural environment, especially when the specifications reflect power asymmetries, altering or diluting the authentic heritage-based local know-how. These asymmetries can originate from actors' infra-group heterogeneity, for example the coexistence between industrial and artisanal producers (see *infra* Chapter 2 Section I).

Frischmann has inquired on the functioning of 'particular set of resources defined in terms of the manner in which they create values'.[228] In particular, he identifies these resources as **infrastructures**, which are 'shared means to many ends',[229] affirming that they can be managed

reputation linked to that name'. (Case C-432/18 Consorzio Aceto Balsamico di Modena v Balema Gmbh EU:C:2019:1045. Other insights emerge from ***Champanillo*** where AG Pitruzzella highlights that 'the Court has recognised that Regulation No 1308/2013 constitutes an instrument of the common agricultural policy aimed, inter alia, *at preventing improper use of those designations by third parties seeking to profit from the reputation which those products, bearing a geographical indication registered under that regulation, have acquired by their quality'.* See Case C-783/19 *Comité Interprofessionnel du Vin de Champagne v GB* EU:C:2021:350 [2021] Opinion AG Pitruzzella, para 35.

227 Belletti, Marescotti and Touzard (n 19). This argument has been further explored in Quiñones Ruiz and others (n 62); Marescotti and others (n 62); Guerrieri, 'The Farm to Fork Strategy as an External Driver for Change' (n 62).

228 Frischmann (n 81), ix.

229 ibid 4.

as commons and produce public or private goods, namely they 'contribute to the production of a wide range of public and social goods because of the ways in which they connect to communities and social systems'.[230] For example, language is considered by Frischmann as a **public intellectual infrastructure** 'serving as foundation for the production and exchange of knowledge and the development of social systems and interdependencies'.[231] According to his classification, **commercial infrastructures**, differently from public infrastructures, 'support production of a wide variety of private goods […] Basic manufacturing processes, such as die casting, milling, and the assembly-line process, are nonrival inputs into the production of a wide variety of private manufactured goods' and 'producers should adequately appropriate the benefits of the outputs via sales to consumers and accurately manifest demand for the required inputs in upstream markets. Because the outputs are private goods, there are no incomplete or missing markets and no production externalities associated with public or social goods'.[232] Commercial infrastructures can be managed as commons when sharing obligations are deemed necessary.[233]

Frischmann concept of infrastructure can be useful to understand and clarify the **role of the name in GIs in relation to place-based reputation, and the consequences derived from their joint management**. The name itself, which I defined previously as allowing information channels to targeted ends (i.e., performing functions to meet higher objectives), can be considered as an **intellectual infrastructure** which has the function of transforming inputs (a type of information) into outputs (other types of information). Yet, being ontologically 'semi-public', GIs should maintain a minimum level of openness (attribute which belongs to the 'public dimension'); at the same time, they serve the commercial strategies undertaken by the firms belonging to the producer group (attributes of their 'commercial' dimension). In other words, *if managed in a specific way*, GIs can produce positive externalities (public goods), while maintaining their commercial

230 ibid 69.

231 The author specifically identifies language as intellectual non-traditional infrastructure defined as having the capacity of transforming 'nonrival input into a wide variety of outputs.' ibid 275. He adds, that 'all intellectual goods are nonrival; some are primarily valuable as consumption goods, while others are primarily valuable as intermediate goods, as intellectual capital. We are concerned with intellectual capital that is generic in nature – that can be used by many (people, firms, etc.) as an input into a wide variety of productive activities – and once we have identified such resources, we are further interested in the nature of the productive activities and whether users produce private, public, or social goods.' ibid 280. The parallel between language and GIs is appropriate, as highlighted by Le Goffic, because they are denominations, used in common language, belonging to the tradition of a country. Le Goffic (n 110) 262.

232 Frischmann (n 189) 68. Examples of commercial infrastructures are basic manufacturing processes, basic agricultural processes and food-processing techniques.

233 One interesting example of commercial infrastructures managed as commons might be embedded in Standard Essential Patents, where the sharing obligation is given by the essentiality requirement. For more insights on this topic see Timothy Simcoe, 'Governing the Anticommons: Institutional Design for Standard-Setting Organizations' (2014) 14 Innovation Policy and the Economy 99 <https://www.journals.uchicago.edu/doi/10.1086/674022> accessed 2 April 2023; Vicente Zafrilla Díaz-Marta and Carlos Muñoz Ferrandis, 'Open Standards and Open Source: Characterization and Typologies' (2020) 15 Journal of Intellectual Property Law & Practice 700 <https://academic.oup.com/jiplp/article/15/9/700/5902008> accessed 2 April 2023.

vocation. Therefore, they cannot be fully recognised as public infrastructures nor as commercial infrastructure: they possess, contextually, attributes belonging to both categories, qualifying as a 'mixed infrastructure'.[234] The public dimension of GIs derives from their anchorage to localised non-excludable assets (cultural and natural or environmental) resulting in information inputs such as history, cultural heritage, biodiversity. The name, functioning as a channel of communication, should be able to sustain processes aimed to the maintenance of these localised assets (outputs). GI commercial dimension derives from the capacity of the name, as marketing tool conveying information on origin-based quality (guarantee function), of allowing infra and intra-generational exchanges expressed in endogenous formal rules. These inputs are encouraged and sustained by the production of economic benefits, social capital, trust etc., redirected to the producer group (outputs).

Looking at the name as a well-defined entity (*coupled* with the place-based reputation) is often neglected in the existing interdisciplinary literature on GIs and collective action. However, it is at the core of the legal protection. Yet, the following conclusions can be drawn, with the help of the infrastructure model proposed by Frischmann. Legal rules at the EU and national level are now more open to embrace the heterogeneous potentials of GIs. However, the legal framework does not offer explicit guidelines on the type of management considered more apt to exploit all the potentials of the sign and avoid inefficiencies.[235] The theoretical reasoning mentioned above leads to assume that when the place-based reputation and the name-infrastructure are managed as commons, GIs are more likely to create social and commercial benefits.[236] On the contrary, other types of management (such as club good management) exposes the functioning of the name-infrastructure to the problem of arbitrary selective membership rules and enclosure. This point will be further explored in Chapter 2 Section II and Chapter 3.

1.7.4.6 Reinterpreting the origin link

Traditionally, the origin link is conceived either as '*terroir*' or 'reputational', as they are 'vastly different in nature'.[237] PDOs are used to identify both the natural and human component of *terroir*.

234 The term 'mixed infrastructure' is used by Frischmann for signalling that fuzziness at the boundaries might be inevitable when complex resource systems are involved. Frischmann (n 189) 278.

235 For example, the principles of representativeness, access to membership, inclusiveness and non-discrimination, democratic functioning, and transparency (later I call them the 'pillars' of collective action) inspire GI governance in some national contexts. However, their importance is quite nuanced and not uniform in all national systems, while they are not even mentioned at the European and international level. Consequently, producers' groups might have a considerable margin of manoeuvre, with a high risk of jeopardising the aptitude of the GI to perform its functions.

236 'one of the measures of the social benefit of a constructed cultural commons may be the degree to which it disseminates the intellectual goods it produces to a wider audience' Madison, Frischmann and Strandburg (n 146) 693-694.

237 Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 21) 7. This differentiation originates from the wording of Reg 1151/2012 which at art 5 defines PDOs as 'products whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors' followed by the

This concept, however, is nowadays confronted with objections as to its practical significance.[238] This work is not specifically a deep investigation on the nature of the origin link. However, the proposed characterisation of the place-based reputation as a complex and nested shared resource challenges its structural elements, and more generally, the conceptualisation of its constituents.

The work conducted by the Max Planck Institute research team on GIs showed that, among the sections of the Single Documents, the origin link section was the most difficult to code. The grid of analysis adopted a 'strictly formalistic approach' and replicated the traditional conceptual distinction mentioned above.[239]

This approach led to the recognition that 'where a product's quality or characteristics are due to human factors – that is, the specific skills and know-how developed by agricultural producers or other groups within the designated place or region – the narrative likewise emphasizes the reputational elements of the goods. Vice versa, where the accent of the link lies on reputation, the specification regularly highlights the local traditions and how they have impacted the development of relevant artisanship in the region concerned, thereby linking to factors that also relate to quality. *The close relationship between both types of links therefore tends to make them indistinguishable in practice*.'[240] Building on these findings, I identify the local 'ecosystem' of the place-based reputation as embedding socio-cultural and natural environments where human interactions take place. This conceptualisation entails two considerations: (1) the factors embedded in the two types of links are placed in a **more complex but realistic contex**t; (2) the place-based reputation is grounded in its components in a more **fluid** way, implying, in the agri-food sector, the existence of a stronger link for PDOs (combining reputation, human, socio-cultural-historical and natural factors) and a weaker link for PGIs (combining reputation, the human and socio-cultural-historical

locality requirement and PGIs as 'whose given quality, reputation or other characteristic is essentially attributable to its geographical origin' followed by the locality requirement.

238 Zappalaglio summarises the definition of *terroir* provided by interdisciplinary scholarship, as a 'geographically defined container that includes the intangible cultural heritage developed by a community through their interactions with the surrounding ecosystem'.

239 In practice: 'A GI was classified as having a quality-based link only when a relationship was expressly indicated between a given characteristic of the product and the natural environment or a human element, in particular local know-how existing in the relevant geographical region. That is, other references to human skills or traditions in the manufacturing were regularly allocated to "reputation" rather than to quality based on human factors. If, as frequently happened, the specification refers to both the natural environment and the local tradition or other historical or reputational aspects, the link was coded in both categories simultaneously. If reference was solely made to marketing practices or the product's renown as attested by consumer surveys, awards, or bibliographic references, it was listed under "reputation". The GIs that could not be placed in one of these two groups account for the residual category'. See Andrea Zappalaglio, 'Quantitative Analysis of GI Registrations in the DOOR Database' in Andrea Zappalaglio and others, *Study on the Functioning of the EU GI System* 27.

240 ibid. Emphasis added.

factors).[241] Beyond being consistent with the holistic concept of origin products, this view is shared by Marie-Vivien, who advocates for the maintenance of two legal options 'based on the criteria of human and natural factors – *whether individually or combined* – which remain relevant irrespective of the nature of the product' (emphasis added).[242] Elsewhere, Biénabe and Marie-Vivien affirm: 'historically, appellations of origin, the first institutional form used to protect GIs, were only granted to well-known geographical names, and reputation was a mandatory criterion (see Lisbon Agreement on the international registration of appellations of origin, 1958). Not accounting for reputation as a criterion per se for granting the GI as an IPR means disregarding the heritage of local communities and their intellectual creation in building the reputation over time. It challenges the GI concept as a specific IPR that differs from trademarks and the justification for granting exclusive rights over geographical names. […] Contrary to those who consider reputation to be a too vague criterion compared to quality criteria, we argue that heritage-based reputation should per se constitute an essential criterion for the decision to grant a GI and that this effectively defines GIs as a specific IPR. This criterion should be explicitly included in GI specifications and publicly examined on a case-by-case basis together with quality criteria.'[243]

Moreover, despite the current formulation, art 5 Reg 1151/2012 does not include reputation as a characterising element of PDOs. Nonetheless, Italian, and French national authorities require, as a general rule, to provide evidence of the prior use of the name or production in the geographical area, independently from the quality scheme. The prior and prolonged use of the name should represent an indirect proof of existing reputation, which is *de facto* extended to PDOs.[244] The importance of reputation as a baseline for every quality scheme is also evident from the formulation of art 2 of the Geneva Act of the Lisbon Agreement, which for Appellations of Origin explicitly attributes the 'quality or characteristics of the good' as 'due exclusively or essentially to the geographical environment, including natural and human factors, *and which has given the good its reputation*'. Less clear on the role of reputation is the definition of GIs 'where a given quality, reputation *or* other characteristic of the good is essentially attributable to its geographical origin'. The same ambiguities as to the cumulative or disjoint qualifying requirements has been replicated in the PGI scheme. It might be the time for seriously considering new conceptualisations of the origin link, based on empirically grounded findings.

241 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11) 225.

242 Emphasis added. Delphine Marie-Vivien, 'A Comparative Analysis of GIs for Handicrafts: The Link to Origin in Culture as Well as Nature?' in Dev Gangjee, *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar Publishing 2016) <http://www.elgaronline.com/view/9781847201300.00022.xml> accessed 16 March 2023.

243 Biénabe and Marie-Vivien (n 6).

244 Interview with Ministry of Agriculture, 28 January 2022, para 4; Interview with INAO legal department, 16 September 2022, para 20-25. For PDOs, the French Rural Code refers to *'notorieté'* rather than to reputation.

This Chapter was indispensable to clarify the current ambiguities on GIs and their proximity to the commons. It enabled to fill the gaps between the legal and interdisciplinary perspectives on collective action and GIs. It also provided the theoretical foundations and justifications to analyse GI systems through diagnostic tools, developed by commons scholars. In the following Chapters, these tools will inspire a new diagnostic approach to unravel legally relevant collective action issues, affecting the valorisation and protection of names of agricultural and non-agricultural origin products. This analysis is aimed to understand the conditions for an enduring management of the place-based reputation and the name-infrastructure.

Chapter 2

NAVIGATING TRANSDISCIPLINARITY FOR DECODING COLLECTIVE ACTION IN AGRICULTURAL GIs

The analytical approach used by the Bloomington school consists in unpacking and analysing complex real-world situations involving human interactions, and interactions between humans and the surrounding ecosystem. This is done by starting from a flowchart called diagnostic framework in which sets of methodological questions and analytical variables are linked and applied to specific case studies. The main diagnostic frameworks used by the scholars of the Bloomington school are the Institutional Analysis and Development ('IAD') framework and the Socio-Ecological-System 'SES' framework. More recently, scholars interested in understanding actors' behaviour in knowledge commons situations developed a new framework called the Governing the Knowledge Commons framework ('GKC'). I will only focus on the IAD and the GKC frameworks in this research. The repeated use of the diagnostic frameworks allows to extract generalisable considerations from specific case studies. I will establish a correlation between the legal rules, their interpretation and operationalisation by the relevant stakeholders at the local and national levels during the GI pre-application and application phases to approach the challenges of collective action in GIs in different contexts. This approach will allow me to target legally relevant issues, without overlooking important lessons learned from the interdisciplinary scholarship on this topic.

This Chapter is divided in two sections. **Section I** focuses on the diagnostic frameworks, namely the IAD framework applied to tangible resources and the GKC framework applied to intangible resources. In this research, I choose to apply the GKC framework, even though some modifications have been necessary, such as the re-introduction of some components typical of the IAD framework which better suit the analysis of GI contexts. Given the specificity of the language of the frameworks and the difficulty to use them in a legal type of analysis, I propose a simplified approach to read and apply the GKC framework in the context of GIs. I call this approach the 'Actors-Process-Outcomes' ('A-P-O') approach, it makes more explicit the embedded rationales of the GKC and IAD frameworks to stress the importance of study the legal implications of collective action in GIs. **Section II** proposes a methodological test of the A-P-O approach within the GKC framework applied to agri-food GIs. This part is structured as follows: (1) introduction of each building blocks of the A-P-O approach to understand the meaning of targeted aspects as shown by the commons scholarship; (2) contextualisation of the Actors, Process, and Outcomes to introduce key issues as emerged from existing GI interdisciplinary scholarship; (3) legal analysis of the legal EU and national rules-in-use influencing collective action in GI settings; (4) analysis of efficiencies and inefficiencies emerging from targeted interviews and documental analysis concerning the understanding, implementation and enforcement of the legal rules at national and local level by the relevant stakeholders. This preliminary test is aimed at proving the efficacy of the A-P-O approach and identifying significant elements for comparison which will be used for analysing in-depth case studies on valorisation and protection initiatives of names identifying non-agricultural origin products.

2.1 SECTION I – A diagnostic framework for case-study analysis

2.1.1 The use of diagnostic frameworks in commons interdisciplinary scholarship

As anticipated in Chapter 1, Ostrom's research was devoted to the study and analysis of the governance of common-pool resources in the aim of decoding and understanding its complexity. Diagnostic frameworks, in institutional analysis, identify and systematise the important aspects useful to understand a specific situation. The IAD framework is a multidisciplinary analytical tool constituted by multi-tier variables used for examining stakeholders' interactions within various types of contexts, and the determinants of these interactions.[245]

The name 'Institutional Analysis and Development framework' summarises the key aspects and object of inquiry. McGinnis highlights that **institutions** are intended as the ensemble of 'prescriptions that humans use to organise all forms of repetitive and structured interactions'; 'shape processes of choice and consequences' and 'act as both constraints and opportunities that shape the processes through which individual and collective choices take place and which shape the consequences of these choices for themselves and for others'. Moreover, 'no institution can be fully understood in isolation from the institutional configuration(s) within which it is embedded'.[246] '**Institutional analysis'** means decomposing a specific complex situation involving institutions (i.e., rules, arrangements) and extrapolating the relevant variables to deeply understand their correlation and significance. '**Development'** flags a diachronic approach to institutional analysis, targeting ongoing processes of interaction between heterogeneous actors.[247]

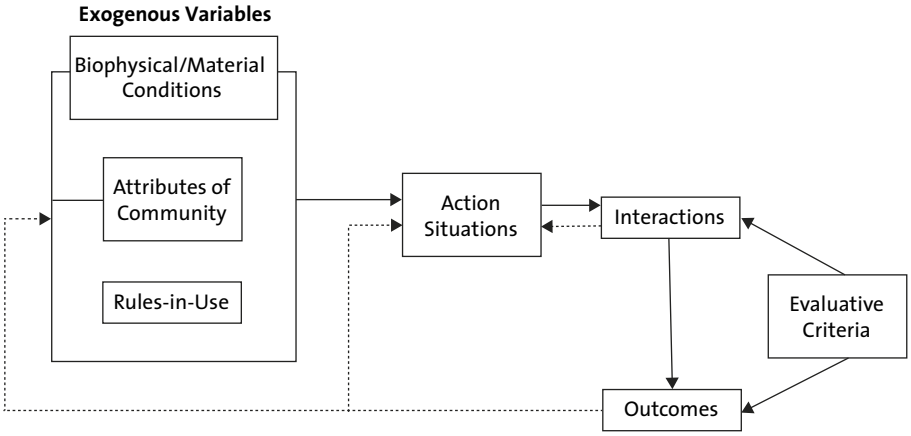
The IAD framework is structured as a relatively simple flowchart, where each box is assigned to a specific element of observation (Figure 4).

245 Ostrom, 'Beyond Markets and States' (n 118).

246 McGinnis, 'Updated Guide to IAD and the Language of the Ostrom Workshop: A Simplified Overview of a Complex Framework for the Analysis of Institutions and Their Development' (n 136) 4.

247 ibid 4.

Figure 4: IAD framework. Source: adapted from Ostrom, E., Gardner, R., Walker, J. (1994) 'IAD framework components. Rules, games, and common-pool resources', University of Michigan Press.



The biophysical or material conditions of the resource, attributes of the community, and rules-in-use are considered by Ostrom as exogeneous variables affecting stakeholders' interactions. Combined, they can affect the settings of the processes involved in the **core action situation**. The action situation is the virtual space where stakeholders interact. The key components of the action situations are '(1) participants in (2) positions who must decide among diverse (3) actions in light of the (4) information about how actions are linked and level of control each actor has over (5) potential outcomes and (6) costs and benefits assigned to actions and outcomes'.[248] For example, actors can interact to solve issues related to the appropriation, maintenance, rulemaking, monitoring and sanctioning concerning a shared resource.[249] The analytical approach usually focuses on one main action situation, even though it is important to consider that each action situation is embedded in a complex context, where adjacent action situations might generate relevant outcomes.[250] More specifically, the '**biophysical or material conditions of the resource**' identifies the resource intrinsic attributes and its conditions prior or subsequent to appropriation. The '**attributes of the community'** summarise all the 'relevant aspects of the social and cultural context within which an action situation is located', e.g., trust, reciprocity as common interests,

248 ibid 14.

249 McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons' (n 89); Michael D McGinnis, 'An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework' Policy Studies Journal 15.

250 Recently scholars have been interested in understanding more in depth the relationships between networks of action situations. For this purpose, the Socio-ecological system (SES) framework has been mobilised. See Hita Unnikrishnan and others, 'Unpacking Dynamics of Diverse Nested Resource Systems through a Diagnostic Approach' (2023) 18 Sustainability Science 153 <https://link.springer.com/10.1007/s11625-022-01268-y> accessed 8 May 2023.

motivations and expectations.[251] The rules-in-use identify all the formal and informal, legal and non-legal, codified or non-codified rules relevant for a specific action situation (i.e., able to impact on actors' behaviour in the situation at stake).

Outcomes are defined by looking at the conjunction between the outputs of the action situation and exogenous factors. **Evaluative criteria** may be used to observe the efficiencies and inefficiencies of observed outcomes.

The repeated use of the diagnostic frameworks in various settings allowed to collect recurring elements characterising systems where cooperation was successful or unsuccessful. To 'explain phenomena that do not fit in a dichotomous world of "the market" and "the State"', Ostrom developed a diagnostic approach to the observation of 'structural factors affecting the likelihood of increased cooperation', called 'design principles'.[252] The '**design principles'** (Table 3) were not conceived as normative prescriptions, but they were crafted to help create or ameliorate policy design and build a 'supportive legal structure at the macro-level that authorizes users to take responsibility for self-organizing and crafting at least some of their own rules'.[253] They are the result of an empirically grounded generalisation aimed to summarize the success factors (a sort of 'best practices') of enduring governance systems for the management of the commons. Even though this research does not strictly apply the IAD or GKC and does not use Ostrom's design principles as benchmarks for comparison of GI situations, some of them are embedded in the axes of inquiry tailored for analysing GI settings (e.g., 'clearly defined boundaries', 'congruence between appropriation rules and local conditions', 'collective choice arrangements', 'minimal recognition of the right to organise'). Most importantly, this research is inspired by Ostrom's legacy not only the general guiding principles governing collective action for the management of shared resources, but also a scientific and analytical approach to qualitative analysis around similar targets of observation. These targets are identified though a set of methodological questions and assumptions elaborated on axes of inquiry, generated from the agri-food GI experience, and used as benchmarks for data collection and case-study comparison.

251 McGinnis, 'Updated Guide to IAD and the Language of the Ostrom Workshop: A Simplified Overview of a Complex Framework for the Analysis of Institutions and Their Development' (n 136) 16.

252 Ostrom, *Governing the Commons* (n 114) 90–102; Ostrom, 'Beyond Markets and States' (n 118) 653–654.

253 Ostrom, 'Reformulating the Commons' (n 116) 46–47. Although the diagnostic and analytical approach used by Ostrom heavily inspired this work and research design (including the design principles), adjustments were needed to fit the purposes and conceptual processes typical of the legal methodology and analysis of GIs.

Table 3: Design principles. Originally crafted by Ostrom in 1990, this version is reported by Cox, Arnold, and Villamayor Tomás.[254]

Clearly defined boundaries: (a) Individuals or households who have rights to withdraw resource units from the common-pool resource must be clearly defined; the boundaries of the common-pool resource must be well defined.
Congruence between appropriation and provision rules and local conditions: [A] Appropriation rules restricting time, place, technology, and/or quantity of resource units are related to local conditions; [B] The benefits obtained by users from a common-pool resource, as determined by appropriation rules, are proportional to the amount of inputs required in the form of labor, material, or money, as determined by provision rules.
Collective-choice arrangements: Most individuals affected by the operational rules can participate in modifying the operational rules.
Monitoring: [A] Monitors are present and actively audit common-pool resource conditions and appropriator behavior; [B] Monitors are accountable to or are the appropriators.
Graduated sanctions: Appropriators who violate operational rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offense) by other appropriators, officials accountable to these appropriators, or both.
Conflict resolution mechanisms: Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials.
Minimal recognition of rights to organize: The rights of appropriators to devise their own institutions are not challenged by external governmental authorities.
Nested enterprises: Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises.

It is important to recall that collective action is often problem-driven, meaning that collective mobilisation and coordination efforts take place to respond to specific issues affecting the management of a shared resource such as its availability over time. As mentioned earlier, in the context of intangibles, 'the dilemma to be solved is not primarily a classic "tragic commons" overconsumption problem. Instead, it is more likely (in part) an underproduction problem and (in part) a coordination problem. In the absence of a governance mechanism to moderate consumption, producers of resources will fail to invest in creating new goods or in preserving them, either on their own or in combination with others, because of uncertainty regarding their ability (whether individually or collectively) to earn returns that justify the investment'.[255] The IAD framework can be a useful tool for empirically grounded policy design. Yet, it 'helps analysts comprehend complex social situations and break them down into manageable sets of practical activities. When applied rigorously to policy analysis and design, analysts and other interested participants have a better chance of avoiding the oversights and simplifications that lead to

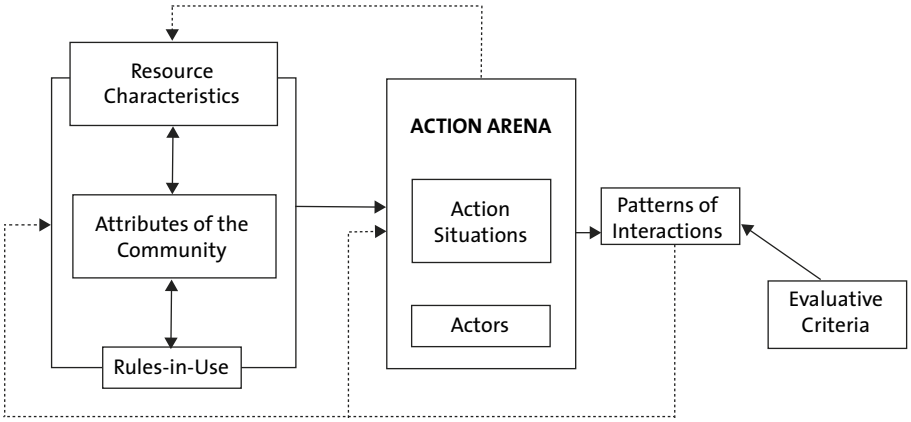
254 Michael Cox, Gwen Arnold and Sergio Villamayor Tomas, 'A Review of Design Principles for Community-Based Natural Resource Management' 15 Ecology and Society 38 <http://www.ecologyandsociety.org/vol15/iss4/art38/>.

255 Michael J Madison, 'Commons at the Intersection of Peer Production, Citizen Science, and Big Data: Galaxy Zoo' in Brett M Frischmann, Michael J Madison and Katherine J Strandburg (eds), *Governing Knowledge Commons* (Oxford University Press 2014) 219 <https://academic.oup.com/book/36261/chapter/316319393> accessed 2 May 2023.

policy failures.'[256] This diagnostic approach can be conveniently used 'to reaffirm or revise policy objectives, evaluate policy outcomes, understand the information and incentive structure of a policy, or develop reform initiatives.'[257]

Madison, Frischmann and Strandburg showed that it is possible for legal scholarship to approach the study of intangible commons in a transdisciplinary perspective. They adapted the IAD framework to these purposes and developed the Governing the Knowledge Commons framework (GKC framework), as shown in Figure 5.

Figure 5: The Governing the Knowledge Commons framework (GKC framework). Source: Frischmann, Madison and Strandburg, Governing the Knowledge Commons (2014) p 19.



As the IAD, the Governing the Knowledge Commons framework (GKC) was developed to analyse specific case studies related to shared resources. However, graphically, and conceptually, some differences can be noticed: they are justified by the different nature of the resources involved, and their impact on stakeholders' interactions. For example, the authors specify that in knowledge commons settings, patterns of interaction are themselves considered as outcomes, being conceptually inseparable. With this argument they justify the absence of the 'outcomes' in the GKC framework as a distinct box from the 'patterns of interaction' (which are clearly distinct in the IAD framework).

It is also important to recall that neither the use of the diagnostic frameworks nor of the guiding principles should be considered *per se* as prescriptive. IP scholars can learn from this approach

256 Margaret M Polski and Elinor Ostrom, 'An Institutional Framework for Policy Analysis and Design' 35, 16.
257 ibid.

how to empirically *inform* or *inspire* policy rather than 'pushing it in one direction or another'.[258] I consider that the frameworks are useful methodological tools to flag important (often overlooked) issues and complementary to legal analysis. Applying the GKC and IAD frameworks means shaping inquiries driven by the following rationales (1) the individuation of a problem or social dilemma; (2) the analysis of actors' interactions as a response to this problem and impacting previously identified resource; (3) both the diagnostic frameworks are used by answering to specific 'buckets' of methodological questions related to each 'box' of the flowchart. These methodological questions are very important because they are used as guidelines both for data collection (e.g., documental analysis and devising interview protocols) and analysis.[259]

Table 4: Representative research questions for applying the Knowledge Commons framework. Source: Frischmann, Madison, and Strandburg, *Governing the Knowledge Commons* (2014), pp 20-21.

Background environment
• What is the background context (legal, cultural, etc.) of this particular commons?
• What is the default status of the resources involved in the commons (patented, copyrighted, open, or other?)
Attributes
Resources
• What resources are pooled and how they are created or obtained?
• What are the characteristics of the resources? Are they rival or nonrival, tangible or intangible? Is there shared infrastructure?
• What technologies and skills are needed to create, obtain, maintain, and use the resources?

258 Daniel H Cole, 'Learning from Lin: Lessons and Cautions from the Natural Commons for the Knowledge Commons' in Brett M Frischmann, Michael J Madison and Katherine J Strandburg (eds), Governing Knowledge Commons (Oxford University Press 2014) 49 <https://academic.oup.com/book/36261/chapter/316318423> accessed 22 June 2023.

259 Brett M Frischmann, Michael J Madison and Katherine Jo Strandburg, *Governing Medical Knowledge Commons* (2017) 16 <http://dx.doi.org/10.1017/9781316544587> accessed 5 November 2018.

Community members
• Who are the community members and what are their roles?
• What are the degree and nature of openness with respect to each type of community member and the general public?
Goals and objectives
• What are the goals and objectives of the commons and its members, including obstacles or dilemmas to be overcome?
• What are the history and narrative of the commons?
Governance
• What are the relevant action arenas and how do they relate to the goals and objective of the commons and the relationship among various types of participants and with the general public?
• What are the governance mechanisms (e.g., membership rules, resource contribution or extraction standards and requirements, conflict resolution mechanisms, sanctions for rule violation)?
• Who are the decision makers and how are they selected?
• What are the institutions and technological infrastructures that structure and govern decision making?
• What informal norms govern the commons?
• How do nonmembers interact with the commons? What institutions govern those interactions?
• What legal structures (e.g., intellectual property, subsidies, contract, licensing, tax, antitrust) apply?
Patterns and outcomes
• What benefits are delivered to members and to others (e.g., innovations and creative output, production, sharing, and dissemination to a broader audience and social interactions that emerge from the commons)?
• What costs and risks are associated with the commons, including any negative externalities?

2.1.2 The framework used in this research: the GKC framework applied to GIs

The diagnostic framework used in this research is inspired both by the IAD and by the GKC frameworks. I decided to get back to the foundations of the IAD framework to better understand the constituents of the GKC framework, and address more efficiently and coherently the peculiarities of GI systems. The reasons justifying my choice are the followings:

(a) In GI contexts, the **nature of the resource** involved, **despite being intangible, maintains a certain anchorage to tangible assets rooted in place** (i.e., natural, and cultural environment). Consequently, the already mentioned difficulty to define the boundaries of the resource is partially mitigated by the presence of a geographical (tangible) environment identified through the name-infrastructure. This feature impacts on the identification of the **local community** though its geographical proximity to the resource, in addition to common interests in its management and specific expertise.

(b) I decided to investigate specifically on the rulemaking process leading to the product specification design in GI contexts. This has consequences on the identification of my **core action situation** (which is rulemaking aimed to devising boundary rules impacting on the conditions for access and use of the name and to the underlying resource) and on the **outcomes**. Because of this characterisation of the core action situation, it makes sense to clearly distinguish, as in the IAD framework but differently from the GKC framework, the 'outcomes' from the 'patterns of interactions'. My outcomes are the operational rules contained in the product specifications, resulting from stakeholders' compromise (outputs of the rulemaking process), from exogenous legal requirements and from the outcomes of adjacent action situations (namely the control plan and statutes design). My 'patterns of interactions' are represented by the consensus building on the content of the product specifications. The principles and rules governing the patterns of interactions are non-homogeneously regulated at the national level and completely overlooked at the EU level.

(c) The GKC is focused on the analysis of **single case studies** through general clusters of questions. To better address issues specific of GI contexts, I propose clusters of questions aligned with three axes of inquiry, that summarise salient aspects of GI characterisation and management, empirically grounded in consolidated experiences of agri-food GIs. This choice is justified by the need to provide a solid basis for comparison. The axes of inquiry, to some extent, have similar functions as the structural variables of the IAD framework, namely they help researchers identify the data relevant for their purposes (e.g., informing policy design). This can be particularly challenging, especially when working with a considerable amount of data, not necessarily structured and organised, such as in semi-structured interviews.

(d) As the building block related to the actors, the original distinction between '**community'** and '**participant'** in the IAD framework is implicit in the GKC framework, where reference to 'decision-makers' is directly included in the cluster questions related to governance, but it is absent in the flowchart. However, the conceptual separation between the community and participants has proven to be relevant in commons scholarship as it can be one of the indicators for different degrees of collective engagement and rule.

Despite these adjustments, my application of the GKC framework maintains:

(1) The qualification of **'attributes of the resource'** taking into account its intangible nature (which absent in the IAD framework, which only refers to the 'biophysical/material conditions' of the resource) and the important conceptual implications of this nature (e.g., on 'virtual' subtractability, appropriation, the impact of the outcomes on the maintenance of the intangible resource and the production of market and non-market spillovers).

(2) The reformulation of 'exogenous variables' as '**contextual variables'** which directly influence the action situation, rather than belonging to a separate dimension.

(3) The fact that the community-based **rules-in-use** contribute, to some extent, to shaping the characteristics of the intangible resource itself. The rules-in-use, which can be codified or non-codified, impact the processes identified in the action situation at various levels and in different moments. However, in the GKC the difference between the working (or *de facto*) rules-in-use and legal rules is solved by identifying the former as 'rules-in-use' and the latter as 'background legal environment'. I am interested in understanding how stakeholders understand, implement, and enforce specific legal rules affecting targeted aspects of GI governance (i.e., the eligibility of participants to the product specification design at the local level, the roles played by heterogeneous actors during this process, and how legal requirements affect its outcomes). Therefore, I will systematically show how relevant provisions of the legal framework are operationalised in practice and concerning multiple aspects of the rulemaking process, by national authorities and stakeholders at the local level. I therefore adopt the more full-encompassing definition of the 'rules-in-use' provided by Ostrom in *Governing the Commons*, which includes both formal legal rules and informal codified or non-codified national and local practices.

The specificity of the vocabulary and theoretical underpinnings of the diagnostic frameworks used in the commons scholarship might seem overwhelming at first glance, especially in fields (as traditional legal studies) where this type of approach is not frequently used. To avoid that this complexity undermines their use and the potential valuable inputs they can generate, I propose a simplified tool to highlight three macro-constituents, common to both the IAD and GKC frameworks: the actors, the process, and the outcomes of a specific action situation at the local level. I call this simplified lens 'Actors-Process-Outcomes' (A-P-O) approach and I contextualise it to the rulemaking process embedded in the product specification design.

2.1.3 The actors-process-outcomes (A-P-O) approach

As suggested by Madison, Frischmann and Strandburg, Ostrom's approach needs to be adapted to study intangible commons. Adaptation means contextualisation and simplification. Contextualisation should allow the observation of the specificity of the GI as a multifunctional tool of protection, valorisation of the geographical name and preservation of localised intellectual and tangible goods; it also needs to consider the heterogeneity of the actors involved (public and private) and the specific legal rules governing their interactions at multiple levels.[260]

One possible way to build a transdisciplinary dialogue merging the Ostrom's diagnostic approach to collective action and the legal analysis is therefore conceptual simplification. I frame the building

260 Madison, Frischmann and Strandburg (n 146).

blocks of Ostrom's approach to identify targeted elements according to its fundamental rationales, and objectives.

One of Ostrom's and colleagues' focuses is the study of community-based processes leading to arrangements to respond to context-specific challenges (e.g., making a resource available over time). Empirical findings showed that stakeholders do not necessarily need external intervention to develop efficient arrangements to manage resources.[261] Despite these arrangements are endogenously developed, they can be influenced by existing legal structures and higher levels of governance.[262] The diagnostic frameworks used in tangible and intangible commons scholarship are built on the fundamental logic of decoding actors' interactions leading to specific outcomes. It is crucial, therefore, to identify, in a specific situation (a) the actors involved in the decision-making process, (b) the objective of the decision-making process and the rules governing it, (c) its outcomes.[263]

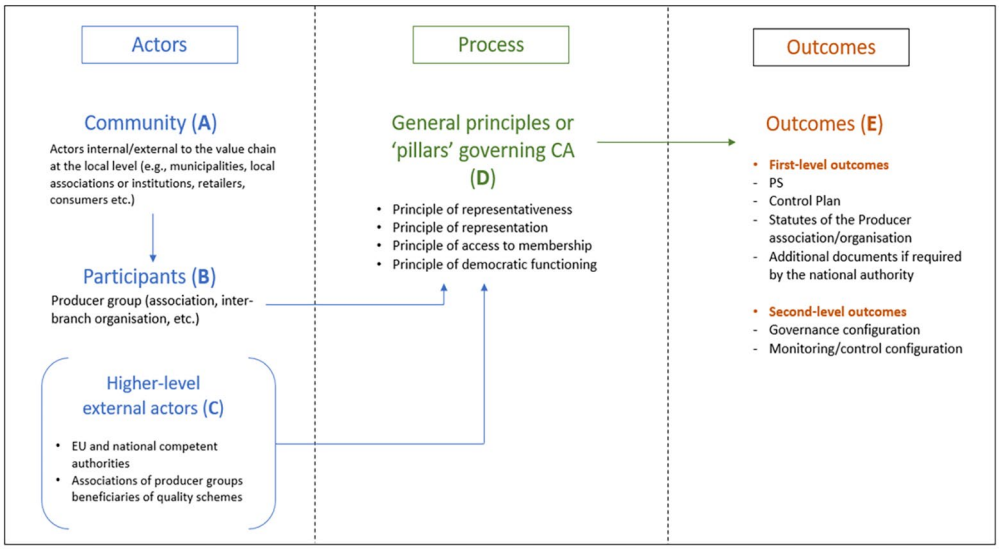
I propose the Actors-Process-Outcome (A-P-O) approach (Figure 6) as a **simplifying and simplified interpretative diagnostic tool** to make the GKC framework applied to GIs more accessible to a larger academic public. It targets the key legal rules governing the application phase of the agri-food GI EU system, and their interpretation and application at the national level (more specifically, in France and Italy).

261 See, inter alia, Ostrom, *Governing the Commons* (n 114) 58–88.

262 Frischmann, Madison and Strandburg (n 259) 33, 56–57.

263 This conceptual scheme not only can be deduced by various sources. Firstly, Ostrom's design principles explicitly targets the importance of clearly defined boundaries, including the identification of the stakeholders who are allowed to access and enjoy the resource, and the importance of the coincidence between actors entitled to the rule-making process and actors bound by the rules. Secondly, this tripartite structure can be found in further simplifications of complex diagnostic frameworks used in the commons scholarship. As an example, the 'structure', 'process', 'outcomes' distinction used by Michael D. McGinnis to explain the governance of polycentric systems Michael McGinnis, 'Concerns about Institutional Changes That May Undermine the Long-Term Sustainability of Polycentric Governance' (2020).

Figure 6: The Actors-Process-Outcomes (A-P-O) approach to decode GI pre-application and application collective action dynamics, in the context of agricultural products and foodstuffs. PS: Product Specification; CA: collective action.



The application for a GI registration is a complex process, which **starts from an initial challenge or problem** (i.e., it is problem-driven) and involves the participation of heterogeneous actors operating at different levels (including public bodies, such as national and regional authorities). These actors self-organise as a group, interact, make assessments, and take decisions to comply with specific requirements defined by EU and national law. At the local level, the applicant group needs to agree, *inter alia*, on the content of the product specifications. The product specification and the single document constitute the legal basis of the GI: they are formed by specific standards qualifying who is allowed to use the name, once registered. GI users are identified as a group, open to the access of new actors, provided that they are compliant to endogenous rules.

As explained in Chapter 1, the name eligible for GI protection identifies an origin product which is by definition the expression of the enduring collective effort of the local community to valorise local (tangible and intangible) resources. The local community 'at large', not only includes actors directly involved in the value chain, but also those involved in the commercialisation, promotion, and consumption of the origin product (**A**). The initiative for the registration of a GI involves members of the local community (the 'participants' of the decision-making process) necessarily including origin product producers (**B**). Public bodies and actors external to the value chain can intervene in this process as well, in different moments and degrees (**C**). The decision-making process follows formal or informal rules aiming to reaching a compromise on the product specifications which

should comply with legal requirements. The content of the product specification can be more or less strict, depending on the national and EU legal requirements, stakeholders' capacity to self-organise, and the specific strategy that they want to achieve (**D**). The 1st level outcomes of this process are the product specifications, which needs to be paired with the control plan, and the statutes of the producer organisation or association. Additional documents to support the application could be required by national authorities as part of the application file. The 2nd level outcomes are the specific governance and monitoring-control configurations stemming out from the implementation of the operational rules contained in the product specifications, statutes and control plan. Depending on the national legal regime, the governance configuration for the management of the sign can evolve after the registration (e.g., in Italy, the recognition of Protection Consortia). The monitoring-control configuration is an important element not only for ensuring that the guarantee, consumer protection and enforcement functions are effective (control *ex ante* and *ex post* the commercialisation of the product), but also for assessing the aptitude of the rules contained in the product specifications to be effective after the registration (**E**).

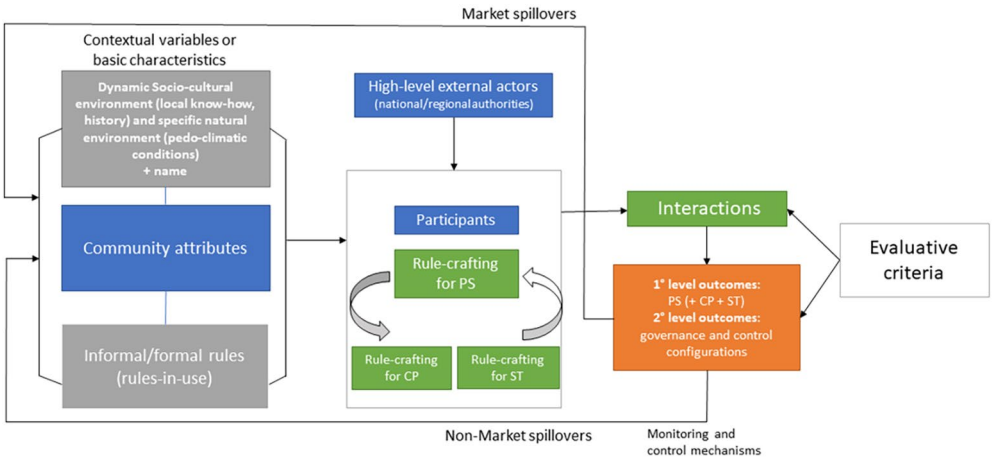
The A-P-O approach embedded in the GKC framework helps to (a) identify and isolate the rules influencing collective action at the national and local level for the registration of agricultural GIs (namely in Italy and France); (b) show how these rules are endogenously operationalised at the local, national and EU level by the stakeholders concerned; (c) highlight some efficiencies and inefficiencies of this operationalisation, showing the informal practices at the national and local level *ex ante* the GI registration; (d) underline the significance of these efficiencies and inefficiencies for the GI management, also in relation to the objectives and rationales defined by national laws and regulations.

The data sample used in this chapter integrate the insights provided by the existing literature on agricultural GIs. They include French and Italian heterogeneous experiences, showing different group sizes and product classes. This will give a diversified overview of various ways in which the GI existing legal framework is operationalised at the local level.

Figure 7 summarises the building-blocks of the A-P-O approach within the GKC framework applied to GIs. The 'Actors' component is identified in blue, and it includes the community, the participants, and high-level external actors. The 'Process' component is identified in green, and it is related to the action situation of 'rule-crafting'. The main action situation is the rule-crafting process for product specification design. However, it cannot be fully understood if decontextualised from adjacent action situations, i.e., rule-crafting for the control plan and for the statutes of the producer association or organisation. The 'Outcomes' of the process are identified in orange and

represent both first level (product specifications, control plan and statutes) and second level outcomes (governance and monitoring/control configuration).

Figure 7: The A-P-O approach within the GKC framework applied to GIs (inspired by Frischmann Madison and Strandburg, 2014). PS: Product Specification; CP: Control Plan; ST: Statutes of the producer organisation.



More in detail, in a GI context I identify:

(1) Contextual variables or basic characteristics, including the resource characteristics, the general identification of the community and, where relevant, interactions leading to rules-in-use prior to the GI registration (e.g., the regulations of use of a prior CTM).

(1.1) Resource characteristics: according to the Ostrom's scholarship, these characteristics qualify the 'environment in which the commons resides'.[264] In a GI setting the constituents of place-based reputation are: (1) a dynamic socio-cultural environment (including a specific know-how passed down from generation to generation – subjected to inter and infra generational exchanges and anchored to the traditional dimension of cultural heritage); (2) a specific natural environment (homogeneous pedo-climatic conditions which impact on the characteristics and quality of the product, including on the generic quality of the raw materials) and a name identifier of the product, functioning as infrastructure for information sharing.[265]

(1.2) The identification of the local community: a group of stakeholders having the common interest in preserving, alimenting, and protecting the local resources. The community is

264 Madison, Frischmann and Strandburg (n 146) 688.

265 The link between the product and place is tangibly evident in the distinctive characteristics of the product. Due to its primary importance, the origin link is at the core of GI theory.

identified by geographical proximity to the resource and by the common interest of its members to have access and enjoy the benefits deriving from the appropriation and use of the resource.[266] The presence of this common interest does not imply full homogeneity of roles motivations, and interests of the stakeholders involved.[267]

(1.3) Rules-in-use: with this expression, following Ostrom and Cole's perspective, I choose to identity all the rules (whether codified or non-codified, legal and non-legal) determining or influencing stakeholders' behaviour during the product specification design and, adjacently, control plan and statutes design. More specifically, I analyse the current EU and national legislation by giving insights on the observed operational consequences deriving by their formulation. These consequences can be observed (a) at the national level, on the interpretative (codified or non-codified) practices and principles followed by the competent national authorities and national and EU Courts; (b) at the local level, on the insights from case studies (resulting from existing literature and fieldwork). Specific aspects of the rules-in-use will be selected by following the building blocks of the A-P-O approach and will emerge from legal analysis.

(2) Action situation: it is represented by the decision-making process aimed to identify and formalise common standards of production in specific operational rules compliant to the legal requirements. I consider the product specification design as the core action situation. I consider as adjacent action arenas, the control plan design and the design of the statutes of the producer association or organisation. The outputs of the adjacent action situations (i.e.,

266 Role of consumers in 'recognising' the reputation is crucial. Filippo Arfini, LM Albisu and Corrado Giacomini, 'Current Situation and Potential Development of Geographical Indications in Europe.' in Elisabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (1st edn, CAB International 2011) 29 <http://www.cabidigitallibrary.org/doi/10.1079/9781845933524.0029> accessed 22 June 2023. The notion of 'consumer' has always been tackled in case law on GIs. However, the focus of this research on collective action implies putting at the centre of the analysis local community of producers' facing the problem of the erosion of place-reputation and actively engaging to protect and preserve it by using the GI as a tool. Consumers, as actors involved in the recognition of the place-reputation are external to the action situation (i.e., decision-making process for product specification design). Their role will anyway be considered while analysing the market-related spillovers derived from the GI registration.

267 Heterogeneity is a key determinant for understanding collective action in commons scholarship. It is identified as a multi-faceted concept in Amy R Poteete and Elinor Ostrom, 'Heterogeneity, Group Size and Collective Action: The Role of Institutions in Forest Management' (2004) 35 Development and Change 435 <https://onlinelibrary.wiley.com/doi/10.1111/j.1467-7660.2004.00360.x> accessed 21 March 2023; Ambika P Gautam, 'Group Size, Heterogeneity and Collective Action Outcomes: Evidence from Community Forestry in Nepal' (2007) 14 International Journal of Sustainable Development & World Ecology 574 <https://www.tandfonline.com/doi/full/10.1080/13504500709469756> accessed 22 June 2023. Cumming et al mention heterogeneity as a relevant factor, albeit recognising a difficulty in methodologically related it to outcomes (see GS Cumming and others, 'Advancing Understanding of Natural Resource Governance: A Post-Ostrom Research Agenda' (2020) 44 Current Opinion in Environmental Sustainability 26 <https://linkinghub.elsevier.com/retrieve/pii/S1877343520300129> accessed 23 March 2023). Furthermore, it is explicitly identified as a key factor of collective action in GI scholarship. Its recognised significance in GI settings and determinants will be analysed in Section II of this Chapter.

control plan and statutes) are crucial for better understanding the implementation of the product specification and the management of the sign after the registration.

(3) Participants: meaning those community members *who actually engage* in the rule-making process. They can or cannot coincide with the enlarged local community. Legally, actors-participants correspond to 'any association, irrespective of its legal form, *mainly* composed of producers or processors working with the same product'. This is the definition of 'applicants' contained in Regulation 1151/2012 (art 3). However, depending on the national legal system, this definition can be more or less strict: in France it corresponds to the notion of '*opérateurs'* and to producers members of the 'applicants-associations' in Italy. **External actors**, such as national and/or regional authorities but also local authorities' representatives and representatives of local non-producers organisations or associations, can interact with the 'group' during compromise building.[268]

(4) Outcomes: I identify two levels of outcomes. The **first level outcomes** are represented by the product specifications, formal (i.e., codified) rules resulting from the compromise between the actors involved (with different types of intervention by the national and regional authorities). The product specification is written taking into account its controllability and it actually becomes effective *if* there is a form of control and governance of the sign. The rules on the governance of the sign are represented by the statutes and the rules on controls are represented by the control plan. I identify these outcomes as adjacent to the specification which remains the main first level outcome.[269] Ostrom and colleagues identify various types of rules, at different levels.[270] My main (and simplified) focus is on 'boundary rules' at the operational level (the rules which 'define the attributes and conditions required of those who enter a position in an action situation').[271] **Second level outcomes** are the specific configurations stemming

268 Depending on the country, these interactions can be stronger or weaker, they can arise very early as a form of accompaniment of local stakeholders (until 2 years before the registration process, in France) or just consist in a mere formal assessment of the national authority on the product specification (e.g., Germany). There are examples in the middle of these two extremes. See Zappalaglio and others (n 92). For role of non-producer external actors, different from state authorities, see Vandecandelaere and others (n 81).

269 The idea that in a specific context, multiple action situations occur simultaneously is traditionally part of the IAD framework architecture. According to McGinnis, the analysis of the processes and outcomes of adjacent action situations are contextual to the main or 'focal' action situation and can be used to explain occurrences in the main action situation. See McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons' (n 89).

270 Elinor Ostrom, Understanding Institutional Diversity (Princeton Univ Press 2005) 186–215.

271 ibid 223–226. 'A key precondition for successful collective action in common-pool resources is the effective enforcement of a set of boundary rules that limits the number of individuals who are entitled to resource units'. Boundary rules are also those arrangement which identify 'a closed set of right holders' whose existence 'distinguishes a common-property resource from an open access resource.' Elinor Ostrom and others, *CPR Coding Manual* (Ostrom Workshop in Political Theory and Policy Analysis 1989) 28 <https://dlc.dlib.indiana.edu/dlc/handle/10535/10728>. The boundary rules contained in the product specification define the production steps to give to the product its specific characteristics, the delimitation of the geographical area where those steps (all or in part) should take place. These rules identify the operators concerned by the rules (i.e., those who will be subjected to controls).

out from the first level adjacent outcomes. The control system (based on the content of the product specification, the content of the control plan and the rules governing controls at the national and EU level) measures the effectiveness and enforceability of the operational rules contained in the product specification. The governance system is affected by the legal form of the producer organisation or association and on the checkpoints related to the maintenance of an adequate governance structure. Since national specificities might reveal an evolution of the legal form after the GI registration (e.g., in Italy), it is important to consider it as a type of second level outcome.

(5) The **'evaluative criteria'**: according to Ostrom's definition, they allow to identify in a specific case 'which aspects are deemed satisfactory and which aspects are in need of improvement'.[272] For the purposes of this research, evaluative criteria emerge from the nature of the outcomes as allowing the sign to perform its functions (see *supra* Chapter 1). My evaluative criteria to identify inefficiencies and efficiencies of the outcomes stem from a legal systematic approach to GI law and are aimed to ensure the coherence of GI management with the principles of fairness, equality, equity, social justice, and with the functions that the GI is supposed to perform. Moreover, they are inspired by what I call the paradigm of 'coherent transitions' which suggests realistic commitments of pre-existing legal regimes to new systems of protection, a mechanism devised to lead to empirically grounded policy recommendations and avoid panaceas.

(6) When the name is registered as a GI and used in the marketplace, feedback loops are engendered. These loops are **market-related spillovers**, generated from localised collective action (information flows targeting consumers and competitors) and **non-market related spillovers**, which help to sustain both intangible goods (traditional local know-how, a facet of cultural heritage) and natural resources (e.g., local raw materials, biodiversity, and landscape). When the GI governance is compliant with the principles of fairness, equality, equity, and social justice the sign is able to maximise market and non-market related spillovers.[273] More specifically, the generation of non-market related spillovers evokes Belletti and Marescotti's model of the 'virtuous cycle' which targets the GI potential of creating and sustaining public goods.

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272 Michael D McGinnis and Elinor Ostrom, 'Social-Ecological System Framework: Initial Changes and Continuing Challenges' (2014) 19 Ecology and Society art30 <http://www.ecologyandsociety.org/vol19/iss2/art30/> accessed 7 March 2023. In the commons scholarship, the notion of evaluative criteria is the object of specific research, as in the early versions of the IAD framework not much importance was given to them (and resulted in an open-ended list of possible ways of assessing the outcomes and the process for achieving outcomes (specific of different academic fields. See Cole (n 258) 62; Ostrom, *Understanding Institutional Diversity* (n 270) 66.

273 Multifunctionality has already been considered as an attribute of origin product systems. In particular, Belletti and Marescotti refer to 'multifunctional virtuous circle' by identifying heterogeneous and beneficial effects for producers/beneficiaries, and 'side effects' (or 'positive externalities', i.e. the creation of public goods) at the local and non-local level Belletti and Marescotti (n 17) 78–79; Vandecandelaere and others (n 81). These externalities correspond to the market-related and non-market related spillovers in the framework.

2.1.4 A-P-O and GKC in practice: methodological approach to data collection and analysis

The focus of my inquiry is to observe how heterogeneous actors involved in the GI pre-application and application process interact at different levels (process) to draft the product specification (outcomes). The draft of the control plan and the statutes of the producer organisation or association are considered as adjacent outcomes to the product specification design.

The data collection covered approximately from 2021 to early 2023 and combined documental analysis of the product specifications, control plan and statutes of the producer organisations, as well as of legal texts, and semi-structured interviews. I have elaborated a fieldwork project named 'Rules, Organisations and Opportunities for the Traditional craft Sector (ROOTS)'. It led me to perform 49 semi-structured interviews involving stakeholders belonging to the Italian and French agricultural and non-agricultural experiences in the protection of denominations of origin products. Out of these 49 interviews, one has been structured as a focus group, 12 interviews were conducted in-person, while the remaining 37 were conducted via Zoom or by phone, and 7 interviews were conducted with national authorities.

The chosen sample in the agri-food sector responded to the specific exigency of testing the A-P-O approach within the GKC framework. Targeted interviews aimed to gain specific insights on relevant case studies, complementing the findings available in the interdisciplinary literature on agri-food GIs.

The diversity of the sample chosen (spanning over 10 product classes in the agricultural and non-agricultural sector) highlights the efficiencies and inefficiencies emerging from collective action initiatives, shaped by the legal framework governing the functioning of different IP tools. This diversification has been preferred to the in-depth analysis of fewer case studies to gather sufficient insights for elaborating policy suggestions.

The steps undertaken for the data collection and analysis are described in detail in the table below (Table 5). In a nutshell, I firstly tested the use of the A-P-O approach within the GKC framework applied to GIs systematising existing knowledge on how stakeholders receive, interpret, and apply existing formal rules on GIs in the agri-food context. Data systematisation, collection and analysis has been based on the one hand, on the constituents of the A-P-O approach and, on the other hand, on the more specific themes emerging from the GKC and IAD derived from the literature review, enriched with insights from the field. The use of the diagnostic framework as a guideline to data collection (i.e., draft of the interview protocols for semi-structured interviews or preparation of the focus group) and thematic analysis (coding) of interview transcripts and relevant documents

allowed cross-case and cross-country comparison.[274] The results of this first methodological test are generalised in three axes of inquiry targeting the Actors, the Process, the Outcomes. These axes, coherent to this diagnostic approach and useful to cluster thematic categories of analysis, constitute my working hypotheses for the analysis of valorisation and protection initiatives of denominations in the non-agricultural context and benchmarks for discussing policy reforms.

Table 5: Step-by-step data collection and analysis.

Data collection	Step 1: documental analysis	First analysis of the legal texts for cross-country comparison (Italy and France) of national legislation vs. EU legislation on agricultural and non-agricultural GIs.
	Step 2: first contact with participants and availability check	First contact with relevant stakeholders, presentation of the fieldwork project named 'Rules, Organisations and Opportunities for the Traditional craft Sector (ROOTS)' and availability check of participants. Snowball sampling to identify available interviewees (from a minimum of 1 person to a maximum of 5 people).
	Step 3: interview protocol	Elaboration of an interview protocol based on the general themes of the A-P-O approach within the GKC framework applied to GIs.
	Step 4: informed consent	Presentation of the fieldwork project to the participants, signature of the informed consent form by the participants as approved by the Ethics Board of the University of Amsterdam, and storage of the digital copy of the informed consent on the UvA directory OneDrive.
	Step 5: interview	Interviews were conducted in person, online, or by phone depending on the availability of the interviewees and lasted approximately 60-90 minutes (in exceptional cases 120 minutes). If further clarifications were needed, the first round of interviews was followed by a second round or follow-ups via email. When the interviews were made in-person, they were accompanied by visits of exploitations/production sites on producers' premises.
Data analysis	Step 6: transcript	The transcript of the semi-structured interviews was, in the majority of cases, integral. Partial transcripts were preferred when the themes addressed by the participant were considered off-topic or when the participant expressly asked to keep their declarations off-records.

274 Madelaine Mutel and Nicole Sibelet, 'L'interpretation Des Données: L'examen Discursif' [2013] CIRAD-IAMM-SUPAGRO-UVED <https://docplayer.fr/5778057-L-interpretation-des-donnees.html>; Mireille Blais and Stéphane Martineau, 'L'analyse inductive générale :description d'une démarche visant à donner un sensà des données brutes' (2006) 26 Recherches qualitatives 1 <http://id.erudit.org/iderudit/1085369ar> accessed 17 May 2023; Manfred Max Bergman and Anthony PM Coxon, 'The Quality in Qualitative Methods' (2005) Vol 6 Forum Qualitative Sozialforschung / Forum: Qualitative Social Research Reuse <http://www.qualitative-research.net/index.php/fqs/article/view/457> accessed 17 May 2023.

Data analysis *(Continued)*	Step 7: first data processing	First analysis of the semi-structured interviews and documents related to French and Italian agricultural GIs through a specific coding system, or thematic analysis. The identification of the codes was an on-going process, and it has been conducted using a qualitative data analysis software (MAXQDA). This type of analysis was aimed to identify thematic occurrences both in documental sources and interview transcripts and to define and refine the themes. Co-occurrences of multiple codes (or themes) were sometimes detected. The themes or codes follow the structure of the A-P-O approach within the GKC framework applied to GIs. (Annex 3)
	Step 8: creation of the axes of inquiry	End of the test phase and creation of the axes of inquiry based on the agricultural GI experience in France and Italy.
	Step 9: Refining data processing and analysis through the methodological questions	Analysis of the results related to non-agricultural experiences in France and Italy: for each component of the A-P-O and related part of the GKC framework applied to GIs and depending on the type of approach used (*ex post* for French non-agricultural GIs and *ex ante* for Italian CTMs), the methodological questions as formulated in Table 17 and Table 18 were targeted. The analysis consisted first in isolating the legal rules relevant for each target of the A-P-O, then in targeting the interview contents clarifying the interpretation/ operationalisation of the legal rules by the actors. The analysis ultimately aimed to assess if and how the axes of inquiry designed on agricultural GI experiences identify similar or diverging trends in the experiences in the industrial and craft sector.

The data collected through the ROOTS project can be regrouped in three clusters:

- **First level data**: documental analysis of the product specifications, statutes, control plans, case law (where available) and other documents specific to the national procedure (e.g., summaries of the public inquiry for French cases). The information gathered through first level data were essential to better understand context-specificities and craft appropriate case-specific questions during fieldwork. These written questions, however, represented a general guideline and followed the thematic general frame given by the A-P-O approach and the GKC framework applied to GIs.
- **Second level data**: transcripts of semi-structured interviews with *producers* directly involved in an initiative of valorisation or protection of denomination of origin products.
- **Third level data**: transcripts of semi-structured interviews involving actors *different from producers* but having observed and/or actively participated as external actors in the GI characterisation and application procedure (national authorities and consultants).

2.2 SECTION II – Testing the diagnostic approach on commons management on GI governance

Targeted interviews (involving representatives of producers' groups, national and regional authorities and control bodies – see Annex 2)[275] integrate existing literature on agri-food GIs. I show that, despite the advanced administrative structure and legal framework developed in Italy and France, the operationalisation of the rules on collective action is a complex matter and can lead to fragilities and inefficiencies at the local or national level. Many of these inefficiencies are rooted in the implementation of the legal rules during the GI application phase.

2.2.1 Actors: heterogeneity, community, and participants

Heterogeneity is considered, in commons scholarship, as an important and multi-faceted factor shaped by various determinants and which can impact, positively or negatively, on collective action. Despite its importance, it has proven to be challenging to empirically test its role in specific settings. For our purposes it is useful extract a general definition of heterogeneity in GIs. Several studies show that heterogeneity (a) is context and resource-dependent[276]and is shaped by multiple **determinants** (e.g., wealth disparities, social and cultural differences, locational differences). These determinants reveal heterogeneous stakeholders' interests, motivations, and expectations; (b) it can impact on stakeholders' cooperation, or 'degree of collective activity',[277] by posing challenges to the group cohesion and compromise building and (c) it can affect stakeholders' relationship with the resource, for example as to its access and use, but also the allocation of the benefits.[278] The determinants of heterogeneous motivations, interests, and expectations might affect (positively or negatively) stakeholders' alignment towards shared objectives embedded in

275 All the declarations made by representatives of national and regional authorities during the interviews are to be considered as 'technical experts 'opinions' emerging from on-the-ground experiences, and not as official declarations of the institution itself.

276 This means that substantial differences might occur when the resource is tangible or intangible, but also among different types of tangible and intangible resources. See inter alia Janis Geary, Trish Reay and Tania Bubela, 'The Impact of Heterogeneity in a Global Knowledge Commons: Implications for Governance of the DNA Barcode Commons' (2019) 13 International Journal of the Commons 909 <https://www.thecommonsjournal.org/articles/10.5334/ijc.861/> accessed 21 March 2023.

277 Case studies on forest management by Varughese and Ostrom showed that heterogeneity per se is not problematic for the likelihood or success of collective action. 'The attributes of different groups affect the structure of constitutional and collective choice arenas within which users decide how to organise themselves and which rules to adopt to allocate rights and duties as well as costs and benefits. Successful groups overcome stressful heterogeneities by crafting innovative institutional arrangements well-matched to local circumstances'. George Varughese and Elinor Ostrom, 'The Contested Role of Heterogeneity in Collective Action: Some Evidence from Community Forestry in Nepal' (2001) 29 World Development 747, 762 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X01000122> accessed 21 March 2023. It follows that 'a single optimal design of institutional rules does not exist' and policymaking can intervene to encourage stakeholders to recognise and agree on rules capable of addressing collective action problems derived from actors' heterogeneity. See Poteete and Ostrom (n 267) 20.

278 Varughese and Ostrom (n 277); Geary, Reay and Bubela (n 276).

resource maintenance and management.[279] According to McGinnis, 'rule-makers may or may not be the same people as those who appropriate or maintain resources and are generally not able to directly observe compliance with the rules they have written'.[280]

In the context of intellectual commons, 'the identity of community members may be clear, or questions may exist about how the community is constituted.'[281] The eligibility to participate in the decision-making process can depend on the compliance to specific standards.[282]

Actors can be participants or non-participants in the rulemaking process, they might or not be directly concerned by the rule enforcement. The coincidence between the role (or position) of actor-participant and actor-concerned by the rules has been recognised by Ostrom as a factor of success of common-pool resource systems 'externally imposed boundaries may not be viewed as legitimate by those who have care for a resource for long periods of time. If imposed boundaries are enforced, they generate substantial costs for local people'.[283]

The qualification of actors-participants (to the rulemaking process) is also relevant in the contraposition between the State and local communities. Local community members might be seen, from the commons perspective, as antagonists to the State because the community is considered to have this self-governing capacity to find tailored-made solutions to the problem affecting the resource. By virtue of this proximity to the resource, local community members are the best suited actors to make decisions and avoid panaceas. However, this interpretation might be misleading: the role of the State, in the commons scholarship, can also be 'benevolent and supportive and try to facilitate cooperative behaviour more generally', provide legitimacy to the actors and set some legal boundaries for a fair and equitable action.[284]

Some studies focusing on GIs stressed the importance of actors' heterogeneity between small and big producers as one of the factors leading to power asymmetries. Sometimes it coincides with an opposition between (newer) industrial and (older) traditional production processes. Other

279 See also Claudia Sattler and Barbara Schröter, 'Collective Action across Boundaries: Collaborative Network Initiatives as Boundary Organizations to Improve Ecosystem Services Governance' (2022) 56 Ecosystem Services 101452 <https://linkinghub.elsevier.com/retrieve/pii/S2212041622000481> accessed 17 April 2023.

280 McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons' (n 89) 94.

281 Madison, Frischmann and Strandburg (n 146) 690.

282 Ostrom, Understanding Institutional Diversity (n 270) 194–197.

283 ibid 262.

284 Erling Berge and Frank Van Laerhoven, 'Governing the Commons for Two Decades: A Complex Story' (2011) 5 International Journal of the Commons 160 <https://www.thecommonsjournal.org/article/10.18352/ijc.325/> accessed 22 June 2023.

studies explored how actors' heterogeneity within the group could affect cooperation.[285]These studies, more or less implicitly, identify a connection between some factors of heterogeneity and stakeholders' motivations and interests, and seem to be particularly focused on intra-group heterogeneity (Table 6), while considering the involvement of public and private actors as a separate item.

Table 6: Determinants of heterogeneity resulting from interdisciplinary literature on GIs

Determinants of intra-group heterogeneity
Size divergences among 'small' and 'big' producers which might lead to power asymmetries.[286]
The degree of vertical integration (i.e., an actor plays several roles in the value chain and thus is the bearer of interests related to his position) might create power asymmetries, affect the repartition of benefits and trust.[287]
Location divergences among producers.[288]
Divergences in quality standards or production techniques among producers, including industrial and artisanal productions, which lead to a different conceptualisation of the GI product, including divergent views on the extent of the geographical area.[289]
Number of producers involved (group size).[290]
Presence of old and new producers.[291]

285 Domenico Dentoni, Davide Menozzi and Maria Giacinta Capelli, 'Group Heterogeneity and Cooperation on the Geographical Indication Regulations: The Case of the "Prosciutto Di Parma" Consortium' 28.

286 Carimentrand and others (n 173); Delphine Marie-Vivien and others, 'Controversies around Geographical Indications: Are Democracy and Representativeness the Solution?' (2019) 121 British Food Journal 2995 <https://www.emerald.com/insight/content/doi/10.1108/BFJ-04-2019-0242/full/html> accessed 17 June 2022.

287 Rangnekar, in particular, refers to the case of Parmigiano Reggiano where the wholesale-ripeners control trade and have 'superior bargaining positions' and the vertical integration is low (meaning that 'some dairy firms have vertically integrated into ripening'. This example highlights how the structure/reorganisation of the value chain, affected by actors' heterogeneity, impacts on collective action. For more details, see Rangnekar (n 26) 4–5.

288 Quiñones-Ruiz and others, 'Why Early Collective Action Pays Off' (n 96).processors, public authorities and research centers. We analyze their efforts, risks and benefits by comparing two EU GI registration processes in Italy and Austria, namely the Sorana bean Protected Geographical Indication (PGI In this study, the authors show how stakeholders' group size and heterogeneity (e.g., the number of stakeholders involved and the tensions among sub-groups) negatively affect the efforts and time spent for the GI registration. This correlation however can be accompanied by positive effects on the benefits derived from the registration. The authors explicitly identify a correlation between group size and heterogeneity and commons way of management.

289 Carimentrand and others (n 92); Quiñones-Ruiz and others (n 40); see the case study of Bitto Cheese in Edelmann and others (n 39) and Marianne Penker and others, 'Polycentric Structures Nurturing Adaptive Food Quality Governance - Lessons Learned from Geographical Indications in the European Union' (2022) 89 Journal of Rural Studies 208 <https://linkinghub.elsevier.com/retrieve/pii/S0743016721003570> accessed 18 July 2022; a comparable example involves the case study on Prosciutto di Parma PDO, described in Dentoni, Menozzi and Capelli (n 91).Menozzi and Capelli (n 91 In both these examples, divergences in views on the GI product and in quality standards caused the creation of concurrent producers' groups, with divergent views as to the characteristics of the origin product.

290 Quiñones-Ruiz and others, 'Why Early Collective Action Pays Off' (n 96); Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (n 98).

291 Carimentrand and others (n 173).

Determinants of intra-group heterogeneity
Different number of employees, turnover, amount of production, organisational structure of producers, including procurement and marketing channels.[292]

My approach to actors' heterogeneity is holistic and transversal: it includes both **intra-group heterogeneity** and **extended heterogeneity**. As suggested by the commons scholarship, I focus, specifically and explicitly, on the determinants of interests, motivations, and expectations towards the GI registration. Yet, I consider determinants of intra-group heterogeneity the attributes of the local producer group (e.g., location divergences, differences in quality standards or production techniques, divergences related to their roles within the value chain etc.). I consider determinants of extended heterogeneity the attributes of distinguishing the producer group from actors different from the producer group. Relevant for my analysis is, for example, their nature (State and non-State), their roles in the action situation (i.e., they can be participants, facilitators, or supporters of the rulemaking leading to the GI application and registration procedure) especially if external to the value chain (e.g., municipalities or other local organisations, control bodies and national authorities).

The choice of considering heterogeneity as a wide, full-encompassing concept is justified by the fact that heterogeneous actors' motivations and interests drive and influence interactions during the pre-application and application process and the nature of the outcomes. In some national contexts (i.e., those with a more long-standing tradition) the GI system is more structured and a horizontal cooperation and vertical integration between producers, processors and traders might develop long before the GI application. These complex governance structures might be challenged, for example, when restructuring the supply chain becomes the underlying strategy beyond GI registration. In other cases, they might affect actors' expectations on the GI registration, in particular concerning the distribution of the benefits. This can influence the performance of the communication function of the sign and modulate the power asymmetries which sometimes involve actors different from producers, including the intermediaries.[293] These factors add on the number of determinants of stakeholders' behaviours and allow to trace linkages between their contribution in shaping the outcomes of the GI initiative.[294]

292 Dentoni, Menozzi and Capelli (n 285).

293 I refer here, for example, to the role played by retailers or traders, considered by Rangnekar as the 'final gatekeepers of consumers', who might affect producers' capacity to efficiently reach the market. The GI in this sense should represent a safeguard for the correct functioning of the information flow between producers and consumers (communication and guarantee function), provided that the decision-making power is proportionally distributed among the actors. This issue has also emerged during fieldwork and referring to the olive oil value chain (Interview with regional authority Tuscany, 19 July 2022, para 31). For more general insights on the role of intermediaries see Rangnekar (n 26) 6.

294 A similar 'transversal' and 'holistic' approach is applied in Poméon and Fournier (n 108).

My definition of 'actors' contextualised to GI application implies (a) the *community*, namely the local stakeholders involved, directly or indirectly, in the production, promotion, and consumption of the origin product at the local level, external and internal to the value chain (e.g., traders, local administrative authorities, other producer groups, local associations); (b) the *participants*, namely the actors who are in the position of formally undertaking the GI application before the competent authorities (the producers or operators) and who will most likely be bound by the rules contained in the specification; (c) *external* non-localised *public and private bodies* (e.g., competent authorities, control bodies, and universities). They might intervene to any degree, and in various moments of the application phase, for supporting the applicants-participants in the drafting of the specifications, the statutes and the control plan.

Looking at the attributes of the actors in the context of collective action is interesting from a legal perspective because it might show different levels of involvement in the GI project of the community members, external and internal to the value chain. It can also reveal their effective participation in the association or organisation recognised as the producer group. This conceptual differentiation between 'community' and 'participants' can flag when producers, despite being bound by the product specifications, *de facto* might not be rule makers. This configuration could impact on the participants' commitment to rule-compliance in the long run and create unnecessary barriers for new producers to access the use of the name and enjoy place-based reputation.[295]

Moreover, heterogeneous actors might be interested, in different ways and at various levels, in the valorisation and protection of the product.[296] Even though the producers have a direct economic interest in preserving the value of the place-based reputation, the community of stakeholders 'at large' might have different motivations for the valorisation and/or protection of the name.[297]

295 Graham Epstein, 'Local Rulemaking, Enforcement and Compliance in State-Owned Forest Commons' (2017) 131 Ecological Economics 312, 313 <https://linkinghub.elsevier.com/retrieve/pii/S0921800916300106> accessed 21 March 2023. In the GI context, Pick explicitly tackles this issue referring to the Vietnamese experience affirming that 'while public intervention signals the increasing importance attached to GIs and should be welcome to promote their use in a country where this concept is still new, this approach also comes with its own pitfalls. The fact that GI projects are driven by outside actors proves problematic for local stakeholders to understand the concept of GIs, take ownership and participate willingly in the initiatives.' See Pick (n 33) 62.

296 This differentiation has also been highlighted by Vandecandelaere et al., who identify four categories of stakeholders: the stakeholders within the value chain (companies involved in the production process), outside the value chain 'but still on the territory', including local communities, institutions, consumers, producer organisation and local administrations. According to the authors, other types of stakeholders can also be located outside the territory but who are involved (or could potentially be involved) in the process as intermediate purchasers, consumers, etc. Vandecandelaere and others (n 81) 40. On this topic see also Carimentrand and others (n 173).

297 The valorisation of place-based reputation through the registered name is perceived by potential applicants as an important aspect of the GI legal protection. As Vandecandelaere et al. also recognise, 'the "protection only" purpose may exist in limited cases, where the GI product is highly reputed, with a much higher price higher price than similar products and where market imitations are widespread. Very often, local stakeholders are also interested in the overall approach to the codification process, including product characteristics linked to geographical origin and in the official

Sometimes, **divergent views** might affect the motivations behind the GI registration and the distinctive characteristics and qualities of the GI product.[298]

Moreover, reflecting upon the nature and role of the applicants allows to introduce the important concept of **legitimacy** of the applicant producer group, often overlooked in the legal debate on GIs. The boundaries set by the rules contained in the specification already define who is eligible to use the registered name. Because of the absence of harmonised rules at the EU level, national approaches diverge. In Italy it is explicitly recognised by law, while in France despite being not explicitly codified, it is informally considered in the practice of the national authorities (especially during the assessment for the formal recognition). I will analyse this topic more in detail in the section related to the Process.

2.2.1.1 EU legislation: requirements for the applicants

According to art 3 (2) Reg. 1151/2012: "'group' means any association, ***irrespective of its legal form***, ***mainly*** composed by producers or processors ***working with the same product***". This formulation implies the involvement of actors *different* from 'producers or processors working with the same product'. The wording of this article does not exclude the participation to the input and decision-making of stakeholders different from GI producers (e.g., investors, traders, municipalities, etc.).

Any association '***irrespective of its legal form***, can be considered as a GI applicant. This element, on the one hand might not reduce the existing regulatory fragmentation at the national level; on the other hand, it might ideally grant to all types of producer groups (independently from their degree of organization and coordination) access to the GI protection, provided that the origin link between the name and the place is adequately proven. However, the following empirical analysis shows that the legal form of the producer groups and the presence and effectiveness of monitoring mechanisms can, in some national contexts, affect their capacity to sustain the GI management in the long term. The same article mentions that applicant producer groups should be producers '***of the same* product'**. This formulation could be perceived as restrictive concerning the possibility that that a producer group (or recognised producer group) oversees the management of more than one PDOs or PGIs. It will be shown that some producer groups, especially in France, are increasingly choosing to be represented by an umbrella association responsible for managing

recognition that legal protection may provide' (Vandecandelaere et al., 154). Poméon and Fournier observed that, for the registration of the name 'Kintamani Bali' coffee, stakeholders' motivations to register the sign did not respond to the classical objective of protecting the name against counterfeiting (i.e., enforcement potential of the GI). They were interested in reinforcing reputation, using the GI as a differentiation tool in the marketplace against mainstream products (i.e., communication, investment and advertising function). Thomas Poméon and Stéphane Fournier, 'La Construction Sociale Des Labels Liés à l'origine Des Produits Agroalimentaires: Une Conciliation Entre Des Intérêts Contradictoires? Etudes de Cas Au Mexique et Indonesie' [2010] ISDA, Cirad-Inra-SupAgro 9–12.

298 Vandecandelaere and others (n 80) 154 ; Carimentrand and others (n 173).

more than one quality scheme (multi-product Producer Defence and Management Organisations, hereinafter 'PDMOs', in French *Organisme de Défense et Géstion*, 'ODG').

2.2.1.2 French national legal rules on the requirements for the applicants

In **France,** since 2006, producer groups must be recognized as PDMO of the PDO or PGI through a formal and compulsory application before the INAO (*Institut national de l'origine et de la qualité)*. It is filed simultaneously to the application for GI registration according to art L. 642-17 of the *Code Rural et de la Pêche Maritime* (hereinafter 'French Rural Code'). [299] This application is followed by a decision of the director of the INAO, a favourable opinion of the national committee competent for the product concerned (art R. 642-34 French Rural Code) based on the report of the commission of inquiry, if it is appointed.[300]

The PDMO strictly federates the operators of the PDO or PGI, meaning 'any stakeholder who actually participates in the production, processing, preparation or packaging activities provided for in the specification of a product identified with an origin and quality scheme' (art L. 642-3 French Rural Code). The rules concerning its composition and functioning are aimed at ensuring the participation to the PDMO by all GI operators.

The French Rural Code does not explicitly specify the **legal form** to be adopted by the producer group. However, art L. 632-1 envisages the possibility to be recognised as interbranch organisation according under specific conditions. Art L. 642-18 states that interbranch organisations can be recognised as PDMOs if they comply with the requirements stated in art L. 632-1-L. 632-12 or if they are created by law, and if they were in charge of the tasks and responsibilities attributed to the PDMOs until 1 January 2007 (art L. 642-19 French Rural Code). The status of interbranch organisation is, therefore, an additional feature formally attributable to groups (organisms having legal personality) involving several stakeholders involved in various steps of the value chain (including processing, but also distribution, and commercialisation). However, these organisational forms should include as a necessary compulsory requirement, producers.[301]

299 According to the Max Planck Institute 'Study on the Functioning of the EU GI System', France is one of the countries to have established additional requirements for the applicants, compared to those defined in the Regulation. Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' (n 83).

300 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion*, p 3 . <https://www.inao.gouv.fr/content/download/1992/20309/version/1/file/2017%2004%2007%20Guide%20demandeur%20ODG.pdf>.

301 This has been done to facilitate simplification and monitoring after the GI registration, to avoid rule conflicts between the legal framework related to inter-branch organisations and the framework governing the functioning of PDMOs. Moreover, the scope and objectives attached to these two legal forms are very different: the missions of inter-branch organisations have a wider scope, which might include also the function of PDMO.

Art L. 642-17 of the French Rural Code clearly states that 'the same PDMO can manage and protect **several products**'. This condition can occur provided that the PDMO is considered accountable for and ensures the defence and management of '*each product* benefiting from a sign identifying origin and quality', elaborating the product specifications and favouring its implementation and control, pursuing administrative and operational tasks (art L. 642-22 and art R. 642-34).

2.2.1.3 Italian national legal rules on the requirements for applicants

In **Italy,** the 'group' strictly defined as constituted by the producers and/or processors involved in the production of that specific product.[302] Compared to Reg. 1151/2012, art 4(1) of the Ministerial Decree 14 October 2013 states some stricter requirements, namely: (1) 'the producers' group, explicitly identified as 'legitimated actors' in art 4, should be an **association** having, among its objectives, the registration of the product whose denomination is to be registered (or has passed a resolution in the assembly to apply for the registration of the denomination) ; (2) has, in its statutes, the provision that the association may not be dissolved before the purpose for which it was established is achieved'. Yet, the minimum level of organisational structure required to producer groups *to apply* is a 'temporary association' (in Italian '*associazione di scopo*').[303] This means that the association is required to be in place until the GI registration or rejection of the application. The Ministerial Circular of 28 June 2000 n. 4 identifies this rule as '**stability requirement'**, which is deemed necessary 'to grant the legal capacity of the applicant to sustain the activities related to the registration procedure, and to resist possible oppositions'.[304] For this purpose, the Ministerial Circular stated that 'it is required that the dissolution of the association does not occur before the achievement of the purpose for which it was created'. This rule is very interesting because it implicitly allows producer groups to dissolve the association aimed to the GI registration after this objective is achieved. It also implies that, differently from France, a formal collective organisation is not mandatory in Italy to manage a PDO or a PGI, being sufficient for each producer to be subjected to the control for certification by the designated control bodies.[305] The

302 Art 4, 3 (a) Ministerial Decree 14 October 2013. However, it is worthy to note that art 2 of the same Ministerial Decree identifies a 'group' exactly with the same wording used in the Regulation ('mainly constituted by producers and processors involved in the production of the same product').

303 The Ministerial Circular n. 4 of 28 June 2000 clarified explicitly this aspect. It also envisaged the possibility of the submission of an application by Promoter Committees or Organisations, provided that the Promoter Committee or Organisation '(a) is established by public act; (b) has as one of its corporate purposes the registration of the product for which it is applying for registration; (c) is the expression of the producers and/or processors falling within the territory delimited by the specification referred to in Article 4 of the Regulation'. The Promoter Committee should also be capable of representing the economic interests of its member producers and/or processors. The constitution of Promoter Committees was easier to achieve than the constitution of an association. Interviews confirm that today associations are the most widespread form of association and that the majority of Promoter Committees constituted since 2000 have been converted (post-registration) in association or Promotion Consortia. See Interview with representative regional authority Tuscany, 19 July 2022, para 8.

304 Ministerial Circular of 28 June 2000 n. 4, p 2.

305 see *infra* Chapter 2, Section II, outcomes, control configuration.

Italian legislator makes available a diversified range of options as to the legal form of the producer group (associations, non-recognised consortia[306], and recognised Protection Consortia), which corresponds to different level of engagement and non-uniform regulatory regime. It will be shown later how this specific configuration might affect the level of coordination between the actors and, more generally, the management of the registered sign.

The definition of 'producer association' defined in the Ministerial Decree 14 October 2013 does not include any formal legal requirements concerning its characteristics and functioning of the producer group to be verified by the competent authority during the application for registration. More details in this regard, instead, emerge in art 13 of the same Decree related to product specification amendments. Additional insights in this regard will be analysed later in this chapter.

In Italy, the possibility of **managing more than one PDO or PGI** is reserved only to Protection Consortia, under specific conditions. Since the formal recognition of Protection Consortia occurs only after the GI registration, I will tackle the relevant issues in the section related to the outcomes.[307]

2.2.1.4 Implementation of the national legislation

2.2.1.4.1 France: a producer-centred approach with multi-level governance opportunities

The French Rural Code only refers to the PDMO as an 'organisation' or 'association' without specifying the requirements for the legal forms. However, in practice the most frequent types of producer groups recognised as PDMOs are 'associations' (the most common being the *Association loi 1901*) and '*syndicats professionnels*' (defined in art L. 411-2 of the French Labour Code)[308] and, under the abovementioned legal requirements, these forms can be recognised as interbranch organisations. This specification is contained in the French Applicant's Guide for obtaining the recognition as PDMO (hereinafter 'Applicant's Guide PDMO'), which is an ensemble of codified national practices that inform and help the interpretation of the GI legal rules contained in the French Rural Code. Interviews with the national authority also confirmed this function, specifying that the absence of more precise requirements is justified by the willingness to preserve a degree of flexibility at the producers' advantage. The producer group must however fulfil the requirements enabling it to perform the tasks and responsibilities to act as PDMO.[309]

306 Non-recognised consortia are consortia that do not reach the necessary threshold of 66% for representativeness. They are therefore not eligible for the formal recognition as Protection Consortia by the Ministry of Agriculture.

307 See *infra* outcomes, governance configuration.

308 The presence of 'syndicat professionnels' derives from the old configuration typical of the wine sector, the only one managed by the INAO until 1992. See Interview, INAO Legal Department, 16 September 2022, para 37.

309 ibid., para 37.

The three legal forms (associations, *syndicats*, and interbranch organisations) are considered, from this perspective, as 'equivalent' by the INAO. However, interviews showed that associations could grant more flexibility than the *syndicat* as to the attribution of membership to actors not strictly involved in the production phases (but contributing, for example to its commercialisation), being traditionally created to protect a specific professional category. Including more professional categories might therefore be the reason for some producer groups to change their structure from *syndicat* to association, apart from benefiting from more advantages in terms of taxation.

Instead, the limitations envisaged for the eligibility of inter-branch organisations, are due to their vocation of covering the upstream and downstream of the value chain. This peculiar nature favours vertical integration, but also makes it more challenging, in practice, the control on anti-competitive behaviours such as the presence of (formal or informal) barriers for the use of the sign by the operators concerned.[310]

Existing interdisciplinary literature on GIs repeatedly showed that intra-group heterogeneity, depending on the production processes involved, can affect compromise building. Emblematic are the examples where the traditional artisanal production has been combined with industrial production, which raised debates concerning the product characteristics and the distribution of the bargaining power between the actors (industrial and artisanal producers), animated by different interests and motivations in the GI protection.[311] Other examples refer to the structure of the value chain, which can be more or less complex depending on the product class. However, it has been demonstrated that high intra-group heterogeneity does not automatically lead to failures or inefficiencies: rather, the GI initiative, when it is producer-driven, can be an opportunity for re-shaping power relationships along the value chain and foster producers' empowerment.[312]

Intra-group heterogeneity is relevant when one **PDMO manages several denominations,** as this implies a complex governance structure**.** As already mentioned, art L. 642-17 does not specify additional requirements for particularly complex PDMOs. However, the Applicant's Guide PDMO clarifies the recognition of the PDMO is made for each candidate PDO or PGI. In these cases, the application file is submitted (and assessed) separately for each denomination. This means on the one hand that if a PDMO is already recognised as the right holder of one PDO or PGI, a new assessment will be made independently from previous recognition for previously registered

310 ibid., para 45.

311 The examples refer, in particular, to product specification amendments of *'Camembert de Normandie'* PDO and 'Tomme des Pyrenées' PGI, described in Marie-Vivien and others (n 286).

312 Xiomara F Quiñones-Ruiz and others, 'Can Origin Labels Re-Shape Relationships along International Supply Chains? – The Case of Café de Colombia' (2015) 9 International Journal of the Commons 416 <https://www.thecommonsjournal.org/article/10.18352/ijc.529/> accessed 20 May 2020.

signs.[313] On the other hand, this more complex governance structure should ensure that, for each PDO or PGI, the relevant producers are concerned by the decision-making process involving 'their' sign, especially concerning the formulation or amendment of the product specification and control plan.

At the local level, however, interactions between all producers involved in the PDMO can be more complex than those limited to the producers of a single GI product. In France, it is more and more frequent to observe that one entity coordinates multiple quality schemes and certifications. Based on the data gathered in this research, two different scenarios can occur: (a) the **multi-product association is recognised as PDMO** by the INAO, federating producers located in the same region not necessarily working with products belonging to the same product class; (b) the PDMO is structured as a **federation of PDMOs** and not formally recognised as overarching PDMO. In the first scenario, inclusive proximity between the managerial actors and producers facilitates knowledge exchanges and can boost the network effect at the local level. [314] The multi-product PDMO is in charge of representing the interests of all PDOs and PGIs (generally organised as 'sections' of the PDMO) at the national and EU level, managing the budget, and supervising the decision-making process internal to each section, which should maintain their independence as to the decisions related to its PDO or PGI (e.g., the modification of the specification, of the control plan, etc.).[315] Even though the French legal framework does not forbid the registration of multiple GIs by the same producer group recognised as PDMO, data showing a multi-product PDMOs registering (simultaneously) more than one PDOs and PGIs are currently unavailable. It remains therefore a phenomenon subsequent to the GI registration. It originates from the incorporation of several PDMOs under one overarching PDMO. These types of spontaneous organisations are interesting when it comes to the compliance to the principles of representativeness, representation, democratic functioning, and transparency.[316]

The federation of PDMOs is not formally recognised as overarching PDMO, meaning that it is not in charge of the powers and responsibilities defined by the French Rural Code. The federation is not legitimated to legally represent its members (the PDMOs), which maintain their decisional and operational independence and diversity. An example is CNAOL (*Conseil National des Appellations d'Origine Laitières*) which regroups PDOs of cheeses and other dairy products at the national level. Its objective is having a global overview of the activities and organisation of its members,

313 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 3.

314 In some cases, there is an overlapping or roles between the 'actors-participants', which favours the capacity to act as a group and cumulate the defence and management activities attributed to the PDMOs.

315 Interview with multi-product PDMO, 1 July 2012, para 28.

316 See *infra*, Chapter 2, Section II, Process.

facilitating networking and, in this capacity, assisting them as to the exchange of best practices and input for research and development activities (e.g., in the context of sustainable value chains). The federation can also represent the interest of its members in national and EU arenas and actively advocates for the preservation of 'living knowledge' maintained by GI producers.[317]

A common element between the federations of PDMOs and the multi-product PDMO could be represented by the centralisation, at a higher level, of actions aimed to the promotion of the signs in the marketplace (communication, investment and advertising functions), whose costs can be more easily mutualised by the members. However, differently from the federation, the multi-product PDMO is a legal entity recognised by the INAO and its governance structure not only affects the mutualisation of costs, but also contributes to monitoring and enforcement, and internal controls.

2.2.1.4.2 Italy: controversies and safeguards for producer-driven initiatives and diversified governance structures (the phenomenon of 'half-sleeping' GIs)

Interviews with the Ministry of Agriculture showed that the definition of 'GI applicant' provided by art 4(1) Ministerial Decree 14 October 2013, is interpreted restrictively for limiting the involvement of actors external to the value chain in the decision-making process for product specification design. In other words it ensures that 'GI producers are and remain at the core of GI management'.[318] Actors external to the value chain (public or private, e.g., representatives of the municipality, regional agencies, chambers of commerce, and other stakeholders external to the value chain), sometimes have a strong leadership at the local level and can be the main divers of the GI project. These dynamics are frequent and can impact the GI governance as a bottom-up, producers-driven, and producers-centred process. The involvement of heterogeneous actors different from producers can 'disturb' the product specification design and affect the formulation of the rules, which are addressed to producers in the first place.

In practice, the Ministry of Agriculture and regional authorities can verify if the GI initiative has been carried out exclusively by producers. If this participation is not formalised in the organisational structure of the applicant association, a modification of the statutes can be suggested.[319] Despite this rule, the participation of actors external to the value chain sometimes cannot be avoided and can still (informally) affect the configuration of the GI and the management of the sign over time.

317 Interview with French producer federation, 26 July 2022. For deeper insights on the overarching role of CNAOL in the preservation and protection of 'living knowledge' shared by the federated PDOs see Mariani, Cerdan and Peri (n 164).

318 Marie-Vivien (n 36) 342; Pick and Marie-Vivien (n 75) 5. See Interview with Ministry of Agriculture, 28 January 2022, para 2.

319 Interview with regional authority Tuscany, 19 July 2022, para 21.

This is not a minor element, because if producers are not the subjects involved in the rule making process, they might be discouraged from rule compliance. In fact, producers' motivations, and awareness on the advantages in using the GI can be weakened in the long term if the input for the registration came from actors different from producers, or if the producers taking the leadership in the GI initiative are not informed about the constraints embedded in the GI registration.[320] This might represent another cause of structural fragilities leading to a weak performance of the sign in the long term, and it can emerge from the lack of producers' engagement, coordination, and commitment after the GI registration.[321] In the worst case, they might even renounce to use the PDO or PGI in the marketplace, preferring to 'invest' in other distinctive signs, such as collective or individual trademarks.

The case of *Pecorino di Picinisco* PDO shows some aspects of this type of dynamics. It was registered in 2013, for the product class 1.3 (Cheeses), by a producers' association, funded in 1999. About 20 producers, including sheep breeders and processors joined the association for the registration of the sign. Today only 2 producers (who are both breeders and processors) use the GI. As already shown by De Rosa et al. in 2017, from the social and economic perspective, multiple causes are at the roots of the underuse of the registered name.[322] Among them, the lack of perception of the economic and social benefits of the GI initiative ('facilitating the small-scale producers' upgrading') and the low level of cooperation and communication between the actors involved, which negatively impacted on the preservation of social capital and trust in the long term. *Pecorino di Picinisco* PDO is a small GI, born to valorise and sustain traditional practices typical of mountain areas. Recent interviews with producers and regional authorities complemented the analysis provided by De Rosa et al. The data showed that the stakeholders' motivations to register the GI were mainly related to the promotion and valorisation of the GI product and the preservation of local breeds and traditional local know-how. The GI registration was *not* a direct response to misuses of the name 'Pecorino di Picinisco' within or outside the geographical area. The reputation of the name 'Pecorino di Picinisco' developed between 1999 and 2013 also thanks to the collective initiative to register the PDO. In parallel, tourism linked to the promotion and commercialisation of the cheese and pastoralism started to increase.[323] However, the collective 'social learning process' that should characterise producers' commitment to rule compliance,[324] did not persist in most cheese producers. This was due in part to the low producers' awareness of the practical

320 Interview with Ministry of Agriculture, 28 January 2022, para 16; Interview with regional agency Latium, 24 February 2022, para 13.

321 This element was also confirmed by ARSIAL (Lazio Region), Interview with regional agency Latium, 24 February 2022, para 3.

322 Marcello De Rosa, Felice Adinolfi and Yari Vecchio, 'Building up Collective Actions to Qualify GIs' (2017) 66 Land Use Policy 340 <https://linkinghub.elsevier.com/retrieve/pii/S0264837717300650> accessed 21 May 2020.

323 Interview with producer, Pecorino di Picinisco PDO, 6 December 2021, para 4.

324 Edelmann and others (n 75).

constraints deriving in the operationalisation of the GI *after* the registration (i.e., complying with the content of the specification required an evolution of the traditional techniques not only to meet uniform and agreed quality standards, but also to meet food safety standards).[325] Most interestingly, the findings revealed the following additional aspects: (1) the producers' initiative to the PDO registration was formally undertaken by the producers as a group, but in practice under the leadership of one of them, who is among those who still use the PDO; (2) the municipality, before and during the application process, was highly involved in supporting the PDO project, but this support lacked when the person in charge ceased to follow the dossier; (3) the producers' objective was, initially, to convert the producers' association in a Protection Consortium after the registration, but this did not happen and the producers' association dissolved, once obtained the registration of the PDO.[326]

As mentioned earlier, Ministerial Decree 14 October 2013 explicitly envisages the possibility that the producer group dissolves after the registration, as no organisational structure or legal form (association, non-recognised consortium or Protection Consortium) is formally required to use the registered sign. Moreover, after the GI registration, each producer interacts directly with the control body for the certification, which further undermines the importance of producers' coordination as a necessary condition for GI functioning.

The practical consequences of these rules are particularly evident in Picinisco case, where even though the registration process was successful (i.e., the applicant producer groups was eligible for registering the sign in 2013) the lack of compulsory requirements upon the producer group in the management phase (e.g., representativeness, democratic functioning etc.) and the absence of efficient periodical controls on the maintenance of these requirements, contributed to the abandonment of any form of coordination between the producers, leading to the underuse of the GI.

Pecorino di Picinisco PDO is far from being an isolated case in Italy, and the risk of underuse or non-use of the sign has been previously identified by GI scholarship as 'sleeping GIs'.[327] The reasons of the underuse or non-use can be multiple: beyond the already mentioned producers' unawareness, other issues can be involved (e.g., the lack of economic resources or agreement to update/renew local varieties). A general indicator is the non-inscription of producers to the control system or the

325 Traditional productions in the majority of the cases do not take into account some requirements set at the national and EU level. Complying with these standards means making investments. See also De Rosa, Adinolfi and Vecchio (n 322).

326 Interview with Producer, Pecorino di Picinisco PDO, 6 December 2021, paras 25-29.

327 Interview with regional agency Latium, 24 February 2022, para 8; Interview with regional authority Veneto, 11 February 2022, paras 15-20; Interview with regional authority Tuscany, 19 July 2022, para 26-27.

absence of amendments of the product specification.[328] In light of these findings, some questions can arise as to the opportunity of pragmatically interpret the content of art 14 of Ministerial Decree 14 October 2013 which sets the cancellation requirements of registered signs: 'the Ministry, in agreement with the Region(s) concerned, on its own initiative as holder of a legitimate interest or at the request of any person natural or legal person having a legitimate interest, may submit a request for **cancellation** of a PDO or PGI (a) where compliance with the conditions set out in the specification is no longer guaranteed; (b) where **no product** benefiting from that PDO or PGI has been placed on the market for at least seven years'.[329] Currently, the Italian legislator privileges the maintenance of the GI in the registry (i.e., the maintenance of the exclusive rights over the registered name) even if a very small (i.e., not representative) percentage of producers uses the sign and complies with the product specifications.[330] This formulation shows that 'sleeping GIs' are not a stand-alone category opposed to 'awake GIs', as traditionally recognised by the GI scholarship. However, they seem to be at the extremes of the spectrum of collective action. In between, as shown by the Picinisco case, the practical counterpart of this rule contained in the Ministerial Decree, allows for further nuance: GIs might also be not completely asleep, they might be 'half-sleeping'. This implies that it is systematically accepted by the Italian legislator that the GI product did not completely disappear from the marketplace. In these cases, a *minimum level of collective engagement* still exists at the local level, even though this collective engagement is not enough to maximise all the potential of the sign, at the market and non-market level.

In addition, the absence of a solid legal and organisational structure might cause a higher exposure of the GI to the risk of ceasing to be an expression of the general interest (i.e., the protection and/or valorisation of an origin product, embedded in the local development and resource production functions). Conversely, it could be used as an instrument reserved to a small group (a 'club') to serve other objectives. To some extents, these objectives could respond to 'more egoistic/individualistic' needs (e.g., the promotion of their product as expression of their individual business initiative), similar to those embedded in the use of a private (individual or collective) trademark. Moreover, the dissolution of the producer association post-registration could increase the risks of localised misuse of the name. Producers established in the geographical area who abandoned the initiative might continue their production activity in the geographical area without being subjected to controls, and without complying with the product specification. In other words, they might continue to take advantage of the reputation of the GI, by making implicit or explicit reference to the GI product. While this would entitle the enforcement of the rights conferred to the GI users, some contextual elements need to be considered. In practice, it is not infrequent

328 Interview with regional authority Veneto, 11 February 2022, para 20.

329 Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' (n 83).

330 Interview with Ministry of Agriculture, 28 January 2022, paras 21-26.

that small-scale context-specific social relationships and localised informal dynamics prevent the GI right holders from enforcing their rights, creating a situation of 'tacit acceptance' of existing misuses and anti-competitive behaviours in the geographical area. Furthermore, the absence of a coordinated action and the lack of financial common resources, coordinated governance and interests might paralyse any decision to react to infringements. These behaviours have destructive consequences, undermining the effectiveness of GI enforcement and jeopardising the resource production function. More generally, they weaken the credibility of the sign and drain its meaning.

Yet, these insights show that the GI registration is not 'the end of the story', but the beginning of a long-term engagement which needs a solid governance structure and appropriate monitoring and sanctioning mechanisms. The cancellation of the GI for underuse *and* non-use of the sign could be one of them, especially when the association or organisation, independently from its legal form, loses its representativeness after the GI registration.

2.2.1.5 External actors' involvement: competent authorities and third parties

2.2.1.5.1 EU legislation

According to Reg 1151/2012 the assessment procedure for GI registration is structured in two-steps. At the EU level, the competent authority is the EU Commission, who decides on the content of the single document, a shorter version of the product specification. In this context, Recital 48 of Reg 1151/2012 mentions that competent national authorities shall be 'impartial and effective, and meet a number of operational criteria'.

Generally, the examination of the EU Commission, both for simplified and normal procedure, consists in checking the presence of the necessary requirements in the single document. It verifies that the assessment made by the national authority is not 'manifestly incorrect' and that the application is sufficiently grounded and complete in relation to the requirements of the chosen quality scheme (PDO or PGI).[331] This rule stems from the repartition of powers between the Commission and the Member States, and it is justified by the fact that the 'examination of an application for registration requires, to a great extent, detailed knowledge of matters specific to the Member State concerned. The competent national authorities are considered as best placed to verify these context-specific issues.[332] The Max Planck Institute 'Study on the functioning of the EU GI system' showed the margin of intervention that, in specific cases, the EU Commission has in relation to the content of the single document. Formal exchanges with the competent national authority might take place in these cases.[333]

331 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd* and Hygrade Foods Ltd EU:C:2002:267 [2003] ECR I-05121 Opinion of AG Alber, para 66.

332 ibid.

333 Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' (n 83).

2.2.1.5.2 French national legislation

In **France** the INAO, administrative institution under the French Ministry of Agriculture, is the national competent authority for GI registration. Art L. 642-5 French Rural Code specifies that the INAO can propose the recognition of the product that can be identified through quality schemes and that in addition to evaluating the application files and registering the names as GIs, it is involved in giving directives on controls, the evaluation of the control bodies and the monitoring on the compliance with the product specifications.[334] The INAO has a decentralised structure: five national committees are established to supervise and accompany PDO and PGI initiatives of specific types of value chains (e.g., wines and spirits, dairy products, etc.). The composition of the national committees implies representatives of the administration and representatives of stakeholders involved in the production of the specific type of value chain involved (Art R. 642-10 French Rural Code). In addition to the national committees, numerous territorial departments distributed all around the country. The territorial departments are in charge of the first exchanges between producers and the national authority during the pre-application phase and continue to interact with producer groups during the application process. In other words, they are the reference point for the applicant in building the application file and setting the conditions for the 'well functioning of the sign' (art L. 642-5 n. 7 French Rural Code). The territorial departments of the INAO have a double role: on the one hand, they inform future applicants on the constraints and implications of the GI registration and assist them in codifying the existing practices for the elaboration of the product specification and the statutes of the future PDMO in compliance with national and EU legal requirements. On the other hand, they informally assess the strength of the link to origin and measure the economic and social capacity of the applicant group to sustain collective action processes, that also involves the management of the sign. Once the application file is considered compliant with the legal requirements, it is presented to the permanent commission of the competent national committee of the INAO. The expression of a favourable decision by the permanent commission opens the inquiry at the national level. A commission of inquiry can be nominated, if required, and this implies the continuation of the exchanges with the territorial departments. These exchanges often involve external specialised technical consultancy. It is codified in the INAO Directive of 31 March 2015, and can affect *ex officio* important elements, such as the delimitation of the geographical area.[335] When the instruction is closed[336] the dossier

334 INAO Directive, 31 March 2015 n. 1, p 4.

335 INAO Directive 31 March 2015 n. 1, p 6.

336 'The work of the commission of inquiry ends once the commission considers that the application file is ready for submission; the producer group is recognised as PDMO; the control plan or inspection plan, written by the control body on the basis of the project of product specifications, is declared approvable by the control services' (translation provided by this author). Institut National de l'Origine et de la Qualité, 'Memento Des Instances Décisionnelles de l'INAO' 34. The activity of the commission of inquiry, as well as its composition, is defined by a formal mission statement approved by the competent national committee. See INAO Directive, 31 March 2015 n. 1, p 9.

is transferred to the national committees for the final assessment (rejection or acceptance) of the application for registration.[337]

The registration or rejection of the application is based on (1) an assessment of the legitimacy of the actors participating in the producer group; (2) assessment on the group's suitability to adequately and efficiently manage, promote, and protect the sign after registration (3) the assessment on the content of the project of product specifications, including the solidity of the statements made therein legitimising specific rules and their controllability post-registration.[338]

The **legitimacy of the actors involved,** although it is not a concept explicitly codified in the French Rural Code, it is at the core of the inquiries carried out by the INAO through documental analysis and on-site inspections. The assessment is made considering the nature of the actors involved in the production chain and directly concerned by the rules contained in the product specification and justified by adequate evidence. One specificity of the French system is that the applicant producer group must file, in parallel with the application for registration, the application for recognition as PDMO (Art R. 641-12). At the end of this procedure, the producer group is considered apt to carry out the tasks and functions defined in art L. 642-22 French Rural Code. The assessment on the recognition as PDMO involves the analysis of the legal form, the statutes, and internal regulations of the producer group. The membership to the producer association or *syndicat* or inter-branch organisation of all the operators is also verified by the INAO. In addition, the representativeness and fair representation of the producer group are assessed, as well as its democratic functioning explicitly defined in art L. 642-18.[339] Moreover, the economic robustness of the group (i.e., its structure, organisation and economic resources devoted to the exercise of the tasks and responsibilities of the PDMO) is considered for the assessment. These elements, which attain to the producer group capacity to carry out the decision-making process effectively and efficiently are regularly monitored by the direct involvement of the INAO, and indirectly through the control activity carried out by the control bodies.[340]

337 According to the Applicant's Guide 'The operation of the INAO is essentially based on the work and deliberations of the national committees, which are the result of close collaboration between professionals working in the field who are already involved in the quality and origin signs process, representatives of the administrations (Ministry of Agriculture, Ministry of the Economy) and qualified individuals' (translation provided by this author). Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur d'une Appellation d'Origine Protegée (AOP) Ou d'une Indication Géographique Proegeée (IGP)* (2017) 7 <https://www.inao.gouv.fr/content/download/854/7671/version/5/file/201711_guideAOPIGP.pdf>. The governance of the INAO includes also GI producers operating in different regions and with various product classes. They participate in the national committees to oversee the integrity/coherence of the decision taken by the INAO with the intrinsic values embedded in quality schemes.

338 See *infra* Chapter 2, Section II, Outcomes.

339 See *infra* Chapter 2, Section II, Process.

340 The INAO Directive 1 July 2009 n. 3 identifies the rules governing the post-registration monitoring phase and identifies the competences of the INAO in checking the maintenance of the eligibility requirements of the PDMO, which is

As to the **assessment on the content of the project of product specifications**, the INAO accompanies the producer group in building the rules contained therein, ensuring its compliance with the EU and national requirements and its operationalisation. The product specification is part of a larger application file, which includes, in addition to the application for recognition of the syndicat/association/inter-branch organisation as PDMO the motivation of the project, a study of the technical and economic impact of the registration of the sign, the precise designation of the product, the name of the designated control body, the controllability document.[341] The INAO Directive n. 3 of 1 July 2009 provides that the INAO and the PDMO 'can meet as frequently as it is necessary to discuss topics related to the life of the GI product and on the evolution of the product specification, if it is envisaged' (translation provided by this author).[342] An ongoing dialogue is therefore established since the early stages of the construction of the application file, between the PDMO and the INAO (bilateral meetings) and, between the INAO, the PDMO and the control body, when it is designated (trilateral meetings).

A **public consultation** preceding the official launch of the opposition procedure might occur but seems circumscribed to the delimitation of the geographical area. At the end of this consultation the official maps with the geographical delimitation of the area are submitted to the municipality. The INAO Directive of 31 March 2013 n. 3 (as revised on 18 October 2022) explicitly mentions this possibility which should apply to agricultural products, foodstuffs, wines, and spirits.[343]

The public consultation is without prejudice of the **national opposition procedure**, which takes place at a later stage, and for two months from the official approval of the national committee (See Table 7). Within these two months, 'every person having a legitimate interest' can file an opposition. Together with the public consultation, the national opposition procedure is an important moment where third parties can intervene to modify the content of the product specifications before the GI registration and highlights the general interest embedded in the GI. The INAO is in charge of collecting the oppositions, allowing sufficient exchange between the applicant and the opponents, and decide on the merit. The national procedure in France ends with the decision of the INAO (subsequent to the opinion expressed by the National Commission on the labels and certifications of agricultural products and foodstuffs and taking into consideration the results of the public consultation) and the transmission of the application to the offices of the EU Commission.

complemented by the control carried out by the control body (see *infra* Chapter 2, Section II, Outcomes, control system).

341 See *infra* Chapter 2, Section II, Outcomes, control system.

342 INAO Directive 1 July 2009 n. 3, p 3.

343 INAO Directive, 31 March, 2015 n. 3 revised on 18 October 2022, pp 14-16.

Table 7: Comparison between the French public consultation and the national opposition procedure. They are considered as opportunities for third parties' participation to the product specification design *ex ante* the GI registration.

Public consultation (INAO Directive of 31 March 2015 as modified on 18 October 2022)	National opposition procedure (R. 641-13 and R. 641-20-1)
Objective: (a) informing the public *exclusively* on the project of delimitation of the geographical area of PDOs, PGIs and GIs for wines and spirits, which might be object of a specific inquiry of the national committee, commission of inquiry and eventually commission of consultants; (b) giving to interested actors the opportunity to intervene and propose modifications to the proposed delimitation.[344] ***When:*** before the preliminary decision of the national committee on the opportunity to register the GI, after the work of the commission of inquiry, for all product classes. ***Third party participants:*** Only legal or physical persons having legitimate interest in the delimi-tation of the geographical area. ***Examination:*** experts of geographical delimitation. ***Duration:*** 2 months. ***Output:*** report of commission of inquiry which might follow a second examination of the com-mission of inquiry or experts. The final report is addressed to the national committee and is followed by the decision of the national committee.	***Objective:*** informing the public on the whole project of product specifications and, if applicable, on the single document. ***When:*** after a preliminary decision of the national committee on the opportunity to register the GI (without further technical inquiry). ***Third party participants:*** legal or physical persons having legitimate interest. ***Examination:*** the INAO services on the receivability of the opposition. The applicant producer group replies to the oppositions. ***Duration:*** 2 months. ***Output:*** report of the commission of inquiry on the received oppositions to be transmitted to the national committee, followed by the evaluation and decision of the national committee on the GI registration.

2.2.1.5.3 Italian national legislation

Art 6 Ministerial Decree 14 October 2013 defines the procedural rules governing the application. Art 7 describes the evaluation of the application file, which also involves the participation of regional authorities, which act as intermediaries between the applicants and the Ministry of Agriculture (which remains the authority competent for evaluating the application file).

The Ministry is in charge of verifying the compliance to the requirements of **eligibility of the proposed name** for registration (based on the submitted application file as defined by art 6 and national additional requirements), and supervises the procedure aimed at identifying the **involvement of relevant stakeholders** (internal or external to the value chain or public authorities) which might have the interest in expressing their opinion on the application file proposed by the applicant group. The moments where this process takes place is defined in art 7 ('Evaluation of the application') and art 8 ('Meeting of public inquiry'), but also art 9 ('Opposition Procedure').

344 This complex procedure only concerns the registration phase, while in the amendment phase a simplified procedure applies. The description of this simplified procedure can be found in the INAO Directive. See ibid, p 17.

After the evaluation of the oppositions eventually submitted by interested actors, the Ministry of Agriculture is in charge of submitting the application file to the EU Commission.

If the application for registration (or amendment) is addressed to the Ministry of Agriculture, at the same time it is forwarded to the competent regional authority (or in case there is a trans-regional denomination, to the authorities competent as to the geographical area involved), which remains updated on the advancement of the application. The same rule applies for the request for amendments and for the recognition of Protection Consortia.[345] The Regional authority plays a key role in advising producers in building the application file, in particular in drafting the product specifications or its amendments,[346] and links the local level with the Ministry formally and informally granting proximity to producer groups.

Formal interactions between the regional authority and the producer groups take place in four moments. The first is the **evaluation of the GI application file** (defined by art 7, Ministerial Decree 14 October 2013): within 60 days from the receipt of the application the regional authority might request a meeting with the Ministry of agriculture to 'examine the problems related to the GI application'. This meeting is optional. The second, defined in paragraph 2 of art 7 Ministerial Decree 14 October 2013 is the **submission of an opinion** by the regional authority 'within 90 (ninety) days from the date of transmission of the application for registration by the applicant and the Ministry, after receiving such opinion shall proceed to assess the application for registration of a PDO or PGI'. The regional opinion is also optional. The Ministry of agriculture will, in any case, give its assessment on the GI application file if, after having contacted the regional administration, no opinion is delivered within 30 days.

The third moment of formal interaction between the Ministry and the Regional authority is the **meeting of public inquiry** ('*riunione di pubblico accertamento'*), defined in art 8 Ministerial Decree 14 October 2013. It is the moment, preceding the opposition procedure, the application file is challenged before the interested stakeholders. The meeting is held upon initiative and under the responsibility of the actors involved and it is preliminary to the national opposition procedure (See Table 8). As in the French context, the meeting of public inquiry and the national opposition procedure allow the participation of actors different from the applicant producer group to the product specification design and highlight the general interest embedded in GIs. However, differently from the French public consultations (which are explicitly tailored to the definition of

345 During the procedure for the recognition of Protection Consortia, the regional authority could be asked by the Ministry of Agriculture to re-examine the statutes of the consortium and to express an opinion. Also in this case, the opinion is not compulsory.

346 Their role is so important that it has been also formally recognised in the Agri proposal by the European Commission (art. 8: 'Regional or local public bodies may help in the preparation of the application and in the related procedure').

the geographical area), the meeting of public inquiry in Italy is explicitly conceived as a verification tool for the Ministry to evaluate the quality of the whole product specifications, at the same time constituting a moment for discussion and refinement of its contents among the relevant stakeholders.

Table 8: Rules governing the Italian meeting of public inquiry and opposition procedure (elabo-ration by this author).

Meeting of public inquiry (art 8 Ministerial Decree 14 October 2013)	National Opposition Procedure (art 9 Ministerial Decree 14 October 2013)
Objective: The Ministry of Agriculture verifies the compatibility of the product specifications to current local practices (art 8(2) Ministerial Decree). It should be summoned by the applicant producer group. ***When:*** After positive documental decision on the application file by the Ministry of Agriculture and before the National Opposition Procedure. ***Third party participants:*** At least 2 representatives of the Ministry, the regional authority involved, the municipalities, the professional organisations, the relevant economic stakeholders, all Italian Regions. ***Examination:*** The representatives of the Ministry of Agriculture read the product specifications and collect observations. ***Duration:*** Not given. ***Output:*** The product specifications as agreed after the meeting of public inquiry is published in the *Gazzetta Ufficiale della Repubblica Italiana*. The final version of the product specifications needs to be formally approved by the Applicant Producer Group (approval through formal letter addressed to the Ministry of Agriculture)	***Objective:*** Giving the possibility to third parties to be informed of the content of the product specifications and modify the content of the product specifications. ***When:*** After the publication of the product specifications on the *Gazzetta Ufficiale della Repubblica Italiana.* ***Third party participants:*** Any natural or legal person having a legitimate interest and established or residing on the Italian territory. ***Examination:*** Ministry of Agriculture. The applicant producer group replies to oppositions. ***Duration:*** One month from the publication of the product specification. ***Output:*** Decision of the Ministry of Agriculture on the GI registration.

The fourth moment of interaction between the Ministry of Agriculture and the Region is when the Region gives an **opinion on the control plan,** which normally follows the evaluation of the *Ispettorato Centrale Repressione Frodi* ('ICQRF').

Regional authorities might also be involved in the request for amendments of the product specifications. The Ministerial Decree 14 October 2013 refers to the same rules valid for GI registration.

2.2.1.5.4 Implementation of the national legislation

2.2.1.5.4.1 France: a case-specific hands-on multidisciplinary approach

The decentralised administrative structure of the INAO (i.e., the presence of territorial delegations) allows to achieve the **territorial proximity** necessary to develop a deep knowledge of the value chain, as well as of the power relations between the local actors. The territorial delegations are the 'interface between the value chains and the national services'.[347]

This **hands-on technical and multidisciplinary approach** characterises the type of intervention of the national authority and contributes to shaping the content of the product specifications, as well as the statutes of the applicant PDMO. The INAO proceeds with the construction of the application dossier, assisting the actors in the progress towards the codification of existing practices, and in reaching a compromise on common rules. Consequently, the content of the legal rules governing the application procedure are not very detailed as to the assessment criteria, which are left to a case-by-case evaluation. The French case-by-case hands-on approach is peculiar, and it touches upon the evaluation of the legitimacy of the actors involved, of the eligibility of the *syndicat*, association or inter-branch association for being recognised as PDMO, and of the content of the product specifications. This type of approach does not imply that the national authority has the power to impose specific choices or directives on the producer group (unless corrective measures of the original proposal of the producer group are to be taken due to the non-compliance of a legal requirement contained in the EU or national law).[348] The producer group remains the only actor entitled to make choices for 'setting the boundaries of the GI' (i.e., deciding on the technical content of the product specifications, which should include existing common practices) and predisposing the operational apparatus for its management.[349]

347 See Interview with INAO territorial delegation, 8 August 2022, para 52. Marie-Vivien et al. specify that national INAO committees are five and 'represent the decision-making level and meet three to four times a year. They are composed of representatives of the Ministry of Agriculture and of the Ministry of Finance, i.e., the administration of fraud, and of at least 50% of producers/processors involved in the PDO–PGI sector concerned'. Representatives of consumers organisations, retailer organisation, certification bodies, researchers, representatives of processing industries and trade are involved. The permanent commission represent a restricted committee of the national committee and meets more frequently. It also receives the application and makes a first screening. See Delphine Marie-Vivien and others, 'Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France' (2017) 98 World Development 25 <https://linkinghub.elsevier.com/retrieve/pii/S0305750X15000029> accessed 17 June 2022.

348 Interview with INAO territorial delegation, 8 August 2022, para 19.

349 Some concerns were raised by Pick and Marie-Vivien concerning the legitimacy of State intervention in defining the common interest in product specifications amendments. The authors refer to the case of *Camembert de Normandie*, where an amendment of the product specifications was negotiated 'under the auspices of INAO […] who invited a wide range of stakeholders of the value chain to participate in the process' including the producers non-members, non-compliant with the product specification but 'who still represented important volumes of production of a similar (albeit industrial) product sold under a similar name'. Although the initiative for the modification of the product specification was shared by 'outsiders' and supported by the INAO, the amendment was rejected by the PDMO. See Pick and Marie-Vivien (n 75). This example also raises the issue of the legitimacy of 'outsiders' to propose product specification

In practice, the legitimacy of the applicants is assessed looking at the production activity as described in the product specification, which allows to identify the 'operators' involved in the production steps relevant for giving to the product its specific characteristics and qualities.[350] During the assistance for the formal recognition of the *syndicat*, association or inter-branch organisation as PDMO, the hands-on approach is preserved and assistance is provided to the group in devising rules capable of taking into account the implications of the GI recognition, of whom producers are not necessarily aware. [351] For example, issues on the necessary and compulsory membership, representativeness, representation, democratic functioning and transparency, main pillars of the functioning of the PDMO, guide the intervention of the national authority during the construction of the application file and help suggest modifications of pre-existing informal rules. This can imply the inclusion of new operators established for a considerable amount of time in the geographical area (or in its immediate proximity) [352] and producing according to the rules of the product specifications. The INAO assistance can also be the impulse for modifications of the statutes of the future PDMO. For example, a modification of the rules governing the attribution of voting rights to specific categories of operators could be necessary, as well as re-balancing their representation in the governing bodies of the PDMO to reflect the significance of their role in the value chain. Moreover, it can result in the identification of implicit barriers for the acquisition of the membership to the group, emerging both in the rules contained in the statues of the PDMO, or in the product specifications. In this last case, a reaction of the national authority during or before the application process could arise when the obligation to localise specific operations causes an unjustified restriction to the principle of establishment and free movement of goods, namely when the statements contained in the product specifications are not sufficiently supported by the evidence of a distinctive quality and characteristics of the product.[353]

amendments to accommodate wider interests equally present within the geographical area. See *infra* Chapter 4, Part I, outsider issue.

350 Interview with INAO legal department, 16 September 2022, para 64.

351 'We make them realise that in terms of PDO/PGI recognition, there will be operators who will come along, to whom it will not be possible to close the door, because as long as they comply with the product specifications and submit to the controls, they can join. And that this can disturb their current functioning and that is why they have to think about a well-set statutes, which does not leave room for a disequilibrium' (translation provided by this author) See Interview with INAO territorial delegation, 8 August 2022, para 22. 'The group must show us that both on the product and on the use of the name there is already a long history, they have a know-how in production, and it is a name that is linked to a processing method that is often circumscribed in a place. Sometimes operators do not know how to formalise it because they are not necessarily aware of it, they do not manage to theorise what they have in their hands. It's all the institute's job to make them talk. It's all the work of the institute to get them to talk, and to understand when we say to them, 'you're doing this, but why?' and they say, 'ah well, I'm doing it'. So, it's a process that lasts for several years. That's why the application process takes a long time. There is a lot of work to do to make them understand that they have codified things not necessarily consciously, and all this contributes to the reputation/notoriety' (translation provided by this author). See ibid.

352 That could also imply a suggestion of adjustment of the boundaries of the geographical area.

353 See Interview INAO legal department, paras 15-16. Moreover, interviews showed that 'the only derogation we will have in competition law/freedom of circulation of goods is the justification by quality in the case law of the court. We are very

The INAO ensures that all the members of the value chain are informed on the impossibility of 'closing the door to operators who come forward, because as long as they respect the specifications and submit to controls, *any operator can join*'. Moreover, 'the landscape of actors involved is going to change over time, and it is necessary that, from the beginning, [producers] are clear about what they are going to be able to do in terms of governance. We tell them that as soon as there is recognition, the GI will be open to all operators who wish to join it'. There is no formal external authorisation to join. 'If they want to produce one day perhaps as a PDO or PGI, the geographical term will be reserved for them, and they won't be able to use it for comparable products. If this is not the aim, it will cause difficulties. It is really important from the first contact to explain everything to them and to discuss with them to understand what is at stake, what the objective is. The quality scheme is not necessarily the solution. The quality scheme is a tool for protection, and for promotion if desired'.[354]

The involvement of the INAO is more significant when producer groups are not sufficiently structured before the GI recognition. This means that the efforts required by the national authority is significant and necessary, both as a support for reaching consensus on the technical content of the product specifications *and* for accompanying and monitoring the structuration of the PDMO.[355]

Interestingly, this eventuality raises some substantial questions on the operational validity of the principle that 'GI registration is aimed to recognise something that already exists', traditionally at the core of the narrative and *modus operandi* of the INAO.[356] The idea that GI could potentially be 'built from scratch', as the result of a creative process undertaken by the applicants and/or the INAO offices (e.g., to promote a quality differentiation strategy) is in principle refused by the national authority.[357] However, interviews showed that, in some cases, especially when the main stakeholders' motivation to register the GI is the 'promotion' of their product (instead of the real need to protect the name from counterfeiting) there is an objective difficulty in providing evidence of the use of the name.[358] This situation can be explained by a very localised reputation of the product, which was not commercialised with a specific name. However, even if the name 'did not really exist' before the GI registration, the production should be traditionally established in the

careful [in verifying] in the product specification that there are no hidden biases for economic purposes, which could create different barriers to operators'. See Interview with INAO legal department, 16 September 2022, para 16.

354 Interview with INAO territorial delegation, 8 August 2022, para 22.

355 Interview with INAO legal department, 16 September 2022, para 3.

356 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur d'une Appellation d'Origine Protégée (AOP) Ou d'une Indication Géographique Protégée (IGP)* (2017) 13 <https://www.inao.gouv.fr/content/download/854/7671/version/5/file/201711_guideAOPIGP.pdf>.

357 Ibid, paras 28-37.

358 ibid, para 22.

area.[359] The attitude of the national authority in these cases is not necessarily disruptive, provided that sufficient evidence of the *usages locaux et constants* can be provided by the producer group.[360]

2.2.1.5.4.2 Italy: the implications of a hybrid (hands-on/hands-off) approach

When the Ministry of Agriculture[361] assesses the correctness and completeness of the application file, it verifies the **legitimacy of the applicants** (art 4 of the Ministerial Decree 14 October 2013), **their capacity to manage the sign** and the **content of the product specification, as well as of the other documents supporting the statements contained in the product specification** (art 6 Ministerial Decree 14 October 2013).

The **assessment on the legitimacy** of the applicants pursued by the Ministry concretely means verifying **their capacity to effectively and efficiently manage the sign**. This verification is however mainly documental at this stage and consists in checking if (1) the association that has been constituted as applicant producer group is composed by producers and processors of the product and (2) the statutes of the producer organisation does not set any barrier to the access to the use of the name by new members. The verification process rarely entails on-site inspections. It more often verified through documental checks to evaluate the truthfulness of the self-declaration made by the applicant group as to its representativeness, representation, and democratic functioning. This documental verification of the legitimacy of the applicants might have its limits, because it weakens the proximity between the national authority and producers and might lead to a less deep understanding of the dynamics of the value chain, including the power relations between the actors involved. One example of the consequences of the reduction of this proximity national authority-producers is the difficulty of identifying producers which should be included in the group because producing in the geographical area (or in its proximity) and to propose modifications of the product specification and the statutes.[362]

It is important to recall that for GI registration the national law does not require any specific verification on the representativeness requirement and democratic functioning of the applicant

359 ibid, paras 31-34.

360 'If we talk about recognition, there can be no recognition if there is nothing. There has to be proof of practices in a circumscribed place, the know-how has to be shared, in PDO we put more emphasis on the know-how because the know-how is a notion that implies a duration in time, sufficiently significant for it to lead to the recognition of a sign.' See ibid para 23. This anteriority can be proved with a prior collective trademark or the simple evidence that the production is established in the area. For these purposes labels and proof of participation to competitions can be requested. See ibid, para 31.

361 Since November 2022, 'Ministero dell'agricoltura, della sovranità alimentare, e delle foreste' (MASAF)

362 Sometimes, for example, an extension of the geographical area could be required and inspections and meeting the produces would be necessary to have a picture of the situation at the local level. *De facto* however this type of assessment is not a homogeneous practice of the national authorities.

producer group.[363] As noted earlier in this Chapter, the Ministry of Agriculture or the Regional authorities are formally required to check the representativeness requirements in two cases: in case of amendments of the product specifications (whether or not the applicant group is organised in any structured entity) and after the GI registration, when the group applies for the recognition as Protection Consortium. In practice, this verification in case of amendment is made checking 'the correspondence between the actors identified as the applicant and the list of producers registered before the control body and the quantity of the certified product'.[364] Possible modifications of the statutes of the association can be requested, when it is evident that actors external to the value chain are formally involved in the decision-making process.[365] These types of modifications are more easily detected at the regional level.

The Ministry of Agriculture also verifies the **content of the product specifications** (and, more generally, of the other documents constituting the application file). A deeper analysis in this regard will be made in the following paragraphs. As already mentioned, after the GI registration, the Ministry of Agriculture competent for recognising the Protection Consortia. In cases where there is no Protection Consortium, the Regional Authority is in charge of coordinating specific activities such as the designation of the Control Body or the identification of the legitimate applicant group for the request for amendment. Regional administrations are often approached by producer groups long before the submission of the application file.[366] Especially for small PDOs and PGIs (which, most likely will not convert in a Protection Consortium right after the GI registration) support is given to producer groups to find and agreement for the content of the specification. These suggestions are also based on an informal assessment on the controllability of the rules contained therein. [367]

At the regional level, the **legitimacy of the applicants** is verified during the construction of the application file. However, since there is no specific requirement, at this stage, on the representativeness of the heterogeneous actors of the value chain, the verification is exclusively aimed to verify that 'those that are included are producers of the product'. The Ministerial Decree 14 October 2013 states that the regional authority can address an opinion to the Ministry of Agriculture concerning the GI application. However, there are no explicit rules concerning the

363 Interview with Ministry of Agriculture, 28 January 2022, para 12.

364 ibid, para 18.

365 Interview with regional authority Tuscany, 19 July, 2022, paras 21-23.

366 The period in this regard can vary: Veneto Region reports that on average the informal contacts occur about 1 year and a half before the official submission. See interview with regional authority Veneto, 11 February 2022, para 2. This period can vary on a case-by-case basis and might be different in other regional experiences.

367 Despite regional authorities' intervention, producers might need extra-technical assistance (sometimes financed by local actors external to the value chain, as municipalities, sometimes offered by universities and research centres). Interview with regional authority Tuscany, 19 July 2022, para 2.

form, function, or content of this opinion. Given its non-compulsory nature, questions could be raised concerning the effective application of this rule. Moreover, the implication of the regional authority in advising producers could require a more precise definition of its impartiality. Interviews show that a formal opinion is released in cases where the application file is incomplete or incorrect (i.e., when the modifications suggested by the authority are not implemented by the applicant producer group). In some Regions, the opinion is connotated by a political meaning, and jointly released by the regional authority and the Regional Council (which is the representative and deliberative body of the Region as administrative and political entity). Therefore, the opinion released by the Regional Council: 'is a political act it is about giving an authorisation to reserve a name that belongs to the collective heritage, of language, of consumption, of use'.[368]

For GIs with and without Protection Consortia, regional authorities are also involved in developing promotion and valorisation of the PDOs and PGIs in their territorial competences. In these cases, they are solicited by the Ministry of Agriculture in two moments: when the control body needs to be re-appointed (every three years) and when a request for amendments needs to be filed. In cases where a structured organisation is absent, the regional authority takes the lead for identifying the stakeholders concerned by the denomination and, chooses the control body or gathers the representative group entitled to file the product specification amendments.[369]

Interviews showed that the **technical expertise** used by the regional authorities, and by other external actors (e.g., universities and research centres) is key to raise awareness on the socio-economic and legal implications embedded in the GI protection.[370] Moreover, it is crucial to facilitate a collective and participatory process of construction of the GI and its practical implications.[371]

In practice, however, the degree and modalities of their involvement is not homogeneously and formally regulated. Some regions (for example, Latium) have specific agencies whose aim is to support stakeholders from the earlier stages of the draft of the dossier. Other Regions, for example Tuscany and Lombardy, do not have specific agencies but manage to coordinate the application process effectively, interacting with local stakeholders. This configuration *per se* does not ensure uniformity, as different degrees of proactivity of regional authorities *and* of the stakeholders' responsiveness to feedbacks can vary significantly across regions.

368 Interview with regional authority Tuscany, 19 July 2022, para 25.

369 ibid.

370 ibid., paras 2, 27-29.

371 Interview with regional authority Veneto, 11 February 2022, paras 4, 20; interview with regional authority Tuscany 19 July 2022, *inter alia* para 27; interview with representative Protection Consortium Tuscan olive oil PGI, paras 2, 24.

Nevertheless, the Italian approach can be defined as 'hybrid', where regional authorities have the possibility to operate (informally) 'hands-on', while the assessment carried out by the Ministry of Agriculture is mainly documental (hands-off).

2.2.2 Process

In the previous paragraphs, I identified the actors involved during the pre-application and application process. It is now important to look at how they interact.

Inspired by commons scholarship I define as 'process' the moment where critical interactions among actors-participants take place to reach specific outcomes.[372] According to Ostrom's terminology, processes happening in the frame of the 'action situation', intended as the 'social space where participants with diverse preferences interact, exchange goods and services, solve problems, dominate one another, or fight'.[373] From a commons perspective, possible action situations are resource appropriation, maintenance, monitoring and rule-making. Rule-making, which is 'the collective process of formulating rules and procedures for individual participation in appropriation and maintenance activities [of the resource]'[374] can involve the participation of external authorities, in addition to (or substitution of) local actors. It is focused on determining the modalities and the requirements to access the resource system.[375] One focal or core action situation relates to adjacent action situations (i.e., is not isolated and it is affected and affects other situations) and can embed multiple action arenas of interaction. The 'permeability' of the action situation and arenas to adjacent action situations is key to understand how one specific process is shaped and how it affects subsequent transformative processes.[376]

I already mentioned that resource management can be subjected to more or less restrictive rules which lead to different degrees of exclusionary effects. I also mentioned that commons management implies restricted access to the use of a resource, although it maintains sufficient levels of openness to provide positive externalities addressed to the community at large. Consequently, both the rulemaking and the management are governed by some guiding principles, and some of them

372 'Process refers to interactions (e.g., cooperation, learning, bargaining) that occur over time between and among actors, institutions, and the components of the natural and built environment, resulting in outcomes. For example, democracies often rely on a voting process where voters choose between candidates for leadership roles. Process is influenced or directed by structure, and vice-versa (e.g., links between system components emerge through different processes, and the existence of these links can constrain processes). Where processes lead demonstrably and causally to outcomes, they are often described as mechanisms.' See Cumming and others (n 267).

373 Ostrom, *Governing the Commons* (n 114) 14.

374 McGinnis, 'The IAD Framework in Action: Understanding the Source of the Design Principles in Elinor Ostrom's Governing the Commons' (n 89) 92.

375 ibid 93–94.

376 Ostrom, *Understanding Institutional Diversity* (n 270) 56–57.

safeguard access, which should be non-discriminatory. 'Commons management is a functional concept that describes the situation in which a resource is shared among members of a community on non-discriminatory terms. In general, non-discriminatory terms are terms that do not depend on the users' identity or intended use. Members of the community have equal opportunities to use the resource as they see it, under conditions that are more or less uniform. Users decide what to do, with whom to interact, or how to use the shared resource; their choices are not predetermined or prioritized by the terms or conditions set by infrastructure providers. This does not mean that use of the resource is free or comes without any terms and conditions.'[377]Commons management is often tied with stakeholders' empowerment and inspires their meaningful engagement in the decision-making, inclusion, democratic and non-discriminatory participation, fair representation, fair distribution of power and of right of access and use.[378]

In GI settings, I consider rule making for product specification design as the core action situation, while I consider resource 'appropriation', 'maintenance' and 'monitoring' as adjacent action arenas. Thus, I consider the control plan design and statutes design as adjacent action arenas.[379] This means that they are analysed less in depth, even though they are complementary to understand the drivers and consequences of product specification design.[380] The concept of action situation is particularly suitable for defining the multi-level and multi-stakeholders interactions happening during the pre-application and application phases.[381] The decision-making process is usually driven by 'a common centre of coordination' between producers and processors of the same origin product, to constitute a collective organisation or 'strategic alliance'.[382] The participation of the GI operators is considered as a condition of success of the GI management as they are the actors concerned by the constraints arising from the GI registration.[383] Furthermore, the equal distribution of the decision-making power and a solid governance structure, can avoid discriminations and create a sense of belonging and awareness among the participants, and more generally the all the

377 Frischmann (n 189) 92.

378 The implications of democracy and justice in the agri-food sector have been analysed by Tschersich and Kok, with a specific focus on agri-food transitions. Some helpful insights are provided in Julia Tschersich and Kristiaan PW Kok, 'Deepening Democracy for the Governance toward Just Transitions in Agri-Food Systems' (2022) 43 Environmental Innovation and Societal Transitions 358 <https://linkinghub.elsevier.com/retrieve/pii/S2210422422000466> accessed 26 June 2022.

379 It is important to highlight that the draft of the control plan (despite being preceded by the draft of the controllability document by the producer group) is assisted, at least in France, by the control body which is informally contacted before the finalisation of the application for registration.

380 See *infra* Chapter 2, Part II, Outcomes.

381 Quiñones-Ruiz and others, 'Why Early Collective Action Pays Off' (n 96).

382 Réviron and Chappuis (n 32) 50.

383 Marie-Vivien (n 36) 341; Kizos and others (n 71).

members of the local community.[384] However, according to Zappalaglio, '[GI] protection must be granted at the end of a bureaucratic process aimed at ensuring the substantive correctness of the specification'.[385] Actors different from producers intervene in this process in various ways and for different purposes. For example, local institutions might play an important role in supporting and promoting decisions having consequences on the regeneration of public goods (i.e., the decisions embedded in the resource production function and in the local development function of the sign). National authorities interact in various ways and degrees with the applicants, generally for the purpose of supervising, accompanying, and evaluating the outcomes. The study carried out by Penker et al. is particularly interesting because it highlights the polycentric structure of the EU GI system, showing how multi-level and multi-stakeholders' interactions affect rule-crafting.[386] Moreover, it highlights how differences among national approaches might derive from how much the tradition in GI protection is established in the country.[387]

The draft of the product specifications is a mix of producers' strategic decisions and evidence-based claims. As mentioned earlier, the process consists in the decision-making leading to the compromise on rules identifying the product and its link to origin. [388] Belletti et al., taking the Penja Pepper case as example, recognise that the rules and principles governing (formally or informally) the process can impact on the outcomes (namely the product specifications and the control system), either by encouraging collective action, new networks, and innovation or by 'crystalising the current situation of the value chain, including power imbalances and the exclusion of the weakest actors'.[389]

In this frame, 'governance refers to the complex systems including mechanisms, processes, relationships and institutions through which individuals and groups articulate their interests, exercise their rights and obligations, and mediate their differences'.[390] I consider the principles of representativeness, representation, democratic functioning, access to membership as 'the four

384 Maria Cecilia Mancini, 'Geographical Indications in Latin America Value Chains: A "Branding from below" Strategy or a Mechanism Excluding the Poorest?' (2013) 32 Journal of Rural Studies 295 <https://linkinghub.elsevier.com/retrieve/pii/S0743016713000600> accessed 17 June 2022.

385 Andrea Zappalaglio, 'Sui Generis, Bureaucratic and Based on Origin: A Snapshot of the Nature of EU Geographical Indications' in Anselm Kamperman Sanders and Anke Moerland (eds), *Intellectual Property as a Complex Adaptive System* (Edward Elgar Publishing 2021) <https://china.elgaronline.com/view/edcoll/ 9781800378377/9781800378377.00018.xml> accessed 17 May 2023.

386 Penker and others (n 59).

387 As highlighted by Belletti et al. 'decisions must be made regarding the name to be used as GI, the rules to be written in the CoP [i.e., the specification] and the control and certification system. Some of these decisions are driven by the specific regulatory system provided in each country.' Belletti and Marescotti (n 88) 103.

388 Quiñones-Ruiz and others, 'Why Early Collective Action Pays Off' (n 96) 180.

389 Belletti, Chabrol and Spinsanti (n 84) 8.

390 Belletti and Marescotti (n 88) 6.

pillars of collective action', for their core significance from the applicants' and national authority perspective. The French and Italian systems explicitly mention these principles. Nonetheless, the current legal framework is substantially weak at the EU level and national approaches to the implementation and monitoring of the pillars is fragmented. My contribution will consist in facilitating the comparative analysis between national systems, to frame general definitions and to identify the theoretical linkages among the pillars.

In-depth inquiries on this topic have only recently been developed in the legal field. Marie-Vivien and Carimentrand et al. highlight that the concept of representativeness could be controversial when heterogeneous actors participate in the value chain. They also question the consequences of mandatory membership (characterising some EU legal contexts, for example France) and recognise the importance of transparency to ensure stakeholders' coordination towards common objectives.[391] Marie-Vivien and Pick investigate on the limits of representativeness and its declinations in bottom-up and state-driven approaches. On the one hand, they recognise the flexibility of the content of the product specifications. On the other hand, they acknowledge that the decision-making power attributed to producers does not offer a complete safeguard against imbalances and non-democratic decision-making processes, especially in complex value chains. This applies, *a fortiori*, after the GI registration, if amendments are envisaged.[392]

2.2.2.1 EU legislation

Reg 1151/2012 does not set any specific requirement, rule or principle concerning the governance of producer groups. No indication or guiding principles safeguard the decision-making process, nor the impact of membership on the democratic functioning of the producer group, leaving producers free to choose the degree of commitment and functioning of their governance structure. Important novelties have been envisaged in the agri-Proposal, I will focus more specifically on them in Chapter 4.

2.2.2.2 French legislation

Arts L. 642-17 – L. 642-26 French Rural Code set specific requirements ensuring some safeguards to the decision-making process. Art L. 642 states that 'the formal recognition of the PDMO is granted upon the condition that the rules governing its functioning ensure, for each product for which the sign is claimed, the representativeness of the operators and the fair representation of different categories of operators, or of professional families regrouping the operators in case of inter-branch organisations' (translation provided by this author). Moreover, art L. 642-21 states clearly that the operators are 'all members of the PDMO' except in the case of inter-branch

391 Marie-Vivien and others (n 286).

392 Pick and Marie-Vivien (n 75).

organisations. The law, therefore, mentions three important requirements, or principles, which I rephrase as (1) the principle of **access to membership**, (2) the principle of **representativeness**, (3) the principle of **fair representation**. A fourth principle, the principle of **democratic functioning**, emerges from national practices.

In France, the principle of **access to membership** is specified by the compulsory nature of the membership of all GI operators to the PDMO ('the operators are all members of the PDMO', according to art L. 642-21 French Rural Code).[393] On the one hand, operators must be members of the PDMO if they wish to use the sign and produce in compliance with the product specifications. On the other hand, it is forbidden for the members of the PDMO to refuse access to the use of the name to new members on a discriminatory basis. The sole formal obligation for the operator to join the PDMO and use the registered name is the identification before the PDMO (art R. 642-35 states that 'membership of PDMO is established by inscription in a register of members kept by the organisation', and the same principle is restated in art D. 642-39-1). This connotation of the principle of 'access to membership' is a French specificity. However, 'access to membership' and mandatory membership seem to be conceptually distinct: while the former only refers to the impossibility to refuse membership ('open door principle') the latter is one of the possible specifications of the right to membership. This approach allows to highlight and compare national heterogeneities.

In France, representativeness, representation, and democratic functioning are all defined in relation to the operators. It is worthy to anticipate that despite mandatory membership the membership status might be differentiated for some stakeholders. These differences have repercussions on the configurations of the other pillars.

The principle of **representativeness and fair representation**, despite having a considerable practical relevance in national authorities' assessments, are less explicitly defined than the principle of access to membership. Important indications in this regard emerge from the Applicants' Guide for the recognition as PDMO. Since the guide represents an ensemble of formalised consolidated practices of the national authorities, they will be analysed in the next paragraphs. Defining the four pillars highlights the importance of this informative official document, as a complementary interpretative tool for generic formulations contained in the French GI law.

393 Marie-Vivien et al explain that necessary and compulsory membership of all operators concerned by the specifications was aimed to establish a stronger coordination and cooperation aimed to the definition of detailed specifications. This appeared as necessary after the extension of the AOC to all products when 'the task of drafting the conditions of production shall be more detailed and shall be consistent with the wishes of all the producers and processors, who shall be brought together as soon as possible'. See Marie-Vivien and others (n 347).

2.2.2.3 Italian national legislation

Differently from the French context, the principles of representativeness and representation, democratic functioning, and access to membership are codified by Italian law. However, this codification is fragmented, as different legal regimes are applicable depending on the legal form of the group and on the moment in which the assessment takes place (i.e., before or after the GI registration). Despite the focus of this analysis is on the pre-application and application phase, it can be useful comparing the legal framework on representativeness, representation, democratic functioning, and access to membership to other phases of the 'life of the GI', e.g., the amendment of the product specification.

As to the principle of **access to membership**, before registration it is mandatory that all operators of the candidate product are included in the temporary association (applicant producer group), according to art 4 Ministerial Decree 14 October 2013. However, membership to the producer association is *optional* after the GI registration. This feature differentiates the Italian from the French experience, where the membership to the PDMO is a compulsory and permanent requirement.

As anticipated, in Italy the principle of **representativeness** and **fair representation** are regulated through detailed top-down criteria. Nonetheless, the discipline set forth in Ministerial Decree 14 October 2013 is not homogeneous for all types of producer groups, and the level of intervention of the national authority in this matter as well as the assessment criteria might differ, depending on the moment of the assessment (*ex ante* or *ex post* the GI registration).[394] The table below

394 The legal framework on this matter appears even more fragmented if considering the rules on PDOs and PGIs applicable in the wine sector. It seems relevant here to mention the general rules concerning the representativeness and defined by Ministerial Decree 6 December 2021 which sets supplementary conditions to be verified by the Ministry of Agriculture and the Regional authority. In particular, art 5 states that the applicant must present a list signed by a number of winegrowers who […] demonstrate representativeness requirements, 'understood as an average, referring to the production claimed by the same winegrowers over the previous two years'. This formulation evokes a form of 'quantitative assessment'. Interestingly, the same article lists a number of detailed conditions which should be fulfilled depending on the following cases: '(i) in the case of DOCG wines, if it is intended to recognise an independent DOCG from an "expressly delimited area" or "sub-zone" within the AOC of origin, at least 66 per cent of per cent of the total number of winegrowers, representing at least 66 per cent of the total area identified in the vineyard register for the relevant denomination. In addition, the same 'sub-zone' of the AOC of origin must have been in the last five years certified and bottled by 51 per cent of the authorised operators, who represent at least 66 per cent of the total production certified and bottled; (ii) in the case of AOC wines, at least 35 per cent of the total number of vine growers, representing at least 35 per cent of the total area of the vineyards claimed or production declaration. For recognition as autonomous AOCs, from expressly delimited areas or sub-areas of pre-existing AOCs, the aforementioned percentages are raised to 51 per cent per cent, with reference to wine growers in the expressly delimited area or sub-area; (iii) in the case of PGI wines, at least 20 per cent of the total number of vine-growers, representing at least 20 per cent of the total area of the vineyards subject to the production declaration; (iv) in the case of delimitation of the bottling area at least 66 per cent of the total area of the vineyards subject to the productive declaration; in addition, the application must be endorsed by a number of producers representing at least 51 per cent of per cent of the production bottled in the last two years'. These requirements show the long-standing practice of identifying sub-mentions for sub-areas, which

(Table 9) shows the requirements for different types of producer groups and time-frames: during the GI application the applicant producer group must be an association and no specific legal requirement is mentioned on representativeness. However, art 7 of the Ministerial Decree states that the Ministry should verify 'the legitimacy of the applicant'. The criteria to assess legitimacy are left to national regional authority practices. After the GI registration the producer group can assume various configurations (Protection Consortium, standard or 'non-recognised' consortium, association, promotional committee, etc.). It is also possible that the producer group decides to not maintain a legally constituted structure. As already mentioned, this scenario is not problematic for the certification *per se* (since membership to the producer group is not required after the GI registration) but it can hinder the management of the sign and the performance of its functions. After the name is registered, the legal framework becomes more complex. By comparing art 4 and 13 of the Ministerial Decree, we can see that there is an evident asymmetry in the declination of the representativeness in the application for registration phase and in the amendment phase.

Table 9: Representativeness requirements at the application for registration and application for amendments, as defined in Ministerial Decree 14 October 2013.

GI application (art 4 Ministerial Decree 14 October 2013)			**GI amendment (art 13 Ministerial Decree 14 October 2013)**		
Applicant Association	Protection Consortia	Other or no legal structure	Association	Protection Consortia	Other/no legal structure
No formal requirement (but applicant's self-declaration)[395]	Not applicable	Not applicable	• 51% of the production controlled in the previous year; • 30% of the producers which are registered in the control system; Or, in the absence of production • 2/3 producers registered before the control body These percentages are assessed based on the definition of 'GI producers and users' defined in art 4 Ministerial Decree 12 April 2000 (regulating representativeness of Protection Consortia)		

has been recently used by some PGIs in the agri-food and non-agricultural sector. The same article seems to extend the same requirements (which apply regardless the form of association or Protection Consortia) to the product specification amendments and identify specific forms set out in Annex VI of the same Decree. Furthermore, the possibility for the applicant to rely on the facilitating and supervising role of regional authority in retrieving the relevant data concerning representativeness is explicitly mentioned. The role of regional authorities is further stressed at art 7 of the same Decree.

395 The declaration implies that the 'legitimated' applicant is constituted by producers and processors operating in the area defined in the product specification and that they produce the same product applied for registration. (see art 4 Ministerial Decree 14 October 2013).

Interestingly, the rules on representativeness converge in the application and amendment phases independently from the legal form assumed by the producer group and coincide with the type of assessment reserved to Protection Consortia. [396] Firstly, a quantitative type of assessment is aimed to verify how much of the production controlled and number of producers is involved in the GI – I will call it, for simplifying, 'control criterion'). Art 13 states that the association or consortium must represent 51% of the production controlled in the previous year and 30% of the producers registered in the control system. If no production has been registered in the previous year, the group representative for the request for amendments should represent 2/3 of the producers registered before the control body. Secondly, a qualitative type of assessment targets the categories of operators who should imperatively be involved in the application for amendment, given their key role in the value chain – I call it 'qualitative criterion'). In this regard, the rule stipulates that the only the category of 'producers and users' of the GI is considered for the definition of the control component.[397]

The framework on the governance of Protection Consortia adds further details on how the four pillars are regulated in Italy, for example clearly distinguishing between the concepts of representativeness and fair representation, setting specific requirements for democratic functioning, and implications for the principle of optional membership. I will tackle these issues more specifically in the paragraphs related to the outcomes, as the recognition of Protection Consortia, happens after the GI registration and heavily influence different types of processes occurring *ex post* the registration of the sign.

2.2.2.4 Implementation of the national legislation

2.2.2.4.1 Framing attempts of the operationalisation of the pillars: insights from the French experience

The French Rural Code does not provide detailed definitions or operational indications as to the interpretation of the notion of representativeness, fair representation, and democratic functioning. In this regard, the French Applicant Guide for the recognition as PDMO offers more detailed explanation on the rationales and assessment criteria.

396 There is indeed a nuance between the two moments: in the application phase, the requirements are less strict and adjusted downward to the model of the applicant association; in the amendment phase, the requirements are stricter and more adjusted upwards to the rules governing Protection Consortia. This discrepancy might be difficult to handle in practice, especially for non-structured or less structured GI holders.

397 The 'producers and users' are the 'actors whose activity, within the value chain, plays an irreplaceable role in giving the product the specific characteristics of the PDO or PGI' and 'the actors who bear the costs for the activities defined in Law 526/1999, *even in the absence of their membership to the consortium*'. Attributing a specific label to the 'producers and users' of the GI is a peculiarity of the Italian system to distinguish them to the 'producers and processors interested in the PDOs or PGIs'. This distinction is determinant for the internal functioning of system of Protection Consortia and its external relations (see infra Chapter 2, outcomes, governance configuration)

The Guide explicitly stresses that the statutes and the internal regulations of the PDMO need to be compliant with the principles and are subjected to a specific examination of the national authority during the application process and after the GI registration.[398]

The principle of **access to membership** is the clearest among the pillars. However, the Guide for PDMOs makes its rationale explicit affirming that 'the membership to the PDMO is aimed to grant to every operator the access to the management and the protection of a sign. It also grants that all operators who comply with the product specifications have the access to the control system established by the EU Regulation and by the French Rural Code'.[399] The necessary membership 'should be included in the statutes'[400] and it is considered a fundamental safeguard for preserving the open-door[401] and producer-driven character of GIs. The implied rationale of the principle of access to membership aims to 'preserve the freedom of establishment of all, once an official sign has been recognised, access should be granted to all', upon payment of a fee calculated according to specific criteria.[402]

The same clarity however has not been reserved by the French Rural Code to representativeness and fair representation, which seems often intertwined both in the academic scholarship and in practice. A closer investigation highlights that these concepts are to be considered as distinct requirements *and* they are assessed differently by the national authorities.[403] This conceptual and operational distinction is justified, first of all, by the formulation of art L. 642-18 French Rural Code which states that the 'recognition of the status of producers management organisation

398 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 4.

399 ibid 7.

400 ibid.

401 Reto M Hilty, 'Individual, Multiple and Collective Ownership: What Impact on Competition?' [2012] Individualism and Collectiveness in Intellectual Property Law 17 <https://www.elgaronline.com/view/edcoll/9780857938978/9780857938978.00008.xml> accessed 30 October 2022.

402 Interview with INAO legal department, 16 September 2022, para 13. Marie-Vivien et al. investigated on the potential discriminatory nature of the compulsory membership to the PDMO concluding that 'discrimination would be clear in the case of exorbitant membership fees, or difficulties in understanding the principles of an association, but in France, membership fees are low, the highest being the contribution per volume of production to finance the cost of controls (usually 1 per cent).' Marie-Vivien and others (n 286). Pick and Marie-Vivien (n 119) had raised the same issue by arguing that 'it is contrary to European law, directly applicable in France, which enshrines the principle of availability of PDOs/PGIs by declaring that these may be used by any operator marketing a product conforming to the corresponding specification (Regulation 1151/2012, art 12.1). This obligation also appears to affect the constitutional freedom of association, including the freedom not to join an association. This appears to be a concern more particularly with regard to the obligation to pay fees (French Rural Code, Article L. 642-24)'.

403 Pick and Marie-Vivien (n 75) 4–5. Interestingly, the nuance in meaning between the concept of representation and representativeness emerges, even more explicitly, in Italy where national law which defines the criteria of assessment, one being quantitative, the other qualitative.

shall be subject to the condition that the rules governing the composition and operation of that body ensure, for each of the products for which a sign is claimed, the representativeness of the operators *and* a fair representation of the different categories of operators, or of the professional families grouping the operators in the case of the recognised inter-branch organisations which carry out the tasks of the protection and management organisations' (translation provided by this author). Similarly, the INAO Directive of 1 July 2009 on the monitoring of the conditions for the formal recognition as PDMOs identifies the representativeness of the producer group *and* the 'fair representation' of all the professional categories concerned as two (distinct) conditions.[404] This approach appears also to be confirmed by the formulation of art R. 642-33(3) French Rural Code. It states that elements in the application dossier for the recognition as PDMO, 'allow to assess the representativeness *and* fair representation of the professional categories for the product concerned'.

Coherently with the clear formulation of the legal rules, the Guide (and the existing litera-ture) affirm that (1) representativeness 'aims at ensuring the democratic functioning of the collective organisation and fair representation of the interests of the different actors, with a view to avoiding privatisation of local resources by non-legitimate groups';[405] (2) it shall be assessed (a) considering the number of actors concerned by the product specifications, the number of operators already members of the group filing the application to be recognised as PDMO and (b) considering the volumes of production for the GI and the number of the members to the group, calculated in relation to the global volume of production.[406] Although these elements do not explicitly define what 'representativeness' is, they provide important information on the type of assessment criteria. Conceptualising **representativeness** would mean qualifying the capacity of the PDMO to 'be representative', meaning to regroup a considerable number of GI operators, compared to the total number of producers or volumes of the 'candidate' product.[407] The reference to the 'candidate product' is particularly interesting as it implicitly might place the assessment on representativeness when the decision-making on the content of the product specifications has already started (*in itinere*).[408] This means that the legitimacy of the PDMO as to its capacity of being representative is based on an initial idea of the origin product to be identified by the future GI. This might have consequences on the outcomes, in particular on the strictness of the boundary

404 INAO Directive 1 July 2009 n. 3, p 2, as modified on 24 November 2011.

405 Carimentrand and others (n 173).

406 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 10.

407 Interview INAO Legal Department, para 47.

408 The identification of the assessment on representativeness as *'in itinere'* seems to be suggested by the reference to the 'project of product specifications' in the French Rural Code and the Applicant Guide for the PDO or PGI registration. This expression conveys the idea that the proposed product specification most likely evolves before the registration of the sign. When the sign is registered, however, a producer group must be identified as PDMO.

rules (or put it differently, on the degree of openness of the GI to other operators). This argument seems also to be confirmed by the fact that, as already mentioned, the four pillars are always assessed based on the concept of 'operator', and the identification of the operators is based on the content of the product specifications. The product specifications identify the production activity necessary to give to the product its specific characteristics and quality. For each rule written in the product specifications, one actor has to be identified. That actor is considered as operator of the GI.[409] The 'legitimate' operators of the GI might have already been identified before the assessment on representativeness. To mitigate this effect, one should consider that the product specification submitted by the applicant is considered as a 'project' or a 'draft'; it is therefore likely to be modified before the registration of the sign.

Defining if the assessment of representativeness takes place *in itinere* or *ex post* the crystal-lisation of the product specification design becomes even more evident in the amendment phase, when the idea of the product, already formalised in the specifications, is rarely challenged, and when the assessment on representativeness is never formally revisited.

An example emerging from the existing literature concerns the *Camembert de Normandie* case analysed by Pick and Marie-Vivien, where different versions of the product currently coexist in the geographical area: on the one hand the PDO Camembert de Normandie, made with 50% raw milk from Norman cows and the industrial type of cheese made with pasteurised milk. The actors' heterogeneity (artisanal vs industrial producers) generated conflicting views as to the nature of the origin product (an issue which has been raised in 2018, where an amendment of the product specification has been proposed by the industrial producers).[410] However, as reported by Pick and Marie-Vivien, the amendment was rejected in 2020 by the PDMO of the PDO, who preferred maintaining the boundaries of the sign as protecting the cheese production issued from raw milk from Norman cows. Despite the intervention of the INAO as 'mediator' in this case, the representativeness considered necessary for legitimising the approval or rejection of the amendment was ultimately assessed on the number of the producers already belonging to the PDO, despite being the minority, if compared to the product of the same kind produced in the area.[411] The actors already included in the PDO were the sole concerned by the boundary crystalised in the product specifications at the moment of the registration and therefore considered 'legitimate'

409 Interview with INAO legal department, 16 September 2022, para 64 and Interview with INAO territorial delegation, 8 August 2022, para 14.

410 Pick and Marie-Vivien (n 75) 12.

411 Pick and Marie-Vivien specify that the rejection of the amendment to the product specification of the PDO 'leads to consider the legitimacy and representativeness of different groups of producers: those who were the early members of the 'original' ODG; those who represented the ODG during the negotiations and agreed to the amended specification; and those outside the original PDO who may want to be included.' Ibid.

to have a veto on a possible revision of the product specification. In this case, the perspective of modifying the boundary rules to achieve a higher degree of openness, has not been the preferred solution. This could be seen as a lost opportunity to formalise existing practices, or as a safeguard for preserving the authentic qualities of the product traditionally identified by the name.

The principle of **fair representation** is assessed differently by the INAO offices from representativeness. Two different aspects are targeted and might be useful to understand the nature of this principle: the first is ***who* should be present in the PDMO** which I identify, for now and for clarity purposes, as 'basic representation'.[412] Interviews with the INAO representatives show that granting stakeholders' representation in the PDMO means making sure that all the actors of the value chain involved in the production of the GI product, are granted participation.[413] There is a necessity of mirroring the heterogeneity of the stakeholders involved and their role in the value chain in the composition of the PDMO. Depending on the product involved and the structure of the value chain, however, the presence of the professional categories in the PDMO might be heterogeneously distributed (e.g., the milk producers could be less numerous than the processors). Therefore, a further assessment on the 'proportionality' (or 'fairness') of the representation is therefore needed as it directly affects power distribution: depending on the complexity of the value chain, there will be actors who have more power to influence decisions than others. The identification of appropriate mechanisms to qualify the 'fairness' of representation (who should be included in the group *and* if some professional categories should be 'more represented than others') is currently left to the initiative of the applicant producer group. Eventually, the national authority can give feedback in case corrections are deemed necessary, and the appreciation of this possibility is undertaken on a case-by-case basis. The assessment of the INAO offices will also be based on (a) the list of the members of the association, *syndicat* or inter-branch organisation at the moment of the application, their function, and an estimation of the total number of operators concerned by the PDO or PGI; (b) an assessment made by the PDMO of the volumes produced or susceptible of being produced by the members or potential members and an estimate of the total volume of the product produced. These documents should be submitted by the applicant.[414]

The second aspect considered by the INAO for assessing fair representation is ***how* heterogenous actors should be represented** in the PDMO. The 'how' relates to the direct and indirect representation. According to the Applicants' Guide for PDMOs, the representation can be **direct** (individual) or **indirect** (through specific groups, '*colleges*', '*filières*', or sections). In the case of

412 It is important to note that this concept of 'basic representation' is only for explicatory purposes. The legal texts and the national authorities' practices always refer to 'fair representation'.

413 Interview with INAO legal department, 16 September 2022, para 51.

414 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 4.

indirect representation, formal elections are organised to identify the actors who are entitled to represent the interests of the professional category concerned (e.g., the breeders, the processors, or the operators of the same GI product). As it is forbidden to oblige an operator to adhere to a specific committee or section, the individual and direct representation within the PDMO should always be granted to every operator.

One can easily deduce from these considerations that representativeness *and* representation are *complementary* but *distinct* criteria for assessing the legitimacy of the producer group and for setting the conditions for enduring governance. The verification of representativeness seems involving prevalently a 'quantitative' type of assessment. On the other hand, the verification of fair representation seems to target in the first place a 'qualitative' type of assessment (to understand the composition of the PDMO which should represent the heterogeneity of the actors concerned), and the 'fairness' of this representation is left to an assessment of proportionality based on the type of product and structure of the value chain.

If the functioning of the PDMO is compliant with the principles of representativeness and fair representation, all the operators involved in the production (i.e., bound by the product specifications) are informed about the management of the sign and are put in the conditions to express (directly or indirectly), their opinion during the decision-making process. Thus, the assessment on the fairness of representation is functional to control the distribution of the decision-making power among the actors and avoid disproportions or asymmetries.[415]

It is evident, at this point that the principle of 'fair representation' is directly linked to the principle of democratic functioning. The principle of **democratic functioning** focuses on the exercise of the right to vote of each member, the modalities of expression of such vote, and the relevance of each vote in the decision-making. The Applicant's Guide for PDMOs does not give any preferable option as to the specific criteria to weight the vote expressed by each member, and simply specifies that 'it is necessary that every operator can express their opinion or nominate a representative'.[416]

In practice, the INAO checks, through specific grid of analysis of the value chain if, based on the content of the product specifications and the structure of the value chain, all stakeholders are represented in some way and if this representation implies risks of imbalance. One risk could be that a professional category is not represented or 'too much represented', another risk could be that despite the professional category is represented, it has little or too much decision-making

415 Interview with INAO legal department, 16 September 2022, para 53.

416 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 11.

power. One very common solution to counterbalance this type of configuration is that decisions are taken at the unanimity of all the members of the relevant committee or multiple committees: *decisions should need to be taken by all the actors of the value chain as a group*.[417]

The interviews and the analysis of the Applicants' Guide show another interesting aspect of the principle of democratic functioning, which adds more nuances to the principle of necessary membership. Despite all 'stakeholders who actually participate in the production, processing, preparation or packaging of the product' are considered operators in the French Rural Code, in practice there is a distinction between *ex officio* members (identified as '*membres de droit*' in the Applicants' Guide for PDMOs) and affiliated members. In particular, '*ex officio* members' are producers who undertake a production step codified in the product specifications. Only *ex officio* members have the right to vote, and their vote is deliberative. Affiliated members are those who participate in the value chain, but do not undertake a production step provided in the product specification. These operators *can* assist and participate in the decision-making process. The aim of this safeguard is to grant transparency of information to all stakeholders directly or indirectly involved in the GI management and allow the expression of their specific interests, while preserving a producer-driven focus.

The distinction between *ex officio* members and affiliated members has also repercussions on the principle of fair representation, and representativeness. Yet, the assessment of fair representation for agri-food, cider and spirits products is made considering all the professional categories concerned and their relevance in the value chain, giving priority to *ex officio* members of the PDMO (producers, processors, packers etc.).[418] As to representativeness, the general notion of 'operators' is involved, and no formal distinction is made between different types of membership. However, it can be inferred that a PDMO should be considered representative if it regroups at least a considerable number of the operators established in the identified geographical and eligible for *ex officio* membership.

It is important to point out that these considerations are an attempt to extract general rules and principles from a case-by-case type of assessment, which remains a main feature of the French attitude towards the implementation of the national legal framework concerning the GI registration and management.

417 Interview INAO, paras 19-24.

418 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 12.

The legal form of the producer group in France should not impact on how these principles are embedded in their governance structure. The functioning of the association and the *syndicat*, if recognised as PDMO, are considered by the national authority as equivalent as long as they can manage the tasks and responsibilities mentioned in the French Rural Code.[419] However, additional flexibilities concerning the extension of the right to membership (affiliation) to non-operators (stakeholders not directly involved in the production) are granted by the association, while more restrictive rules apply for the *syndicat* (where only the operators involved in the product specifications are considered members of the PDMO).

2.2.2.4.2 Finding coherence in the Italian 'legal patchwork': consequences of the fragmented approach on the pillars of GI governance

In practice, the verification on the **principle of access to membership** is carried out at the level of regional authorities and at the Ministerial level. The Ministry of Agriculture and the regional authorities verify that the statutes of the producers' association do not create, implicitly or explicitly, any barrier for the access to the use of the name by new members (safeguard to the open-door system).[420] The same principle and assessment practice is maintained after the GI is registered, but only to verify the maintenance of the eligibility requirements upon Protection Consortia. The membership to the applicant association in Italy is mandatory, while it is voluntary after the GI registration. I will tackle this issue more in depth in the paragraphs related to the Outcomes.

As already observed in France, the principles of representativeness and fair representation are important indicators to verify the legitimacy of the applicant. Differently from France, in Italy the legitimacy of the producer group is codified in the Ministerial Decree as one of the criteria to assess the application file. However, the law remains silent as to the modalities of assessment. The regional authorities, in practice, are called to express an opinion in this regard, as they enjoy more proximity with producers. However, their verification merely aims to ensure that 'all the actors present in the associations are producers of the [candidate product]', and a specific assessment on the proportion of each professional category involved in the production in the association is not undertaken.[421] At a later stage, the Ministry receives from producers the deed of incorporation of the associations and the statutes. From the deed of incorporation, the competent Ministerial offices, if necessary, can map the actors involved in the GI initiative and pursue a documental verification checking if each identified producer effectively produces in the geographical area.

419 Interview with INAO legal department, 16 September 2022, para 40. This flexible approach is also confirmed by the fact that the INAO can accept legal forms different from the association, *syndicat*, inter-branch organisation, if the operators show that they are appropriate for them.

420 Interview with regional authority Tuscany, 19 September 2022, para 17.

421 ibid., para 21.

The implementation of art 13 of the Ministerial Decree concerning the verification on legitimacy of the applicant at the amendment phase, is more structured. To verify the compliance with the legal requirements (which I identified as 'the control criterion' and 'qualitative criterion') the Ministry of Agriculture verifies the list of the producers registered in the control system and the quantity of certified product, checking the correspondence between the declarations of the applicants concerning their representativeness and the data emerging from the documentation coming from the control bodies.[422]

As already mentioned, the legal rules governing the four pillars (especially the principles of representativeness, fair representation, and democratic functioning) in Italy are differently articulated depending on the moment of the assessment (*ex ante* or *ex post* the GI registration) and the legal form assumed by the producer group. It emerges that for the Italian legislator it seems irrelevant whether the producer group keeps its representativeness after the GI registration, unless it 'converts' in a Protection Consortium seeking formal recognition. *A fortiori*, it seems irrelevant if all professional categories are fairly represented in the governing bodies of the group different from Protection Consortia.[423] As shown by the Picinisco case, the maintenance of an organisational structure after the registration is not relevant for the certification, as each producer interacts with the control body. Even though this element is not determinant for exercising the right to use the name, it has huge impact on the sustainability of collective action for the management of the GI as a participatory and collective producer-driven process. The gap between Protection Consortia and the absence of structured organisations is particularly evident in the application for amendment, when the application requirements converge: when a structure gathering all operators is lacking and collective action is low at the producer level, regional authorities must substitute to the producer group taking the lead for identifying the legitimate applicant group for amendments, and verify the compliance with the legal requirements for its eligibility.[424]

2.2.3 Outcomes

From a commons perspective, the outcomes 'concretize the stakeholders' problem-solving capacity, they result from interactions and evaluation processes embedded in the decision-making

422 Interview with Ministry of Agriculture, 28 January 2022, para 18.

423 This means that there is no legal obligation for an association to 'continue to exist' after the GI registration, and there is no obligation for the group which is not formally recognised as Protection Consortium to be representative after the GI registration. See ibid, paras 12-14.

424 In other words, there is a substantial asymmetry in the legal approach to the identification of the 'legitimate applicant' in case of amendment: the laxist approach towards legal forms different from Protection Consortia might not set the conditions for stakeholders to self-organise and comply with the (strict) representativeness requirements, making the intervention of the regional authority necessary. See interview with regional authority Lombardia, 6 March 2023; interview with regional authority Tuscany, 19 July 2022, para 31.

as a response to a specific problem'.[425] The identification of the type of action-situation, therefore, can impact on the individuation of the outcomes. McGinnis and Ostrom highlight that 'outcomes of interactions in different levels of analysis are explicitly connected to each other'[426] and to other outcomes at higher or lower levels.[427]

In GI theory, initiatives have been implicitly or explicitly identified as processes leading to outcomes. Pick and Marie-Vivien highlight that the structure of the decision-making process 'may have exclusionary effects in respect of those who are unwilling or unable to comply with these specifications, especially the small-scale or traditional producers who often build the image of the GI. Such exclusionary effects reflect a trade-off between inclusiveness and economic success linked to an "exclusivity strategy"'.[428] Belletti et al. identify outcomes as 'second order effects' and distinguish them from outputs, meaning 'first-order effects' among the potential effects of GI initiatives.[429] This distinction denotes that GI registration can have various consequences (which are reflected, as mentioned, by the multiple functions of the sign). The work of Belletti et al. targets, from an economic perspective, the variables useful for the evaluation preceding the stakeholders' decision making on the opportunity to valorise and protect origin products through GIs. They also focus on the variables to assess GI performance *ex post* the GI registration. A similar terminology has been used by Guerroué, Barjolle and Piccin to explain the contribution of researchers in the development of a GI initiative. From their perspective, 'outputs' are 'products derived by research', and 'outcomes' identify its 'appropriation' by the actors of the value chain to craft the product specifications (i.e., socio-technical innovations). It is interesting to note here that the 'outcomes', according to the authors, have two different types of implications. First level outcomes impact on producers, while second level outcomes are more widespread, and reach actors 'who indirectly benefit from the innovation'.[430] This differentiation evokes the difference between the 'participants' and the community at large adopted in this research and implicitly refers to the resource production function of the sign (including the production of public goods).

My analysis concerning the outcomes has a slightly different focus and implies zooming in the rules and practices governing the decision-making in the pre-application and application phases

425 Jacopo A Baggio and others, 'Harnessing the Benefits of Diversity to Address Socio-Environmental Governance Challenges' (2022) 17 PLOS ONE e0263399 <https://dx.plos.org/10.1371/journal.pone.0263399> accessed 7 March 2023.

426 McGinnis and Ostrom (n 272).

427 Unnikrishnan and others (n 250).

428 Pick and Marie-Vivien (n 75).

429 Belletti and Marescotti (n 88) 24–36.

430 Jean-Louis Le Guerroué, Dominique Barjolle and Luca Piccin, 'Quel Rôle Joue La Recherche Lors Du Développement d'une Indication Géographique ? Le Cas Particulier de l'AOP GRUYÈRE En Suisse' [2022] Économie rurale 63 <http://journals.openedition.org/economierurale/9739> accessed 13 April 2023.

to understand stakeholders' roles and interactions, and the consequences of these interactions relevant for the legal discourse. Decomposing the process in this sense, leads, therefore, to the identification of two classes of outcomes. I identify as **first-level outcomes** the tangible rules and processes mainly embedded in the product specifications, and adjacently on the control plan and the statutes of the producer organisations. All these documents are necessary for the operational functioning of the GI. They set the basis for **second-level outcomes**, namely the governance configuration of the producer group[431] and the control configuration on stakeholders' compliance with the product specifications and on the governance of the producer group.

2.2.3.1 First-level outcomes: content of the product specifications, the control plan, and statutes of the producer organisation

The product specifications are a normative document which is considered as the 'masterpiece of the collective organisation' and the result of a 'social construction'. [432] They set the boundaries of what is permitted, codify the alignment of practices set forth by producers 'to inform consumers about the "special" high quality of the product and physically separate their products from the mainstream'.[433] Vandecandelaere et al. identify the product specifications as the 'rules of the game' which 'need to ensure the participation of all relevant stakeholders in the development and management of a GI system, to avoid the exclusion of concerned stakeholders'.[434]

The recognition of this difference is pursued by following a double objective. On the one hand it implies finding a compromise on the GI product characterisation through specific conditions of production and the justifications for the legitimate restricted use of the name by well-identified type of stakeholders. On the other hand, it requires control and sanctioning mechanisms necessary to monitor and enforce these rules.[435] For the first objective, stakeholders make choices on the formulation of specific operational rules reflecting long standing common practices (e.g., on the methods of production determining distinctive product characteristics, on the raw material used, etc.). These choices should lead to outcomes respondent to specific legal requirements, which shape their content and drive the rulemaking process. They should be producer-driven and result from a democratic, transparent, and participatory process, because they set the 'conditions for inclusion or exclusion' of stakeholders eligible for using the GI.

431 Belletti and Marescotti (n 88); Réviron and Chappuis (n 32) 53. It is particularly relevant to distinguish the governance setting among the outcomes to highlight specific modifications which might occur after the GI registration in the Italian national context (namely those affecting the legal form of the producer group and the recognition of Protection Consortia, which implies stricter requirements for GI governance).

432 Poméon and Fournier (n 108).

433 Réviron and Chappuis (n 32) 50.

434 Vandecandelaere and others (n 81) 158.

435 Carimentrand and others (n 173) 2.

The construction of the product specifications is therefore a complex matter, which is challenged by the presence of heterogeneous actors, having heterogeneous aims. Elements such as the product description and the delimitation of the geographical area are critical points characterising the content of the product specification. The product description might include information on the raw materials, on the physical and chemical, microbiological, and organoleptic product characteristics and on specific processing techniques which contribute to giving to the product its specific characteristics and quality. Vandecandelaere et al. highlight the importance of measurable criteria for defining delimi-tation these product characteristics and suggest a mobilisation of scientific methodologies of data collection, which put at the core the direct involvement of producers, for drafting the rules. The main challenge, as to the product characterisation is 'to choose which products will be concerned by the GI, so to determine the adequate rules in order to reduce the pre-existing heterogeneity' or including sub-types.[436]

The same authors, investigating on the most frequent criteria for delimitation, point out no 'one-size-fits-all solution' exists. 'On the contrary, each delimitation process requires a collective conceptualisation and a specific solution. An effective balance must be reached between different criteria'. Among the possible criteria identified by the authors based on case-study analysis: (1) ecological setting; (2) know-how, specific practices, and traditions; (3) history of production; (4) production stages and economic situation; (5) social network; (6) existing zoning. For each criterion, specific methods are suggested including mapping, soil analysis, interviews with local stakeholders, participative meetings. In practice, a 'delimitation report' might 'constitutes the basis for the discussion of the delimitation proposal. The evidence of the link with the geographical area, in combination with other type of objectively verifiable data, provide sufficient grounding for the delimitation.[437]

From a commons perspective, the product specifications constitute the producers' response to the 'social dilemma(s)' affecting the place-based reputation in the absence of legal protection of the name. The agreed rules need to be efficient for sustaining the nested resource but flexible enough to grant access to the resource to satisfy the general interest. The product specification is an ensemble of operational arrangements which have the potential to protect the resource from erosion. However, as pointed out by Pick and Marie-Vivien, 'despite their mandatory content, the product specifications allow for some flexibility and can vary greatly in terms of details and standards across PDO/PGI products. Local stakeholders taking part in the elaboration process are ultimately the ones deciding which criteria and rules of production to include – or deliberately ignore. Even if there is mediation from the State, as does INAO in France, producers are the ones

436 Vandecandelaere and others (n 81).

437 ibid 63–68.

who ultimately make the decisions.'[438] The difference between the need to envisage adequate restrictions to the access to the use of the name and unjustified exclusive management of a resource by a small group of stakeholders can be very subtle. The mediation role of the State and experts external to the value chain proves to be essential to attain and preserve this equilibrium over time. If the content and formulation of the rules is sufficiently clear, it allows the identification of check points and modalities of control. These elements are contained in the control plan, a document which is drafted with the assistance of independent control bodies. The control plan is a valuable tool for understanding the specification and decoding collective action dynamics leading to the GI registration.[439]

2.2.3.1.1 EU legislation on the first and second level outcomes

The content of the product specification is defined in art 7 Reg 1151/2012 and includes: (a) the **name** to be protected 'as it is used, whether in trade or in common language, and only in the languages which are or were historically used to describe the specific product in the define geographical area'[440]; (b) the **description of the product**, including the raw materials ('if appropriate'), as well as the main physical, chemical, microbiological or organoleptic characteristics of the product; (c) the definition of the **geographical area** delimited with regard to the origin link; (d) **evidence** that the product originates in the defined geographical area (i.e., 'proof of origin' section)[441]; (e) a **description of the method of production** and information concerning **packaging**, 'if the applicant group so determines and gives sufficient product-specific justification as to why the packaging must take place in the defined geographical area to safeguard quality, to ensure the origin or to ensure control, taking into account Union law, in particular that on the free movement of goods and the free provision of services'[442]; (f) the **link** between the quality or characteristics

438 Pick and Marie-Vivien (n 75) 5.

439 Guerrieri F. Marie-Vivien D., 'The control plan of agricultural and non-agricultural GIs: the Cinderella of collective action?' <http://publications.cirad.fr/une_notice.php?dk=602384> accessed 1 November 2022.

440 The name proposed for registration should be 'effectively used'. No time frame is provided in this rule as to the anteriority of use. The national legislations are more specific in this regard. See *infra* Chapter 2, Section II French and Italian legislation and implementation of national legislations. It is important to point out that art 3(3) Reg 1151/2012 specifies that a 'proven usage on the domestic market for a period that allows transmission between generations is to be at least 30 years'. 30 years is the time-frame that the EU legislator considered as sufficient to characterise a 'traditional' production.

441 Proof of origin section is related to all the elements related to the monitoring, control, and traceability of the production. The Max Planck Institute Study showed that this section has been interpreted differently by applicants and national authorities in various Member States, sometimes including information on the history of the product or the origin link. This element is particularly significant to highlight that interpretation of the EU requirements can vary, depending on the country and the time-frame; and so despite harmonisation efforts undertaken at the EU level. Zappalaglio and others (n 92) 48.

442 The logic behind the construction of the product specification lies on the general principles that GIs, being exceptions to the restrictions to the principle of free movement of goods defined at art 28 TFEU, is that the restriction (i.e., locality requirement) should be adequately justified. For this reason, each rule implying a condition for the use of the name needs to be sufficiently grounded. To claim exclusive rights over a name of a product the rules contained in the product

of the product and the geographical environment or between a given quality, the reputation or other characteristic of the product and the geographical origin; (g) the **name and address of the authorities or certification bodies**; (h) **labelling and traceability rules.**

Art 8 of Reg 1151/2012 identifies the documents composing the application file, namely (i) the name and address of the applicant group and of the control body; (ii) the product specification; (iii) the single document summarising the main points of the product specification.[443]

I consider the control plan and the statutes as the outcomes of action situations adjacent to the core situation involving product specifications design. As such, they help understand why and how the operational rules contained in the product specifications are written. While the rules governing the governance of producer groups are almost overlooked at the EU level, the framework on the control system is more developed. According to recital 46, of Reg 1151/2012, 'the added value of the geographical indications and traditional specialities guaranteed is based on consumer trust. It is only credible if accompanied by effective verification and controls'. The rules governing the control system are contained in art 35-38 of the Regulation. Marie-Vivien et al., describe the control system as structured in two levels, a macro and micro level. At the macro level the 'official control' is 'ensured by the competent authority of the Member State'; at the micro level, it 'concerns the monitoring of compliance with the specifications for each PDO/PGI, which is ensured by the competent authorities of the Member State and/or by a product certification body, an independent third party, accredited in accordance with European standard EN 45011 or ISO/IEC Guide 65'.[444]

specification need to assert the presence of a specific quality given by the human factor or a combination of natural and human factor linked to place. In other words, whenever there is a locality requirement (i.e., a specific phase needs to take place in the identified geographical area, or raw materials need to be sourced inside the geographical area) the explicit mention of the quality derived from this restriction needs to be identified and proved by appropriate evidence (application file). This element is crucial and is one of the conceptual pillars of the logic behind GIs.

443 The single document is a shorter version of the product specification, and it is assessed by the EU competent authority. A *Guide to applicants* has been released by the Commission to help the harmonised interpretation of the content of the single documents. Although the focus of this work is mainly on the national phase of the application, some key principles of this analysis can be found in the guide (e.g., the requirement of the prior use of the name; the description of the specificities of the product which should include 'technical scientifical data' and 'in what ways [the product] is different from another product of the same category'; the causal link). A thorough analysis of the interpretation of the requirements of the single documents of PDOs and PGIs in all EU countries has been made in the Max Planck Institute Study. Zappalaglio and others (n 92); Guide to Applicants: *How to Compile the Single Document* <https://agriculture.ec.europa.eu/system/files/2022-08/guide-to-applicants-of-single-document_en.pdf>.

444 These considerations are referred to the content of Reg 510/2006, but they are also applicable to Reg 1151/2012. The rule EN 45011 has been replaced by the rule ISO 17065. See Marie-Vivien and others (n 347) 27. See for a general overview on the French and Italian system Andrea Zappalaglio, 'EU Geographical Indications and the protection of producers and their investments' in Enrico Bonadio and Patrick Goold (eds), *The Cambridge Handbook of Investment-Driven Intellectual Property* (1st edn, Cambridge University Press 2023) 308–328 <https://www.cambridge.org/core/product/identifier/9781108989527/type/book> accessed 23 March 2023.

2.2.3.1.2 French legislation

French legislation aligns with Reg 1151/2012 as to the content of the product specifications.[445] Art L. 641-5 French Rural Code defines the requirements for PDOs, while art L. 641-11 sets the requirements for PGIs. Interestingly, the GI registration is defined in the French Rural Code as a 'recognition of a denomination' through the 'homologation of the product specifications' (art R. 641-11 French Rural Code). Art L. 641-6 and L. 641-11 specifies that the recognition of a PDO and a PGI is 'proposed' by the INAO, after having consulted the applicant producer group. The formulation of this rules shows, once again, the 'hands-on' approach of the national authority, describing it almost as a process of co-construction of the application file.

Art R. 641-12 French Rural Code inscribes the product specifications in a more extensive application file, which should include:

- The specific designation of the product;
- The application for the formal recognition as PDMO;
- The project of product specifications and single document;
- The name of the control body already accredited for the product concerned or the application for accreditation;
- A study on the economic and technical impact;
- A document establishing that the dispositions of the product specifications can be controlled;
- If appropriate, the application for transitional protection.

The product specifications can define declarative obligations upon the operators, consisting, for example, in the duty to keep records of the steps involved in the production, transformation, or packaging. Moreover, they might imply measures aimed at favouring the preservation of '*terroirs*' (art L. 641-6 French Rural Code). Even though at first sight the rule is explicitly linked to PDOs (implying that it is more suitable for those quality schemes that have a stronger link with the natural environment) it seems to implicitly extends to both quality schemes, indirectly, as the activity of elaboration of (non-binding) good practices is part of the tasks and responsibilities of all PDMOs (art L. 642-22 and art L. 642-5 n. 9). In the French national law, the product specification is defined as a 'project', since the first proposition made by the applicants can evolve due to the interactions with the INAO offices and during the opposition procedure. The INAO Directive 31 March 2015 n. 1, which states that the project of product specifications should include the denomination that will be the object of protection, the description of the product, the project of geographical area, the project of description of the link between the product and the geographical area.[446] More detailed

445 These guidelines are formally non-binding and presented as suggestions. However, they reflect the consolidated practice of the national authority in assessing the application file.

446 INAO Directive 31 March 2015 n. 1, p 5.

indications on the content of the product specifications are defined in the Applicants' Guide for a PDO or PGI registration, which codify the practices of the INAO in this regard and will be discussed in the following paragraphs of this Chapter.

Despite the draft of the product specification is at the core of this inquiry as the tangible outcome deriving from the identified action situation, it *cannot be considered separately* from other action situations happening, almost simultaneously, at producers' level during the pre-application and application process. One adjacent action situation has, as outcomes, the statutes, and the internal regulations of the PDMO, which must be compliant with the four pillars. These documents are the basis for the recognition of the producer group as PDMO. Another important adjacent action situation has, as outcomes, the control plan which is drafted by the control body with the collaboration of the producer group. The draft of the control plan (not always publicly available after the GI registration) must be filed by the control body at a later stage of the procedure. The producer group includes in the first application file a 'document establishing that the dispositions of the product specifications can be controlled' (also known as 'controllability document'), which is preliminary to the control plan, and represents a French specificity.

Taking into account the main and adjacent action situations is important, as it allows to better contextualise the rules governing the rulemaking process leading to the product specification. Looking at the statutes of the PDMO allows to understand how decisions on the product specifications have been made, and by whom; looking at the control plan allows to understand the consequences stemming out from the agreed rules of the product specifications on all operators (i.e., how these rules are monitored and enforced by the actors involved in the production of the GI product and the impact of monitoring and control on compliance and collective action).

2.2.3.1.3 Italian legislation

The national legal framework is not complemented by codified guidelines provided by the national authority as the Decree is considered exhaustive in this regard. Informal indications are usually given by the regional authorities through informal channels.[447] Art 3 of Ministerial Decree 14 October 2013 identifies the following elements of the product specification:

- The name to be protected as PDO or PGI, as used in trade or common language and in the languages currently and historically used to identify the product;

447 Art 6 Ministerial Decree 14 October 2013 also mentions the additional documents constituting the application file, namely: 'assembly resolution indicating the willingness of the producers to apply for registration of the PDO or PGI, where such a provision is not contained in the articles of association or in the articles of association'; 'name, address and contact details of the control body'; historical, technical and socio-economic report; a map which identifies the geographical area; the single document. The historical report is a national specificity of the Italian system. For more insights in this regard see Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' (n 83).

- The description of the product included the raw materials and the main physic and chemical, microbiological and organoleptic characteristics of the product;
- The definition of the geographical area;
- The elements that show that the product originates from the geographical area;
- The description of the method of production and, if applicable, of the long-standing practices and the elements concerning the packaging of the product in the geographical area when it is required to safeguard the quality of the product, to ensure origin or control and if supported by sufficient specific motivations;
- For PDOs, the elements which establish the production phases taking place in the geographical area and the link between the characteristics and quality of the product and the geographical environment. For PGIs, the elements which show that at least one of the production steps takes place in the geographical area and the link between the reputation, the product and other characteristics of the product and the geographical origin;
- The name and address of the control body;
- Specific rules on labelling.

AREPO reports that 'Italy was the only Member State to have adopted, already in 2004, national legislation (Legislative Decree 297/04) regarding the identification of GI products as ingredients in the labelling, presentation or advertising of a compound, prepared or processed product' and precises that 'the original text of the decree also included a criterion requiring the processed product not to contain any other ingredient comparable to the GI product. This criterion has been repealed and no product criteria are included in the current text'.[448] According to the Decree, the authorisation for the use of the name (and the inclusion in a specific register) comes from the Protection Consortium, where present.[449] In cases where the Protection Consortium is absent, the Ministry of Agriculture is in charge of issuing the authorisation and managing the register.[450]

Art 6 Ministerial Decree 14 October 2013 (content of the application file) specifies that, in addition to the product specification, the applicant should submit:
'(a) the deed of incorporation and/or statutes of the association;
(b) a resolution of the shareholders' meeting indicating the willingness of the producers to apply for registration of the PDO or PGI, where such a provision is not contained in the articles of association or in the statutes;

448 AREPO, 'The Use of EU Geographical Indications as Ingredients. An Analysis Based on AREPO Member Regions and Producer Associations' 7 <https://www.arepoquality.eu/2021/06/21/the-use-of-eu-geographical-indications-as-ingredients/>.

449 This means that producers groups with Protection Consortium often develop internal rules concerning this specific issue. ibid 28.

450 The Ministry of Agriculture decides according to specific guidelines and on a case-by-case basis. ibid 16–17.

(c) the product specification referred to in Article 3;
(d) name, address and contact details of the authorised party and of the authority or body verifying compliance with the provisions of the product specification […];
(e) a historical report, accompanied by bibliographical references proving the production for at least twenty-five years, even if not continuous, of the product in question, as well as the established use, in the trade or in everyday language, of the name of which registration is applied for;
(f) socio-economic report containing the following information: quantity produced with reference to the last three years of production available; number of companies involved distinguished by segment of the sector (current and potential);
(g) technical report clearly showing the link with the territory, understood as a causal link between the geographical area and the quality or characteristics of the product (in the case of PDOs) or a specific quality or reputation or other characteristic of the product (in the case of PGIs). The report also highlights the reasons why, only within the indicated boundaries, are obtained and maintained in a precise causal relationship and due to effect of well-identified human and natural factors, the quality or the characteristics of the product associated with the name applied for. The technical report also shows that the product for which registration is requested, has at least one quality or characteristic that differentiates it from the quality standard of products of the same type, obtained outside the production area. *The contents of the report shall be supported by technical and scientific evidence to be produced by the applicant for registration*;
(h) cartography on a scale adequate to permit the precise identification of the production area and its boundaries […];
(i) the single document […].' (translation provided by this author)

Looking at the outcomes of the adjacent action situations, no additional guidelines on the structure of the **statutes** of the applicant producer association are included. The requirements for the statutes are strict and defined in Ministerial Decree 12 April 2000 only for Protection Consortia (therefore after the GI registration). The **control plan**, drafted by the control body chosen by the applicants, is always part of the application file and publicly available in national registries, on the website of the Ministry of Agriculture.[451]

451 A specific section dedicated to control plans of PDO and PGI products is available here: <https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/7467>.

2.2.3.1.4 Implementation of the national legislation

2.2.3.1.4.1 France: an assisted quest towards evidence-based boundary rules

The INAO Directive mentions the Applicant's Guide for PDO and PGI registrations as an integrative informative source defining how, according to the consolidated practice of the national authority, the application file should be constructed.

Table 10 shows the INAO guidelines for interpreting the different sections of the product specifications.[452] The 'project' of the product specification as identified in the French Rural Code and Applicant's Guide for PDO and PGI registrations, needs to be 'accompanied, if necessary, by supporting documents relating to certain elements of the specifications: name to be registered, packaging, immediate proximity, etc.'.[453] Additional required documents are: the forwarding letter, the note of presentation and motivation of the project including its technical and economic impact, the application for the recognition as PDMO, the controllability document and the single document.[454]

452 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur d'une Appellation d'Origine Protegée (AOP) Ou d'une Indication Géographique Proegeée* (IGP) (n 337) 12–28.

453 ibid 9.

454 ibid.

Table 10: INAO guidelines for drafting the product specification (based on the content of the Applicant' Guide for the registration of a PDO or a PGI, 2017).

Sections of the product specification	Interpretative guidelines given by the INAO
Producer group	Identification of the group and its legal form, as well as the professional categories concerned (e.g., raw material producers, processors, etc.)
Type of product	Product class concerned and based on the list provided in Annex 1 Reg 1151/2012
Choice of the name	Name as used in trade or common language. The choice should be justified and evidence on the current *and* ancient use of the name should be provided.[455]
Description of the product	Precise description of organoleptic characteristics, chemical and physical and microbiological characteristics. In case of a processed product, the description of the raw materials used and their percentage in the final product. Race or plant variety can be specified and if it is produced also outside the geographical area, the elements justifying its distinctiveness should be added. The modalities of the presentation of the product should also be described (fresh or graded, sliced, etc.).[456]
Delimitation of the geographical area	Administrative and natural boundaries accompanied by a map. Mention of the steps which must take place in the geographical area. The delimitation of the geographical area should correspond to the elements contained in the section related to the origin link.[457]
Elements proving that the product comes from the geographical area	Declarative and traceability obligations and identification of the product, as well as the data concerning the monitoring and control of the production.[458]

455 ibid 11.

456 This allows the applicant to define 'from which stage of processing and/or up to which stage of processing the product has the PDO or PGI characteristics'. See ibid 15.

457 The initial proposition of delimitation undertaken by the applicant is the object of a specific evaluation and expertise by the commission of inquiry appointed by the national authority. The expertise is aimed to: (1) define *objective* delimitation criteria coherent to the principles of the link to origin (i.e., human, and natural factors) and (2) the specific area resulting from the application of these objective criteria. See ibid 17.

458 'In the case of GI products, a traceability system allows clear identification of the steps followed by the product to reach consumers'. Vandecandelaere and others (n 81) 72. Conversely, consumers are able to trace all the firms involved in the production process and to identify which steps are localised and contribute to the quality and characteristics of the product.

Sections of the product specification	Interpretative guidelines given by the INAO
Description of the method of production	The rules on the production which allow to obtain the product eligible to benefit from the GI. The production steps should guarantee that the link to origin is preserved, and the rules should be sufficiently clear to allow their controllability.[459]
Elements proving the link to origin	There should be a casual correlation between the contextual conditions typical of the geographical area and the specific characteristics of the product. The contextual conditions, the causal link and the product characteristics should emerge clearly in this section (tripartite structure)[460]
References concerning the control body	The control body is appointed by the producer group approved by the national authority.
Labelling rules	Compulsory use of the EU logo (since 4 January 2016), specific non-binding guidelines for the use of the GI product as ingredient of a processed product.[461]
National requirements	Check points and evaluation criteria in relation to the content of the product specification.

Producers and the national authority interpret and operationalise these guidelines on a case-by-case basis. Interviews reveal how this approach might originate interpretative discrepancies or alternative informal practices. For example, Reg 1151/2012 states that the **name** is eligible for registration if it is traditionally or currently used in trade or common language. In France, the Applicant's Guide for PDO and PGI registration qualifies explicitly the registration process as a 'recognition': 'The PDO or PGI recognition is not aimed to create new denominations but to

459 The document of controllability is part of the application file, and it is aimed to measure ex ante the attitude of the producer group to comply with the operational rules contained in the product specifications. See INAO Directive 2005 n. 1, p. 5-6.

460 See, *inter alia*, Zappalaglio and others (n 92) 88.

461 AREPO reports that these guidelines are defined by the defined by the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* (DGCCRF) and the INAO. In particular, 'the product used as ingredient must actually benefit from the GI'; it must be the only product of its category incorporated in the preparation; 'the criteria do not establish a minimum quantity, but specify that the GI must be incorporated in a quantity sufficient to give the final product a particular character'. Moreover, 'the presence of the GI should not be over-emphasised by the use of oversized and contrasting characters to attract the attention of the consumer; the terms PDO/PGI/TSG may be mentioned after the name, provided that they are linked to the protected name and not to the product incorporating it; the corresponding logo (PDO, PGI, TSG) may not be used under any circumstances. If the criteria for processed products are not met, the name of the GI can only appear in the list of ingredients.' AREPO (n 448) 19–20.

recognise the use of a name linked to production practices. The notoriety or the reputation[462] of a name should, therefore, be duly established and proved'.[463]

The Applicants' Guide also states that evidence should show the anteriority of the use of the denomination for the specific type of product and the current use of the denomination.[464] It might be inferred that applicants do not have complete freedom in choosing the name eligible for registration, as it should result from well-established and documented local practices.[465] In practice, however, the possibility that the denomination is 'constructed' for the purpose of the GI registration cannot be excluded. This might happen especially when the place-based reputation is little developed, and the product is not known for being identified with a specific name (rather it is known for its specific characteristics) or it is known only locally. The consequences deriving from this situation are the followings: (a) a place-based reputation might exist, but it is not directly associated with the specific name proposed for registration, being generally attributed to the product for its specific characteristics; (b) the name is chosen by the applicants for the purpose of the registration, although it was not the object prior use ('*anteriorité d'usage*'); (c) since the product is not (or little) known and the place-based reputation is weak, episodes of counterfeiting are generally rare. Therefore, the stakeholders' motivations to register the sign are more related to the valorisation and promotion functions of the GI than the protection function and enforcement potential.[466] In these cases, the evidence of notoriety or reputation of the name cannot be provided. However, applicants are required to prove the long-standing productions as typical of the geographical area.[467] The orientation of the *Conseil d'Etat* seems also aligned with this principle, considering sufficient, for assessing positively the presence of the origin link, an established production in the area of at least 20 years prior to the registration.[468] The national authority considers that a first overview on the content of the entire product specifications allows to assess if the product is already known in the marketplace.[469]

462 See Interview with INAO legal department, 16 September 2022, para 22. According to the Office evidence of a prior use of the name should be provided. When this type of evidence cannot be provided by the applicant, the burden of proof is 'lighter' and refers to the production of the product established in the area. This type of evidence is given by providing labels, proofs of participation to competitions, etc. See Interview with INAO legal department, 16 September 2022, para 30.

463 Insitut National de l'Origine et de la Qualité, *Guide Du Demandeur d'une Appellation d'Origine Protegée (AOP) Ou d'une Indication Géographique Proegeée* (IGP) (n 337) 13.

464 ibid 14.

465 Interview INAO with legal department, 16 September 2022, paras 22 and 32-36.

466 ibid., para 30.

467 ibid., paras 32-34.

468 See **inter alia** CE, 27 December 2019 N° 425492, FR:CECHR:2019:425492.20191227 (Sel de Camargue).

469 Ibid., para 25. This timeframe is shorter from the 30 years identified by the EU legislator as connotating a 'traditional' production (art 3(3) Reg 1151/2012). However, art 7 1151/2012 does not mention the adjective 'traditional' concerning the prior use of the name, nor it specify any time frame as a minimum requirement.

Another important aspect which emerged during the interviews is the **identification of the geographical area**, which should be based on objective criteria of assessment. The national authority can suggest modifications of the boundaries identified by the applicants. This exigency might arise when experts and consultants identify delimitation criteria and principles on the basis of objectively verifiable elements. These elements might lead to a different assessment on the legitimate community of operators producing in the geographical area and according to homogeneous and traditional practices. These principles and criteria must be approved by the national committee of the INAO.[470] As already mentioned,[471] the delimitation of the geographical area is also subjected to public consultation, which represents another opportunity for acquiring a wider overview of the real situation at the local level, beyond the initial proposal of the applicant.

The sections related to the **product characterisation and the method of production** contain the common conditions of production necessary for obtaining the origin product. In practice, an uncontested explicit formulation of these conditions rarely pre-exists to the codification process. This means that producers, before undertaking the GI initiative, might not necessarily have a clear idea of the elements of similarities among their individual practices. It might also happen that the existing differences justify the coexistence of multiple variants of the same product.[472] Often producers are not necessarily aware of the reasons justifying the uniqueness of their practices.[473] The role of the national authorities, their proximity to the value chains and the use of a technical multidisciplinary approach facilitates the sharing of 'informal' knowledge. It also ensures that the codification of the rules remains coherent to the existing practices and allows appropriate monitoring and enforcement. Therefore, (1) solid evidence should be the grounding element for reaching, as far as possible, objective outcomes; (2) drafting clear rules (especially defining, without ambiguities, the product, and the methods of production) can avoid the risk of detours (i.e., ambiguities leading to divergent interpretations of the rules and problems in the enforcement of the sanctions provided in the control plan). The national authority assists producers in finding the right balance between the risk of standardisation, of enclosure, and of ineffective rules.[474] The territorial delegations of the INAO have a clear mission in this regard: interviewees report that 'when we have GI recognition, we have a product that is very well rooted locally, endangered, because there are others that make it as well, differently, *or* elsewhere. What is written in the specifications can be seen as a communication tool, but we see it as a way of obtaining a unique

470 Interview with INAO territorial delegation, 8 August 2022, para 62.

471 See *supra* Chapter 2, Section II, External actors involvement.

472 Vandecandelaere and others (n 81) 55–57. See also Interview territorial delegation INAO, 8 August 2022, para 30.

473 Interview with INAO legal department, 16 September 2022, para 22; Interview with multi-product PDMO, 1 July 2021, para 20.

474 Interview INAO territorial delegation, 8 August 2022, paras 30-32.

product and guaranteeing that behind it there is protection. We are really in the public heritage domain, and usurpation and fraud must not be possible'.[475]

The INAO approach to product specifications design is strict concerning the necessary correlation between quality and **locality requirement**. This aligns with the orientation of the ECJ, in verifying that any restriction imposed in the product specifications (e.g., the locality of some or all production steps including sourcing of raw material) is adequately justified for a specific quality. The results of the study that we carried out at the Max Planck Institute show that in France, 100% of the single documents of 105 registered PDOs and 63,38% of the single documents of the 142 registered PGIs refer to the locality requirement, localising all phases of the production in the defined geographical area. These data are relevant as they show that the applicants' interpretation of the locality requirement brings to a blurred distinction between PDOs and PGIs in the agri-food sector. However, this documental analysis did not specifically verify if an objectively verifiable correlation between the locality requirement and a specific quality claimed by the applicants was ensured in each case.[476]

The French national authority is particularly careful in verifying that adequate evidence is provided for the **origin link**, meaning the causal relationship between the local and contextual conditions (namely the human and natural factors) and the product characteristics. The commission of inquiry might be determinant, and require external expertise of geographers, chemists, historians, anthropologists.[477] Key in this regard is the assessment on the prior use of the denomination or established production of the product in the area (in French '*anteriorité*' of the use of the name or the production of the product), which would secure the anchorage with local identity and tradition.[478]

France developed national **guidelines on labelling** for the use of the GI product as ingredient. The Study conducted by AREPO in this regard reports that 'even if in France GI producer groups have not the recognised duty to authorise processors to use their GI name in the labelling, presentation and advertising of foodstuffs containing such GI as ingredients, several GI producer groups have adopted specific criteria to adapt these principles to the needs of their products.'[479]

475 ibid., para 52.

476 Zappalaglio and others (n 92) 24.

477 This happens especially when tangible evidence is difficult to provide and to avoid that the GI is the result of an 'arbitrary construction'. The experts provide evidence-grounded criteria for the delimitation, while a commission of consultants provides delimitation principles based on specific technical inquiry. See Interview with INAO territorial delegation, 8 August 2022, para 62.

478 Ilbert, Hélène, 'Le marquage des terroirs par les indications géographiques: politiques internationales et stratégies nationales en Méditerranée' <https://hal.science/hal-02192759v1/document>.

479 AREPO (n 448) 20.

As mentioned, the **controllability document** is part of the application file. It is provided by the applicants, and it is used by the national authority to assess if the proposed rules of the product specifications can be monitored and controlled. More broadly, it serves as a safeguard to the enduring producers' commitment to the compliance with the product specification, and to secure the guarantee function of the sign. It is defined by the Applicants' Guide as a sort of 'working tool' for producers and as an instrument of evaluation for the national authority.[480] Before the formal appointment of the control body, producers are in fact encouraged to pragmatically measure their level of commitment and envisage possible check points tailored upon the proposed content of the control plan. The controllability document reinforces producers' awareness as to the practical consequences of the registration. This direct involvement of producers seems to remind to a subtle form of peer-control, even though the main type of control for certification in France remains the third-party certification enacted by the control body.[481] Consensus should be reached as to the points of the product specifications and on the controllability document between the PDMO and the Commission of inquiry of the INAO. Then, the control body is nominated and drafts the (more detailed) control plan.[482] The control plan, which is subsequent to the controllability document, and it is filed by the designated control body, includes more detailed check points formalising existing practices (see *infra* control configuration in second level outcomes).[483]

Finally, the Applicants' Guide for the recognition as PDMO states, as minimum requirements that 'the **statutes** of a PDMO must indicate in particular:

- the tasks assigned to the body following its recognition as a PDMO;
- the principle of compulsory membership of all operators who are *de facto* members and specify, where appropriate, the associate members;
- the rules for decision-making on matters relating to the PDO/PGI, including the vote on the PDMO membership fee, which can only be taken by the operators involved in the specification.[484]

2.2.3.1.4.2 Italy: a quest for validation of evidence-based boundary rules

As in France, the Italian national authority oversees making applicants aware of the restrictions embedded in the **choice of the name** and to guide the choices of the producer group. Interviews with the national and regional authorities report the frequent problem of raising awareness among the applicants on the need to provide specific evidence for the prior use of the name. The

480 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur d'une Appellation d'Origine Protegée (AOP) Ou d'une Indication Géographique Proegeée* (IGP) (n 337) 28. See also Interview INAO, para 34.

481 Marie-Vivien and others (n 347).

482 Interview with INAO territorial delegation, 8 August 2022, para 34; interview with control body, 24 June 2021.

483 Interview with control body, 24 June 2021.

484 Institut National de l'Origine et de la Qualité, *Guide Du Demandeur Pour La Reconnaissance En Qualité d'organisme de Defense et de Gestion* (n 300) 4–5.

historical report part of the application file should show that the product has been produced for at least 25 years and 'the consolidated use, in trade or common language, of the name of which the registration is applied for' (translation provided by this author).[485] Interviewees specify that this rule is valid both for PDOs and PGIs and *de facto* corresponds to an indirect inquiry on the existence of a place-based reputation.[486]

Toscano PGI for olive oil is an example where the main denomination was chosen because it had a stronger place-based reputation (i.e., the place-based reputation of the name 'Toscano' was well established in national and international markets)[487]. This denomination is particularly interesting because it is structured as a double-level registration: the 'umbrella' protected name is 'Toscano', but it coexists with other sub-denominations, corresponding to sub-areas or variants of the product. The rationale of this choice reveals the existence of two layers of place-based reputation and different exigencies beyond the GI protection. Registering the term 'Toscano' meant protecting the place-based reputation attached to the name from counterfeiting (consumer protection function and enforcement potential of the PGI); registering the sub-denomination was meant to preserve the local specificities, known mostly locally, maximising the local development and resource production function.[488] This choice, however had consequences on the delimitation of the geographical area and affected the arguments chosen for justifying the **origin link**, and for defining product characteristics.[489] The experience of the Tuscan Olive Oil as

485 Art 6 lett. e) Ministerial Decree 14 October 2013.

486 Interview with Ministry of Agriculture, 28 January 2022, paras 2-4; interview with regional authority Tuscany, 19 July 2022, para 2; interview with regional authority Latium, 24 February 2022, para 3.

487 Threats to place-based reputation of the term 'Toscano' for designating olive oil are shown by the Case T-510/15 *Roberto Mengozzi v European Union Intellectual Property Office* EU:T:2017:54 (***Toscano/Toscoro*** case). It is interesting to note that consensus for registering the denomination 'Toscano' was difficult to achieve. Some producers asked for the annulment of the registration of the PGI (granted through simplified procedure according to Article 17 of Regulation 2081/92) as 'those producers use other names for the marketing of their products'. The action of annulment was considered by the ECJ inadmissible due to lack of personal interest in the annulment of the contested decision (Case T-78/98 *Unione provinciale degli agricoltori di Firenze, Unione pratese degli agricoltori, Consorzio produttori dell'olio tipico di oliva della provincia di Firenze, Francesco Miari Fulcis, Bonaccorso Gondi, Simone Giannozzi and Antonio Morino v Commission of the European Communities* EU:T:1999:87 [1999] ECR II-01377)

488 Interview, Ministry of Agriculture para 5; Interview Protection Consortium Olio Toscano, para 2.

489 Interviews revealed that the production of olive oil in Tuscany embeds 80 indigenous varieties which are widespread across all the regional territory. This imposed the challenge of finding common characteristics in the final product identified through the denomination (Interview with Protection Consortium Olio Toscano, 16 December 2021, para 10). The sub-mentions were established to valorise local specificities, which I identify as variants. As observed by Quiñones-Ruiz et al. on this specific case, 'the registration mainly involved three categories of GI firms: olive growers, olive millers, and oil bottlers located in diverse relatively small territories with distinct reputations for olive oil production. Therefore, some favoured local PDOs opposed to one region-wide PDO. These conflicting interests asked for a strong involvement of regional authorities as mediators, and of universities and research centres to produce technical justifications for the geographical delimitation and product characteristics. In the end a compromise was reached, and the majority of stakeholders accepted a region-wide PGI'. See Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (n 98) 112. The experience of Tuscan Olive Oil is also interesting

a regional denomination registered as a PGI was not an isolated episode, even though registered through simplified procedure in 1998. Yet, it seems to have encouraged similar approaches to the registration of denominations in the olive oil sector (e.g., the *Olio Campania* IGP, *Olio di Puglia* IGP). These region-wide denominations[490] have in common with 'Toscano' IGP the fact that the use of the name for identifying the product was the result of a trade-off strictly *instrumental* to solve the 'social dilemma' (which might consist either in the valorisation or in the protection potential of the GI). However, none of these additional examples shares with *Toscano* the use of sub-mentions. The choice seems rather have been the valorisation of highly reputed names (justified by the gastronomic and/or the historical and cultural tradition of the place), to the detriment of the intensity of the origin link. One example is the 'Olio di Roma' PGI (registered in August 2021) whose geographical area comprises the territories included in the province of Rome but covers a much wider area.[491] The reputation is generally attributed to the ancient well-known tradition in the olive oil production (dating back to ancient Romans times). This attribution raises doubts concerning the strictness of the application of evidence-based approach to assess the origin link.

National and regional authorities report that the definition of the **origin link** (causality relation) is sometimes affected by producers' lack of awareness concerning the evidence-based approach, which implies *inter alia* proving objectively the prior use of the name, regardless of the type of quality scheme (PDO/PGI).[492]

Regional authorities also report that some inefficiencies occur in the section related to the **product characteristics and the method of production.** These sections are the most affected by the risk of vague formulations which cannot be easily translated into check points in the control plan and can lead to arbitrary choices on parameters which have little correlation with the specific attributes of the origin product.[493] This suggests a favourable orientation, in the practice of the national authorities, for a strict interpretation of the evidence-based approach. However, the duty to provide evidence seems ultimately to be upon the applicant, despite the informal feedback given by the regional authority during the pre-application phase. This approach seems to emerge by the

from a governance perspective. More insights will be explored in the paragraph related to 2nd level outcomes (see *infra* Chapter 2, Section II, Second-level outcomes, governance structure). Another interesting example is presented by Guerroué, Barjolle, and Piccin on the case of Gruyère PDO, where researchers are identified as 'knowledge brokers' and are considered essential for the GI characterisation. See Guerroué, Barjolle and Piccin (n 430).

490 'Olio Campania' PGI was registered on March 2023, 'Olio di Puglia' PGI in July 2019.

491 The product specification mentions the 'very specific geographical, orographic, soil and climatic conditions which have been proven to be exceptionally well-suited to olive-growing' which are attributed to the region, and 10 endogenous varieties of olives and 2 varieties of 'consuetudinary use' for a minimum of 80%.

492 Interview Ministry of Agriculture, 28 January 2022, para 2; interview regional authority Latium, 24 February 2022, para 3.

493 Interview regional authority Veneto, 11 February 2022, paras 56-61.

formulation of art 4 Ministerial Decree 14 October 2013, concerning the arguments justifying the **delimitation of the geographical area**.[494] The applicant, in the Italian system, is the main proactive actor during the construction of the application file and providing the related evidence, while the national and regional authorities are (formally) responsible of checking the compliance of the documentation with the legal requirements.

2.2.3.2 Second-level outcomes: governance configuration for GI management and control mechanisms

I identified the first-level outcomes as the operational rules contained in the product specification and, adjacently, in the control plan and in the statutes. These documents have important consequences on the management of the sign, such as determining exclusion or inclusion, imposing a control configuration which implies producers' commitment, rules governing the decision-making process and the governance structure which will allow the producer group to carry out its tasks and responsibilities after the registration of the sign.[495] The pivotal role of producer groups is recognised by art 45 Reg 1151/2012 and Recital 57 Regulation 1151/2012 not only in relation to the application process, but also after the GI registration (namely during the process of amendment of the product specification or cancellation). Moreover, the Regulation also specifies the type of activities attributed to the group after the registration (i.e., 'surveillance of the enforcement of the protection of the registered names, the compliance of the production with the product specification, the information and promotion of the registered name as well as, in general, any activity aimed at improving the value of the registered names and effectiveness of the quality schemes. Moreover, it should monitor the position of the products on the market'). This general principle is embedded in art 45 of the Regulation.

2.2.3.2.1 French legislation

2.2.3.2.1.1 Governance configuration

In France, the PDMO is recognised in parallel to the GI registration process (art L. 642-17 French Rural Code). The formal recognition by the INAO is aimed to ensure that the producer group can perform, after the GI registration, the tasks and responsibilities defined in the French Rural Code, and indirectly implies an assessment on the legitimacy of the applicant. The formal recognition is usually undertaken only once at the registration, despite the changes which can affect the statutes, the control plan, and the product specification. In practice, it might also happen that after

494 'The geographical area of the product for which registration is requested and delimited in the specification referred to in Article 3 above has characteristics that differ significantly from those of neighbouring areas, or the characteristics of the product for which registration is requested differ significantly from those of products from neighbouring areas. *The burden of proof is on the individual legal person applying for registration.*' art 4 Ministerial Decree October 14, 2013. Guerrieri, 'Cross-National Comparative Analysis of Procedural Laws and Practices in the EU Member States' (n 83) 72–73.

495 Poméon and Fournier (n 104) 3 ; Belletti and Marescotti (n 88) 11.

the GI registration the producer group changes its governance setting: for example, groups might set up spontaneously additional governance levels (which I call governance meso-levels). Adding institutional complexity, these complex structures challenge the implementation of the pillars and the conditions leading to the initial formal recognition.

2.2.3.2.1.2 Control configuration

In France, the control system evolved over time: after 2006, it assumed the characteristics of a 'mixed private-public' control system 'to meet expectations of consumers who often questioned the impartiality and the continuing guarantee of effectiveness of controls'.[496] In the French Rural Code, art L. 642-27 – L. 642-35 define the general principles governing the control system. These rules are complemented by INAO Directive 1 July 2009 n. 3 and by the *Directive du conseil des agréments et controles* n. 6. As mentioned, the control configuration develops at macro and micro level: it affects the **activity of the PDMO** and **producers' compliance with the product specifications**.

The checks on the activity of the PDMO is targeted to:

(a) the verification of the maintenance of the eligibility requirements (the four pillars). It is directly ensured by the INAO representatives, who must be informed about the projects of amendment of the statutes and internal regulations of the PDMO earlier than their presentation at the assembly.[497] This activity pursued by the INAO is aimed to monitoring and consulting, and it is identified as '*suivi ODG*' (in English 'monitoring PDMO'). It also implies the direct participation of the INAO representatives to the general assemblies of the PDMO and the organisation of annual meetings between the PDMO and the INAO. The loss of the eligibility requirements is followed by graduated sanctions defined by the INAO Directive 1 July 2009 n. 3. The less invasive sanction provided in the Directive is a warning, while the more invasive is the suspension or the withdrawal of the formal recognition as PDMO.[498] Similarly, if the PDMO fails to exercise its powers and responsibilities, art L. 642-26 French Rural Code provides that, in case of non-conformity to the corrective actions suggested by the INAO, the statutes of the PDMO can be suspended for a period up to 6 months or it can be revoked.

496 The devolution of the control system from the INAO to private certification bodies was not without consequences. In addition to the weakening of the role of the national authority in pursuing this task, it raised issues on the risk of standardisation of controls (less producer-driven) and on the sustainability of the system, especially by small and medium-sized GIs, that preferred renouncing to quality schemes because of high costs. Last but not least, the presence of multiple private certification bodies created a competing market where the offer could be slightly different. Questions related to impartiality can arise, especially considering that the appointment of the control body is made by the producers and the service is paid by the producer group. See Marie-Vivien and others (n 347) 27.

497 INAO Directive, 1 July 2009 n. 3, as modified on 29th November 2011, p 2.

498 ibid., pp 7-8.

(b) the performance of the tasks and responsibilities defined at art L. 642-22 until art L. 642-23 of the French Rural Code. These activities are: the elaboration or amendment of the product specification; the implementation of the technical, financial or regulatory decisions of the National Committee of the INAO; the choice of the control body; the feedback on the control plan and its implementation; the identification of the list of members; the other activities related to the monitoring of the production under PDO/PGI; the participation in the protection activities ensuring enforcement of the rights granted by the PDO/PGI and valorisation of the denominations; communication on the budget and activity reports. The activities related to the evolution of the product specifications are monitored by the INAO representatives. However, the INAO shares some competences with control bodies. For example, control bodies are in charge of verifying that the list of the PDMO members is regularly updated and participate with the INAO and the PDMO to 'tripartite meetings' aimed to monitor the application of the control plan which 'do not only serve to verify the compliance with the product specifications but should also be contextualised to a global initiative of progress'.[499] In this regard, the object of these meetings is evaluating the consequences of controls on the value chains and take further decisions on their optimisation. As for the compliance with the four pillars, the INAO Directive 1 July 2009 n. 3 identifies a list of graduated sanctions, which can lead to the withdrawal of the recognition as PDMO.

Three types of control are envisaged for verifying **the compliance with the product specifications**: the internal control, the third party (external) control and the self-control.

The basis for this type of control is the control plan which is written by the control body, an independent and impartial external actor,[500] in collaboration with the PDMO. The control body is chosen by the applicants and must be formally recognised by the *Conseil des Agrements et Contrôles*. It facilitates, through its technical expertise, the compromise on detailed check points, based on the content of the product specifications and current control practices, adjusted to GI requirements. At present, 5 private control bodies are formally recognised by the *Conseil* and formally habilitated to perform controls on PDOs and PGIs for agricultural products and foodstuffs (meaning wines and spirits excluded).[501] The content of the control plan is also established by implementing the guidelines provided by the Conseil des *Agrements et Contrôles*. They are called

499 INAO Directive 1 July 2009 n. 3, p 4.

500 'Controls can be carried out by an ISO 17065 accredited certification body, that is, an independent body in charge of inspecting and certifying the conformity of the product with its specifications, or by a public entity that must offer adequate guarantees of objectivity and impartiality. In France, an ISO 17065 accredited certification body monitors such control, qualified as external control, combined with an "internal" control by the GI Management and Defense Organization' Marie-Vivien (n 36) 338.

501 The count has been based on the list published on the website of the INAO as updated in May 2023.

'common control provisions' and identify the minimum content of the control plan. More detailed guidelines on the essential check points, specific for each value chain, are also suggested. The checkpoints present in the control plan for third-party control is replicated for internal controls pursued by the PDMO. The control plan also identifies the administrative duties of the PDMO concerning the admission of new operators (criteria for inclusion, and the duty to update the register). Once the control plan is drafted, it must be approved by the *Conseil*. Prior to this formal approval, however, the territorial department of the INAO informally interacts with the control body for agreeing on the content of the control plan.

The **internal control** is exercised by the PDMO on the registered operators to ensure the compliance with the product specifications according to the control plan. Generally, the internal control targets the same aspects subjected to third-party (external) control. The PDMO is the sole responsible for the internal control.[502]

The **third party (external) control** is undertaken by the control body according to art L. 642-3 French Rural Code. The control body must be accredited according to INAO Circular n. 4 of 14 December 2021. The third-party control targets all the operators (stakeholders who participate effectively to the production steps) for verifying their compliance with the product specification according to the control plan, including their initial authorisation of new operators ('*habilitation*'). This preliminary control is pursued by the control body after an on-site inspection at the operator premises, and a documental analysis of the internal control made by the PDMO.[503] The control for verifying the operators' compliance with the product specifications is exercised periodically, based on the characteristics of the value chain and on specific evaluation criteria identified by the Annex 1 of *Directive du conseil des agréments et controles* n. 6. This type of control can be remote (documental), on site (documental, visual, by measurement, analytical, sensorial by a specific commission or by a lab). Control bodies are subjected to a periodical evaluation, according to art L. 642-34 French Rural Code.

The **self-control** is a type of control exercised by the operator on his own activity. Each operator is responsible for self-controls and keeps the records, for a specific period, of the checkpoints identified in the control plan.

Table 11 gives an overview of the actors (controller and controlled) involved in the control system, the various types of control, and the object and modalities of control.

502 See also *Directive du conseil des agréments et controles*, 4 July 2013, n. 1.

503 Directive *Conseil des agréments et contrôles*, 12 August 2021 n. 6.

Table 11: Overview of actors involved in the control system, main check points, and modalities of control.

Actor competent for control	Checkpoints	Actor(s) controlled	Modalities of control
INAO representatives	Maintenance of the requirements for recognition (representativeness, fair representation, access to membership, compulsory membership, democratic functioning)	PDMO	In-person and documental; ongoing and annual meetings PDMO/INAO.
INAO representatives and control body	Tasks and responsibilities defined by art L. 642-22 - art L. 642-23, French Rural Code.	PDMO	In-person and documental; ongoing by the control body and tripartite meetings PDMO/ control body/INAO.
Control body, commission appointed for testing the organoleptic qualities of the product, laboratories.[504]	Compliance with the product specification through the control plan.	Operators	Remote (documental); on site (documental, visual, by measurement, analytical, sensorial by a specific commission or by a lab).
PDMO	Compliance with the product specification through the control plan.	Operators	Remote (documental); on site (documental, visual, by measurement, analytical, sensorial by a specific commission or by a lab).
Operator and control body	Compliance with the product specifications	Operator	Self-control

2.2.3.2.2 Italian legislation

2.2.3.2.2.1 Governance configuration

The applicant producer association in Italy is created for the sole purpose of applying for registration and must comply with the 'stability requirement'. After the registration, three main scenarios might occur: (1) the association might dissolve after having reached its scope (i.e., the GI registration or rejection of the application, according to art 4 Ministerial Decree 14 October 2013); (2) the association is maintained or transformed in a consortium, without undertaking the recognition process as Protection Consortium; (3) the association is converted in a consortium and the producer group is formally recognised as Protection Consortium by the Ministry of Agriculture and authorised to exercise the functions of public interest established at art 14(15) Law 526/1999.

504 See also *Directive du conseil des agréments et controles* 26 November 2013, n. 2.

The rationale behind the formal recognition of Protection Consortia resides in the formal attribution to the group of tasks and responsibilities targeting public/collective interests, additional to those provided by art 2602 of the Italian Civil code, such as 'the protection, promotion, valorisation, consumer protection' (art 14(15) Law 526/1999). This recognition heavily affects high-level legal rules governing the process, setting specific requirements on representativeness, fair representation, and on democratic functioning.

Compared to the lack of assessment criteria reserved to the temporary association necessary for obtaining the GI registration, the principle of access to membership, representativeness, fair representation, and democratic functioning is subjected to strict legal rules for Protection Consortia. Consequently, this strict assessment is made only after the GI registration, and only for certain types of producer groups.

The Ministerial Decree 12 April 2000 n. 61413 identifies two different types of relevant stakeholders relevant for Protection Consortia: (a) the producers and users and (b) the producers and processors *interested in the* PDOs or PGIs. 'Producers and users' are : (i) the stakeholders whose activity, within the value chain, have an **irreplaceable** role in giving to the product its specific characteristics and qualities (for processed products the processors and for unprocessed products the raw material producers); (ii) the nature of the **economic investments** for the activities undertaken according to art 14 (15) Law 526/1999), whose costs are upon the producers and users, *independently from their adhesion to the Protection Consortium*. Only the 'producers and users' are considered for the determination of representativeness threshold and, according to fair representativeness requirements, occupy the major number of seats in the governing bodies of the Protection Consortium.

Concerning representativeness, the Decree follows the principle of 'irreplaceable role' stated above for identifying, for each product class covered by Italian registered PDOs and PGIs, the 'producers and users' (Table 12).[505]

505 The list is periodically updated by Ministerial Decree, based on new PDO/PGI registrations. See *inter alia* Ministerial Decree 12 March 2014.

Table 12: List of professional categories considered as 'producers and users' according to art 4 Ministerial Decree 12 April 2000 n. 61413 and relevant for the assessment of the representativeness of Protection Consortia.

Product class	'Producers and users'
1.3. Cheeses	Cheesemakers
1.6. Fruit, vegetables and cereals (fresh)	Producers
1.6. Fruit, vegetables and cereals (processed)	Processors
1.5. Oils and fats (butter, margarine, oil, etc.)	Olive growers
1.1 (fresh meat)	Breeders and butchers
1.2. Meat products (cooked, smoked, salted, etc.)	Processors
2.3. Bread, pastry, cakes, confectionery, biscuits and other baker's wares	Processors

Although in most of the cases the definitory criteria seem to be followed consistently (e.g., cheesemakers in the cheese sector, producers in the unprocessed fruit, vegetables, and cereals), the assessment seems to be less rigorous, to respond to the exigencies of specific value chains (e.g., olive producers for olive oil; processors for essential oil).[506]

Table 13: Representativeness and fair representation requirements for the formal recognition of Protection Consortia according to the Ministerial Decrees 12 October 2000 n. 61413 and 61414.

Representativeness of the Consortium	Fair representation in the governing bodies of the Consortium
At least 2/3 of the controlled production by the control body, calculated in a 'significative time-frame'	66% of 'producers and users' of the GI and the remaining 34% is constituted by the other stake-holders interested in the GI[507]

In the Ministerial Decree 12 October 2000 n. 61413 and in Law 526/1999, the difference between the criteria on **representativeness** and **fair representation** is explicitly stated. The formulation of representativeness is aimed to assess *how many* stakeholders are included in the Protection Consortium compared to the total number of producers concerned by the denomination. Art 5 of the Ministerial Decree sets that to be representative a Protection Consortia must gather 'at least 2/3 of the production controlled by the (private or public) control body and considered eligible for certification, assessed in a significant period' (translation provided by this author). The

506 The definition of processed and unprocessed product: as long as there is a transformation step, the product is a processed product. This differentiation will be useful in the following chapters of this work.

507 This percentage is assessed assuming that 'all producers belonging to the same category subjected to controls' adhere to the Protection Consortium (representativeness 100%). Art 4 of the Ministerial Decree states that, lacking this condition on representativeness, the percentage of fair representation is proportionally reduced. The reduction is measured on the quantity of 'certified or compliant production, of actors controlled belonging to each category, not adhering to the consortium' (art 4 Ministerial Decree 12 October 2000 n. 61414).

representativeness threshold is to be quantified under the hypothesis that all producers (namely producers of the product concerned by the denomination) adhere to the Protection Consortium. Otherwise, the threshold is reduced considering the production compliant or certified of producers belonging to the professional categories concerned and not adhering to the Consortium (art 3 Ministerial Decree 12 April 2000 n. 61413).

The principle of fair representation is also expressed in the Ministerial Decree 12 April 2000 n. 61414: the qualitative approach is the first step to qualify the presence of all operators involved in the value chain within the governing bodies of the Protection Consortium. Following this assessment, a quantitative approach is applied to decide on the relevant proportion of the stakeholders involved in the governing bodies. Beyond the dominant category of 'producers and users' (which should be present for 66% in the governing bodies of the Consortium), 'producers and processors interested in the PDOs and PGIs' is identified as residual and further specified art 2 of the Ministerial Decree (Table 13). This last category of stakeholders does not count for the assessment of the representativeness of the Protection Consortium and share, without any additional repartition criteria, the remaining 34% of seats in the governing bodies.

Table 14: 'Producers and processors interested in the PDOs and PGIs' according to art 2 Ministerial Decree 12 April 2000 n. 61414 on 'fair representation' criteria.

Product class	'Producers and processors interested in the PDOs and PGIs'
a) Cheeses	for fresh cheeses: a1 – dairy farmers; a2 – dairies; a3 – packers; for ripened cheeses: a1 – dairy farmers; a2 – dairies; a3 – ripeners and/or portioners;
b) Fruit, vegetables and unprocessed cereals	b1 – farmers; b2 – packers; c) fruit, vegetables and processed cereals supply chain: c1 – farmers; c2 – processors; d) fats (oils) supply chain: d1 – olive growers; d2 – millers; d3 – bottlers;

Product class	'Producers and processors interested in the PDOs and PGIs'
e) Fresh meat	e1 – breeders and slaughterers; e2 – portioners and processors; f) – meat preparations sector: f1 – breeders; f2 – slaughterers; f3 – processors; f4 – portioners and packers;
g) Bakery products	g1 – raw material producers; g2 – millers; g3 – preparers.

The **principle of access to membership** is also specified by the Ministerial Decree 12 April 2000 n. 61413. Art 3 states that the statutes of the Protection Consortium should expressly ensure 'the access, individually or collectively, to all actors participating to the production process'. However, membership is not a necessary requirement for using the registered name. In Protection Consortia the consequences of optional membership are evident. Being non-members implies the exclusion from the decision-making process, but not from the duty to finance the activities exercised by the Protection Consortia for the management of the sign. Yet, art 1 of the legislative Decree 12 September 2000 n. 410 which regulates the repartition of costs of the activities of Protection Consortia states they are funded by (1) the members of the Protection Consortium and (2) the actors belonging to the categories of 'producers and users' defined in art 4 Ministerial Decree 12 April 2000 n. 61413, *even though they are not members* of the Protection Consortium. This rule implies another important specificity of the Italian system, which is the attribution of powers and responsibilities of the Protection Consortium towards its members and non-members (called '*erga omnes* functions') accentuating the differences arising from participation.[508] The rationale behind the attribution of the *erga omnes* functions is in the vocation of the Protection Consortium to exercise tasks and responsibilities satisfying the public interest (which is considered as extending, more generally, to all producers of the geographical area). In other words, optional membership does not imply the exclusion of non-members from the duties to economically finance some aspects of the management of the PDO or PGI *because* they enjoy the benefits derived from the

508 See art 1 Ministerial Decree 12 September 2000. Art 2 specifies that 'the fee attributable to each category of stakeholders should not go beyond the percentage of representation for the same category. The contribution follows what I identified as the 'control component', meaning that it is measured on the 'quantity of the product controlled by the private authorised control body or delegated public control body and suitable for certification'. The fees not covered by a specific category or member or non-member stakeholders, are re-distributed among the other categories. These rules apply *exclusively* for the fees which finance *erga omnes* functions. The activities outside the scope of art 14(15) Law 526/1999 are exclusively financed by the members of the Protection Consortium. This rule can have questionable consequences, from a systematic point of view, on the equal treatment between associations and recognised Protection Consortia.

place-based reputation (if compliance with the specification is ensured). This specific configuration is not immune from inefficiencies, such as those identified as the 'outsider problem'.[509]

The principle of democratic functioning for Protection Consortia regulated by the same decree setting fair representation criteria (Ministerial Decree 12 April 2000 n. 61414) which contains specific legal rules on the attribution of the vote for each type of stakeholder. Art 5 states that 'the statutes of the Protection Consortium must ensure to each member the expression of the vote. The value of the vote derives from the ratio between the quantity, eventually defined by classes, of the certified product, of which the member shows the attribution and the total quantity considered compliant to the product specifications or certified for each category by the public or private control body. If the member carries out more than one production and is identified as producer and user, the overall value of the vote shall be determined as the sum of the individual voting values for each category concerned'.[510] Operators who do not adhere to the Protection Consortium do not have voting rights.

Another rule which applies *exclusively* to Protection Consortia is the possibility of managing multiple quality schemes. In Italy it is possible to find multiple denominations managed by a single Consortium (multi-product Protection Consortium). This possibility seems not to exist for other types of legal forms, e.g., associations. The rule, introduced by Ministerial Decree 4 May 2005, 'responds to the exigency manifested by professional associations and producers' and allows to facilitate the constitution and management of a Protection Consortium which constitutes a 'not easily sustainable burden', especially for smaller productions. It is subjected to strict requirements: (a) the PDOs and PGIs concerned should be related to the same value chain; (b) the area of production should be 'totally coincident', or one area should be embedded in the other. The requirements of representativeness and representation should be assessed for each denomination independently from the unified management structure (art 3 Ministerial Decree 4 May 2005). Moreover, the attribution of votes should be calculated considering the overall voting values attributable to the member (art 4 Ministerial Decree 4 May 2005). The repartition of the costs is also defined through top-down rules, meaning that the costs related to the activities specific for a single PDO or PGI should not affect other PDOs or PGIs managed by the same Protection Consortium (art 5 Ministerial Decree 4 May 2005).

2.2.3.2.2.2 Control configuration

The legal framework concerning monitoring and controls is complex and scattered in different sources. My attempt to organise these provisions is aimed to give a general overview on the

509 See *infra* Chapter 4, Part I, outsider issue.

510 Translation provided by this author.

characteristics of monitoring and controls on the governance of the producer group and on the compliance with the product specifications. The Italian system envisages two types of control: the third party (external) control and the self-control.

As to the **controls on the governance of producer groups**, we are again confronted with fragmentation and regulatory asymmetry, opposing Protection Consortia and other types of producer groups. The control on the governance structure of Protection Consortia is done by the Ministry of Agriculture in the following ways:

(a) *Yearly monitoring* (Ministerial Decree 12 May 2010). It explicitly refers to the 'minimum operational requirements'[511] This type of monitoring is based on the documents sent by the Protection Consortia. In case the Ministry assesses the non-compliance with the minimum operational and representativeness requirements graduated sanctions are established. [512]

(e) *Trimestral formal assessment* (art 3 Ministerial Decree 12 May 2010). This verification is also documental and consist in a more thorough control on both the operational and representativeness requirements as defined by art 7 Ministerial Decree 12 April 2000 n. 61413. For example, if the producer group falls below the eligibility threshold of 66% of producers and users, it loses its formal recognition. Modifications of the statutes can be requested by the Ministry and the formal recognition as Protection Consortium can be renewed or denied. The consortium can apply for recognition again, provided that it proves compliant with the legal requirements. The Ministry can pursue *ex officio* any necessary verification, which might be documental or in form of inspections (art 4 Ministerial Decree 12 May 2010).

Although the focus of this research is not primarily on controls, it is important to have some elements concerning the legal framework on the control *ex ante* the commercialisation as it might influence product specifications design. It is pursued at the local level through private control bodies and delegated public authorities designated to exercise controls on PDOs and PGIs. A specific list of the private and public control bodies is kept by the national authority.[513]

511 The minimum operational requirements are specified in the Annex attached to Ministerial Decree 12 May, 2010: 'availability of a legal and/or operational seat capable of ensuring the performance of the tasks assigned to the Consortia towards members and third parties in any case included in the control system of the protected designation; possession of an organisational structure consistent with the exercise of the functions of promotion, valorisation and protection of the designation; the effective and efficient exercise of the functions of promotion, valorisation and protection of the denominations'. Specific evidence of the persistence of these requirements over time should be presented to the Ministry, including a report on the activity of valorisation, promotion, and protection of the denomination.

512 Other types of sanctions are: 'a) written warning; b) prohibition from making requests to the Ministry of contributions related to the enhancement and/or promotion of the quality characteristics of PDO/PGI products; c) extraordinary administrative inspection and control in accordance with procedures to be laid down by decree by decree of the Minister; d) temporary suspension of the assignment; e) revocation, even partial, of the appointment' (art 5 Ministerial Decree 12 May 2010).

513 see *infra* Chapter 2, Section II, Second-level outcomes, implementation of the national legislation.

A formal recognition is mandatory for both public and private control bodies (effectuated by the accreditation body, Accredia). Control bodies should be compliant with the norm ISO 17065, should have qualified personnel and appropriate internal procedures (art 2 Law 526/1999). The appointment of the control bodies for each denomination lasts 3 years and can be renewed through Ministerial Decree. The control body can be appointed by: (i) the applicant producer group, (ii) actors who have exercised control functions (for the simplified procedure according to art 17 Reg (CEE) 2081/1992), (iii) producers or individual actors who wish to use the denomination, (iv) by the regional authority.

The control body certifies producers' compliance with the specification in the form of external control and the control plan might envisage forms of self-control. Specific commissions are nominated by the Ministry of Agriculture for testing the organoleptic characteristics of the product, and they never include producers. The draft of specific control plans by the control body are devised on a case-by-case basis depending on the content of the product specifications.[514]

- For completeness, the control *ex post* the commercialisation is pursued:
- at the ministerial level, the competent authority is the *Dipartimento dell'Ispettorato Centrale della Tutela della Qualità e Repressione delle Frodi dei prodotti alimentari* (hereinafter 'ICQRF');[515]
- at the local level by Protection Consortia as part of the *erga omnes* functions. When appointed (by ministerial decree), Protection Consortia establish a partnership with the ICQRF as to the monitoring of the marketplace through the appointment of vigilance agents ('*agenti vigilatori*').[516] These types of activities are explicitly differentiated from the promotional, valorisation, promotion activities and are financed both by members and non-members.

514 The control body can be appointed by the applicant producer group, by actors who have exercised control functions (for the simplified procedure according to art 17 Regulation (CEE) 2081/1992, by producers or individual actors who wish to use the denomination, by the regional authority (see art 14 Law 526/1999). As already highlighted, the regional authority is in charge of designating the control body in the absence of an organised structure gathering GI producers. In this case, the identification of the legitimate stakeholders is needed upon its initiative and guidance. The controls on the control bodies are centralised and specific rules their functioning. Sanctions for non-compliance are provided in art 4 Legislative Decree 19 November 2004.

515 Art 31, Ministerial Decree 14 October 2013.

516 Art 14(15) lett. d) explicitly includes, among the tasks and responsibilities of the Protection Consortia, the collaboration 'according to the directives issued by the Ministry of Agricultural and Forestry Policies, in the supervision, protection and safeguarding of the PDO, PGI or certificate abuse, acts of unfair competition, counterfeiting, improper use of the protected designations and conduct that is prohibited by law; this activity is carried out at all levels and in relation to anyone, at every stage of production, processing and trade. To the vigilance agents employed by the Protection Consortia, in the exercise of such functions, may be attributed the status of public security agent'. For more insights on the appointment of vigilance agents see Ministerial Decree 21 December 2010 available at <https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2011-01-07&atto.codiceRedazionale=10A15655&elenco30giorni=false>. The monitoring activity of agents is however subordinated to the payment of the fees by members of the Protection Consortium as well as by non-members. In

- Finally, control bodies are also object of a monitoring activity by the Ministry of Agriculture. The controls on the control bodies are centralised and specific rules their functioning. Sanctions for non-compliance are provided in art 4 Legislative Decree 19 November 2004.

2.2.3.2.3 Implementation of the national legislation

2.2.3.2.3.1 France: analysing the governance consequences of multi-product PDMOs and federations of PDMOs

After the registration of the sign, the **governance** structure of the PDMO can evolve after the GI registration. The data collected in this work reveal two possible scenarios:

(1) some activities, tasks or responsibilities might be delegated by PDMOs to higher level PDMOs federations or associations (often the PDMOs involved in a federation or association operate in the same geographical region or involve the same product classes, not necessarily in the same geographical area). The federation or association of PDMOs does not require any formal change in the original governance structure, nor any formal recognition by the national authority;

(2) a multi-product PDMO can be created, which entails a change in the governance structure to federate already existing PDMOs (usually the pre-existing PDMOs are located in the same region). This configuration, instead, requires a new formal recognition by the national authority and impacts on the operationalisation of the pillars.

The advantages of the federation of PDMOs described in the first scenario are the followings: (a) the possibility of mutualising costs related to communication and advertising and, organising at a higher level coordinated actions for the promotion of the origin products and GIs concerned and creating positive externalities benefiting local development; (b) the possibility to foster collaborations between producers, facilitate the exchange of best practices also aimed to the evolution of the specifications; (c) the possibility to amplify the negotiating power of professional categories at the national and political levels.[517] This type of governance configuration does *not* imply the transfer from each PDMO to the association or federation, of the power to enforce GI protection, nor the producer's responsibility for the management (e.g., amendment) compliance, monitoring and control of the quality standards embedded in the product specifications. An example of this type of configuration, as anticipated, is the *Conseil National des Appellations d'Origine Laitières* (CNAOL).

Multi-product PDMOs, differently from the federation or association of PDMOs, manage in a centralised way the enforcement and consumer protection, communication, investment, and

practice, the difficulty in obtaining the payment by non-members might preclude or fragilise the monitoring function exercised by Consortia. See Interview with regional authority Latium, 24 February 2022, paras 12-14.

517 Interview with federation of PDMOs, 26 July 2022.

advertising functions related to each pre-existing PDO and PGI represented in its sections. However, the guarantee function (including the elaboration and modification of the product specifications, control plan and choice of the control body) is managed by each section independently.[518] This governance structure, which can be identified at the meso-level between the producer level and the national authorities, is spontaneous and aimed to the mutualisation of some costs, e.g., concerning the decisions on communication, investments, and advertising functions of GIs.

Vendée Qualité is an example of the multi-product PDMO. Constituted as an association law 1901, it regroups 11 value-chains (structured in 10 sections of the association) representing pre-existing PDOs and PGIs belonging to different product classes established in the Vendée region, in western France.[519] The institution of this multi-product PDMO can be seen as an institutional innovation compared to the traditional governance setting of pre-existing PDOs and PGIs, and some meta-arrangements had to be established by the stakeholders to create an intermediate level of governance between producers and the national authority (meso-level of governance). The pre-existing PDMO still maintain exclusive competence on the core issues related to each GI, discussed in the general assemblies related to each section (e.g., the product specification design or amendment, decisions concerning the economic sustainability of the sign).[520] However, the meso-level of governance is constituted by the representatives of each section, who manage the global economic sustainability of ensemble of the denominations. The decisions taken at this higher level of governance affect the budget, the communication and advertising function of the managed signs.[521]

The multi-product PDMO implies a different operationalisation of the four pillars. The principle of access to membership is affected by the meso-level of governance to safeguard and counteract anti-competitive behaviours, eventually enacted by the members of the sections (e.g., it can detect and discourage the establishment of direct or indirect barriers to access the use of the sign by new members). Three possible membership status are granted to the relevant stakeholders, with different repercussions on the democratic functioning: active members (*ex officio*), associated members-users (processors and traders) and third parties. The active members, but also associated members-users have deliberative vote, and they can exercise it to express their opinion on the

518 Interview with multi-product PDMO, 1 July 2021, para 50.

519 The productions include not only GI origin products, but also product certified Label Rouge. The GI products are all PGIs and cover the following product classes: Class 2.3. (Bread, pastry, cakes, confectionery, biscuits, and other baker's wares); Class 1.1 (Fresh meat); Class 1.6. (Fruit, vegetables, and cereals fresh or processed); Class 1.2. (Meat products - cooked, salted, smoked, etc.). Source: eAmbrosia database.

520 Interview with multi-product PDMO, 1 July 2021, para 38.

521 ibid, para 28.

content of the product specifications. Third parties have a consultive vote. The general rule for the attribution of votes is one member one vote.

The principle of fair representation at the meso-level implies that all active members and associated members are organised in two different committees ('*colleges*'): one regrouping the producers and composed by the breeders, industrial and artisanal producers; another regrouping partners (i.e., upstream companies, and downstream companies including processors, slaughterhouses, cutting and freezing, and packaging factories). The same structure is kept in the section related to each GI.

Since this type of structure has been constituted after the registration of the denominations, it is not clear if representativeness has been granted and assessed globally for the new PDMO, even though each pre-existing producer group had already been formally recognised as PDMO in relation to each sign when they have been registered.

From a collective action perspective, these spontaneous territorial dynamics have positively impacted on the mutualisation of costs of and established collaborations between non-homogeneous PGIs.[522] However, because of the complex governance structure made necessary by the heterogeneity of stakeholders, possible inefficiencies might arise. For example, the visibility and decision-making power of smaller GIs could be diminished if compared to bigger GIs. Heterogeneous actors (in the upstream and downstream of the value chain) playing an active role in the decision-making for product specification design, might have different motivations and interests in GI protection which might be cause of inefficiencies for consensus building, and for the tangible transposition of heterogeneous instances in tangible outcomes. If the coexistence of heterogeneous actions might be beneficial for collecting different point of views on a specific point of discussion, it might also make the tracking of power asymmetries and imbalances more challenging (especially when these dynamics remain informal). Some additional difficulties might involve the monitoring of representativeness over time.

For all these reasons, INAO representatives and the control bodies are directly involved in monitoring the governance structure of these types of organisations,[523] which for the moment remain a relatively new phenomenon.

Interviews with INAO representatives gave interesting insights on the working rules governing the **control on the governance of the PDMO**. The national authority, as explained in the legal analysis,

522 ibid, para 66.

523 ibid, para 40.

is directly involved in two different operational actions. Here below some insights emerging from the interviews involving the implementation of the legal rules:

(a) the 'monitoring of the PDMO' ('*suivi ODG*') targets the way in which the PDMO operate as to the principles of representativeness, fair representation, democratic functioning, and necessary membership. The INAO representatives report that the sanction of withdrawal of formal recognition is never applied.[524] This rule has a strong dissuasive function, but the INAO offices in practice privilege a case-by-case approach, involving direct participation, ongoing monitoring and interaction with the PDMO to find informal solutions to fragilities before they lead to structural inefficiencies.[525] Moreover, these fragilities affecting the functioning of the PDMO is due to managerial choices, mostly not attributable directly to producers. Instead, the consequences of the withdrawal for producers would be 'dramatic' as they would not be allowed to use the denomination. [526]

(b) Within the 'monitoring of control bodies' ('*suivi OC*') INAO verifies if the control body has duly supervised the PDMO with regard of its formal tasks.[527] For example, in the framework of the monitoring of the PDMO ('*suivi ODG*') the diligence concerning this task of identification-authorisation ('*habilitation'*) of new operators[528] might be verified by the control body through specific checkpoints in the control plan. The control body, therefore, shares with the INAO the task of verifying 'how the PDMO behaves in relation to external parties, i.e., if it manages appropriately the operators' declarations'.[529] In parallel, the INAO receives the periodically updated list of authorisations and, within the framework of the monitoring of the control bodies, will verify the work pursued by the control body in checking these requirements upon the PDMO. The control on the respect of the statutes, however, remains a competence of the INAO and not of the control body, which is mainly in charge of this 'administrative' type of verification.

The control body is accredited by the COFRAC according to the norm ISO 17065.[530] The interpretation by the INAO of rule ISO 17065 explicitly identifies the PDMO as the 'client' of the control body.[531] This qualification reveals the French approach to controls of PDOs and PGIs: 'the system is similar to "group" certification and avoids the need to sign individual contracts. The contract between the control body and the PDMO is compulsory and the coordination and

524 interview with INAO legal department, paras 67-69.

525 ibid.

526 ibid.

527 ibid., para 76.

528 Interview with control body, 24 June 2021, para 34.

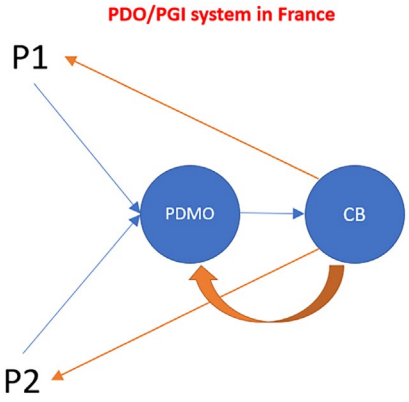
529 Interview with INAO legal department, 16 September 2022, para 74.

530 Interview with control body, 24 June 2021, para 34.

531 INAO, 'Eléments d'explications concernant l'entrée en vigueur de la nouvelle norme NF EN ISO/CEI 17065' available at <https://extranet.inao.gouv.fr/fichier/2014-105-Norme-17065---Elements-de-langage-27-08-2014.pdf>.

management of controls (including the relationships with the control body) is centralised upon the control body.[532] However, each operator producing under quality schemes must commit to all the commitments listed in point 4.1.2.2 of the ISO 17065 standard' (Figure 8).[533] Each producers pays the costs of the controls to the PDMO and the PDMO pays the control body, which performs the controls for the certification and shares competence for checking the performance of internal controls. The PDMO has therefore a legal obligation to stipulate a contract with the control body. This centralisation of control management upon the PDMO can be a positive driver for collective action, as it stimulates exchanges on the enforceability of the product specifications, on quality improvements, and the mutualisation of the costs.

Figure 8: Control management in the French PDO/PGI system. P1: Producer 1; P2: Producer 2; PDMO: Producer Management Organisation; CB: Control Body.



An example of the usefulness of the control system to interpret the enforceability of the product specifications is represented by the *Huile Essentielle Lavande Haute Provence* PDO case. The product specifications is centred on the local variety of Population Lavender, which traditionally grows under specific climatic conditions and altitudes, and whose characteristics are considered very similar to the wild lavender. Interviews showed that the PDO had originally been created to protect this local variety against products issued of chemical substitutes of aromatic plants and competition in international markets. The harvest is therefore at the core of the product specifications (more than processing techniques) as the variety properties alone give to the essential oil its specific characteristics and qualities. However, recently, external factors such as rising temperatures and the development of diseases heavily affected the survival of the local

532 Interview with control body, 24 June 2021, para 12.

533 ibid.

variety, especially those exploitations who are located at lower altitudes.[534] For this reason, research brought to the development of new varieties, which are more resistant to diseases and resilient to the new climatic conditions, although they still are formally identifiable as Population Lavender. Some of the producers use these new varieties, especially those located at lower altitudes. As a result, producers are discouraged in certifying their production, due to the high risk of registering non-compliance with the current product specifications.[535]

In 2019, the PDMO filed temporary amendments to introduce more flexibility in the rules contained in the product specification and related checkpoints. However, structured initiatives aimed to modify the product specification have been until now unsuccessful. The factors hindering the stakeholders' capacity of finding a compromise mainly rely on two factors. One is the disaggregated motivation in managing collectively the PDO and pragmatically avoid inefficiencies affecting the outcomes. This fragility emerges, for example, by the low level of participation in the meetings organised by the PDMO.[536] The other factor is the coexistence between two opposing views on the characteristics of the origin product: one more traditional (brought forward by producers who manage to maintain few successful exploitations of the original variety), the other forged by the need to devise new rules and controls able to ensure flexibility to changing conditions.[537] In this specific case, the control system represented *the* first tangible indicator of endogenous fragilities of the PDO, which call for a governance system able to give resonance to heterogeneous interests.

The case of lavender essential oil of Haute Provence PDO is also interesting because it gives a snapshot of how internal and external controls are performed in France. It is important to highlight that in French PDO/PGIs producers are directly involved in the commission deputed to verify the organoleptic characteristics of the product. In the lavender essential oil case, organoleptic tests are olfactive tests, and are complemented by lab tests. The commission for olfactive tests is constituted by three committees: the committee of the memory bearers ('*porteurs de memoire*') constituted by the operators and retired operators, the committee of technicians of the value chain, and the committee of the users of the product, meaning the traders and distilleries. The commission is recruited based on the availability of the participants (voluntary basis) and after having followed a short training instructed by the PDMO. The commission operates both in the frame of internal and external controls which touch upon the same aspects and have the

534 Interview with producer n. 2, lavender essential oil Haute Provence PDO, 6 July 2021, para 17.

535 ibid.; interview with producer n. 1, lavender essential oil Haute Provence PDO, 6 July 2021, para 77; interview with representative PDMO, lavender essential oil Haute Provence PDO, 12 July 2021, para 66.

536 Interview with producer n. 2, lavender essential oil Haute Provence PDO, 6 July 2021, para 38; interview with representative PDMO, lavender essential oil Haute Provence PDO, 12 July 2021.

537 Interview with producer n. 2, lavender essential oil Haute Provence PDO, 6 July 2021, para 30; Interview with representative PDMO, lavender essential oil Haute Provence PDO, 12 July 2021, paras 62-64.

function of mutual verification. It is possible to appeal the decision of non-compliance given by the commission. However, generally, specific rules on the composition of the first and appeal commission are left to the initiative of the PDMO. In the case of the lavender essential oil the commission is constituted by the same members who gave the first assessment of conformity,[538] raising questions on the impartiality (and usefulness) of the second evaluation.

2.2.3.2.3.2 Italy: practical effects of the 'legal patchwork'. Protection Consortia vs other types of legal forms

Localising all the relevant legal sources concerning the regulation of governance of Italian producer groups is particularly challenging. Interpretative ambiguities are favoured by the fragmentation created by the extremely prolific discipline reserved to Protection Consortia, compared to the 'minimalist' legal framework governing the other types of legal forms.

A (non-resolutive) remedy to the legal fragmentation is represented by a project of unified legislation (in Italian '*Testo Unico*') including all the relevant legal rules on Protection Consortia. At the time of writing, this project is still ongoing and the draft of the text under discussion has the ambition not only to systematise the relevant legal discipline, but also to introduce some novelties.[539]

The current rules for the recognition of Protection Consortia prove to be inefficient in practice for various reasons. Firstly, for the difficulty in attaining the minimum threshold for representativeness of 66%. It is not uncommon that a producer consortium cannot be formally recognised and exercise *erga omnes* functions). This case is more frequent for small and medium-sized GIs.[540] Interviews involving national, regional authorities and some producer groups refer to the lack of interest in engaging in collective action as a structural factor hindering the recognition.[541] However, this

538 ibid., paras 66-68.

539 Among the proposed modifications, different percentages for assessing representativeness and introduction of another component (the 'certification component') beyond the already mentioned control and subjective components. See synopsis below. The differentiation is linked, in the draft, to the functions that consortia can pursue *erga omnes*.

Erga omnes functions	**Only among the members**
• The Protection Consortium must be representative of 66% of the controlled production calculated in the previous 2 years (**control component**)	• The Protection Consortium must be representative of 51% of the controlled production in the last 2 years (**control component**)
• 80% of this production must be certified (40% if it is an aged product) (**certification component)**	• 66% percent of the production must be certified (**certification component**)
• It must gather 40% of producers and users of the GI (**subjective component**)	• It must gather 35% of the producers and users of the GI (**subjective component**)

540 Interview with regional authority Veneto, 11 February 2022, para 30; interview with regional authority Tuscany, 19 July 2022, para 8.

541 Interview with Ministry of Agriculture, 28 January 2022, para 12.

should not be generalised as a characteristic of the Italian context, but should be observed on a case-by-case basis. Small producer groups might be less interested in engaging in demanding tasks and responsibilities and complex and costly organisational structures coherently with the necessity of their own objectives (e.g., they might be more oriented towards the valorisation than the protection of the denomination).[542]

At present, 168 consortia are recognized[543] out of 312 Italian PDOs and PGIs for agricultural products and foodstuffs.[544] The geographical distribution of Protection Consortia can also vary depending on the Region. In Veneto, out of 28 PDOs/PGIs only 11 do not have a consortium; in Tuscany 16 out of 31;[545] in Latium only 5 out of 27 PDOs and PGIs.[546] Consequently, a diversity of configurations falls outside the formal conditions for the attribution of the functions defined in art 14 Law 526/1999, ranging from 'standard' consortia which do not reach the representativeness requirement of 66%, associations to the inexistence of a governance structure. Sometimes, the costs needed for the protection and valorisation functions are not covered by sufficient incomes (also deriving from the difficulty to obtain the payment of the *erga omnes* fees by non-members). This situation engenders the paradox of depriving the Protection Consortium, although representative, of its capacity of performing its tasks and responsibilities, including the monitoring post commercialisation through the vigilance agents.[547]

Secondly, limiting the calculation of representativeness to 'producers and users' shows a more favourable treatment for these actors compared to 'producers and processors interested in the PDOs and PGIs'. This might have strong repercussions on the incentives of the producers and processors interested to the PDOs and PGIs to join the Consortium, and to participate actively to the decision-making.[548]

Thirdly, since the fair representation is based on subjective and qualitative criteria for the repartition of the seats in the governing bodies, 'producers and users' are always prevalent in number than

542 Interview with regional authority Tuscany, 19 July 2022 para 8; interview with regional authority Lombardy, 6 March 2023.

543 Source updated 3 January 2023, available at <https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/2086>.

544 Interview with Ministry of Agriculture, 28 January 2022, para 14.

545 It is interesting to note that, among the registered PDOs and PGIs without protection consortia in Tuscany, there is an organisational, structural and legal heterogeneity: 4 non-recognised consortia; 4 association non-profit; 1 non-profit organisation which started the transformation to become a consortium; 1 promotion committee which includes two products, 1 promotion committee, and 2 GIs are not managed by any type of organisation or association. See interview with regional authority Tuscany, 19 July 2022.

546 Interview with regional authority Latium, 24 February 2022, para 3.

547 ibid para 14; interview regional authority Tuscany, 19 July 2022, para 8.

548 Interview regional authority Tuscany, 19 July 2022, para 11.

'producers and processors interested in PDOs and PGIs'. Moreover, the voting system based on the volumes of production (controlled or compliant to the product specifications), might crystalise power asymmetries in favour of 'producers and users', independently of the subject matter of discussions.[549] For example, if a decision is to be taken on elements involving the quality and sourcing of milk for the production of cheeses, it is highly likely that the raw material producers will have less decision making power than the processors.[550] This implies a *de facto* prevalence of the principle of investment over the principle of contribution. Furthermore, one producer is not prevented from registering its participation as pursuing different activities and having major decision-making power on the decisions concerning the management of the sign.

Lastly, the representation requirement is not *per se* compulsory, meaning that in practice 'the Ministry of Agriculture verifies that in the statutes there is the *possibility* to be represented'. This does not automatically imply that all categories of 'producers and processors interested in the PDOs and PGIs', despite being 'minor', adhere to the Protection Consortium.[551] It might be that only the category of 'producers and users' participate in the decision making, while the representation percentage of the 'producers and processors interested in the PDOs and PGIs' remains unexpressed. Contrarily to representativeness, the non-compliance to the fair representation principle does not seem to be subjected to any type of sanction (e.g., the loss of the formal recognition).[552] One might argue that representativeness, being in the worst case the exclusive expression of producers and users, might in practice take the form of an 'empty box': it sets the conditions for inclusive participation, but it not grants the participation of all professional categories ('minor' categories can or cannot be represented, they can be sufficiently or insufficiently – i.e., 'fairly' – represented). Moreover, actors interested in the PDOs or PGIs share the 34% of the seats, without further specifications. This number of seats can be discretionally assigned to the categories of stakeholders considered 'minor', not necessarily mirroring the proportion of the professional categories involved in the value chain.

For example, comparing the statutes of two Protection Consortia of PDOs belonging to the same product class, Parmigiano Reggiano PDO[553] and Grana Padano PDO, shows how this mechanism works in practice (Table 15). In the statutes, the percentage of seats reserved to producers and

549 This should also be considered taking into account that the percentage of 34% is residual, meaning that it can be distributed discretionally among the 'minor' categories identified in art 2 Ministerial decree 12 April 2000 n. 61414.

550 Interview with regional authority Latium 24 February 2022, para 20.

551 Interview with regional authority Tuscany, 19 July 2022, para 13.

552 ibid.

553 The statutes of the Protection Consortium Parmigiano Reggiano PDO are available here <https://www.parmigianoreggiano.com/it/consorzio-statuto>; the statutes of the Protection Consortium of Grana Padano PDO is available here <https://www.granapadano.it/wp-content/uploads/2023/02/STATUTO GRANAPADANO2020-43987.pdf>

users is defined as 'minimum', instead the percentage of the 'other producers and processors interested in PDOs and PGIs' is identified as 'maximum' and more flexibility is allowed for the repartition of the residual 'maximum' 34%, as well as on the possibility of the Consortium of reconsidering this repartition over time. This shows that the category of producers and users has, always and incontestably, a privileged position in the participation to the governing bodies of the Protection Consortium.

Table 15: Comparison between the interpretation of the fair representation requirements for GI products belonging to the same-class products. The comparison is based on the statutes of Parmigiano Reggiano PDO and Grana Padano PDO.

	Parmigiano Reggiano PDO	**Grana Padano PDO**
Percentage of seats reserved to 'producers and users'	66% cheese producers (*minimum* percentage)	66% cheese producers (*minimum* percentage)
Percentage of seats reserved to 'other producers and processors interested in PDOs or PGIs'	17% breeders and milk producers 17% ripeners and portioners (*maximum* percentages, they can be reduced on the basis of the contribution of these professional categories to the overall production)	12% breeders and milk producers 15% ripeners 7% portioners (*maximum* percentages, they can be reduced on the basis of the contribution of these professional categories to the overall production)

The legal requirements reserved to Protection Consortia as the four pillars are typical of the Italian legislation, while no specific requirements are given for other legal forms of producer groups. This creates *de facto* a two-speeds system, opposing Protection Consortia (more strictly regulated and more 'exigent') to other organisational solutions. This imply a different level commitment in the maintenance of sufficient levels of collective action, especially when it is less regulated or monitored to adequately sustain the management of the sign and a maximisation of its functions.

Theoretically, the control bodies might retrieve the information on the maintenance of the requirements of representativeness and representation for all producer groups. However, lacking declarative requirements for producers before and after the GI registration, this monitoring activity is not pursued systematically.

Furthermore, a full-encompassing overview of the regional trends affecting Italian denominations is difficult to obtain. This complicates the task, upon the regional authorities, of monitoring the activities of producer group and understanding if the registered denomination is effectively used by producers. One practical difficulty reported by national authorities in this regard is to interpret the

data concerning the discrepancy between the quantity of certified and controlled production.[554] In specific sectors (e.g., the olive oil sector) where intermediaries have a strong decision-making power as to the modalities of commercialisation of the product, differences between the quantity of the certified production and the controlled production might not derive exclusively from non-compliance.[555] It might also be the result of specific commercialisation choices which have their decision-making centres outside the producer group (at the downstream of the value chain). The presence of other types of variables affecting the quantity of certified and controlled production also affects the assessment of representativeness and fair representation. This inefficiency hinders the capacity of the regional authorities to take the necessary measures to prevent or correct collective action issues.

In Italy, multi-denomination producer groups exist, but this possibility is only available for Protection Consortia.[556] Besides, spontaneous federative initiatives are developing. For example, the region wide Toscano PGI is managed by a Protection Consortium, an organisation federating the majority of the olive oil producers of the Tuscany region. Even though it cannot formally be considered as a multi-product PDMO, it meant to mutualise costs to sustain the promotion and protection activities. Besides the positive achievements, these complex organisations raise the concerns of the producers involved in pre-existing and coexisting PDOs. Yet, due to the low volumes of and the difficulty to gather enough members, smaller producer groups struggle to survive.[557] The same federative dynamic can be observed in 'Olio di Roma' PGI. It served to 'overcome fragmentation' and allow the inclusion of productions belonging to areas that, otherwise, would not have had any chance to register their denominations. However, also in this case, pre-existing and coexisting PDO holders based in the same geographical area, lament the 'potential de-valorisation' of their PDOs as a consequence of the less strict conditions of the new PGI. Yet, the wide range of varieties used in the PGI (10 endogenous and 2 of 'current use') should be used for the 80% as minimum requirement, according to the product specifications.[558] From the perspective of PDO producers, this would undermine the guarantee on the provenance of the raw materials and legitimise lower quality standards (compared to the stricter pre-existing PDOs). In Tuscany, this type of issue might have been mitigated by the presence of the sub-mentions.

554 Interview with regional authority Tuscany, 19 July 2022, para 31.

555 ibid.

556 One Italian example of multi-denomination Protection Consortium is the the *Consorzio per la Tutela dei Formaggi Valtellina Casera e Bitto for the PDOs Bitto* and Casera. For more insights on this specific case see Edelmann and others (n 75).

557 Interview Protection Consortium Tuscan olive oil, 16 December 2021, para 2.

558 For more insights on the 'Olio di Roma PGI' case see https://it.oliveoiltimes.com/business/controversy-in-italy-over-new-olio-di-roma-pgi/64150.

In Italy, accredited control bodies allowed to perform controls before the commercialisation of the GI products are 42. Private control bodies authorised to perform controls are 24, while delegated public authorities are 18. Among them 9 are Chambers of Commerce and 9 are represented by more specialised actors (for example regional agencies and research institutes). No differences have been reported during interviews as to the quality of control, except from the costs, which are lower for delegated public authorities.[559] Despite this difference in number, in Italy controls are mainly pursued by private bodies.[560]

The control plan is validated by the ICQRF. As in the French context, the content of the control plans is strictly tailored to the product specifications. The Ministerial offices in charge of assessing the quality of the application file do not exchange directly with control bodies.[561] However, guidelines are also provided by the national authority and identify the minimum content of control plans for some product classes (i.e., 1.2. Meat products; 1.3. Cheeses; 1.5. Oils and fats).[562] Regional authorities, on their own initiative, might informally encourage producer groups to contact control bodies at the early stages of the construction of the product specifications, to ensure the controllability of the rules contained therein.[563] One cannot however qualify this practice as systematic in all Italian regions, and this might affect the overall quality of the product specifications submitted to the Ministry of Agriculture.

559 ibid, para 20.

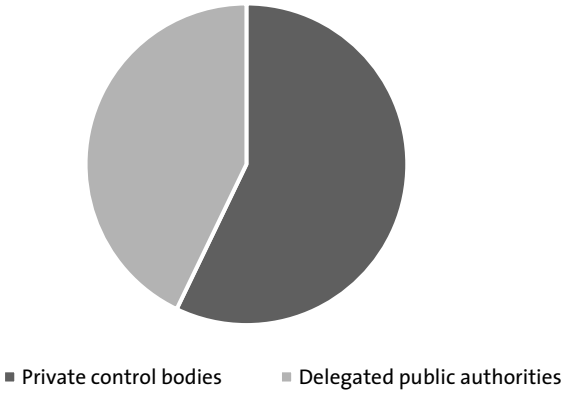
560 Interview Ministry of Agriculture, para 20.

561 Interview with Ministry of Agriculture, 28 January 2022, para 40.

562 These guidelines are very detailed, and identify, for each checkpoint, the typology of control, the frequency and the actors subjected to controls. They are available on the website of the Ministry of Agriculture.

563 Interview with regional authority Tuscany, 19 July 2022, para 29.

Figure 9: Private control bodies and delegated public authorities exercising controls on Italian PDOs and PGIs.[564]



Producer groups without Protection Consortia are not subjected to particular requirements and controls as to the four pillars. This more flexible regime could match the expectations and motivations of smaller realities, but it also engenders higher risks of collective action breakdowns. As already mentioned, only representativeness is verified at the registration phase through a documental check. This might cause difficulties, for example, in matching higher eligibility requirements to assess the legitimacy of the producer group to file amendments.

As things stand in Italy, the Protection Consortium clearly is 'the privileged interlocutor' of the regional authorities and Ministry of Agriculture.[565] One tangible element of their role is the cooperation with the ICQRF. The monitoring activities pursued by the vigilant agents are considered, together with valorisation activities, *erga omnes* functions that the Protection Consortium pursues for the benefits of all operators registered in the control system. Therefore, they are financed by members and non-members. However, since the obligation to pay *erga omnes* contribution for non-members is not associated with the possibility to participate in the decision-making processes related to the management of the sign, it might be subjected to inefficiencies (e.g., the difficulty in obtaining the payments of these contributions by non-members).[566] The *absence of necessary membership* implies that, when Protection Consortium are absent, each producer is registered in the control system and manages individually its own contractual relationship with the control body (Figure 10, right).[567] When there is a Protection Consortium, *because of the*

564 Source for identifying the number of recognised control bodies: Website Ministry of Agriculture <https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/4951> accessed in May 2023.

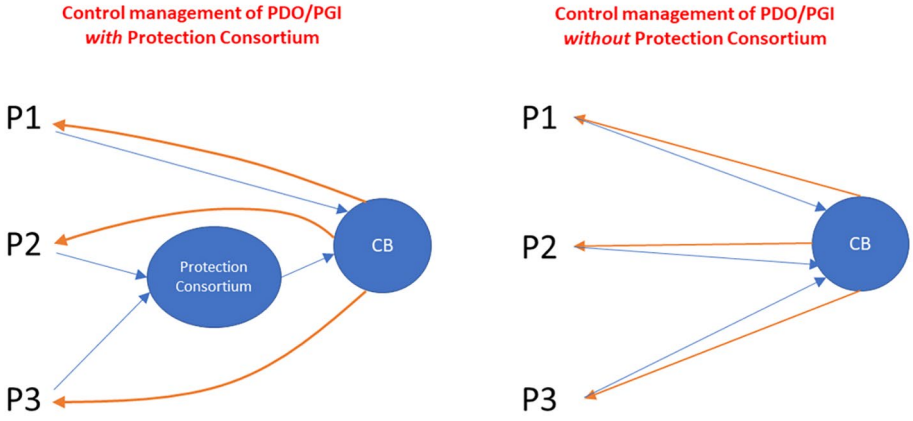
565 Interview with Ministry of Agriculture, 28 January 2022, para 28.

566 Interview with regional authority Latium, 24 February 2022, para 14.

567 Interview with Ministry of Agriculture, 28 January 2022, para 18.

optional membership rule, the relationship producers-control body can be diversified: on the one hand, the Protection Consortium plays an aggregation role, for example it forwards the request for registration on behalf of the single producer (Figure 10, left P2 and P3),[568] it exercise a bargaining power in determining the cost of control for its members and in managing the relationships with the control body.[569] On the other hand, for the same PDO/PGI, users-non members (in Figure 10, left, P1) of the Protection Consortium manage individually the relationship with the control body. This situation might dilute the strength of collective action at the local level.[570] Differently from the PDO/PGI French system, the Protection Consortium is not formally controlled by the control body as to its tasks and responsibilities.

Figure 10: Control management in the Italian PDO/PGI system with and without Protection Consortium. CB: Control Body.



568 This possibility is mentioned in the Regulations of the Italian control bodies (see, for example, Assam and CertiProDop) and it is subordinated to a formal delegation by the individual producer.

569 See also interview with Protection Consortium, Tuscan Olive Oil PGI, para 26.

570 ibid., para 30.

2.3 A constructive approach to conclusions: axes of inquiry and methodological questions

Table 16 summarises the most salient aspects of the pre-application and application process of GI registration and its outcomes in the context of the French and Italian PDO/PGI system. It synthetises both the characteristics of the legal framework and its implementation by the relevant actors.

Table 16: The main features of the French and Italian PDO/PGI models from an A-P-O perspective.

A-P-O	French agri-GI model	Italian agri-GI model
Actors	At the **local level**, legal framework and practice aligned: producers are at the core and main driver of the GI initiative. Group formally institutionalised as PDMO. Municipalities and local associations/organisations are supporters of the GI initiative. **At the higher-level** intermediate layers of governance between producers of the same area or product type (multi-product PDMO and federations of PDMOs). **The national authority** uses a technical and multi-disciplinary hands-on approach based on a strong proximity to the value chain and power of direct inquiry.	At the **local level**, legal framework and practice not fully aligned on exclusively producer-driven initiative for GI registration. The leadership of external actors at the local level (municipalities, other actors different from producers) can still play a strong role, especially in small and medium-sized GIs. At the higher-level multi-product Protection Consortia ex post registration, upon fulfilment of specific/strict requirements. The **national authority** uses a hybrid approach. Regional authorities might establish proximity to the value chains and use a technical hands-on approach with limited power of direct inquiry; the Ministry of Agriculture has mainly a supervision role (hands-off approach). Meeting of public inquiry for fostering participation of interested state and non-state stakeholders at the local level.
Process	**Principle of access to membership:** compulsory membership to the PDMO and open-door system. Distinction between *ex officio* members (producers concerned by the PS) and associate members (other state and non-state actors). **Legal form:** association, syndicat, inter-branch organisation. **Principle of representativeness:** specific definition absent in the French Rural Code and Applicants' Guide for PDMOs. In practice left to case-by-case assessment with general guidelines. These guidelines imply an assessment ex ante the GI registration (when the project of product specifications of the *'produit candidat'* is already available) based on the volumes produced by the producer group and the volumes of products of the same kind produced in the area.	**Principle of access to membership:** compulsory membership to the Applicant Association (before the registration process), but voluntary membership to the association/Protection Consortium after the GI registration. Different membership status is granted depending on the role played by each actor in the value chain. **Principle of representativeness:** fragmented legislation. Defined *ex lege* through top-down criteria for Protection Consortia, not defined for other legal forms at the registration. Specific and codified assessment criteria aligned for all legal forms only for applications for amendments. The assessment for Protection Consortia is made ex post the GI registration (after the formalisation of the product specification of the *GI product*) based only on actors defined by law as 'producers and users', and on the controlled production identified as eligible for certification within a specific time frame.

A-P-O	French agri-GI model	Italian agri-GI model
Process *(Cont'd)*	**Principle of fair representation:** not explicitly defined by the French Rural Code and Applicants' Guide. In practice assessed on a case-by-case basis. **Principle of democratic functioning:** assessed on a case-by-case basis, some guidelines contained in the Applicants' Guide. One person one vote preferred. Formal assessment on PDMO eligibility *in parallel* with the application for registration.	**Principle of fair representation:** fragmented legislation. Defined *ex lege* through top-down criteria for Protection Consortia only, for other legal forms the assessment criteria are expressed as to the application for amendments. **Principle of democratic functioning:** fragmented legislation. Defined *ex lege* through top-down criteria only for Protection Consortia (weighted vote according to volumes). Documental formal assessment on eligibility of the Applicant Association; formal recognition only for Protection Consortia *after* the GI registration.
Outcomes	**1st level outcomes:** content of the specification detailed by French Rural Code and Applicants' Guide; strict evidence-based approach (power of on-site inquiry by national authority) and strict correlation quality-locality requirement; content of the statutes should explicitly include reference to the four pillars, guidelines provided in the Applicants' Guide for recognition as PDMO; controllability document as a tool to measure the 'quality' of the specification and prepare for control plan. Control plan detailed by the common control provisions (additional national requirements). **2nd level outcomes (governance):** The governance configuration in France remains, mainly, unchanged since the recognition of PDMO in parallel with the GI registration (tendency to uniformity independently from legal form) **2nd level outcomes (controls):** mixed public-private control only private control bodies. Controls centralised upon PDMO. ***Control compliance with the specification:*** control body (public and private) formally recognised by the national authority. Control plan drafted based on the product specifications and of INAO guidelines. External (third-party), internal control, self-control as complementary. ***Control on governance*** of the PDMO pursued directly by the INAO within the framework of the 'monitoring of PDMOs' and indirectly within the framework of 'monitoring of control bodies'. Control bodies verification of the correct fulfilment of the tasks defined by the French Rural Code (mainly documental).	**1st level outcomes:** content of the specification following a strict evidence-based approach (burden of proof upon the applicant) and strict correlation quality-locality requirement; content of the statutes not specified by law, content of control plans not specified by law. **2nd level outcomes (governance):** possible recognition of Protection Consortia impacts on the operationalisation of the four pillars. Two-speed system opposing Protection Consortia and other legal forms due to non-uniform legal framework on eligibility requirements, functions performed, and monitoring and control mechanisms on governance. **2nd level outcomes (controls):** mixed public-private, control bodies public or private. Controls managed between each producer and the control body; possibility to manage controls collectively (e.g., for Protection Consortia). ***Control compliance with the product specification:*** control body (public and private) formally recognised by the national authority. Control plan drafted based on the product specifications and on the basis of ministerial guidelines (for selected product classes). External (third-party) and self-control as complementary; absence of internal control). Vigilance agents for control at the commercialisation (only for Protection Consortia). ***Control on governance:*** only for Protection Consortia, control bodies recognised by ICQRF by decree, monitored yearly (documental control) as to the minimum operational requirement and re-appointed every 3 years after verification of minimum representativeness requirement. No specific rules for other legal forms of producer groups and phenomenon of 'sleeping' or 'half-sleeping GIs'.

Based on this comparison, I formulate axes of inquiry derived from the application of the A-P-O approach embedded in the GKC framework. These axes are a summary and generalisation of the main conclusions drawn from the methodological test on agri-food GIs. They are aimed at identifying some conditions for an efficient rule-making process for product specifications design, creating favourable conditions for the subsequent GI management. In Chapter 3, these axes of inquiry will have the function of hypotheses for comparing French and Italian experiences in the valorisation of denominations of origin products in the industrial and craft sector. In Chapter 4, they will be used as benchmarks for assessing collective action gaps between French and Italian PDO/PGI experiences in the agri-food sector and current experiences in the industrial and craft sector.

2.3.1 Axis of inquiry 'Actors'

Axis of inquiry 'Actors': heterogeneity of interest, motivation, role and involvement can influence the rule-making process.

The participation of stakeholders belonging to the local community, **different from producers**, can facilitate and support collective action in the pre-application and application phases. However, when all the producers concerned by the product specifications are the **main participants and decision-makers** it is easier to convert interests and motivations in common operational rules, as well as to choose the legal form and governance structure suitable to sustain commitment to these rules. The **technical multidisciplinary assistance** provided by state actors, control bodies and experts, especially through on-site inspections, can help set the conditions for a sustainable management of the sign and to ensure that the GI initiative is aimed to satisfy the collective interest of the local community at large.

Arguments supporting the formulation of the axis of inquiry 'Actors'

GI interdisciplinary scholarship is aligned in considering the *sui generis* approach to GI registration as a bottom-up process, where the initiative is undertaken by producers who should be the main actors of the decision-making for rule-crafting. This configuration should favour, *inter alia*, a higher level of commitment in rule-compliance and an adequate system of monitoring and sanctioning.[571] The test undertaken on agricultural GIs showed that identifying the actors involved in the rulemaking process is particularly important and it implies evaluating the eligibility of the producer group, as well as its legitimacy to establish rules restricting the use of the sign. On the one hand, the EU approach in this regard is permissive, also admitting that actors different from producers are entitled to take part in rule crafting. On the other hand, a stricter approach seems

571 See Varughese and Ostrom (n 277).

to be adopted by Italian and French national systems, where national authorities verify that producers are at the core of the decision-making leading to the product specification.

Despite some formal similarities in the legal rules, the French and Italian GI implementation of those legal rules reveal some differences. Literature and targeted interviews highlight that in France cooperation is strongly producer driven. In Italy, as shown by the case of *Pecorino di Picinisco* PDO, it might happen that leadership for rule making is taken by actors external to the value chain, such as municipalities. This situation is more likely to occur in the context of small-medium GIs and it reduces the significance of producers' empowerment, especially intended as their capacity to sustain collective action in the long run. The producer-driven approach does not exclude the participation of external actors (as municipalities or other local associations or organisations), whose contribution is essential for supporting the initiative and facilitating compromise building.[572]

National authorities' involvement during the pre-application and application process in France and Italy presents some common elements, but also some differences. In France the decentralised administrative organisation of the INAO favours a proactive, technical, and multidisciplinary approach ('hands-on' approach), driven by proximity with the value chain and the involvement of scientific expertise. In practice, this allows continuous exchanges and feedback with the stakeholders involved in the GI initiative and, at the same time, is aimed to gain a deep knowledge of the dynamics at the local level (even beyond the reconstruction made by the applicants in the application file). Instead, in Italy the system could be identified as 'hybrid', where the hands-off approach centralised upon the Ministry of Agriculture is mainly aimed to verify the compliance of the application file and the product specification with the legal requirements. This assessment is complemented by the hands-on approach of regional authorities. Regional authorities establish informal interactions with the applicants and usually play the role of intermediary between the producers and the Ministry of Agriculture. As also highlighted by Penker et al., they can autonomously decide the degree of implication and modalities of intervention in supporting the applicants, and currently there is no legal safeguard to avoid the risk of regional inhomogeneities.[573] The more applicants are autonomous in making choices and providing evidence of their claims, the higher is the risk that legal consequences derived from the legal protection are misunderstood or overlooked, including the preservation of the general interest embedded in the GI protection. These conclusions align with Quiñones-Ruiz et al.[574]

572 Marie-Vivien and others (n 286) 3005. Vandecandelaere et al. point out, in this regard that 'the only good rules are those that can effectively be enforced and controlled; the only good controls are those that can result in sanctions or rewards'. See Vandecandelaere and others (n 81) 53.

573 Penker and others (n 59).

574 'The role of the state is very relevant, namely in the design and implementation of the legal framework, and in creating a supporting environment for providing technical assistance o stakeholders along the registration process […] Top-down

2.3.2 Axis of inquiry 'Process'

Axis of inquiry 'Process': principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing specification design and GI management.

When the principles of representativeness, representation, democratic functioning, and access to membership shape the GI initiative, are **clearly stated**, **assessed**, and efficiently **monitored over time**, independently from the legal nature and complexity of the governance structure of the producer group, stakeholders can show higher awareness and long-term engagement in the management of the sign. **Compulsory membership** of GI producers concerned by the specification can favour producers' involvement in the draft of the specification and in the management of the sign as established in the statutes. If GI users-participants directly involved in the specification design are also involved in the design of the control plan, that would set favourable conditions for rule compliance. Reflecting stakeholders' heterogeneity with **different types of memberships** to the producer group can encourage **fair representation, representativeness,** and information **transparency** in the decision-making, which empowers actors if accompanied by mechanisms to ensure **democratic functioning**.

Arguments supporting the formulation of the axis of inquiry 'Process'

The four pillars guide collective decision-making towards equity and justice. The French and Italian national legislations clearly distinguish the assessment criteria for representativeness, fair representation, and access to membership. However, an explicit definition of representativeness, fair representation, democratic functioning, and access to membership is lacking and leads, in practice, to terminological confusion. My objective in this Chapter was to provide a more accurate conceptualisation of these principles and to identify the relationships between them, using a comparative approach which embeds the empirically grounded perspective. According to my interpretation of national legal requirements, 'representativeness' entails a quantitative assessment on the number of producers involved in the producer group/applicant producer group; 'representation' involves a qualitative assessment on the type of professional category involved in the value chain. The assessment on representation is further characterised by an evaluation of 'fairness' ('fair representation'), which implies a quantitative distribution of the seats of the actors involved in the value chain. 'Access to membership' refers to the duty of the producer group to

approaches that minimise efforts and conflicts during the registration process seem to be the best solution, as they might limit the direct participation of supply chain actors in the GI building process. GI registration should not only be seen as a bureaucratic procedure, but as a co-learning process, where GI-stakeholders can attain better awareness of the specificities of their product and develop collective strategies and initiatives that should go far beyond merely registering the GI. The willingness to use the GI after the registration can also be improved by participative processes. […] Shared bottom-up processes should be preferred and more assistance is to be provided to weak GI systems and GI actors to give the possibility to access and benefit from GI protection'. See Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (n 98) 114–115.

avoid any barriers for new operators to enter the group. The duty to provide access to membership does not automatically entail that membership is compulsory. Democratic functioning implies active participation, through deliberative or consultive vote, to decisions.

In France, the membership is **compulsory** independently from the legal form of the producer group. This pushes stakeholders to engage, directly and actively, in the rule-making process and to be identified, from the beginning, as rule-makers *and* rule-takers. The Applicant's Guide for PDMOs places the assessment during the construction of the product specifications (*in itinere*), meaning that the representativeness of the producer group is assessed based on the '*produit candidat*', which is described in the project of product specifications presented by the applicant producer group. These product specifications, being defined as a 'project' might evolve before the GI registration, under the input of the INAO, the public consultation, the opposition procedure and ongoing informal interactions between the applicant producer group and the other stakeholders concerned. The procedure is supervised by the INAO offices, which adopt a case-by-case approach (complemented by the consolidated codified guidelines contained in the Guide).

In Italy, the legal framework is fragmented: all producers must be members of the applicant association until the decision of the Ministry of Agriculture concerning the GI registration. However, **membership** is voluntary after **the GI registration**, and the persistence of an organisational structure is not necessary to use the PDO/PGI. However, the non-membership to (or inexistence of) the producer group impacts on the actors' capacity to take part of the decision-making process on the GI management. The Italian legislation differentiates the type of assessment on the four pillars, depending on *when* the evaluation on representativeness, fair representation, democratic functioning takes place (before or after the GI registration) and on the legal form of the producer group. Before the GI registration, the criteria to assess the representativeness, fair representation, and democratic functioning of the applicant association are not specified by the law. In practice, this type of verification is mainly documental and aimed to check that all producers of the product are members of the applicant association. The regional authority can contribute to this evaluation. After the GI registration, a new type of assessment on the pillars is undertaken by the Ministry of Agriculture, if the applicant producer group applies for the recognition as Protection Consortium. In this case, the national legislation is very detailed and set specific top-down criteria, based on the type of the value chain, on how much specific categories *generally* invest in the PDO/PGI and how much they *generally* contribute to the characteristics and quality of the product. Being one-size-fits-all approaches, these pre-determinations limit the margin of manoeuvre of producers' capacity to self-organise might be incompatible with local specificities. They might also affect stakeholders' capacity to comply with the legal requirements. This type of inefficiency is particularly evident, for example, from the low number of recognised Protection Consortia, which is due to the difficulty,

perceived from many producer groups, to attain the representativeness threshold of 66%, measured exclusively on the category of producers and users. The representativeness assessment for Protection Consortia is, therefore, made *ex post* the codification of the product specifications (i.e., when those rules already affect inclusion or exclusion).

Because of this legislative setting, after the GI registration a two-speed system emerges, opposing producer groups with a structured governance (Protection Consortia) and much less structured groups (associations, non-recognised consortia, committees) or the absence of structured groups. In cases where Protection Consortia are absent, a legal void on the requirements for representativeness, fair representation, and democratic functioning shifts the responsibility on devising appropriate mechanisms for enduring governance exclusively on the producer group. In the worst of cases, it might not favour stakeholders' awareness towards the importance of coordination strategies and ongoing commitment to rule-compliance and might cause collective action breakdowns.

2.3.3 Axis of inquiry 'Outcomes'

Axis of inquiry 'Outcomes': clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration.

The formulation of the rules contained in the product specifications reflect stakeholders' motivations and interests in the GI registration (valorisation or protection) and the effectiveness of the mechanisms ensuring democratic and inclusive decision-making. The content of the product specifications impacts on the conditions of access to the use of the name, and they are **justified, non-arbitrary** and **non-discriminatory** when they are supported by solid **verifiable evidence**. When the rules are **not ambiguous**, efficient **monitoring, control, and sanctioning mechanisms** can be envisaged and facilitate their enforcement. The operationalisation of the product specifications affects, temporarily or permanently, the governance and control configuration. **Evolutions in the governance structure after the registration** implies a redefinition of the type of actors involved and can affect the rules governing the decision-making process. The **type of interaction of producers with the control body** (individual or collective) the control type (multilevel, external, internal, and self-control; public, private, or mixed) and its **targets** (controls on the compliance with the product specifications and/or on the governance of the producer association/organisation) can affect collective action, including the capacity of the sign to perform its expected functions.

Arguments supporting the formulation of the axis of inquiry 'Outcomes'

The operationalisation of the specifications cannot be fully understood without looking at the outcomes of adjacent action situations of product specification design (i.e., statutes and control plan design). I call 'first level outcomes' the product specification (and adjacently the statutes of the producer organisation and the control plan); I call 'second level outcomes' the governance configuration deriving from the statutes of the producer association or organisation, and the control configuration deriving from the control plan.

The current legal framework both at the EU and national level, sets the legal requirements for the content of the product specification as part of the application file. In practice, the French and Italian national authorities promote a **non-ambiguous and evidence-based approach** to product specifications design. With 'non-ambiguous' rules, I mean rules having sufficiently *precise* formulations. This feature is compatible both with flexible and strict approaches to rulemaking.[575] With 'evidence-based approach', I identify the need for the applicants to provide sufficient objectively verifiable evidence to the claims embedded in the rules. The evidence-based approach for product specification design relies on the rationale that producers should not have, at least theoretically, full margin of manoeuvre as to the product characterisation.

In France the main sources are INAO Directives, complemented by consolidated practices codified in the Applicant's Guide for PDOs and PGIs registration. In Italy, the Ministerial Decree 14 October 2013 is considered self-sufficient, but it is *de facto* integrated by informal recommendations given by regional authorities and, to some extent by the Ministry of Agriculture.

In practice, the national authorities' approach to product specification design implies that the **choice of the name** should **not be arbitrary** but grounded on a documented prior use of the name in trade or common language. The verification on the prior use of the name (anteriority of use) involves both to PDOs and to PGIs. National authorities consider this element as indirect evidence of the place-based reputation. However, interviewees reported that the evidence grounding the choice of the name is often overlooked or mislead by the applicants. Sometimes, this is an indicator of the absence of an established use of the name to identify the product, which pushes national

575 It has been pointed out by existing scholarship that too strict rules might cause stakeholders' difficulties in adapting existing practices. See Vandecandelaere and others (n 81) 92. This might lead to the constitution of an informal system of rules, parallel to the codified product specifications or to major disincentives in maintaining the product certification. This chapter has shown that some disincentives might lead, inter alia, to a less quantity of certified product due to non-compliance to too strict standards under the effect of global warming (as in the Lavender Essential Oil PDO case); or they might lead to the exit of the majority of operators from the producer group or organisation (as in the Picinisco case, where one major disincentivising factor was represented by the reduced operators' capacity of making investments to adapt traditional production processes to modern sanitary standards). Conversely, too general rules might result in fuzzy boundaries diluting product specificity.

authorities to adopt more flexible approaches to assess the prior use of the denomination. The applicants' motivations regarding the GI initiative can privilege valorisation over protection objectives. In these cases, the general principle that GI is the 'recognition of something that already exist' is nuanced by a 'construction' of the GI for the purpose of the registration. Those cases are exceptions.

Producers' specific strategy of valorisation or protection of the place-based reputation can also explain the registration of **'umbrella' denominations accompanied by sub-mentions** (as in the Toscano PGI case). This choice implies a complex organisational structure and a remarkable collective effort benefiting market and non-market functions performed by the sign. However, since the complexity of the governance structure involves distinct groups of stakeholders having heterogeneous (sometimes conflicting) interests, it might require stricter safeguards as to the assessment of representativeness, fair representation, and democratic functioning. The declination of the four pillars is particularly relevant in these cases, as it might affect the description of the product, the origin link, and sometimes the 'chosen' quality scheme (PDO or PGI). Repercussions might involve the level of consensus reached within the group and the risk of conflict between the sub-groups and between the group and co-existing denominations in the geographical area.

Elements such as the **product description and the description of the method of production** always require awareness on the common grounds of informal practices, and the capacity to convert these practices in formal rules. This process might be difficult to occur without producers' awareness on the risk of arbitrary enclosure, which justifies the intervention of the national authorities as supporters, facilitators, and impartial evaluators of the application. The differences between the hands-on and hybrid approach characterising the French and Italian systems implies a different degree of proactivity in gathering the evidence of the claims and the power of intervention in modifying those claims.

Considering the product specifications as main formal and tangible outcomes of the decision-making process in the French and Italian agri-food context reveals slightly different features: I identified the French outcomes as 'an assisted quest' to show that the rules are heavily influenced by the independent power of inquiry of the INAO, which pushes for a strict interpretation of the evidence-based approach. I defined the Italian outcomes as a 'quest for validation' to highlight that Italian rules are crafted by the applicants in the first place. Italian producers are *the* actors ultimately responsible for the degree of accuracy of the rules contained in the product specifications (and related evidence). The regional authorities informally intervene to guide the codification process, but they do not possess direct power of inquiry (as the INAO). The Ministry

of Agriculture has a supervising role and checks the compliance of the product specifications with the legal requirements.[576]

The identification of the **factors shaping the origin link** (and the related evidence) justifies the types and extent of restrictions and, both in Italy and in France, should be formulated to convey an objectively verifiable causal relationship between the product and the place (including the **quality-locality requirement correlation**). Issues can potentially arise in cases where the extent of the geographical area covers an entire region or country (as in the case of region wide PGIs on olive oil). In these cases, the difficulty to trace a causal relationship between heterogeneous conditions determining the product characteristics might weaken the origin link. Other issues can occur when the link evolves over time (because of changing in climatic conditions typical of the defined geographical area, for example, such as in the case of Lavender Essential Oil PDO). A discrepancy between the *de facto* product characteristics and quality standards might occur impacting on producers' compliance with the codified rules. The control plan is crucial to measure the implementation of the rules contained in the product specifications.

The statutes set the basis for specific governance settings or configurations. Differences can be detected also in this regard between the French and Italian system. In Italy, after the GI registration the governance structure of the producer group might change generating heterogeneous scenarios which do not necessarily imply the maintenance of an organisational structure. In France, the producer group is formally recognised as PDMO, and monitoring activities are undertaken by the INAO to verify the maintenance of eligibility requirements (the four pillars). Therefore, the formal recognition of PDMOs seems to embed a tendency to uniform the legal form of producer groups, if it is compatible with the objectives defined in the French Rural Code. In Italy, instead, there is a clear distinction between the pre and post registration phases, and a tendency to *diversify* the governance configurations (and related applicable rules) based on the legal forms assumed by the producer group (Protection Consortia opposed to other legal forms or no legal form). This configuration can heavily affect collective action, leading to a two-speed system where Protection Consortia are bound by strict requirements on the four pillars.

Both in Italy and France, producer groups might want to self-organise in much more complex structures. In France the creation of multi-product PDMOs implies a formal recognition by the national authority and the devolution of the tasks and responsibilities to a new overarching PDMO

576 An example is the approach to the delimitation of the geographical area: in Italy the Ministry of Agriculture laments, in some cases, the weakness or absence of objective delimitation criteria as a defect of the submitted application. In France, the INAO (i.e., the territorial delegations, Commission of inquiry, and external consultants) *proactively* assists the applicants since the early phases of the application, in the aim of preventing fuzzy or arbitrary definition of geographical boundaries.

by pre-existing PDMOs. Another possible configuration is the federations of PDMOs, which implies the maintenance of the tasks and responsibilities upon each PDMO. In Italy, only Protection Consortia can become multi-product producer groups, and this possibility is subjected to strict requirements.

In Italy and France, the **control plan** is drafted by a recognised control body based on the content of the product specifications (on a case-by-case basis). The competent national authority identifies some guidelines to guarantee a minimum level of homogeneity among the control plans of products belonging to the same class, even though in Italy these guidelines (which are binding) only cover some product classes. However, in France control bodies are private, while in Italy they can be public or private (even though in practice, the Italian producer groups prevalently choose private control bodies). In all cases they must be formally recognised by the national authority.

As to the **control configuration for the compliance with the product specifications**, both France and Italy present a two-level mixed public and private third-party control for certification, which is complemented by self-control. National authorities are actively engaged in the monitoring of the activity of the control bodies at a higher level. Among the French specificities, the direct monitoring of the activity of the PDMO by the INAO representatives, and the presence of **internal controls** undertaken by the PDMO. The direct engagement of operators in self-monitoring in France also emerges from the draft of the controllability document to be submitted by the GI operators as part of the application file. Conceived as a tool for evaluating the quality of the product specifications and for measuring self-commitment, it encourages the operators' self-reflection on the operationalisation and enforcement mechanisms. The PDMO centralises the management of controls (including the interactions with the control body).

Italy has a more straightforward external third-party vocation: no internal control by the producer group is provided before the commercialisation, and no controllability document must be submitted by the applicants. Moreover, each operator registered in the control system interacts with the control body individually, which can be understood as a consequence of the rule on the optional membership to the producer group. The Italian legislation on controls differentiates between the rules addressed to producer groups with and without Protection Consortia. One of these differences is in the establishment of a privileged partnership between Protection Consortia and the ICQRF in the controls occurring at the commercialisation. Protection Consortia, coherently with their missions of public interest, have also the possibility to nominate vigilance agents, to monitor the presence of counterfeiting in the marketplace. The vigilance activity pursued by the Protection Consortia is financed by both members and non-members. Producer groups not formalised as Protection Consortia are not in charge of these functions.

The **control configuration on the governance structure of the producer association/organisation** is left, in France, to the competence of the national authority at the macro-level ('monitoring of PDMOs') for verifying the compliance with the four pillars. Control bodies monitor the administrative tasks and responsibilities of the PDMO. The control on the governance of the PDMO is *compulsory* and affects all producer groups independently from their legal form, it is informal and ongoing, involving the participation of the INAO representatives to the general assemblies of the PDMO and on-site inspections. This type of control never leads to the withdrawal of the recognition: although formal legal rules explicitly establish this sanction, they are never applied. Informal interactions and strategies are preferred by the INAO officers to solve specific collective action issues emerged during the ongoing monitoring of the PDMO. Being the formal recognition and membership to the PDMO necessary for using the registered sign, the withdrawal of the status of PDMO entails the impossibility for producers to use the PDO/PGI.

In Italy, the ongoing monitoring on the governance of producer groups is centralised at the macro level *only for Protection Consortia*. The check on the compliance of the governance with the statutes embedding the four pillars is made through a formal assessment only when the confirmation or denial of the formal recognition as Protection Consortium is needed. Beyond this formal evaluation, an ongoing monitoring is granted (again, only for Protection Consortia), and it targets its compliance to minimum operational standards (documental verification). Moreover, the control body must give an endorsement of their representativeness when the formal assessment of their recognition is renewed by the national authority (every three years). Differently from the French context, in Italy the withdrawal of the formal recognition as Protection Consortium happens frequently, as the formal recognition and membership to the group is not necessary for using the sign. If there is no Protection Consortium, the verification on the four pillars is made at the registration or if a modification of the product specifications is requested by the applicant producer group. This aspect accentuates the regulatory fragmentation which characterises the Italian legal framework.

2.3.4 The methodological questions

Table 17 guides the application of the GKC framework to GIs, using the simplified A-P-O approach and the axes of inquiry. For each component of the diagnostic framework, it identifies the methodological questions to be tackled during data collection and answered during the case-study analysis. These questions are particularly useful, especially because a considerable amount of data and themes are involved in documental sources and semi-structured interviews. In other words, using the diagnostic framework allows to target specific aspects involved in the case study and to select the data relevant to reach the objectives targeted by the A-P-O approach (i.e., the identification of the actors, the process, and the outcomes from a legal and operational

perspective). Moreover, it allows to measure results with the elements summarised by the axes of inquiry. This version of the table is used for case study *ex post* analysis (or 'retrospective evaluation'), relevant for cases where a GI registration is already ensured at the national level (i.e., French IGPIAs presented in part I of chapter 3). In the socio-economic field, 'its aim is to assess to what extent the GI initiative is worthwhile, and whether the natural and human resources used to produce the GI products are reproduced, improved and preserved to foster long-term economic, social and environmental sustainability'; to 'suggest certain modifications to a GI initiative (e.g., enlarging the production area, changing certain production process rules or improving the control system for greater customer assurance)'.[577]

Table 17: Methodological questions for applying the GKC framework to GIs using the A-P-O *ex post* approach.

Targeted components of the GKC framework	Methodological questions	Axes of inquiry
Basic characteristics of the resource General overview on the community attributes + General overview on the formal/informal rules-in-use	What are the constituents of the place-based reputation according to the model of complex and nested resource (i.e., distinctiveness/typicity derived from traditional local know-how anchored in a specific socio-cultural and historical environment and/or natural environment)? What is the name identifying the origin product? Has it been used before the GI registration?	
Community attributes Participants High-level external actors + Formal/informal rules-in-use	How are the applicants defined in the EU and national framework? What is their role/motivations/interests regarding the GI registration? Does this definition include actors who *are not* producers-users of the GI? How does it affect the GI initiative? What is the role of national and regional authorities? Can local community members different from the applicants participate in rule-crafting? How? What are stakeholders' expectations on the legal performance of the registered GI?	**'Actors': heterogeneity of interest, motivation, role, and involvement can influence the rule-making process**

577 Belletti and Marescotti (n 88) 6.

Targeted components of the GKC framework	Methodological questions	Axes of inquiry
Main action situation (product specification design) + Formal/informal rules-in-use	What are the legal rules and principles governing the decision-making and product specification design? How are these rules interpreted, operationalised, and enforced by the stakeholders involved at the national and local level? How do different national approaches impact on stakeholders' interactions and outcomes?	**'Process': principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing PS design and GI management.**
1st level outcomes (product specifications) + Formal/informal rules-in-use 2nd level outcomes (governance and control configuration set by the 1st level outcomes) + Formal and informal rules-in-use	**1st level outcomes**: What are the solutions found by the participants (with the involvement of the external actors) to solve or mitigate the social dilemma affecting the resource? What are the rules and conditions defining the name, the product description, the delimitation of the geographical area, the method of production, the description of the link to origin? How do actors justify these choices? How do rules on the governance and controls, as outcomes of adjacent action situations, contribute to operationalising the 'rules of the game' for GI management? **2nd level outcomes**: How are the rules of the specification controlled and enforced? Does the governance configuration evolve after the GI registration? What are the impacts of the governance and control configuration on collective action and decision-making?	**'Outcomes': clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration.**

The Italian case studies presented in Section II of Chapter 3 serve as examples of existing experiences of protection of names identifying non-agricultural origin products, in the absence and in view of a GI registration. Therefore, exigencies of coherence with the proposed methodology further challenged the A-P-O and the GKC framework. Yet, Italian experiences require an ***ex ante*** approach, meaning, using the expression adopted by Belletti and Marescotti a 'prospective evaluation' aimed to understand 'whether and how to regulate the use of the GI. [this type of evaluation] has to be carried out to decide whether and how to launch a GI initiative. It concerns the phase where the GI initiative is being defined and rules, normative tools and control systems are still to be chosen'.[578] Inspired by this insights, the analysis conducted through the A-P-O approach within the GKC should guide towards: (a) the identification of origin products whose denominations could be *potentially* eligible for GI protection; (b) the analysis of the state of the art at the local level (including but not limited to the governance setting, the type of IP tool used, etc.) and the identification of the unsolved 'dilemmas' (or are currently mitigated) in the absence of GI protection; (c) a prospective assessment on the opportunity (expected outcomes) of GI registration as an alternative e response to these dilemmas.

578 ibid 5.

From a methodological point of view, the themes (or codes) identified during the *ex post* analysis remain unchanged. However, they are applied using a different angle, combining the analysis of the *status quo* and the existing gaps between the rules and governance settings derived from the use of CTMs and the legal requirements for a possible GI registration (see Annex 3). The methodological questions are therefore rephrased as in Table 18.

Table 18: Methodological questions for applying the GKC framework to GIs using the A-P-O *ex ante* approach.

Targeted components of the GKC framework	Methodological questions	Axes of inquiry
Basic characteristics of the resource	What are the *current* constituents of the place-based reputation (i.e., distinctiveness/typicity derived from traditional local know-how, socio-cultural historical and/or natural environment)? Which is the name identifying the origin product? Is it used in common language and trade?	
Community attributes Participants High-level external actors + Formal/informal rules-in-use	Who are the *actors involved in the input and management of the CTM*? What are their roles, motivations, and interests regarding the *management of the sign and a potential* GI registration? Does this definition include actors who *are not* producers-users of the CTM? How does it affect the initiative? What is the role of national and regional authorities? Can local community members, different from the applicants, participate in rule-crafting? How? What are stakeholders' *feedbacks* on the legal performance of the *collective trademark*?	**'Actors': heterogeneity of interest, motivation, role, and involvement can influence the rule-making process**
Main action situation (product specification design) Adjacent action arenas (control plan design and statutes design) + Formal/informal rules-in-use	What are the legal rules and principles *currently* governing the *regulations of use of the trademark*? How are these rules interpreted, operationalised, and enforced by the stakeholders involved at the national and local level? *How do these rules or principles impact on the outcomes?*	**'Process': principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing PS design and GI management.**

Targeted components of the GKC framework	Methodological questions	Axes of inquiry
1st level outcomes (local formal rules-in-use governing the future GI management) + Formal and informal rules-in-use **2nd level outcomes** (governance and control configuration set by the 1st level outcomes) + Formal and informal rules-in-use	**1st level outcomes:** what are the solutions found by the participants (with the involvement of the external actors) to solve or mitigate the social dilemma affecting the resource? How do actors justify these choices? *How would they need to be rephrased to meet GI standards?* **2nd level outcomes:** How are the rules of the specification controlled and enforced? How does this frame impact the governance configuration of the sign? *Would these rules and control mechanisms be enough to operationalise the GI functions?*	**Outcomes: clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration.**

Chapter 3

NON-AGRICULTURAL EXPERIENCES IN FRANCE AND IN ITALY. INSIGHTS FROM THE 'ROOTS PROJECT'

This chapter is divided in one introductory part and two Sections. In the introductory part I show how the concept of origin products, generally linked to the agri-food sector, could be extended to products of 'non-agricultural' craftsmanship. I also present the French and Italian case studies through the contextual variables of the GKC framework applied to GIs.

In **Section I**, mirroring the methodological test undertaken on agri-food GIs, I analyse French non-agricultural GI experiences using the A-P-O approach to the GKC framework. I use the methodological questions listed in Chapter 2 Section II, from the *ex post* perspective. I conclude by evaluating the selected non-agricultural GI experiences, using the axes of inquiry.

In **Section II**, I apply the same methodology to unpack, from the *ex ante* perspective, Italian CTMs used for the valorisation and/or protection of the names of non-agricultural origin products (i.e., crafts and industrial products). Guided by the axes of inquiry, I draw preliminary conclusions.

3.1 Extended definition of 'origin products' for crafts and industrial products

I explained in Chapter 1 that origin products could be defined by names eligible for GI protection. They are characterised by a typicality or distinctiveness due to 'specific qualities essentially attributable to their geographical origin as a result of a combination of unique climatic conditions, soil characteristics, local plan varieties or breeds, local know how, historical or cultural practices, and traditional knowledge concerning the production and processing'.[579] Because of their intrinsic relationship with communities at the local level, origin products are characterised by a collective dimension and semi-public interests, which embeds collective action dynamics of protection, perpetuation, and valorisation of local resources, synthetised in place-based reputation. As mentioned, the origin link can be constituted by various combinations of human and natural factors.

Tamma focuses on the concept of **culture-based products** where 'the creation, preservation, enhancement and transmission of a specific culture all play vital roles in embedding particular aesthetic and symbolic content in the unique cultural consumption experiences that they offer'.[580] Qualitative research involving luxury perfume industries shows how individual companies 'place culture at the core of their respective business models and product selections' as a factor of differentiation in the marketplace, having positive effects on social and economic development and innovation.[581] Culture-based products is a broad notion, which *could* embed the creation of

579 ibid 2.

580 Chiara Isadora Artico and Michele Tamma, 'Culture-Based Products: Integrating Cultural and Commercial Strategies. Cases from the Luxury Perfumery Industry' [2015] SSRN Electronic Journal <http://www.ssrn.com/abstract=2656595> accessed 25 June 2023.

581 ibid.

a specific identity, constructed in the cultural environment, and valorised in global markets for its local dimension. Moreover, there is a difficulty in 'replicating' the product characteristics because these specificities are tied to the local heritage and community.[582] Another aspect characterising culture-based productions, which implicitly emerges from the definition of origin products, is the presence of an artifact in which 'cultural immaterial heritage lives', in the sense that 'this cultural immaterial heritage is created, sedimented and regenerated in people, in relations, in artifacts, in institutions, in production organisations and in products that, together constitute communities and their territories'.[583] Reference is made to cultural capital and to the difference between culture-based products and standardised commodities. However, this concept of culture-based productions not necessarily embeds, in its operational dimension, producers' collective engagement, producers' structured organisation and commitment to evidence-based quality standards. In other words, in culture-based productions cultural heritage is used as a branding strategy where 'connections to past historical events and characters' as well as traditional local know-how can be more or less present, are not to be proven or justified, and can imply innovation without necessarily maintaining any type of coherence to tradition. Individual (or collective) trademarks are used to differentiate the uniqueness of these products in the marketplace. In culture-based productions, producers communicate on culture but not necessarily codify common standards of production grounded in the objective evidence of socio-cultural, historical contexts nor necessarily develop coordination strategies. They however respond to the need or recognise the advantage to communicate on the 'cultural capital', as a quality differentiating attribute.[584]

Furthermore, Bertacchini, Marelli, Bravo and Santagata focus on **cultural districts** to analyse 'localized systems of production involving goods and services whose value resides in the aesthetic and semiotic pleasure they convey, such as artisanal or fashion products. The strong connection to a social context and its historic evolution is the basis of competitive advantage for place-specific and cultural products as they are the outcome of the accumulation of localized cultural capital'. Cultural districts are localised and embed social interactions and agglomerations of producers and other local community members to aliment and preserve traditional know-how. Differently from culture-based products, cultural districts seems to emphasise the context for the development of collective action dynamics aimed at 'institutional intervention' and implying an evaluation of the opportunity to valorise and protect through 'the stipulation of territorial agreements'.[585] The

582 Michele Tamma, 'Produzioni Culture-Based: Creare Valore Coniugando Differenziazione, Diffusione, Protezione' in Lauso Zagato and Marilena Vecco (eds), *Le culture dell'Europa, l'Europa della cultura* (FrancoAngeli 2011) 68.

583 ibid 69.

584 Martin Senftleben warns against restrictions to the freedom of use of cultural sign engendered by trademark protection in Martin Senftleben, 'Cultural Heritage Branding – Societal Costs and Benefits' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4399942> accessed 25 June 2023.

585 Walter Santagata, *The Culture Factory: Creativity and the Production of Culture* (Springer 2010) 53–57. According to the author, 'there are agglomerations of micro-enterprises that produce goods and services based on culture but are

authors recognise that localised intangible goods can face the risk of disruption and that as a response, they can be managed as commons ('cultural commons'), fostering cultural diversity and enhancing socio-economic development of local communities.[586] Through the case study of San Gregorio Armeno handicrafts, Cuccia et al. show that a cultural district is characterised by a long-standing cultural tradition with a reputation developed locally and internationally; a 'system of small enterprises where each unit is often family-run and able to handle the entire chain of production, from the development of the concept to the sale of the product'; the production of artistic goods and the prevalent use of handcrafted techniques preferred to the use of technology; a system where 'creativity is passed down through tacit knowledge and learning by doing'; the coexistence between common cultural identity and belonging to the community and competition between individual producers; the coexistence between high-quality unique productions and 'standardised lower-quality goods'; the preference for traditional designs or rarely innovative re-elaboration of traditional designs; the need to protect 'the cultural factor' against misappropriations; spontaneous coordination of the district, which is community based.[587] Interestingly, this case study has been used by the authors to envisage the use of a collective trademark as possible protection and valorisation tool for its 'informative' and 'managerial' functions, given a certain degree of collaboration among producers which 'does not include mutual inputs in the production process, but it concerns the dissemination of information, the marketing of the product, the institutional relations and the search for an increasingly stronger and shared reputation' (translation provided by this author).[588] The difference between the 'legal performance' of GIs and CTMs to valorise and protect localised productions will be analysed in depth later in this chapter.[589] For now, it is important to highlight that, as for agri-food products, *in the non-agricultural sector producers perceive the exigency to preserve, valorise and protect a reputation anchored to distinctive characteristics of the product resulting from a shared and localised cultural heritage*. However, using GIs or CTMs implies choosing different collective strategies for 'appropriating' these resources. Murano for artistic glass manufacture and Grasse

something less than a district and need to be supported by a system of individual and collective incentives. In other words, there are *potential cultural districts, but there is a lack of good institutions and good governance*'.

586 Bertacchini and others (n 168) 4–5.

587 Tiziana Cuccia, Massimo Marrelli and Walter Santagata, 'Collective Trademarks and Cultural Districts: The Case of San Gregorio Armeno, Naples' in Philip Cooke and Luciana Lazzeretti (eds), *Creative Cities, Cultural Clusters and Local Economic Development* (Edward Elgar Publishing 2007) <https://www.elgaronline.com/view/9781847202680.00013.xml> accessed 25 June 2023.

588 Tiziana Cuccia and Walter Santagata, 'Aspetti Istituzionali Ed Economici Della Domanda: Un'analisi Di Valutazione Contingente Sulla Disponibilità a Pagare per Il Marchio Collettivo Di San Gregorio Armeno' [2007] Dipartimento di Economia "S. Cognetti de Martiis" Working paper. The study explores the possibility of valorising and protecting the product name through a CTM. It was released in 2007, few years before the start of the negotiations for the possible extension of GI protection to non-agricultural products.

589 See *infra* Chapter 3, Section II.

for perfumery have explicitly identified as industrial *and* cultural districts by Santagata.[590] Similarly, Corò and Micelli explored the competitive value of place embedded in industrial districts and highlight the potential of stakeholders' cooperation for innovation.[591]

It might be interesting to investigate on the proximities between culture-based productions, cultural and industrial districts with the concept of origin products. The first consideration is that non-agricultural origin products identify goods whose reputation, characteristics and quality are essentially attributable to the geographical origin (here intended primarily as cultural environment).[592] Therefore, origin products could be qualified as specific types of culture-based products when embedded in contexts, such as cultural or industrial districts, which favour stakeholders' dynamics of aggregation (cooperation and coordination) developed to valorise traditional productions. The second consideration is that not all origin products are 'GIable products',[593] meaning that not all names, although identifiers of origin products, are eligible for GI protection. This eligibility should firstly imply that the name is not generic and used in trade or common language, and secondly that craftsmen (supported by other local stakeholders) sustain, valorise, and promote origin-based productions. Moreover, producers should be able to identify and codify the distinctive characteristics of the product and 'objectivise' the causality link between the contextual elements of place and the product characteristics.[594] When all the conditions are reunited, the reputation of the name or the product can be connotated as place-based. However, the sole presence of a place-based reputation is not *per se* enough to prefer GI protection to other IP tools (e.g., CTMs). It is essential that the GI protection initiative is part of a specific and collective valorisation and protection strategy based on the ongoing coordination of the stakeholders involved. Thus, the presence (as in some cultural districts) of an environment where information is shared, and the interest and motivations of stakeholders have the potential of being aligned towards a common goal might be favourable for a GI initiative. The level of collective action measures the stakeholders' capacity to work together for the codification of shared quality standards, and the explicit definition of the evidence-based (i.e., non-arbitrary) factors shaping the origin link. Moreover, the creation of a governance structure able to sustain the management

590 Santagata (n 585) 57.

591 Giancarlo Corò and Stefano Micelli, 'I Distretti Industriali Come Sistemi Locali Dell'innovazione: Imprese Leader e Nuovi Vantaggi Competitivi Dell'industria Italiana' (2007) 1 Economia Italiana 1.

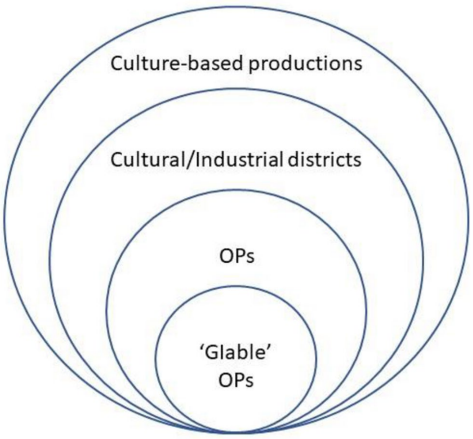
592 The importance of the infra-generational and inter-generational transmission is often evident from the presence of professional schools aimed to the transmission of the traditional know-how to the new generation and to from the presence of museums documenting the long-standing anchorage of the production in the geographical area.

593 The expression 'GIable products' has been mentioned by François Casabianca during the closing session of the International Conference 'Worldwide perspectives on Geographical Indications' held in Montpellier on 5-8 July 2022. For more insights on the contextualisation of the GI product system as part of the origin product system see Belletti and Marescotti (n 88) 12.

594 Belletti, Marescotti and Touzard (n 19) 53.

of the sign, paired with an appropriate control and sanctioning mechanism, is key for ensuring the effectiveness of the enduring protection granted by the GI registration.

Figure 11: Relationship between culture-based productions, cultural and industrial districts, origin products and 'GIable origin products'. OP: Origin Product.



The concepts of cultural and culture-based production, to date applied to non-agricultural productions, show undoubtedly some interesting connections with origin products. One might question what we mean with 'non-agricultural products' and 'crafts and industrial products'. More importantly some legitimate concerns could arise on the suitability of the expression used to identify, without ambiguities, the enlarged scope of GI protection. Prior to 2022, the Commission used to refer to 'non-agricultural products' when addressing the extension of the EU-wide GI protection to product different from agricultural.[595] However, identifying the scope of protection *a contrario* might have not been the best option to avoid legal uncertainty. This is particularly relevant when more flexible rules are envisaged for obtaining the same level of PDO/PGI protection. To avoid opportunistic behaviours by the applicants, the non-agri Proposal, seems to address this concern and clarify that the scope of protection of the reform would involve 'industrial products and crafts'. More specifically, according to art 3 (Definitions):

(a) '"craft products" means products produced either totally by hand or with the aid of manual tools or by mechanical means, whenever the direct manual contribution is the most important component of the finished product;

595 EU Commission (2014) Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products; InSight, REDD, and OriGin, 'Study on Geographical Indications Protection for Non-Agricultural Products in the Internal Market'; Michaelsen and others (n 16); Rzepecka and others (n 15).

(b) "industrial products" means products produced in a standardised way, typically on mass scale and through the use of machines'.

Moreover, art 2 precises that: 'This Regulation applies to craft and industrial products listed under the combined nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87'.

Recital (9) explicitly mentions that the scope of the Regulation 'needs to be determined in line with the relevant international framework, namely, the World Trade Organization. Hence, the use of the Combined Nomenclature should be established through direct reference to Annex I to Council Regulation 2658/87. This approach ensures coherence with the scope of the revised GI Regulation for agricultural products, foodstuff, wine, and spirits'. In fact, the agri-Proposal (art 5) refers to 'Chapters 1 to 23 of the combined nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87, and the 'additional agricultural products' under the combined nomenclature headings and codes set out in Annex I [of the Regulation]' (product destined to human consumption and other agricultural products), while the non-agri Proposal does not give any explicit indication as to the Chapters of Reg 2658/87 involved. Yet, the definition provided in the non-agri Proposal is still very broad: the expression 'industrial and crafts' seems to refer to a method of production more than to specific product classes. As such, it could also be referred to agri-food productions. This is evident, for example, when in the agricultural and non-agricultural sector industrial and artisanal producers coexist in one denomination. Moreover, the residual chapters of Regulation 2658/8743 include products which do not necessarily present the characteristics of non-agricultural origin products.[596]

An example of incoherence emerging from the current framework involves the PDO 'Huile Essentielle de Lavande de Haute-Provence' (Lavender essential oil), registered according to Reg 1151/2012 under class 2.10. 'Essential oils'. It is currently considered as an agricultural non-food product according to the Lisbon System.[597] However, it is not comprised in the Chapters 1-23 of

596 The Cambridge dictionary define the noun 'craft' as 'the activity of making objects in a skilful way'. See Cambridge dictionary at <https://dictionary.cambridge.org/dictionary/english/craft>. Often this definition is accompanied by the connotation 'mostly done by hand'. This last meaning, however, is more precisely attributed to the word 'handcrafts' ('a skilled activity in which something is made in a traditional way with the hands rather than being produced by machines in a factory, or an object made by such an activity'). See Cambridge dictionary at <https://dictionary.cambridge.org/dictionary/english/handicraft>; 'Industrial products' literally means 'products used in industry, rather than used by consumers'. See Cambridge dictionary at <https://dictionary.cambridge.org/dictionary/english/industrial-product>.

597 This category of non-food products also includes: games, playthings and sporting articles; glass and crystal; musical instruments; religious, ornamental and handicraft objects; salt and minerals; stones and ceramic objects; textile products; others. The category of non-food products is opposed to the category of food-products in Lisbon Express, and it collects 'information on all the Appellations of Origin and Geographical Indications entered in the International Register kept by the WIPO International Bureau in accordance with the Lisbon System for the Protection of Appellations of Origin and Geographical Indications and their International Registration'. See <https://www.wipo.int/ipdl-lisbon/struct-search>.

Regulation 2658/8743, while it is included in the category of 'products of the chemical or allied industries – Essential oils and resinoids, perfumery, cosmetic and toilet preparations' according to the combined nomenclature (Chapter 33 Reg 2658/87).[598] Interestingly, the same Chapter 33 of Reg 2658/8743 includes concretes and absolutes, which are currently considered as 'non-agricultural' products (i.e., industrial products and crafts), therefore outside the current scope of Reg 1151/2012. The denomination 'Absolue Pays de Grasse' is registered, at the national level, as a French non-agricultural GI. This raises questions as to how the EU legislator will craft a harmonised and coherent framework and how competent authorities will handle 'borderline cases' after the reform, including both future applications and already registered GIs.[599] National EU experiences prior to the establishment of a *sui generis* GI regime consist mainly in judicial recognition of the denomination concerned (e.g., in France the *Dentelle du Puy* recognised in 1919, *Toiles de Cholet* recognised in 1936 prior to the institution of the *Indications Géographiques pour les Produits Industriels et Artisanaux,* hereinafter the 'IGPIA system') or laws protecting specific products (e.g., the Solingen knives in Germany).[600] Other solutions are represented by the use of collective and certification trademarks.[601] Outside the EU, relevant experiences for the protection of non-agricultural GIs are present in India, Malaysia, Vietnam.[602]

In France since 2015, a system of protection for non-agricultural GIs has been established.[603] The law n. 344 of 7 March 2014 (i.e., *Loi Hamon*), added new provisions to the French Intellectual Property Code for allowing the operationalisation of system of protection of IGPIAs. According to art L. 721-2 'a geographical indication is the denomination of a geographical area, or a specific place used to designate a product, *other than agricultural, forestry, food or sea products*, which originates therein and possesses a specific *quality, a reputation or other characteristics that can be essentially attributed to that geographical origin*. The conditions of production or processing of this product, such as cutting, extraction or manufacture, shall comply with a specification approved by a decision taken pursuant to Article L. 411-4' (emphasis added, translation provided

598 Other 'non-food' product classes currently covered by the scope of protection of Reg 1151/2012 are 2.9. Hay; 2.11. Cork; 2.12. Cochineal (raw product of animal origin); 2.13. Flowers and ornamental plants; 2.14. Cotton; 2.15. Wool; 2.16. Wicker; 2.17. Scutched flax; 2.18. Leather; 2.19. Fur; 2.20. Feather.

599 See *infra* Section I. I refer here to the Absolue Pays de Grasse case.

600 For more insights in this regards see Andrea Zappalaglio, Flavia Guerrieri and Suelen Carls, 'Sui Generis Geographical Indications for the Protection of Non-Agricultural Products in the EU: Can the Quality Schemes Fulfil the Task?' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 31 <http://link.springer.com/10.1007/s40319-019-00890-1> accessed 21 May 2020.

601 For a complete overview of the EU context, see InSight, REDD, and OriGin (n 595); Zappalaglio, Guerrieri and Carls (n 600).

602 The presence of multiple initiatives at the national level outside the EU makes the extension of the protection particularly needed, especially considering that the impossibility to recognise foreign GIs in the EU impacts on bilateral agreements. For more insights see Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11).

603 Together with Portugal, they represent two EU countries allowing a national GI protection for these product classes.

by this author). The French system has adopted the PGI scheme for identifying the origin link. For the purposes of this preliminary overview, the French and extra-EU experience in the GI protection reveals some of the main features of these origin products:

(a) Raw materials are not always locally sourced but can be historically sourced. As such they might help build place-based reputation over time. For example, the case of *Porcelaine de Limoges* where the presence of kaolin deposits allowed the development of unique local craftsmanship to develop over time. I will show that this is very common in these types of production, even in the Italian context. Prior to 2015, the outsourcing of raw materials was one reason of refusal (e.g., *Faience de Moustiers*). As noted by Marie-Vivien, even when the raw materials are outsourced, high quality raw materials might be required such as in the case of *Siège de Liffol* (see *infra* Section I).[604] However, the sourcing of the raw materials, for specific types of non-agricultural origin products, can be the most significant anchoring factor. Examples of these specific cases are represented by the French denomination *Toiles de Cholet* recognised in 1936, and the GIs *Pierre de Bourgogne* and *Granit de Bretagne*. Other examples will be shown later in this chapter.

(b) The origin link in non-agricultural products is mainly (but not exclusively) constituted by the human factor. The fact that non-agricultural origin products are most likely rooted on place through the human factor has been recognised by Marie-Vivien and Zappalaglio et al. [605] This entails the following considerations: firstly, the link mainly based on human factors needs a specific type of assessment. According to Marie-Vivien, historical evidence and the 'level of sophistication or refinement' of the method of production can be effective grounding elements to 'objectivise' the assessment on the traditional local know-how. She also highlights that 'know-how is influenced by surroundings, including both elements of the nature and human interaction. When migration occurs, know-how is not blindly transferred as such, but adapted when used in new surroundings'.[606] This approach qualifies the causal relations occurring between the constituents of the place-based reputation, where producers' choices (local know-how), dynamic but localised, result from and (are anchored to) a specific natural and cultural environment. Secondly, the characterisation of product 'uniqueness' or typicity, is represented by the method of production, namely a sophisticated know-how mainly involving manual skills. Thirdly, it cannot be totally excluded that, for some product classes, such as potteries and textiles, the specific (local) quality of the raw materials is determinant to qualify the uniqueness of the product. This occurrence *per se* impedes to affirm that the absence of an

604 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11).

605 While natural factors besides the soil such as the climate, the origin of raw materials, or environmental elements such as water can indeed influence product quality, the territorial link for most non-agricultural products or handicraft goods is based above all on the producers' know-how, skills and practices – that is, on human factors' ibid 224; Zappalaglio, Guerrieri and Carls (n 600); Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 21) 225.

606 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11) 243.

anchorage of non-agricultural origin products to natural factors is, by default, *their* distinctive attribute.

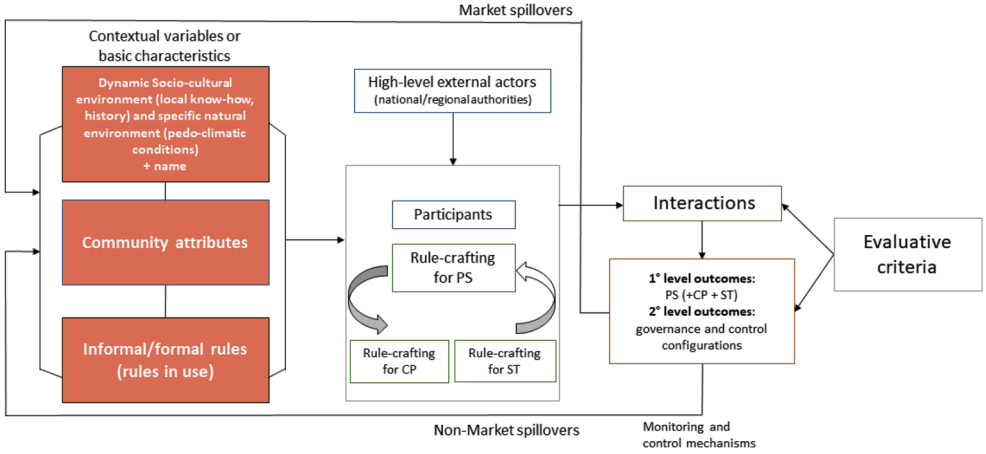
3.2 Case study presentation: contextual variables or basic characteristics

The cases have been selected considering the diversity of IP tool used, product classes involved, and the availability of the stakeholders to participate. They include (a) already registered GIs, namely some of the French IGPIAs; (b) potentially eligible Italian denominations identifiers of origin products, involving stakeholders currently interested in the future extension of GI protection to industrial products and crafts.

The following paragraphs introduce the case studies, following the scheme provided by the GKC applied to GIs with the A-P-O approach and the general definition of the origin products. I will focus first on the contextual elements, meaning the 'default status of the resource involved in the commons'.[607] In GI contexts, it corresponds to the components of place-based reputation, namely (1) the **local dynamic socio-cultural environment**; (2) the **local natural environment**; (3) **the name-infrastructure identifier of the origin product;** (4) the general identification of the **local community** (including actors different from producers but interested in the GI registration); and (5) **the overview on rules-in-use** (e.g., at the local level the arrangements or quality standards prior to the codification of the specification; at the higher level, the legal rules impacting on stakeholders choices and interactions). This analysis aims to understand the nature of place-based reputation and community characteristics.

607 Frischmann, Madison and Strandburg (n 155) 20.

Figure 12: The GKC applied to GIs with a specific focus on the resource characteristics. PS: Product Specification; CP: Control Plan; ST: Statutes of the producer organisation.



The legal background (formal **high-level rules-in-use**) for all the French case studies is represented by the national rules on GI protection for industrial products and crafts. These rules are contained in the Intellectual Property Code as modified by the *Loi Hamon* in 2014. In particular, the legal framework on non-agricultural GIs ('*indications géographiques sur le produits industriels et artisanaux*', IGPIA) is represented by art L. 721-2 to L. 721-10 and correspondent regulations. In Section I of this Chapter, these substantial and procedural rules will be analysed more in detail following the A-P-O approach, as well as their implementation by the stakeholders concerned.

The name '**Absolue Pays de Grasse'** has been registered as a GI by the French INPI on 6 November 2020 and it identifies an odoriferous substance involving an extract of plant raw materials and the transformation of this primary extract into absolute using ethanol. The **place-based reputation** links Grasse and the perfumery industry since very long time, and the industrial production is known for the quality and distinctiveness of the odoriferous substances extracted from the aromatic plants harvested in the geographical area, traditionally identified with the **name** 'Pays'. As for today, the product is commercialised in business-to-business and all the production steps takes place in the geographical area. The main factor justifying specific characteristics and quality of the product, as presented in the specification, is the industrial local know-how of the absolute processors (**human factor**), evolving over time and passed down from generation to generation, as documented by several historical sources.[608] The reputation of perfumery in Grasse developed in parallel with other localised productions, which reinforced place-based reputation and local

608 Product specification, Absolue Pays de Grasse, p 14.

development[609] (**cultural environment**). The conditions for the development of processing techniques, however, stem from the presence of unique raw materials. Because of this tight link between raw material producers and processors, the rules contained in the product specification explicitly state that all the processing steps need to take place in the geographical area. As shown both in the product specification and from the interviews, the distinctiveness and quality of the absolute is also recognised by experts as deriving from the quality and variety of aromatic plant species, traditionally harvested in a peculiar **natural environment** (i.e., pedo-climatic conditions), favoured by harvesting methods traditionally established in the area.[610] Yet, the 'quality of the ingredients' and their 'irreplaceable role' in the perfume industry due to their quality, clearly emerges from the product specification and is also mentioned as an argument for obtaining the UNESCO recognition of the skills related to perfume production.[611]

The **Siège de Liffol** is a traditional seat produced in the Voges department. It is a niche product, commercialised mostly business-to-business. The **place-based reputation** is developed only in very specific sectors and professional categories (including interior designers, luxury hotel businesses). Despite the long tradition in the localised production, the product is not very known outside the geographical area, and these restrained circles, *and* it is not marketed under a specific name. Yet, the **place-based reputation** derives from some distinctive physical attributes of the object, which justify its quality and robustness. The localised **traditional know-how** is enriched with innovative techniques.[612] The availability of raw materials in the area (beech wood forests) created the favourable conditions for the development of this traditional craftsmanship.[613] Nonetheless, raw materials, today, are outsourced, while the other production steps must take place in the geographical area (**locality requirement**). Because of this feature, the cultural environment plays a primary role (i.e., the historical and human factor), while the **natural environment** (natural factor) is less significant for qualifying distinctiveness. Siège de Liffol has been the first GI to be registered in France (on 2 December 2016). Interviews were useful to illustrate the challenges embedded in

609 Product specification, Absolue Pays de Grasse, pp 11-13. In this specific case, the specification mentions the development of handcrafted leather products which were marketed together with the Grasse fragrances (e.g., perfumed gloves). This 'marriage between products' is not infrequent in localised productions, especially when the leading product is a GI product. It has been at the core of a very popular model in the economics, which is the 'basket of good model'. Other examples involve Huile d'olive de Nyons PDO (olive oil), combined with the olive pastes and shower gels and wines; Laguiole PDO (cheese) in combination with the Laguiole Knives. Maud Hirczak and others, 'Le Modèle Du Panier de Biens: Grille d'analyse et Observations de Terrain' [2008] Économie rurale 55 <http://journals.openedition.org/economierurale/366> accessed 25 June 2023.

610 Product specification, Absolue Pays de Grasse, pp 8-9; interview with organic raw material supplier n. 3, Absolue Pays de Grasse, 12 July 2021, paras 15-26; interview with processor, Absolue Pays de Grasse, 17 August 2021, paras 37-42 ; interview with organic raw material supplier n. 1, Absolue de Grasse, 21 April 2021, paras 1-4.

611 Product specification, Absolue Pays de Grasse, pp 16-17.

612 Interview with producer n. 1, Siège de Liffol, 1 April 2021, paras 64-69.

613 Interview with representative PDMO, Siège de Liffol, 30 March 2021, paras 2-3.

the operationalisation of the (at the time) new system of protection, including the attribution of the competences to the INPI. All the producers interviewed had obtained, individually, the EPV (*Entreprise du Patrimoine Vivant*) label.

Alsace Potteries (**'*Poteries d'Alsace*'**) are potteries well known for their functional usage ('*usage utilitaire*'), its distinctive characteristics being constituted by the suitability for food storage (Betschdorf) and cooking (Soufflenheim). These usages are supported by a renowned robustness which represents their specific characteristics and quality.[614] Some pottery traditional manufacture techniques are 'historically associated' to the village of Soufflenheim, others to the village of Betschdorf. The traditional know-how is rooted in the geographical area because of the presence of clay, and this is documented by historical sources.[615] Despite the current presence of **raw materials in the area**, they are nowadays outsourced, while all the processing steps take place in the geographical area. The GI has been registered on 11 March 2022. Producers constituted a pre-existing association and registered in 2008 a semi-figurative collective trademark with the indication '*Poterie d'Alsace passionnemment*'.

The Couteau Laguiole is a knife emblematic of French popular culture, a tool of the countryside (typical of the Aubrac region), one of the most nationally and internationally reputed (among both the general public and connoisseurs) French regional knives. The distinctiveness and typicity of the product are embedded, according to the rules defined in the product specification of the registered GI, in its shape and aesthetic and functional details (the blade 'yagatan' and the peculiar curved and undulated shape of the handle in combination with the emblematic bee or fly).[616] The quality of the product is linked to the traditional methods of production while innovative re-elaborations are allowed.[617] It is commercialised with the **name** 'Couteau de Laguiole' or 'Couteau Laguiole' both as a niche product (which is, for the most part, handmade), but also as a product of daily use and destined to the general public (production in series using industrial methods). This diversified production methods, both grounded in tradition and cultural identity, seem to be anchored to a long-standing partnership between producers in Thiers (historically more linked to an 'industrial' and 'mechanised' type of production) and Laguiole (traditionally focused on artistic, handmade productions). Yet, the **cultural environment** seems dominant compared to the **natural environment**. The GI 'Couteau Laguiole' is the last registered IGPIA (23 September 2022). The process of recognition, however, was one of the longest and most tormented (together with the 'Savon de Marseille') due to conflicts happening at the local level involving the majority of Laguiole and Thiers producers, baring incompatible visions of the GI and opposing interests. This example

614 Interview with anonymous participant, Poterie d'Alsace, 10 August 2021, para 45.

615 Product specification, Poterie d'Alsace, pp 8-13.

616 Product specification, Couteau Laguiole, pp 2-7.

617 Product specification, Couteau Laguiole, p 15.

questions some pillars of GI law, including the eligibility of the name for registration, indirectly the legitimacy of the applicant, the nature of the link to origin and the function of the registered name after registration. Producers in Laguiole and Thiers had previously obtained the *Entreprise Patrimoine Vivant* (EPV) label.

France is a rare example of pre-existing national legal system of GI protection for industrial products and foodstuffs. However, in countries such as Italy (i.e., the majority of the EU countries), such national GI protection is absent, despite the necessity to valorise and protect denominations identifying non-agricultural origin products expressed by the stakeholders involved in various types of local productions. The solutions found to compensate this legal void rely heavily on the stakeholders' capacity of (a) identifying their motivations, interests, and needs, (b) auto-organising and (c) identifying and devising the instruments appropriate to respond to their 'social dilemmas', among those available by the legal system. Because of these circumstances, Italian experiences, despite having some (implicitly or explicitly) common features, are quite heterogeneous and involve 'product-specific collective marks […], both publicly and privately owned […]; laws introducing a collective mark for an individual product […]; laws introducing a collective mark for an individual product […]; umbrella collective marks, i.e. collective marks, generally established by law that are opened to the protection of different varieties of products'.[618]

Italy is rich of local traditional non-agricultural productions. One of them is represented by traditional and artistic ceramics, currently valorised and protected through the ***Ceramica Artistica Tradizionale*** (**'CAT'**) **trademark**. The legal basis for the trademark is represented by Law 188/1990, and no registration at the Italian Intellectual Property Office or at the EU level has been provided. Its management is within the competences of the Ministry for Business and Made in Italy, and can be considered as an 'umbrella trademark' because it can identify various types of products with an anchorage to localised traditional manufacture, each one regulated by specific specifications. Law 188/1990 contains the substantial and procedural rules to obtain the right to use the mark. Interestingly, art 1 of Law 188/1990 explicitly refers to 'denomination of origin', revealing the attempt to consider the institution of the trademark as a solution aimed to compensate the lack of a national GI system of protection.[619] Art 2 of the Deliberation of National Council precises that the trademark should include the following essential elements: 'the geographical area of renowned tradition in ceramics production to be identified with the name or, or in addition to, with a distinctive graphic representation […] related to the ceramics to be protected'. A basic template is

618 Zappalaglio, Guerrieri and Carls (n 600) 21.

619 It will be shown later that this similarity is also justified by the fact that Law 188/1990 does not explicitly refer to a trademark 'owner'. This element is not irrelevant and brings (at least theoretically) the CAT trademark even closer to the institutional setting embedded in GIs. However operational inefficiencies hinder its effectiveness to meet its original goals.

provided in Art 1 Ministerial Decree 26 June 1997 (Figure 13). This template is completed with the specificities of each municipality involved.

Figure 13: Logo of the basic template of the CAT semi-figurative trademark and the example of the CAT trademark, as used by producers of Impruneta.

Eligible for the application process are the *municipalities* of the geographical area recognised of baring a 'renowned tradition' in ceramic craftsmanship. The trademark can be used by the craftsmen, producing according to the product specifications, and placed on the product. The origin products identified through the CAT trademark that I have chosen as examples are the **ceramics of Faenza**[620] and the **terracotta of Impruneta**[621]. Both municipalities obtained the right to use the CAT trademark and are members of Italian Association of the Cities of Ceramics ('AiCC'), which is a network 'bridging' the local and national governance levels. Nonetheless, collective action follows different patterns and, most importantly, highlights different issues and potentials for a possible GI registration. In the case of **Faenza ceramics**, the localised resource is characterised by a dynamic socio-cultural environment specifically due to the **traditional local know-how** (i.e., decoration for traditional crafts). The specification identifies as distinctive the traditional shapes and decorations as rooted in history and tradition, but at the same time it leaves room for innovative productions, especially aimed to the realisation of unique pieces. The **terracotta of Impruneta,** commercialised prevalently business-to-business, derives its distinctive character from the **local natural environment,** in particular the use of local clay (*galestro*), which possesses unique chemical and physical characteristics (antifreeze properties). The final products are characterised by some functional properties such as their robustness, especially when exposed to very low temperatures, and aesthetic properties such as baking cracks ('small pebbles, which make up the clay, to appear on the surface, and the pots become even more porous and rough

620 Faenza is a municipality located in the province of Ravenna, in Emilia-Romagna Region (northern Italy).

621 Impruneta is a municipality located within the metropolitan city of Florence, in Tuscany Region (centre of Italy).

to the touch')[622] and a characteristic changing colour caused by the mineral salts that can cause a white or black patina on the surface of the pots (**distinctiveness**). The **traditional local know-how** is involved in all the product types (vases, planters, statutes, furniture, jars and other objects) made through moulds or shells, but it especially characterises the coiling work (an ancient and difficult technique typical of the area). The specific architecture of the kilns determines the best conditions for drying and firing. The place-based reputation, attached to the **name** 'terracotta of Impruneta' is therefore strictly anchored both to natural and human factors and all phases of the production must be carried out in the geographical area (**locality requirement**).

Another significant Italian example is constituted by the **Murano Glass**, an emblematic product of the Italian tradition, produced in Murano, a small island very close to Venice.[623] It is considered one of the symbols of Italian craftsmanship as its techniques of production have been developed in the island for over a thousand of years, giving rise to a remarkable variety of objects and techniques and to a professional production of excellence, profoundly anchored in local identity (historical-cultural component and traditional local know-how). A semi-figurative collective trademark including the words 'Vetro artistico Murano' is registered at the EU level, and at the national level instituted and owned by the regional authority (Veneto region) through Regional Law 70/1994 and managed by producers, organised in a Consortium. The trademark identifies two types of manufacture: the so-called 'first manufacture' is represented by kilns and identified through a red logo and 'second manufacture' such as decorated glass, *murrine* canes, coloured glass beads is identified through a blue logo.[624] The trademark signals to consumers, through a system of traceability (QR code), that *the object has been produced in Murano.* Quality standards are not defined by the trademark. This last aspect, however, deserves further analysis.

Finally, another Italian experience in the valorisation and protection of local tangible and intangible resources involves the red coral harvesting and manufacture. Being very place-specific, it is typical of few areas in the Mediterranean costs. One of the most renowned is the western coast of Sardinia. Alghero since the XIII century is considered as the 'city of the red coral'. The connection with red coral fishing and craftsmanship is a strong component of the local identity of Alghero community. Therefore, both the natural and cultural environment and the local traditional know-how are components of the place-based reputation. In 2016 the semi-figurative CTM '**Corallium Rubrum ad Alghero**' (Figure 14), owned by the municipality, has been registered at the Italian Intellectual Property Office. It is not aimed at certifying quality and provenance, but it is licenced to artisans and retailers established in Alghero under the obligation to sell authentic red coral,

622 For more details see <https://fornacemasini.it/en/handmade-quality/>.

623 Venice is located in Veneto Region (northern Italy).

624 Information on the logo of the CTM 'Vetro Artistico Murano' can be found here: <https://www.muranoglass.com/marchio/>.

fished in all the Mediterranean see. The trademark aims to distinguish authentic red coral retailers from those who commercialise cheaper non-authentic corals.

Figure 14: Semi-figurative CTM 'Corallium Rubrum ad Alghero'.

3.3 SECTION I – Understanding *sui generis* systems for industrial products and crafts: French IGPIAs

This section follows the same structure as Chapter 2 Section II. The three axes of inquiry summarize the main key issues emerged from the selected experiences of agri-food GIs in Italy and France. In practice, the analysis is developed to answer the methodological questions identified in Table 17 in Chapter 2. As already explained, French IGPIAs are analysed using the *ex post* approach. I use it to assess whether the non-agricultural GI is used *coherently* to its policy objectives and ultimate goals, meaning as a tool performing specific functions defined by law.

3.3.1 Actors

In this part, I will focus on the axis of inquiry 'Actors' (heterogeneity of interest, motivation, role, and involvement can influence the rule-making process), which I defined in Chapter 2. I will mobilise the following parts of the GKC framework: (a) community attributes, (b) participants, (c) high-level external actors and (d) rules-in-use. I will answer the following questions:

- How are the applicants defined in the EU and national framework? What is their role/ motivations/interests regarding the GI registration?
- Does this definition include actors who *are not* producers-users of the GI? How does it affect the GI initiative?
- What is the role of national and regional authorities? Can local community members different from the applicants participate in rule-crafting? How?
- What are stakeholders' expectations on the legal performance of the registered GI?

3.3.1.1 Definition of the 'applicant' (participants and community)

In **France**, the rules defining the obligation for the producer group to be recognised as PDMO by the INPI (application simultaneous to the application for GI registration) and the 'operator' (art L. 721-5 Intellectual Property Code) are identical to the rules contained in the French Rural Code and the Applicant's Guide for agricultural GIs. Therefore, all the operators must be members of the PDMO (principle of necessary membership – i.e., compulsory membership). Relevant procedural differences can however be found in the modalities of assessment of the national authority. One PDMO can be in charge of managing multiple denominations, 'provided that the rules governing its functioning ensure compliance with the representativeness requirement' (art L. 721-4 Intellectual Property Code).

3.3.1.2 Implementation of the national legislation

As in the French PDO/PGI system, in the IGPIA system the legislator does not restrict the eligibility for being recognised as PDMO to specific legal forms. Often, producer groups are *syndicats* or associations Law 1901. At present, no association has been recognised as inter-branch organisation.[625] In all registered IGPIAs, the applicant corresponds to the origin product producers, while other local stakeholders are indirectly involved in the GI initiative as supporting actors. However, despite the text of art L. 721-5 Intellectual Property Code, the case studies analysed in this research show how the interpretation of the concept of 'operator' by the stakeholders involved and by the INPI can impact on the application process and on its outcomes. In particular, the attribution of the quality of 'operator' might affect the identification or exclusion from the category of 'participant' to the decision-making process, or its identification or exclusion from the local community identified through the name.

For example, the GI 'Absolue Pays de Grasse' shows a flexible interpretation, by the INPI and the operators, of art L. 721-5 Intellectual Property Code. The peculiarity of this case study is that the GI initiative does not come from the GI holders (the 7 absolute industries traditionally established in Grasse). Instead, the process has been driven by the pre-existing association of organic plant growers '*Association Fleurs d'Exception Pays de Grasse'*, representing about 25 raw material suppliers. In the absence of real episodes of counterfeiting, this initiative was motivated by the organic plant growers' interest in re-establishing and securing the relationship between local plant growers and processors and ensuring that the name 'Absolue Pays de Grasse' identifies exclusively the absolutes issued from plants species harvested and processed in the identified geographical area.[626] The processors (7 absolute industries) adhered to the GI initiative promoted by the plant growers for increasing the visibility of the product in national and international markets, reinforcing the aspect of local identity and its anchorage to the local natural, traditional, and cultural environment (the image of Grasse, traditionally associated to both flower harvest and processing). Given the low degree of vertical integration in the value chain, where heterogeneous motivations and interests of the actors involved are perfectly distinguishable, the GI initiative represented an opportunity for empowerment for plant growers.[627] For processors it represented the beginning of a form of cooperation among perfume industries.[628] Since the most relevant 'dilemma' is resource disruption for non-use, processors are interested in the communication

625 Out of 13 registered IGPIAs, 10 associations or *syndicat* have been created before the GI registration with the larger scope of gathering professionals operating in the sector and promoting the local production (sometimes through a CTM). Among them, 4 have maintained their original configuration and explicitly mention the presence of a 'GI section in their organisation'. As to the legal form, 3 are *syndicats*, while the remaining 10 are Association Law 1901. The data are updated to May 2023. For more insights see Annex 1.

626 Interview with organic raw material supplier, Absolue Pays de Grasse, 21 April 2021, para 6.

627 ibid., paras 23-24.

628 Interview with processor, Absolue Pays de Grasse, 17 August 2021, paras 123-124.

investment and advertising functions of the GI, while they are less interested in the enforcement potential. Raw material producers are interested in local development and resource maintenance spillovers. Yet, the analysis of the control plan and the product specifications (complemented by interviews) revealed the persistence of a competitive behaviour among the processors, which still impacts on information sharing and trust.[629]

The organic plant growers' association has been recognised as PDMO by the INPI. It is mainly focused on activities exclusively involving organic raw material producers (the members of the Association), while the management of the GI is described as its adjacent 'mission'.[630] The consequence of this setting is twofold: (1) the GI users (processors) are not members of the Association; (2) the non-organic plant growers are not admitted to the membership to the PDMO, despite being raw material suppliers for the GI product traditionally established in the area. Both these elements impact on processors and non-organic raw material suppliers' participation to the decision-making and on its outcomes. Consequently, the 'participants' of the GI initiative are the organic plant growers, which led the coordination of the processors. The non-organic plant growers are part of the local community because they are established in the geographical area, and they supply raw material to the GI processors. However, they cannot be considered as 'participants' of the GI initiative because they are not admitted to the membership to the Association.

The identification of 'participants' of the GI initiative was particularly problematic for the registration of the name 'Couteau (de) Laguiole'. Yet, this case study shows how the actors involved, and their conflicting views of the product can challenge the legitimacy of the GI. As already mentioned, historical sources seem to show that the production of the knife was for long time established in both regions, and that the producers in Thiers have always been mainly sub-contractors for detached pieces of the prestigious knife.[631] However, this connotation seems to not to be shared by the producers in Laguiole, who claim that all production steps must take place in the geographical area, that the Laguiole knife is not made "industrially", and that it is *the* symbol of the local identity of the people from Laguiole. Yet, according to their vision, the producers in Thiers should not be considered as participants (i.e., and legitimate GI holders) nor as local community members, but as competitors. This perspective led to the submission of the application for the name 'Couteau de Laguiole' submitted by the majority of Laguiole producers, organised in the

629 Interview with organic raw material supplier, Absolue Pays de Grasse, 21 April 2021, para 9.

630 Interview with organic raw material supplier, Absolue Pays de Grasse, 8 July 2021, paras 42-44. This setting, which is not unusual in IGPIAs, might impact on producers' engagement as the activities are not exclusively focused on the management (valorisation and protection). See also interview with producer n. 2, Siège de Liffol and for an overview on the 13 registered IGPIAs, see Annex 1. Producers' engagement and wider missions of the PDMO are not necessarily correlated, as long as the decisions concerning the GI management are taken by producers exclusively ('participants') and not by non-producers members of the association ('community').

631 Interview with producer, Couteau Laguiole, 24 February 2022.

'Syndicat des fabricants aveyronnais' on 24 November 2020. The few producers in Laguiole who did not share this strict approach, preferred adhering to the more inclusive perspective proposed by the Association *Couteau Laguiole Aubrac Auvergne* for the registration of the name 'Couteau Laguiole', led by a representative of Thiers producers. From the association's perspective, the participants of the decision-making process should include both the producers based in Laguiole and those based in Thiers, because both these communities participated in the construction and maintenance of the place-based reputation. The lack of agreement concerning the identification of the legitimate actors profoundly influenced the pre-application and application process because it affected the product characterisation (including the method of production giving to the product its distinctive characteristics and qualities); the extension of the geographical area (which, in this case would involve or reject the possibility of including two disjoint and far regions); the choice of the name.[632] After the positive decision of the INPI concerning the registration of the denomination 'Couteau Laguiole' by Thiers producers, the Syndicat, lamenting an 'expropriation' of the name to its 'legitimate community' of Laguiole, appealed to the registration decision.[633] The matter is still pending at the time of writing.

The differences between the two application dossiers are not only represented by the stakeholders' heterogeneous interests, but also by their motivations to the GI registration (i.e., the applicants' expectations concerning the GI performance). The *Syndicat des fabricants aveyronnais* were mainly interested in the repression of counterfeiting, widespread at the national and international level. The association is also interested in the enforcement potential of the GI against illicit uses, at the same time valorising the partnership between Thiers and Laguiole manufacturers, which is less known to consumers. Both groups are interested in the resource preservation, production and local development function of the sign, despite their divergences in views concerning the geographical area and product type. They are both sensitive to the expected guarantee function of the GI, while having in mind different ideas on the nature of the product and its localisation. As noticed in the agricultural context, the protection against counterfeiting (erosion of place-base reputation for dilution) is more likely to be one of the main stakeholders' objectives of GI registration when the reputation is strongly rooted in place.

The examples of *Siège de Liffol* and *Poterie d'Alsace* reflect a more classical pattern involving the direct engagement of producers as a group or led by one 'leader'. In the GI *Siège de Liffol* subcontractors are involved in the raw material supply or specialised in a type of production process used for components of the GI product. The subcontractors who supply the raw materials

632 See *infra* Chapter 3, Section I, Outcomes.

633 See, *inter alia*, 'Nouvel épisode dans la guerre des couteaux entre Laguiole et Thiers', 13 October 2022 (Press article) available at <https://france3-regions.francetvinfo.fr/auvergne-rhone-alpes/puy-de-dome/thiers/nouvel-episode-dans-la-guerre-des-couteaux-entre-laguiole-et-thiers-2634720.html>.

are not located in the geographical area and specific place-based quality is not required in the product specifications; subcontractors specialised in a type of production process, instead, must be located in the geographical are and are subjected to the direct control of the control body. Only this last category of subcontractors enjoys membership to the PDMO (with the status of *'membres adherents'*).[634] In Alsace, the value chain is less complex (involving only craftsmen), and local and regional institutional actors and actors with technical expertise supported the initiative.

Interestingly, in the case studies analysed in the French non-agricultural context frequently the 'social dilemma' stimulating stakeholders' collective coordination initiatives rarely resides in the actual threat represented by counterfeiting. Despite the IGPIAs were crafted following the logic of ensuring the guarantee function, consumer protection, interviews showed that the main stakeholders' concern at the moment of the application was the protection of the place-based reputation from the risk of depletion due to the non-use of the name, rather than depletion for dilution. In other words, for the majority of interviewed producer groups (especially those producing in business-to-business), counterfeiting episodes were not the main concern leading to GI registration. Stakeholders were mainly interested in 'making the product known to the public' as produced in a specific place with a specific quality, using local know-how.[635] In these cases, producers' motivations behind the GI registration concern the communication function, the investment and advertising function, and the guarantee function (less the consumer protection function).

3.3.1.3 External actors' involvement (national authorities and third parties)

In France, the application, evaluation and the registration process are carried out before the INPI, designated competent authority for non-agricultural GIs. This solution entails a separation of competences between the INPI and the INAO, followed by considerable procedural and methodological differences of evaluation and assessment. Consequently, also the stakeholders' approach to the application process is affected and might present some differences if compared to the interactions happening in the agricultural context.

The formal *discrimen* between these two parallel paths to seek GI protection in France is the qualification of the product as agri-food or craft and industrial. However, the definitory boundaries between 'what is agricultural and what is non-agricultural' are still unclear. They can give rise to

634 Product specifications, Siège de Liffol.

635 See interview with producer 1, Siège de Liffol, para 35; interview with anonymous participant, Poterie d'Alsace, para 6. In agricultural GIs, I highlighted that this element of valorisation and promotion is also present, but always accompanied by a strong vocation to consumer protection/enforcement of the sign. See interview with INAO territorial delegation, paras 31-32.

ambiguity and aliment legal uncertainty not only concerning the legal requirements for registration, but also on the identification of the competent national authority and applicable procedural rules.

Art L. 721-3 Intellectual Property Code states that the application must be addressed to the INPI. The GI application procedure before the INPI is shorter and less complex than the procedure before the INAO. Art L. 642-5 n. 1 and 7 French Rural Code identifies the possibility of intervention of the INAO for assisting applicants *before and during* the constitution of the application file, while the rules contained in the Intellectual Property Code describe the interaction national authority-applicants as taking place *once the application file is finalised*. Yet, art L. 721-3 Intellectual Property Code refers to the type of assessment made by the INPI for the purpose of the registration, namely after: (1) the verification of the content of the product specifications and the representativeness of the operators in the PDMO; (2) the realisation of the public inquiry; (3) the consultation of the territorial departments; (4) the consultation of the professional groups involved; (5) the evaluation of the risk of confusion with a previous PDO or PGI; (6) the consultation of consumers associations. The assessment made by the INPI, according to the same article is aimed to 'ensure that the phases of the production or processing described in the product specifications, as well as the delimitation of the geographical area, allow to grant that the product concerned has a quality, reputation or other characteristics that can be essentially attributed to the geographical area or specific place linked to the geographical indication'. This formulation is very general. The direct reference to the modalities of assessment for the registration and absence of rules describing the phase preceding the application denotes that the INPI's approach for the registration of non-agricultural GIs in France is different from the approach of the INAO. In other words, the legal framework contained in the Intellectual Property Code shows that the hands-on approach characterising the pre-application and post-application phases in the French agricultural GI system is not replicated for non-agricultural GIs.

There is no homologue in the IGPIA system of the INAO's commission of inquiry and expertise, which is key in the agricultural GI system for the identification of issues not necessarily evident or declared by the applicant producer group. Art R. 721-3 and R. 721-4 Intellectual Property Code define the public inquiry and the public consultation (see Table 19). As for the agri-food GI system, these moments represent an opportunity for third parties to challenge or propose modifications to the content of the product specifications, the statutes of the PDMO, and the control plan. These documents, differently from the agricultural GI system, are published on the website of the INPI and the public inquiry represents the equivalent for the national opposition procedure in the agri-food sector.

Table 19: Comparison public inquiry and public consultation in the IGPIA system.

Public inquiry (L. 721-3; R. 721-3; R. 721-4 Intellectual Property Code)	Public consultation (L. 721-3 Intellectual Property Code)
Objective: Submitting observations on the product specifications, the statutes, and the control plan, publicly available on the website of the INPI and *Bulletin Officiel de la Propriété Intellectuelle.*	**Objective:** Submitting observations on the product specifications, the statutes, and the control plan, publicly available on the website of the INPI and *Bulletin Officiel de la Propriété Intellectuelle.*
Third party participants: Anyone.	**Third party participants:** local authorities; interested professional categories, INAO director when the IGPIA registration can engender a risk of confusion with a PDO or PGI; consumer associations.
Examination: INPI office.	**Examination:** INPI office.
Duration: 2 months.	**Duration:** 2 months
Output: Synthesis of public inquiry drafted by the INPI and the office's recommendations to the applicants on modifications. Another public inquiry could be undertaken after a first round of modifications of the content of the application file. The same procedure is applicable for amendments (on the parts subjected to amendments).	**Output:** Synthesis of public inquiry drafted by the INPI and the office's recommendations to the applicants on modifications. Another public inquiry could be undertaken after a first round of modifications of the content of the application file. The same procedure is applicable for amendments (on the parts subjected to amendments).

Art R. 721-3 n. 3 states that 'any person may submit observations within the same time limit (2 months), in accordance with the procedures laid down by decision of the Director General of the Institute'. The product specifications, the control plan, and the statues of the future PDMO, differently from the agri-food GIs, are all part of the same dossier which is made public in the Bulletin. Since during the public inquiry anyone can submit observations on the whole content of the application file, the feedback received might include experts' opinion (historians, collectors etc.). [636]When the public inquiry and the public consultation are closed, a synthesis of the remarks is published in the register, including the number and nature of the remarks (favourable, not favourable and favourable with modifications) and the nature of the actors involved (local authorities, public bodies, associations, private individuals, etc.).

3.3.1.4 Implementation of the national legislation

Art L.721-3 n. 1 states that the, as the INAO, the INPI is in charge of 'verifying the content of the specifications and the representativeness of the operators within the PDMO' (translation provided by this author). Interviews with INPI representatives confirmed the differences between the INAO and INPI approach to the construction of the application file. Despite the presence of 20 INPI delegations dislocated within the French territory, the request for IGPIA registration is processed solely by the competent office in Paris. This *per se* reduces the **proximity** that characterises the territorial departments at the INAO (i.e., their key role in assisting the applicants throughout the pre-application and application procedure). Although it is not codified by law, however, in

636 Interview with INPI, 15 March 2021, paras 40-41.

practice an informal exchange between the future applicants and the Office before the formal submission of the application. The aim of this exchange is providing stakeholders, upon their request, the necessary information useful to build the application file. The approach used by the INPI for the assistance (and later, for the assessment of the documents constituting the application file) is '**purely legal'** and does not entail any in-person assessment or expert's consulting.[637] In comparison, the INAO's expertise resides on a **multidisciplinary** assessment, involving in-person interactions of the representatives of the territorial departments, the commission of inquiry and scientific expertise on the origin product. Consequently, the INPI disposes of a general overview on the structure of the value chain at the local level, the situation in the marketplace, and the reasons justifying the locality requirement.[638] This assessment is documental, and it does not involve on-site inspections. The interaction takes place exclusively between the competent office and the applicant producer group which applies for recognition as PDMO and consists in 'an external vision of what happens between the actors', rather than an *ex officio* inquiry aimed to understand collective action dynamics.[639]

This approach has its limits, as key information concerning local dynamics between the actors involved are difficult to identify from a prevalent use of a documental analysis. Consequently, it might impact on the thoroughness of the evaluation of the quality of the application, which is limited to an assessment of the completeness and correctness of the information provided by the applicant. This is applicable to the assessment on the representativeness of the applicant producer group (which is based on a self-declaration made by the producer group and based on the product as identified in the product specifications) and to other elements indirectly affecting the boundaries of the GI (such as the delimitation of the geographical area, the product characterisation, the method of production, etc.). From this perspective, the capacity of the INPI to anticipate and correct, *ex ante* the GI registration, elements which could entail fragilities in the management phase is less effective. This 'hands-off' approach of the INPI, to some extent similar to the examination for registration of trademarks, seems more favourable to accommodating stakeholders' strategic decisions relying a lot on their capacity of substantiating autonomously their demand, rather than to prevent potential fragilities and oppositions through accompanying tools and proactive and autonomous inquiries.

Given the complex nature of non-agricultural origin products and the absence of technical multidisciplinary expertise within the INPI GI Office, or the nomination of a commission of inquiry as at the INAO, the **public inquiry** could represent a way to gather technical expertise.[640] However,

637 ibid., para 15.

638 ibid., para 13.

639 ibid., para 10.

640 ibid, para 26; ibid, paras 56-57.

it is important to highlight that the intervention of experts during the public inquiry is voluntary and spontaneous (meaning, it might or might not occur and it is not subjected to any sort of formal preliminary mandate by the INPI). Moreover, no official instrument is provided to detect possible conflicts of interests of the actors intervening in this process, nor to verify the objectivity and impartiality of the submitted remarks. Those remarks are not binding, neither for the applicant nor for the Office. The Office is free to decide which comments are more pertinent or reliable to guide the final assessment on the GI registration or rejection of the application. The Office is also free to assess whether the producer group fulfilled the requirements targeted as problematic during the public inquiry, providing amendments to the content of the application dossier. The conclusions drawn from the public inquiry and, eventually, the recommendations suggested by the Office, are shared exclusively with the applicant group.

A case-by-case approach seems to be favoured by the Office, which leaves applicant considerable freedom in crafting tailored decisions on the product specification, control plan and statutes. For the moment, the opportunity of creating official guidelines for the potential applicants, as the INAO Applicants' Guides, is excluded.[641]

3.3.2 Process

In the next paragraphs, I will focus on the axis of inquiry 'Process' (principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing product specifications design and GI management), as defined in Chapter 2. I will look at the following components of the GKC framework: (a) main action situation (product specification design), (b) rules-in-use. I will answer the following questions:

- What are the legal rules and principles governing the decision-making and product specification design?
- How are these rules interpreted, operationalised, and enforced by the stakeholders involved at the national and local level?
- How do different national approaches impact on stakeholders' interactions and outcomes?

3.3.2.1 The pillars in the French Intellectual Property Code

Despite the legal framework on IGPIAs has been clearly designed taking into account the rules of the French Rural Code, some differences emerge, in particular on the transposition of the concepts of representativeness, representation, and democratic functioning. Art L. 721-4 Intellectual Property Code affirms that 'the rules on the *composition* and on the *functioning* of the PDMO need to ensure the *representativeness* of the operators concerned'. The rule does not contain any reference to the concept of 'fair representation', nor to the concepts of democratic functioning.

641 ibid, para 73.

On the contrary, these principles seem to be identified in one, more specifically with the principle of representativeness.

According to the operational definition of this concept given by the INAO and codified in the Applicants' Guide for the recognition as PDMO, representativeness refers to the capacity of the PDMO to regroup a considerable number of producers compared to the total number of producers in the area. For this purpose, the volumes of the candidate product are compared to the volumes produced in the area of products of the same type. In Chapter 2 Section II, I propose an interpretation of the concept of representativeness based on a quantitative type of assessment, which takes into account how many producers of the geographical area the applicant producer group is able to federate. In the French PDO/PGI system, the eligibility assessment of the producer group as PDMO is complemented by the concept of fair representation, which is absent in the Intellectual Property Code. This means that, in the Intellectual Property Code, no indication is given on the fact that the composition of the PDMO should mirror the 'structure' of the value chain, meaning that all professional categories involved in the production of the product should compose the producer group.[642] Moreover, the generic mention in the Intellectual Property Code of the 'rules on the composition and on the functioning of the PDMO' related to the principle of representativeness *only*, seems to be a simplification and constitutes a difference between the French PDO/PGI and IGPIA system.

This approach is also confirmed by the wording of art L. 721-3 Intellectual Property Code, which describes the modalities of assessment for the decision on the registration of IGPIAs. This article states that 'the decision to register [the GI] is taken after the verification of the content of the specifications and of the *representativeness* of the operators within the defence and management organisation'. Moreover, art R. 721 specifies that the applicant must include 'information making it possible to assess, in particular with regard to the rules laid down in the third paragraph of art L. 721-4 and in n. 4 of art L. 721-6, the representativeness of operators within the PDMO'.[643]

The principle of **access to membership** is mentioned in the Intellectual Property Code, fully reflecting the French agricultural GI perspective (mandatory membership): 'all the operators must be members of the PDMO' (art L. 721-5 Intellectual Property Code). Instead, the principle of democratic functioning is not mentioned in the Intellectual Property Code, nor any indication

642 The rationale of this rule is to ensure information transparency and is strictly related to the principle of democratic functioning (when paired with mechanisms for the attribution of the right to vote).

643 The same documentation (on representativeness only) must be filed in case of amendment of the specification, *'if those elements are modified*', according to para 2 art R. 721 French Intellectual Property Code. From the wording of the article, one could infer that the operators should do not 'prove' representativeness of the PDMO by default in case of amendment, but only if changes occur. This rule highlights, once again, that the 'declarative' responsibility is upon the applicants, while the Office is in charge of a (mainly) documental assessment.

concerning the modalities of the decision-making process (i.e., right to vote and criteria for weighted votes).

The INPI assesses the eligibility of the producer group (association or *syndicat*) to be formally recognised as PDMO at the moment of the registration (as in the agricultural GI system). After the GI registration the control on governance can be ensured by the control body, if it is established in compliance to the contract concluded between the PDMO and control body. This is a very interesting profile which will be discussed later in this chapter.[644]

3.3.2.2 Implementation of the national legislation

In agricultural and non-agricultural GIs, representativeness should be evaluated in relation to the GI operators. Yet, in the PDO/PGI and IGPIA system the operator is any person who participates in the production, processing, preparation, or packaging of the product, willing to use of the sign and compliant with the product specifications, and this calls for a preliminary consideration. Firstly, a representative PDMO is a PDMO which gathers a considerable number of operators, compared to all the producers established the geographical area and involved in the production of similar products (I defined this as the 'quantitative criterion'). These operators are 'fairly represented' in the PDMO when the structure of the value chain is adequately reflected in its composition (I pair the representation assessment firstly a with 'qualitative criterion', then with a 'quantitative criterion' to qualify the 'fairness' of representation – i.e., a representation of the professional categories measured with their presence in the value chain).

The French approach to the principles of representativeness, fair representation, democratic functioning, and access to membership is not homogeneous in the IGPIA system and in the PDO/PGI system. The formulation of the legal rules has relevant consequences on the interpretation and operationalisation of the legal framework by the relevant stakeholders.

The decision of the Court of Appeal of Paris concerning the case *Porcelaine de Limoges*, is one of the few examples where the representativeness of the PDMO is contested before national courts after the GI registration. The Court states that 'the defence and management organisation has provided information making it possible to assess the *fair representativeness* of the various categories of operators for the product concerned, including an estimate of the total number of operators for the product concerned and the total volumes produced by all operators in the sector'.[645] It is evident

644 See *infra* Chapter 3, Section I, Outcomes, second level outcomes.

645 Paris, Civ. 1re, 25 September 2018 (Porcelaine de Limoges), p 6. The same formulation of 'fair representativeness' has been used by the Cour d'Appel of Bordeaux on the Linge *Basque case* (Bordeaux, Civ 1re 12 October 2021): *'Par ailleurs, il ressort du document relatif à la représentativité des opérateurs composant l'ODG (pièce 3 INPI) que cette* ***représentativité est équilibrée*** *par rapport à l'ensemble des opérateurs pour le linge basque, au nombre total de quatre*

from the formulation used by the Court that the concepts of representativeness and representation overlap. Similarly, in the decision Court of Appeal Bordeaux on the *Pièrres Marbrières de Rhône Alpes*, the representativeness has been contested by the applicant, and Court explicitly refers to the 'number of producers of the value chain, the volumes produced, the and the revenues generated, as well as the number of employees' joining the PDMO.[646] The interpretation of the Court, again, does not take into account that the principle of fair representation and representativeness are complementary, although representing distinct concepts, which are assessed differently.

The formulation of the legal rules concerning the pillars also affects the interpretation given by the INPI in assessing the eligibility of the producer group to be recognised as PDMO, with repercussions on the recognition of a legitimate decision-making power for rule-crafting upon specific actors of the value chain.

As already mentioned in the paragraphs related to the Actors, the product specification of the GI *Absolue Pays de Grasse* has been constructed based on the stakeholders' choice of characterising the link between the GI product and place prevalently through the processing method, while the quality and provenance of the raw materials is less valorised. This product characterisation could, *prima facie*, explain the positive assessment made by the INPI on the **representativeness** of the PDMO: all the processors historically based in the geographical area are identified as operators in the statutes, and no 'fair representation' assessment is provided by the INPI, because it is not required by the Intellectual Property Code. It should be recalled that organic plant growers, represented by the president of the PDMO, were interested in localising raw materials, and as actors-participants of the rule-making process, they introduced in the product specification the obligation to use local aromatic plants as raw materials for the GI product (even though quality requirements are not specified – see *infra* first-level outcomes).[647] They are, therefore, directly concerned by the product specifications. However, they do not seem to be considered as 'operators' of the GI, and as such, they are not taken into account in the assessment of the representativeness, representation and democratic functioning of the PDMO.[648] Looking at the value chain of the *Absolue Pays de Grasse* through the principle of 'fair representation' as formulated in the French PDO/PGI system,

répondant au cahier des charges, dont trois sont membres du syndicat des tisseurs de linge basque, le quatrième n'ayant pas souhaité s'engager dans la demande d'homologation sans toutefois s'y opposer pendant l'enquête publique'.

646 Bordeaux, Civ. 1ere, 23 March 2021 (Pièrres Marbrières) p 8.

647 Moreover, the aromatic qualities of the absolute seem to be due to the processing *and the quality of the plants*. 'The aim of the GI is to highlight know-how on two levels: the cultivation of perfume plants, which is based on the know-how of the people who grow them, but also on a terroir that has developed the qualities we are looking for today, and then on a second level, which is expertise and know-how in extracting this raw material'. See Interview GI user, Absolue Pays de Grasse, para 42.

648 The formal 'exclusion' of the plant growers from the category of 'operators' of the GI, has also been highlighted in the public inquiry. See summary of the public inquiry, Absolue Pays de Grasse, p 4.

would have implied ensuring that all the professional categories involved in the production of the GI product and concerned by the product specification are (directly or indirectly) represented in the PDMO.

As already mentioned, the GI initiative has been led by the organic plant growers' association, later recognised as PDMO. As already mentioned, the Association represents some of the plant growers suppliers of the absolute processors, who in some cases still use locally sourced non-organic raw materials.[649] As a consequence: (1) the organic plant growers are directly represented by the president of the plant growers' Association-PDMO; (2) the **plant growers not adhering to organic certification standards**, cannot join the association because of the limits imposed in the statutes, even though they still can supply raw materials to the processors by virtue of the rules contained in the product specification; (3) non-organic plant growers can only be represented indirectly, by their buyers, meaning the processors.[650] Within this setting, the interests and motivations of the 'represented' raw material supplier and the 'representant' processor might be conflicting on some specific issues, given their different position in the value chain.

The governance structure preferred for the *Absolue Pays de Grasse* does not currently imply the presence of committees (or sections) regrouping raw material producers, nor other solutions to differentiate between organic and non-organic raw material suppliers. As already explained, the presence of committees gathering different types of professional categories of operators is not compulsory in the PDMOs of French PDOs/PGIs. However, this configuration in the *Absolue Pays de Grasse* case could avoid information asymmetries between organic and non-organic raw material producers. More generally, it could impact positively on the democratic functioning of the PDMO: non-organic producers are not put in the conditions to express their opinion during the decision-making process as they are not admitted to the membership of the PDMO.

In this case study, the preferred solution for granting democratic functioning is consensus, rather than the formal attribution of voting rights based to specific criteria. While this is still a possibility currently available to producers (in the agri-food and non-agricultural sector) it proves effective when accompanied by a high level of cooperation and consolidated collaborative interactions between the stakeholders. In the case of the *Absolue Pays de Grasse*, the solution of consensus has been preferred to reduce some inefficiencies affecting information sharing and low level of trust originating by the history of competitive relationships and individualistic behaviours of the processors. The PDMO, in this context, is a key intermediary and facilitator for consensus building. The processors are identified in the statutes as 'initial operators' of the GI, even though they are

649 Interview with processor, Absolue Pays de Grasse, 17 August 2021, paras 59-68; ibid., para 60; ibid., paras 125-126.

650 Interview with representative PDMO, Absolue Pays de Grasse, 22 April 2021, paras 61-70.

formally excluded from membership, which is reserved only to organic raw material suppliers, and the GI management considered one of the 'missions' of the Association.[651]

The case *Couteau (de) Laguiole* shows another nuance on the importance of the four pillars in inspiring and structuring GI initiatives, as it shows how the GI pre-application and application process has been conducted when the denomination is contended between communities established in different territories. The geographical 'fragmentation' of this GI was a source of conflict among two producer groups, which brought to the creation of parallel dossiers, for the registration respectively for the name 'Couteau Laguiole' and 'Couteau de Laguiole'. The name 'Couteau Laguiole' has successfully been registered on 23 September 2022. The governance structure of the PDMO of this GI is quite complex, and the members are divided in seven committees (fair representation principle). Three of these committees gather active members with deliberative vote (namely 'industrial' knives producers, artistic knives producers, and sub-contractors). The raw material suppliers and retailers have a consultive vote (democratic functioning principle). Other institutions and actors external to the value chain are considered members-supporters.[652] All these members are subjected to the payment of a fee for supporting the activities of the association. The last committee is composed by the honorary members, who are not obliged to pay the fee. It is interesting to note that only the first three committees gather the operators of the GI, while the others include other stakeholders or supporters of the GI initiative. Therefore, the operators and the non-operators enjoy different membership status which enhances the inclusive participation of heterogeneous actors without influencing the distribution of the bargaining power in the decision-making. However, this complex structure is not sufficiently inclusive to remedy to the deficit of participation of knife producers based in Laguiole.

Looking at this case study from the perspective of the principle of representativeness allows to flag important issues concerning the eligibility and legitimacy of the PDMO. The defined geographical area of the GI 'Couteau Laguiole' includes both the municipalities of Thiers and Laguiole and their surroundings. The statutes of the PDMO does not prevent Laguiole producers to join the PDMO, which make its functioning in line with a *potential* dimension of the principle of access to membership, fair representation, representativeness, and democratic functioning. However, *de facto* at the moment of the registration the composition of the PDMO is mainly constituted by Thiers producers, which determines a power imbalance in the management of the sign in favour of the Thiers producers.

651 The association has a larger scope than the GI. See Interview with organic raw material supplier n. 1, Absolue Pays de Grasse, of 8 July 2021, para 40. This configuration is not unusual, and not prevented by national law. For more insights in this regard see *infra* Chapter 3, Section I, Second-level outcomes.

652 Statutes PDMO, Couteau Laguiole, p 106.

It could be questioned if, where a GI regroups disjointed territories, the interpretation of the principle of representativeness should be considered more strictly. To avoid the practical ineffectiveness of the principle of representativeness, it could be interesting to consider (1) if, in cases where distinct local communities coexist in the same GI, the actual geographical distribution of membership should be seen as a supplementary requirement for assessing the representativeness; (2) if the PDMO should be considered *potentially* compliant with the principle of representativeness or compliant at the moment of the registration. Following this reasoning, the PDMO for the GI 'Couteau Laguiole', should be considered representative if its membership, at the moment of the registration, is proportionally shared between Laguiole and Thiers producers.

Following the same logic for the principles of fair representation and the democratic functioning, the statutes of the PDMO of the GI 'Couteau Laguiole' clearly show the stakeholders' effort towards a structured and inclusive governance, as all professional categories involved are organised in committees. However, *de facto* there are no specific rules concerning the participation of Laguiole producers in these committees. Interviews revealed that a participation of Laguiole producers was highly encouraged by the PDMO, but that was hindered by the lack of agreement on the content of the product specification and, more generally, by the conflictual context.[653] A stricter interpretation of the principle of fair representation, which takes into account the *actual* geographical localisation of the professional categories involved could be a one possible safeguard for inclusiveness and conflict resolution. At present, the Laguiole producers affirm to have been 'deprived' of the right to protect 'their denomination' and do not accept to be subjected to the rules that they did not contribute to craft.[654]

The same reasoning concerning a stricter interpretation of the fair representation principle could be applied to the Pottery of Alsace, where the two distinct local communities, rooted in Soufflenheim and Betschdorf, 'revendicate' the uniqueness of their production through the GI registration. However, in this case, the solution found by the stakeholders was envisaging the sub-mentions 'Soufflenheim' and 'Betschdorf' in addition to the more general denomination 'Poterie d'Alsace'. The GI initiative was undertaken by both operators established in Soufflenheim and Betschdorf who are all members of the PDMO.[655] Despite this distinction, the principle of representativeness related to the denomination 'Poterie d'Alsace' is considered *notwithstanding* the geographical

653 Interview with producer, Couteau Laguiole, 24 February 2022, paras 57-58.

654 'How can a Geographical Indication be recognised without the main community, the one bearing the geographical name, which refused the project, being involved in the process? Can we oblige the knifemakers of the village of Laguiole to adhere to a GI that they have not chosen, under threat of being forbidden to use the name 'Laguiole''? (translation provided by the author). See 'En conflit avec Thiers sur l'IG, Laguiole dépose un recours' (Press article) available at <https://www.lepoint.fr/societe/en-conflit-avec-thiers-sur-l-ig-laguiole-depose-un-recours-13-10-2022-2493660_23.php#11>.

655 Interview with anonymous participant, Poterie d'Alsace, 10 August 2021, para 24.

distribution of the operators, which could be justified by the fact that the registered main denomination identifies both participants producing according to Betschdorf and of Soufflenheim standards. The principle of fair representation does not seem to be particularly problematic in this case, since all the production steps are performed by the same operator (i.e., actors' heterogeneity as to the role in the value chain, motivations and interest is not a critical element in this GI). However, the denominations 'Betschdorf' and 'Soufflenheim' are presented as being two variants of the same product and are regulated by the same specification. Despite these differences, the current structure of the PDMO does not involve a separation in committees or sections between the two sub-groups.[656] In practice, each sub-group has informally decision-making power on the parts of the product specification related to its variants. The decisions concerning the management of the sign in general, however, are taken by all producers. Theoretically, this is not irrelevant from a democratic functioning perspective, considering that Soufflenheim producers are more numerous than Betschdorf producers, that each member has one vote, and the decisions are taken by the majority of the members.[657]

The examples listed above are used to show that (1) the principle of representativeness and fair representation are erroneously confused, and this definitory confusion might create biases on their operationalisation; (2) they are ontologically different and subjected to specific modalities of assessment; (3) a separate and specific assessment on representativeness and fair representation might allow to uncover blind spots in the assessment of the eligibility of the PDMO and prevent possible issues related to collective action during the early phases of the GI initiative.

The approach adopted by the INPI, which is consistent with the current formulation of the rules contained in the Intellectual Property Code, diverges from the INAO type of assessment, and influences how applicants interpret and operationalise the GI registration requirements. It seems significant to report that, in the absence of specific guidelines on the four pillars and given the current legal framework, only 2 out of 13 IGPIAs currently have in their statutes a repartition of the members in internal committees (or *collèges*).[658] Producers are left substantially free to propose the governance configuration they consider more appropriate, as shown by the statues of the IG *Couteau Laguiole* which includes as members in the committees both operators and non-operators. The identification of internal committees, as already mentioned, is deeply related to the fair representation, and allows democratic functioning.

656 ibid., paras 26-32.

657 ibid., paras 24-32.

658 For a more complete overview see Annex 1.

3.3.3 Outcomes

In this final part, I will articulate my analysis on the axis of inquiry 'Outcomes' (clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration), as explained in Chapter 2. I will consider first level (product specification), second level (governance and control configuration) outcomes and corresponding rules-in-use within the GKC framework applied to GIs. As Chapter 2 Section II, the second level outcomes are analysed considering the first level outcomes of adjacent action situations (i.e., statutes and control plan design). I will answer the following questions:

- 1st level outcomes: What are the solutions found by the participants (with the involvement of the external actors) to solve or mitigate the social dilemma affecting the resource? What are the rules and conditions defining the name, the product description, the delimitation of the geographical area, the method of production, the description of the link to origin? How do actors justify these choices? How do rules on the governance and controls, as outcomes of adjacent action situations, contribute to operationalising the 'rules of the game' for GI management?
- 2nd level outcomes: How are the rules of the specification controlled and enforced? Does the governance configuration evolve after the GI registration? What are the impacts of the governance and control configuration on collective action and decision-making?

3.3.3.1 First-level outcomes: French legal requirements on the content of the product specifications, the control plan and the statutes of the producer association/ organisation

Art L. 721-7 Intellectual Property Code sets the requirements for the content of the product specification which should include:

- the name (without further specification);
- the product description;
- the delimitation of the geographical area;[659]
- the description of the origin link, replicating the PGI scheme, including quality, reputation, *traditional know-how* or other characteristics, the description of the process and the locality requirement;
- the possibility to specify '**environmental and social engagements**'.[660]

659 Concerning the delimitation of the geographical area, some indications emerge from the decision of the Cass. com., 16 March 2022 paras 19-25 on the Savon de Marseille case, where the Court affirms that a specification where the geographical area coincides with the national territory, should be considered as lacking geographical delimitation. With this decision, the Court confirms the rejection of the GI application by the 'Association Savon de Marseille'.

660 The *Siège de Liffol* is the only GI explicitly mentioning in the product specification the 'environmental engagement' referred to the compulsory requirement of using raw materials certified as FSC (Forest Stewardship Council).

- This rule seems to evoke the option for French PDOs/PGIs that the conditions of production 'can entail measures aimed to favour the preservation of *terroirs*', complemented by the tasks and responsibilities of the PDMOs (art L. 641-6 French Rural Code).[661]
- The duty to include, rules on the modalities and frequency of controls with check points and information on the control body. This rule is not complemented by any other guidelines, given the small number of registered GIs and the diversity of the product classes involved.
- Rules on labelling. Art R. 721-8 Intellectual Property Code specifies that using the logo conceived for IGPIAs is not mandatory for operators, members of the PDMO and compliant with the product specifications.
- Details on the financial resources of the PDMO.

The product specification of IGPIAs is a full-encompassing document (which contains the checkpoints and modalities of controls). It must be submitted by the applicant in addition to the formal request for GI registration, the contacts of the applicant producer group and the document attesting its representativeness. The application file for IGPIAs therefore does not require documents such as the study on the technical and economic impact and the controllability document (which are part of the application file of PDOs and PGIs, in addition to the project of single document). Lacking the controllability document (which in agricultural GIs should be drafted by the producer group *before* the involvement of the control body, and examined by the commission of inquiry), the role of the control body is core to measure the 'quality' of the product specifications in relation to the controllability of the rules. This process is directly undertaken during the draft of the **control plan,** which is not a separate document, but is part of the publicly available dossier submitted to the public inquiry.

No specific requirements define the contents of the **statutes**, but the composition and functioning of the PDMO should respect the representativeness of the operators concerned.

Differently from the French PDO/PGI system, also the statutes of the producer group are integrally published in the *Bulletin* and on the INPI website during the public inquiry and remains accessible after the GI registration.

3.3.3.2 Second-level outcomes: governance and monitoring and control configuration

The Intellectual Property Code does not envisage the possibility of an evolution of the **governance configuration** of the producer group after the GI registration: in other words, the formal recognition is made in parallel with the registration of the sign, and it ends with the attribution of the status of

661 See supra, Chapter 2, Part II, first-level outcomes.

PDMO to the producer association or *syndicat*. Nevertheless, amendments of the statutes of the PDMO are still possible, upon the initiative of the producer group.

The tasks and responsibilities of the PDMO (art L. 721-6 Intellectual Property Code) partially differ from those stated in art L. 642-22 French Rural Code. These differences implicitly show that the regulatory framework of agricultural GIs has not fully been reproduced for the IGPIA system. One of the most remarkable differences is related to the management of controls, in particular **those aimed to producers' compliance with the product specifications** and **controls on the governance of the PDMO**.

Art L721-6 n. 3 Intellectual Property Code mentions the duty of the PDMO to ensure that the control body performs controls on producers' **compliance with the product specifications** according to art L. 721-9 (i.e., control for certification), the duty to inform the INPI on the results of the controls and, eventually to communicate to the Office the corrective measures applied. Differently from the French PDO/PGI system, there is **no mention of the duty of the PDMO to perform internal controls**. The control body, as in the French PDO/PGI system, is accredited by the French Committee of Accreditation (COFRAC) which verifies their compliance with the norm ISO 17065.

In IGPIAs, the control on the governance of the PDMO by the control body is not required. However, the INPI performs only a documental check (verification of a periodical report) to verify that the PDMO complies with the duty to ensure the 'representativeness of the operators in the composition and functioning rules' (art L. 721-6 n. 4, Intellectual Property Code). No graduated sanction in case of non-compliance with the rules contained in the statutes is envisaged and nothing is stated in the Intellectual Property Code on the duty for the PDMO to maintain the eligibility requirements for its formal recognition.

3.3.3.3 Implementation of the national legislation

3.3.3.3.1 Product specifications, statutes, and control plan in IGPIAs: some examples and lines of inquiry

The following case studies identify how the interpretation and operationalisation of the rules governing product specification design in the IGPIA system impact, *inter alia*, on the formulation of the boundary rules, on the stakeholders' approach towards the duty to provide evidence, as well as on their solutions for codifying the correlation between the quality and locality requirement.

The Intellectual Property Code does not specify how detailed the description of the product characteristic and the method of production should be, and the codified legal rules are not

complemented by official guidelines of the INPI, which applies a case-by-case approach. The product specification of the *Absolue Pays de Grasse* shows a wide formulation of the **product characteristics**.[662] Interviews showed that, despite the successful registration of the denomination, cooperation might still be affected by a low level of information sharing between GI users (i.e., processors) as each of them is interested in keeping his methods of production secret.[663] Consequently, informally multiple variants of the GI product exist. An explication of this choice can be retrieved by contextual elements: the history of interactions between the processors before the GI initiative was characterised by a low level of cooperation. Therefore, a considerable effort had to be enacted by the participants during the pre-application and application phases. The PDMO had a key role of mediation in this regard.[664] Those efforts led to the draft of common rules, embedding the common elements shared and agreed between the participants. The level of generality affecting the product characterisation, however, implies that, in practice, each processor, informally and internally, applies stricter rules. The same formal degree of generality accompanied by the informal application of stricter rules can be observed on the description of the method of production (specific for each absolute manufacturer), and the sourcing and type of raw materials (which varies depending on the practices established by each processor).[665]

In the *Siège de Liffol* and in the *Poterie d'Alsace* cases, the wide formulation of the product characterisation relies entirely on the general 'distinctiveness' of the method of production, which derives from a long and local tradition and leads to higher quality products. A detailed description of the quality and characteristics of the product, however, remains implicit in the product specifications.[666] Yet, interviews revealed that for the *Siège de Liffol*, the main distinctive quality is the structure of the backrest of the seat ('from the top of the backrest to the floor, the leg is a single piece of wood' which gives to the seat solidity and robustness) and that the wide description was also functional to ensuring enough freedom to the operators regarding the use of innovative

662 'Absolute essence or "absolute" is a "product obtained by extraction with ethanol from the concrete, a floral ointment, a resinoid, or a supercritical fluid extract […] Main characteristics: its smell is characteristic of the plant from which it comes; the absolute is soluble at 10% in ethanol and of maximum olfactory concentration.' See Product specification, Absolue Pays de Grasse, p 5.

663 Interview with processor, Absolue Pays de Grasse, 17 August 2021, paras 15-16.

664 Interview with representative PDMO, 22 April 2021, para 4; interview with organic raw material supplier, Absolue Pays de Grasse, 21 April 2021, para 9.

665 Interview with processor, Absolue Pays de Grasse, 17 August 2021, para 129.

666 'Seats produced using traditional or innovative manufacturing techniques that meet the specific criteria specific to the geographical area of the Basin of Liffol-le-Grand'. See, product specifications, Siège de Liffol version, p 8. 'The products covered by the Geographical Indication are pottery produced using two traditional manufacturing techniques, one historically associated with the village of SOUFFLENHEIM and the other with the village of BETSCHDORF, which meet the specific criteria of the geographical area of northern Alsace. The pottery can have a utilitarian (cooking and conservation) or decorative use'. See product specification, Poterie d'Alsace, p 5.

materials and shapes.[667] As to the *Poterie d'Alsace*, participants highlighted that the main distinctive feature of the pottery is the traditional functional aspect (i.e., 'cooking and conservation'), rather than the decoration and use of specific colours and patterns.[668] Again, this element is not central in the product specifications: on the one hand, the choice was justified by the need to adjust to consumers' taste, oriented to more modern designs; on the other hand, it is grounded by the willingness of craftsmen to keep a sufficient margin of freedom and differentiation.[669] In both the specifications of *Poterie d'Alsace* and *Siège de Liffol* the various production steps are explained, but a scientific and technical description, complete with the measurable elements is absent. This level of generality attains, therefore, both the distinctive characteristics of the product and the method of production section.

Instead, a different approach has been used in the case of *Couteau Laguiole*, where the product specification includes multiple variants ('*le couteau fermant'*, *'sommelier'*, *'de table'*).[670] The main distinctive element is the *shape* of the knife and the characteristic 'fly' (or 'bee').[671] According to the GI users, all the variants of the product contributed to its current reputation.[672] Thus, the method of production includes both artistic-handmade and industrial knives. The wide characterisation of the products implies the possibility of adjustments due to innovation and is left to the assessment of the '*Comité des Sages'*. Attributing decision-making power to the *Comité* as to the admissibility of new variants might broaden the boundaries for product characterisation.

It is interesting to note that the environmental sustainability chapter is not explicitly and formally mobilised by IGPIA applicants, while it emerges informally in some cases. For example, in the case of *Absolue Pays de Grasse* the PDMO obtaining the organic certification standard for raw material producers is not mandatory for the processors, but it is mandatory for the raw material suppliers to access and participate in the decision-making of the PDMO.[673] Even though this configuration is aimed to encourage virtuous agricultural practices, it has exclusionary effects: non-organic plant growers are excluded from the possibility of actively participating in the decision-making processes

667 Interview with producer n. 1, Siège de Liffol, 1 April 2021, paras 64-69.

668 It is worthy to highlight the introduction of explicit reference to innovation, as potteries should ensure high robustness for the (modern) 'expected cooking usages' including microwave, oven, and dishwasher. See Product Specifications, Poterie d'Alsace, p 30.

669 Interview anonymous informant, Poterie d'Alsace, 10 August 2021, paras 41-44.

670 Product specification, Couteau Laguiole, p 1.

671 'The Laguiole knife is recognisable by its characteristic shape with a fly. It is this shape AND the combined fly that together give it its own identity […] However, the combination of the fly and the particular and traditionally recognised shape of the Laguiole knife "the yatagan blade and the curved handle with its characteristic concave and convex shapes" makes it a model that is recognisable among all. It is named here: "Laguiole yatagan". See product specification, Couteau Laguiole, p 2. Historical evidence of the evolution of the shape of the knife has been provided by the applicant.

672 Interview with producer, Couteau Laguiole, 24 February 2022, paras 13-16.

673 Interview with organic raw material supplier n. 1, Absolue Pays de Grasse, 8 July 2021, para 24.

concerning the GI. In the *Siège de Liffol* case, the raw materials are certified 'FSC', meaning that they are sourced from sustainable managed (although non-localised) forests.[674]

An objective definition of the geographical area is grounded on verifiable evidence and responds to specific criteria. In the case *Absolue Pays de Grasse* the **geographical area** has been identified using the historical criterion, and it refers to the traditional areas of the sourcing of aromatic plants. This delimitation is coherent with the description of the origin link: prevalently justified by the historical and the human factor, this characterisation is focused prevalently on the processing methods than on raw material harvesting. To use the denomination the raw materials must be sourced inside the geographical area. However, the product specification does not mention specifically and scientifically *why* this restriction is justified (e.g., natural factors giving to the absolute its specific characteristics and products).[675] The absence of information on the generic quality of the raw materials is replaced by arguments on the historical factor (i.e., the traditional nature of flower and aromatic plant harvesting in the area), which justifies the locality requirement.[676] From a collective action perspective, this choice can be explained by the different rationales behind this GI registration and the existence of two decision-making centres, upon the processors and the raw material producers, each of them performing at different levels and degrees.[677]

A correlation between the delimitation of the **geographical area, the generic quality and locality requirement** and the factors shaping the origin link is also shown in the *Couteau Laguiole* case, where the identification of the disjoint territories of Thiers and Laguiole is made exclusively through the historical criterion (longstanding partnership between Thiers and Laguiole producers). The origin link is defined by historical elements and traditional local know-how which justify the place-based reputation and the locality requirement.

The Intellectual Property Code remains silent as to the duty to provide evidence of the choice of the name. Consequently, the applicants and the national authority in this regard adopt a flexible approach. For example, in the *Absolue Pays de Grasse* and *Couteau Laguiole* cases, the applicants ground their choice on previous uses of the name.[678] However, the same cannot be

674 Interview with producer n. 1, Siège de Liffol, 1 April 2021, para 73.

675 Other cases, for example the Siège de Liffol case, show that raw materials issued from the natural environment can be subjected to specific standards (in that case, the FSC standard for the wood). However, the generic qualities of the raw materials are not mentioned because there is not a specific rule limiting their sourcing in a specific area.

676 For a more extensive analysis of the relationship between the provenance of the role of raw materials and the locality requirement see Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 21) 202–204.

677 Guerrieri F., Marie-Vivien D. (n 174).

678 The name 'Couteau Laguiole' literally is the name 'given by Thiers producers when delivering detached pieces as sub-contractors of Laguiole producers' (see interview with producer, Couteau Laguiole, 24 February 2022). Laguiole, today, does not mean that *the knife is made in Laguiole* but that the *knife* is produced according to the production standards

affirmed for *Siège de Liffol*, where the name had never been used before the registration of the GI. This circumstance is not new in the French PDO/PGI system, even though the practices of the INAO devise some safeguards to ensure the presence of other types of linking factors. In the IGPIA context, the INPI performs a two-stage assessment: first the office verifies if a reputation is attached to the name. If the name is not used (or little known), the assessment on reputation is made with reference to the product characteristics.[679] It is important to remark that the reputation is assessed on the basis of the product as described in the product specification by the applicant group. The case of *Poterie d'Alsace* is particularly interesting as it evokes, for the first time in the non-agri sector, the use of sub-mentions. This choice has been justified by the fact that the name 'Poterie d'Alsace' is more familiar to consumers and reflect the valorisation purposes as inputs for the registration.[680] In the *Poterie d'Alsace* case, the sub-mentions are functional to preserve, from the GI users' perspective, local specificities. The link to origin is shaped exclusively by historical and human factors, while the raw materials are nowadays outsourced.

Regarding the labelling rules, some interviewees mentioned that they use the logo of the GI mainly on promotional materials: for example, in the *Siège de Liffol* case, born mainly to 'make the product known to the public', producers tried to implement a system based on a QR code, which would have work as a 'guarantee certificate' and a traceability tool. This project was not implemented for technical issues.[681] In this case, as in the *Absolue Pays de Grasse* case, the use of the GI logo and the name *on the products*, is not the main concern because they are commercialised mainly business-to-business. In Grasse, the product can be used as an ingredient or in a composition. When this research was undertaken, an agreement should be reached on the opportunity to oblige processing industries' clients to use the name and the GI logo on the packaging when a certain percentage of absolute is used.[682] In these cases interest in registering the sign seem firstly related to fostering collective action dynamics at the local level for non-market related purposes, while market-related purposes seem to be seen as consequence of coordination and cooperation among producers.

elaborated and enacted by the Thiers and Laguiole producers. The majority of Laguiole producers do not agree with this reconstruction.

679 Interview with INPI, 9 June 2021, paras 7-8.

680 Another example is the GI Linge Basque. The more general name 'Linge Basque', identifying the product when the tourism started to develop in the area, was preferred to the previously used name 'Toile du Bearn', with consequences on other manufacturers established in the area, who are excluded from the right to use the registered name as non-compliant to the strict product specification and who filed an opposition to the registration decision of the INPI (Bordeaux, Civ 1re, 12 October 2021). The use of sub-mentions for similar reasons has already been observed in the Italian PDO/PGI system (for the case of Toscano PGI and other region-wide denominations for olive oils).

681 Interview with producer 1, Siège de Liffol, 1 April 2021, paras 44-47.

682 Interview with representative PDMO, Absolue Pays de Grasse, 22 April 2021, paras 59-60; interview with processor, Absolue Pays de Grasse, 17 August 2021, paras 100-102.

3.3.3.3.2 Governance configuration

The statutes allow to identify the structural functioning mechanisms governing the PDMO after the GI registration. The formalisation of the PDMO in parallel to the GI registration, as in the French agricultural GI system, means the crystallisation of the rules governing its functioning (except modifications of the statutes submitted by the PDMO after the registration).

3.3.3.3.3 Monitoring and control configuration

In IGPIAs, the **control on compliance with the product specification** (before commercialisation), as mentioned above, is performed both by the private control body (in the form of third-party control for certification) and, complementarily, through self-control. The internal control of the PDMO has not been transposed in the Intellectual Property Code.

The analysed case studies showed that the fuzziness of the boundary rules contained in the product specifications can affect the effectiveness of controls. This is particularly evident in the *Absolute Pays de Grasse* case, the check points are concentrated only on the processing steps, while the plant growers are not controlled and only the provenance of the raw materials is checked at the processors' premises.[683] Another remark concerns the high relevance of self-control in this case, which includes protocols (including olfactory tests) operationalised within each processing factory and stricter than the product specifications. These protocols are drafted based on the specific characteristics of the absolute produced by each processor, which increases the product differentiation. It can be seen as an additional factor susceptible to weaken collective action over time.[684] In the case of *Siège de Liffol*, the check points are very synthetic and do not allow, at present, to ensure that all steps of the production process take place in the geographical area and are mainly based on self-declarations of the operators and good faith concerning the locality requirement and the role of subcontractors.[685] In the case of *Poterie d'Alsace*, the impact of the fuzziness of the content of the specification is revealed by the absence of specific check points concerning the robustness of the products, which one would have expected coherently with 'functional criterion' identified in the product description. Interviews showed that informal checks are performed, individually by each producer, following his own parameters.[686] As for the case

683 Interview with organic raw material supplier n. 1, Absolue Pays de Grasse, 8 July 2021, paras 41-42.

684 Interview with processor, para 20. It can be interesting to compare this experience to the example on Lavender essential Oil PDO. The checks on the olfactory properties of the essential oil follows the same scheme of the verification of the organoleptic qualities of agri-food products, meaning that a committee is nominated, and this committee can include producers (peer-to-peer control) identified as 'memory carriers' (*porteurs de memoire*). Also, controls are evenly distributed along the value chain, which stems from the strong vertical integration and coordination between the actors. For more insights on this comparison see Guerrieri F. and Marie-Vivien D. (n 174).

685 Interview with producer n. 1, Siège de Liffol, 1 April 2021, paras 10-11; 14-15.

686 In previous versions of the product specification, some check points concerning the robustness of the potteries were present, but later eliminated to prefer a form of self-control which follows independent and heterogeneous parameters.

of *Absolue Pays de Grasse,* this aspect reinforces the evidence of a lower level of cooperation and information sharing between producers (if compared to similar experiences in the agri-food sector). In the case of *Couteau Laguiole*, the control plan is structured to embrace all the variants of the product. Producers' choice in this regard does not imply the presence of check points specific for each variant, but a minimum level control.[687]

It is important distinguish between the control targeting the compliance of the functioning of the PDMO with the pillars and the control on the correct fulfilment of the tasks and responsibilities performed by the PDMO and defined by art L. 721-6 of the Intellectual Property Code. In the IGPIA system, there is no equivalent of the 'monitoring of PDMOs' as pursued by the INAO (in French *suivi ODG*') after the GI registration: the national authority does not supervise the PDMO in the form of on-site participation to the General Assemblies and on-going follow ups, nor graduated sanctions are envisaged in case of non-compliance with the four pillars. The INPI monitors the activity of the PDMO through an annual written report which must be submitted by the producer group.[688] The control body *can* (but it is not obliged to), if stipulated and agreed in the contract with the producer group, perform a documental control on the performance of the tasks and responsibilities defined by art L. 721-6 of the Intellectual Property Code. This control activity, however, does not necessarily imply the participation of the control body to the general assemblies and, in any case, it is not pursued by all control bodies (as it depends on the content of the contract stipulated with the PMDO).[689] Moreover, the INPI does not directly monitor the activities pursued by the control bodies, as the INAO does in the agri-food GI system.

As a consequence of this setting, the relationships between the **control body and the PDMO** are managed differently than in the French PDO/PGI system. The 'Specific requirements for the accreditation of the organisms certifying industrial products and crafts' released by the French Committee of Accreditation (COFRAC) specifically identifies as 'client of the certification' the 'operator as defined in the intellectual property code'.[690] It also precises that 'the PDMO is not controlled by the control body'. In practice, this rule describes a pattern different from its homologue in the PDO/PGI system: each producer in the IGPIA system has a contract (and interacts), independently and individually, with the control body. The control body *can* (but, differently from the agricultural GI system, it is not obliged to) check the PDMO governance (Figure 15). The checks

Interview anonymous Pottery Alsace, paras 49-52. The same could be argued for *Siège de Liffol,* provided that the quality of robustness of the product was explicitly included in the specification.

687 Interview with producer, Couteau Laguiole, 24 February 2022, para 66.

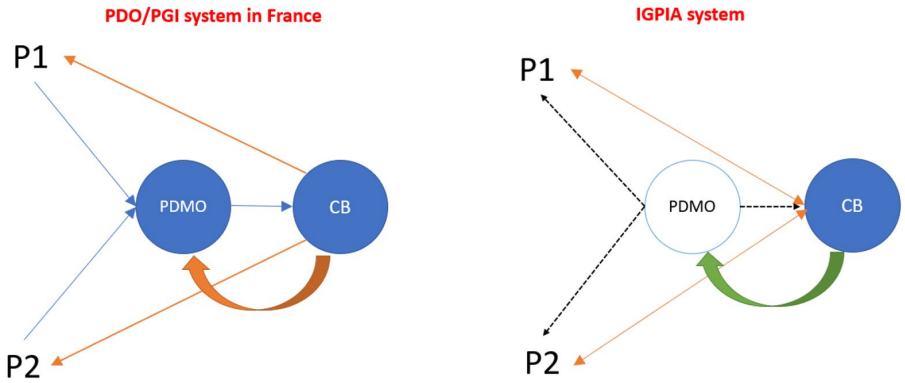
688 Interview with control body, 24 June 2021, para 16.

689 ibid., para 34.

690 Here, we find a different approach than the one adopted by the INAO and highlighted by the CAC. Cofrac, 'Exigences spécifiques pour l'accréditation des organismes procédant à la certification de produits industriels et artisanaux sous indication géographique' available at <https://tools.cofrac.fr/documentation/CERT-CPS-REF-39>

on the governance will only be documental (it means that, as in the PDO/PGI system, it is limited to check the fulfilment of the obligations defined in the Intellectual Property Code as tasks and responsibilities of the PDMO). From the collected data emerges that the control body can offer, among its services, assistance for the draft of the periodical report on the governance of the PDMO required by the INPI (an obligation which is formally upon the producer group). This type of service offered by the control body, being non-mandatory, is not regulated. In practice, when it is present, it consists in a documental control on the tasks and responsibilities defined by the Intellectual Property Code and does not involve a monitoring on the pillars, nor the renewal or withdrawal of the formal recognition. Currently, 7 IGPIAs control plan out of 10 explicitly mention control on governance in the control plan; in 3 registered IGPIAs, the control on the ODG is not mentioned in the control plan.

Figure 15: Comparison between control management French PDO/PGI system and IGPIA system. P1: producer 1; P2: producer 2; PDMO: producer management organisation; CB: control body.



3.4 Conclusions on French non-agricultural GIs

In this last part, the axes of inquiry formulated in the conclusions of Chapter 2 will be used as benchmarks to draft of the preliminary conclusions on French non-agricultural GIs.

3.4.1 Axis of inquiry 'Actors'

Axis of inquiry 'Actors': heterogeneity of interest, motivation, role and involvement can influence the rule-making process.

The participation of stakeholders belonging to the local community, **different from producers**, can **facilitate and support** collective action in the pre-application and application phases. However, when all the producers concerned by the product specifications are the **main participants and decision-makers** it is easier to convert interests and motivations in common operational rules, as well as to choose the legal form and governance structure suitable to sustain commitment to these rules. The **technical multidisciplinary assistance** provided by state actors, control bodies and experts, especially through on-site inspections, can help set the conditions for a sustainable management of the sign and to ensure that the GI initiative is aimed to satisfy the collective interest of the local community at large.

GI initiatives in the French non-agricultural sector are producer-driven. However, some operators seem to be positioned on a different level of awareness on the importance of cooperation and coordination strategies. The complexity of the value chains and the history of interactions among craftsmen, more individual than community-centred than in the agri-food sector, might be a structural feature of this sector. The role of external actors (municipalities, regional authorities, other stakeholders organisations or associations) as supporting actors seems clear. The heterogeneity of interests and motivations as a consequence of the complexity of the value chain is particularly relevant in the non-agricultural sector and can impact on the operators' capacity to align towards common objectives. This configuration can impact compromise building for rule-crafting and stakeholders' coordination. Some PDMOs are represented by groups involved in objectives and goals wider than the GI management (e.g., in Grasse and Liffol). This might be a factor of complexity and can divert the focus from the core role of operators in the decision making, as well as increase the risk of power interferences and imbalances.

The diversity of **governance structures, where the applicants self-organise and differentiate membership** within the PDMO shows that they are quite autonomous during the pre-application and application phases.

Contrary to the INAO, the INPI maintains a **hands-off approach with a purely legal focus**. This does not exclude that, if necessary, exchanges between the applicant and the Office can happen informally. These differences in focuses and approaches between the French agricultural and non-agricultural GI system describe two parallel systems: despite being inspired by the same general principles, the PDO/PGI and the IGPIA systems implement different operational rules.

For example, the technical multidisciplinary assistance, which characterises the INAO approach, is not replicated for IGPIAs. The need to ensure an 'objective' examination of the application and adequate safeguards for the semi-public interest is left by the INPI to the public inquiry and the consultation. However, the output of **public inquiry** is less accurate and complete than the inquiry and evaluation undertaken by the commission of inquiry, the territorial delegations, and national committees of the INAO. In the IGPIA system, the contribution of actors equipped with a technical knowledge on the origin of the product is left to their spontaneous initiative to intervene, and there is no safeguard to the **impartiality** of the submitted observations. This inefficiency is partially corrected by the selection of pertinent observations made in the conclusions by the INPI Office, which however maintains a discretional power in this regard. The national opposition procedure is absent.

As in the PDO/PGI system, in IGPIAs the recognition of the producer group as PDMO implies the formal attribution of the tasks and responsibilities of public interest, and it is assessed *contextually* to the application process. This implies that the assessment on the representativeness and fair representation is made *in itinere*, using as a basis the content of the product specification, as proposed by the applicant producer group. The project of product specifications (together with the statutes of the PDMO and the control plan, which are all part of the application file) might be the object of modifications following the observations expressed during the public inquiry and consultation, and the conclusions drawn by the INPI Office.

Another difference between the INAO and INPI approach resides on the different level of proximity to the value chains: while the INAO approach is 'immersive' and aims to attain a deep knowledge of the value chain and its dynamics, the INPI examines exclusively the first level outcomes (documental analysis, eventually complemented with informal exchanges with the applicant producer group). The 'hands-off' approach adopted by the INPI implies that the Office is not directly involved in the codification of the producers' consolidated practices. Rather, it consists in the evaluation of the completeness and correctness of the application file, and the assessment on the representativeness based on the documents submitted by the applicant producer group.

3.4.2 Axis of inquiry 'Process

Axis of inquiry 'Process': principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing PS design and GI management.

When the principles of representativeness, representation, democratic functioning, and access to membership shape the GI initiative, are **clearly stated, assessed**, and efficiently **monitored over time**, independently from the legal nature and complexity of the governance structure of the producer group, stakeholders can show higher awareness and long-term engagement in the management of the sign. **Compulsory membership** of GI producers concerned by the product specifications can favour producers' involvement in the draft of the product specifications and in the management of the sign as established in the statutes. If GI users-participants directly involved in the product specifications design are also involved in the design of the control plan, that would set favourable conditions for rule compliance. Reflecting stakeholders' heterogeneity with **different types of memberships** to the producer group can encourage **fair representation, representativeness**, and information transparency in the decision-making, which empowers actors if accompanied by mechanisms to ensure **democratic functioning**.

'The French PDO/PGI system and IGPIA system embed two different approaches to GI registration. Despite originating in the same national context, there **is not a complete overlap between their features**. The principle of **access to membership** ('open door' principle) is common to both the IGPIA and in the French PDO/PGI system, being impossible for the PDMO to refuse membership to any operator compliant with the product specifications to join the PDMO. The membership is compulsory in IGPIAs, as in the French PDO/PGI system. **Envisaging different types of memberships within the PDMO** (e.g., *ex officio* and affiliated members) is left to the initiative of producer groups.

The principle of **representativeness** is mentioned but not explicitly defined in the Intellectual Property Code, and erroneously intertwined in practice with the principle of **fair representation,** which is not stated in the Intellectual Property Code. This interpretative ambiguity is source of inefficiencies and affects the interpretation and implementation of the legal rules both by the INPI and the applicants. As shown by in the *Absolue Pays de Grasse*, *Couteau Laguiole*, and *Poterie d'Alsace* cases, a clear definition and assessment criteria of the representativeness and fair representation could have revealed important nuances of the GI initiative. Moreover, it could have allowed the INPI to correct or suggest modifications to the operators during the application phase, helping them to operationalise more efficient governance setups. The following critical elements emerged from case studies: (a) the lack of a rigorous and full-encompassing mapping of all the operators contributing to the production of the product in the geographical area, beyond the declarations submitted by the applicant producer group; (b) the absence of an '*ex officio*' on-

site inspections (c) the lack of a quantitative assessment (beyond the applicants' declarations) on the number of operators who joined the applicant producer group at the moment of the registration, compared to the number of producers established in the geographical area and producing homogeneous products; (d) the lack of a twofold assessment on fair representation, namely an evaluation of the (direct or indirect) representation of the professional categories involved and on the 'fairness' of the representation (proportional distribution of the professional categories involved in the value chain); (c) the need of interpreting more strictly the four pillars when disjoint territories are involved (as in the case of *Couteau Laguiole* and *Poterie d'Alsace*) using the geographical distribution of the stakeholders as additional parameter.

The principle of **democratic functioning** is not mentioned in the Intellectual Property Code and the mechanisms to ensure a democratic structure of the decision making (as well as the attribution of deliberative or consulting voting rights) are left to stakeholders' initiative. The hands-off approach used by the INPI does not currently allow to identify and counteract, prospectively, the inefficiencies of producers' choices in this regard. In the *Absolue Pays de Grasse* case, for example, the principle of democratic functioning has been operationalised as informal consensus, which has been preferred to a more codified voting system. Even though this solution might currently be sufficient for sustaining the GI governance, given the specific characteristics of thew value chain and the history of interaction between the actors, it might expose the decision-making to inefficiencies affecting the GI management at a later stage. Furthermore, it has been shown that the joint assessment of the principle of democratic functioning and fair representation can avoid power asymmetries and lead to a more complete assessment of the quality of the outcomes of the decision making. This is all the more relevant in cases where two distinct communities of operators self-organise to manage the same name-infrastructure and place-based reputation.

3.4.3 Axis of inquiry 'Outcomes

Axis of inquiry 'Outcomes': clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration.

The formulation of the rules contained in the product specifications reflect stakeholders' motivations and interests in the GI registration (valorisation or protection) and the effectiveness of the mechanisms ensuring democratic and inclusive decision-making. The content of the product specifications impacts on the conditions of access to the use of the name, and they are **justified, non-arbitrary** and **non-discriminatory** when they are supported by solid **verifiable evidence**. When the rules are **not ambiguous**, efficient **monitoring, control, and sanctioning mechanisms** can be envisaged and facilitate their enforcement. The operationalisation of the product specifications affects, temporarily or permanently, the governance and control configuration. **Evolutions in the governance structure after the registration** implies a redefinition of the type of actors involved and can affect the rules governing the decision-making process. The **type of interaction of producers with the control body** (individual or collective) the **control type** (multilevel, external, internal, and self-control; public, private, or mixed) and its **targets** (controls on the compliance with the product specifications and/or on the governance of the producer association/organisation) can affect collective action, including the capacity of the sign to perform its expected functions.

As shown by case studies the rules concerning the **method of production** and the **distinctive characteristics** in the first level outcomes are not as detailed as we are used to see in the French PDO/PGI system. The fuzziness of the boundary rules in this regard shows an approach to product distinctiveness and typicity which sometimes keeps tangible characteristics and qualities implicit, or non-specified by objectively measurable elements. This could be attributed to the nature of the manufacturing techniques, often implying either the necessity to preserve of a degree of creativity to the craftsman, or more generally a lack of in-depth scientific expertise on the product classes involved. Sometimes, the distinctiveness and typicity is vaguely attributed to the traditional method of production (*Liffol*, *Alsace*). Rarely, but significantly, explicit reference is also made to the shape of the product (*Laguiole*). Sometimes, generic formulations of boundary rules can hide low stakeholders' availability in information sharing and low levels of trust (see *Absolue Pays de Grasse* case study), which might represent weakening factors of collective action. This can, on the one hand, impact the identification of adequate check points measured on stakeholders' commitment and, on the other hand, the possibility to perform adequate controls to ensure the guarantee function of the sign. Contrary to the agricultural GI system, the controllability document (which is a tool used by the INAO for measuring the quality of the rules contained in the product specifications) is not part of the application file in IGPIAs. This shows a less central role of

producers in envisaging possible check points to verify compliance with the rules in the product specifications, endogenously and independently from the intervention of the control body. Thus, in the IGPIA system, the control body is the main actor driving the formalisation of checkpoints based on the content of the product specifications and existing practices.

These circumstances imply that when fuzzy codified boundary rules are not enforced (or enforceable), other rules might be followed individually by the firm involved in the value chain. In other words, general product characterisations might hide multiple variants of the product, characterised by different standards of production, but the codified rules are so vague that it is difficult to envisage adequate check points to control compliance.

A flexible approach is adopted as to the identification of the **name** (as used in common language and trade) ***and*** **place-based reputation**. The INPI assessment follows a two-steps approach: (a) the identification of the reputed denomination; (b) if the reputation is little developed, the identification of the reputation of the product and its specific characteristics (the second step implies the *absence* of a specific denomination used as identifier of the origin product). In IGPIAs, this situation is more frequent than in the French PDO/PGI system, and it is associated with the prevalence of promotional and valorisation objectives on protection and enforcement objectives. Sometimes, the choice of the name can reveal complementary needs: generic and well-known denominations are chosen to meet the valorisation and protection objectives, accompanied communication of local specificities through by sub-mentions (as in the case of *Potteries d'Alsace*). These choices reveal specific strategies of the value chain, aimed to take advantage of some of the functions of the sign (not necessarily the consumer protection/guarantee functions). However, as already mentioned regarding agricultural GIs, the choice of a 'new' name for identifying the origin product should not be arbitrary. Instead, it should be justified by objectively verifiable evidence. For IGPIAs, the actors vested of the burden of proof for providing evidence of the claims contained in the product specifications are exclusively the applicants, while the INPI GI office carries out documental verifications. This type of configuration might expose rulemaking to arbitrary reconstructions of the justifications for inclusion or exclusion, which are not necessarily detected through the hands-off approach adopted by the INPI.

It is also important to highlight that the content of the product specifications and the application file is slightly different for IGPIAs and French PDOs/PGIs. In particular: (1) the product specifications are presented as a full-encompassing document, which following the text of the Intellectual Property Code, should contain the modalities of control envisaged by the control body. Consequently, the controllability document is not required. Controls are exclusively identified in the control plan, which are not the object of a separate document, and are directly written by the control body; (2)

the study on the economic and technical impact is not required. These less exigent requirements resonate with the hand-off purely legal type of assessment made by the INPI, and might encourage a less strict interpretation, by the applicants and the national authority, of the evidence-based approach for justifying the GI registration.

As to the **second level outcomes**, the governance configuration of the producer group is crystalised at formal recognition of the PDMO (as in the French agricultural GI system). The activity of monitoring of the governance of PDMOs is not directly pursued by the INPI by on-site inspections (i.e., the equivalent of the 'monitoring of PDMOs'), but through a written report of the PDMO to verify the compliance with the tasks and responsibilities defined by the Intellectual Property Code. The INPI does not directly supervise the control bodies (i.e., the equivalent of the 'monitoring of control bodies' pursued by the INAO is absent in IGPIAs).

Control bodies, accredited by the COFRAC, might pursue the control activity on the PDMO compliance with formal tasks and responsibilities defined by the Intellectual Property Code, if it is established in the contract stipulated with the PDMO. This control mainly targets administrative obligations, such as the update of the list of operators, the formal control of the representativeness, but it does not necessarily entail the direct participation of the control body in the general assemblies. The checks on fair representation and democratic functioning are not covered (not by the INPI, nor by the control body), as they are not mentioned by the Intellectual Property Code. This setup might expose registered GIs to governance inefficiencies which remain invisible to the national authorities and control bodies.

The control system for verifying the compliance with the product specifications in IGPIAs does not imply the internal control by the PDMO. To some extent, this configuration evokes the Italian PDO/PGI system. In Italy, the mechanism of independent interaction between each GI user and the control body *can be combined with* a centralised management (upon the Protection Consortium, if recognised after the GI registration). This configuration is justified by the simultaneous presence of GI users, members and non-members of the Consortium, a configuration derived from the optional membership to the producer association or organisation. Instead, in the French IGPIA system, being the membership *compulsory*, the non-centralised management of controls upon the PDMO seems to be justified by the mere reason of allowing more flexibility to the operators. This setup, combined with the absence of internal controls managed by the PDMO, might weaken or discourage cooperation between the operators.

3.5 SECTION II – Alternative experiences of valorisation and protection: Italian collective trademarks

This Section is aimed to analyse the Italian experiences of valorisation and protection of denominations identifying non-agricultural origin products, which is currently granted by CTMs involving national or regional authorities.

I introduce the similarities and differences between CTMs and GIs and I give an overview of the Italian context and of the use of geographical CTMs for valorising and protecting the origin and quality of goods in the agricultural and food sector. Then, I analyse selected case studies involving the use of CTMs for valorising and protecting non-agricultural origin products. I follow the A-P-O within the GKC framework applied to GIs and the axes of inquiry, applied using an *ex ante* approach, to target legally relevant issues affecting collective action in view of a potential GI registration.

This Section has the objective of identifying the gaps between the current solutions to valorise and protect these denominations through CTMs and the requirements of a GI application, considering that the national context is deprived of a national system of protection of GIs for non-agricultural products.

3.5.1 Ambiguities and overlaps between the valorisation and protection of origin and quality

Gangjee recognises that indications of source (which include GIs) and CTMs have '*apparent similarities* in communicative functions and the nature of the intangible interest' (emphasis added).[691] This similarity involves both the name-infrastructure and the resource-reputation. Concerning the name-infrastructure, the difference between GIs and CTMs lies in '(a) a collective interest in the availability of the name and (b) the use of a sign considered descriptive'.[692] These differences *per se* could impede a complete overlap between the tools. Moreover, even though both trademarks and GIs protect, ultimately, the product reputation, in GIs reputation is necessarily connotated as place-based. This difference is crucial as not only embeds the '*terroir* logic',[693]but it

691 In Case C-487/07 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd* [2009] EU:C:2009:378 ECR I-05185, the ECJ recognises that trademarks have more functions than the function of guaranteeing commercial origin, namely the function of guaranteeing the quality of the goods and the communication and investment function. The limits of this functional approach have been highlighted by Martin Senftleben, 'Trade Mark Protection – A Black Hole in the Intellectual Property Galaxy?' (2011) 42 International Review of Intellectual Property and Competition Law 383 <https://research.vu.nl/ws/portalfiles/portal/2902909/wipo+ipr+ge+11+topic8-part2.pdf>; Annette Kur, 'Trademarks Function, Don't They? CJEU Jurisprudence and Unfair Competition Principles' [2014] SSRN Electronic Journal <http://www.ssrn.com/abstract=2401536> accessed 12 July 2022.

692 Gangjee, *Relocating the Law of Geographical Indications* (n 3) 40.

693 ibid 76.

also posits the challenge of re-defining core concepts, such as 'ownership' and legitimacy of access and use.

Moreover, Gangjee refers to the early stages of the devising of a GI protection at the international level and highlights that 'the collective dimension to this valuable reputation would prove to be an enduring obstacle, particularly at the stage of defining entitlements. Trademark doctrine had developed around the legal requirement of distinctiveness, or the ability to indicate a single trade source as the basis for distinction on the marketplace. Accommodating a fluid group of users, as opposed to a specific commercial entity, ran against the grain. This is possibly yet another symptom of the liberal individualism bias in modern intellectual property law, where recognising the group or collective has proved challenging'.[694]Conversely, Santagata identifies in geographical CTMs the capacity of identifying origin products (embedded in cultural districts) and protecting reputation which 'has been constructed by the members of the organisation or association it belongs to'.[695] He however points out that 'the association has the right to say no to firms whose products or services fall below the standards set. Candidates whose quality is substandard, cannot enter the *trademark club* and this could generate conflict and uncooperative behavior' (emphasis added).[696] The use of the expression 'club' is particularly significative here, even though it can generate some ambiguities. It summarises how, the protected resource, which is place-based because anchored in cultural and natural environments, *can* be 'appropriated' by a group who decides 'what standards are important to maintain and what test firms need to pass in order to be granted authorisation to use the collective trademark'.[697] Despite this procedure might evoke symmetries with the process embedded in the GI initiative, it is substantially very different as the standard setting process is not subjected to specific requirements, and technical assessment as to the degree of accuracy and significance reserved to quality. In other words, the trademark owner is not tied to any obligation to provide objectively verifiable evidence grounding the correlation locality requirement and quality (i.e., the equivalent of the evidence grounding the origin link in GIs).[698] This exposes 'appropriation' to arbitrary enclosure of the shared resource which (still) is place-based reputation.[699]

694 ibid 75.

695 Santagata (n 585) 69.

696 ibid 73.

697 ibid 71.

698 However, art 75 Reg (EU) 2017/1001 on the content of the regulations of use only refers to the membership requirement, while the choice of the sign is subjected is limited by the distinctiveness requirement and the other limitations included in art 7 of the same Regulation, which reduce the applicant's margin of manoeuvre. These limitations (i.e., grounds for refusal) include non-deceptive use.

699 This calls an important point, which is, that, despite this duty to provide evidence and to describe product characteristics, GIs protection is *limited to the protection of the denomination* and should not extend to the product itself. As highlighted by Annette Kur, 'competition-sensitive elements of the product and its appearance therefore retain ''submarine'' status; they only emerge when use of similar products is prohibited on the basis of the GI' See Annette Kur, 'No Strings

Senftleben recognises that trademark owners' rights cannot be considered as 'absolute' and 'unconditioned', especially when the protected intangibles 'collide' with material belonging to the public domain (e.g., trademarks of cultural significance). These limitations have the objective of granting free access to material which should remain 'unencumbered by intellectual property rights' and relate to the eligibility for protection of the sign and to reserve the name for exclusive use. From the bundle of rights perspective explained in Chapter 1, this characterisation would correspond to 'the right to appropriation or withdrawal'. Conversely, my approach to GIs limitations involves the rulemaking capacity of the GI applicant-holder in crafting (or modifying) the conditions for the use of the sign. In the bundle of rights perspective, it would correspond to the right to exclude (i.e., the GI holder right to decide who has access to the use of the name). Yet, the question on the legitimacy of the appropriation or withdrawal, based on the eligibility of the name, should be considered as solved by the non-generic status for the denomination (i.e., the name identifies an origin product and has, objectively, the capacity to communicate on the origin link, that is to function as a GI).[700] However, the legitimacy of the GI operators to restrict access to the use of the name, 'owned by no one' but still being used in trade or language to identify origin products, is linked to how the group is constituted and how the decision-making process for rule-crafting is handled.

When the boundary rules are arbitrarily set by one actor, it is more likely that collective action aims to the satisfaction of his interests and needs (than to the formalisation of existing practices to which a larger group contributes). CTMs might grant more flexibility to the stakeholders taking the registration initiative,[701] although providing less safeguards on the capacity of the tool to

Attached to GIs? About a Blind Spot in the (Academic) Discourse on Limitations and Fundamental Rights' (2023) 54 IIC - International Review of Intellectual Property and Competition Law 87, 91 <https://link.springer.com/10.1007/s40319-022-01273-9> accessed 28 February 2023. I will come back to this issue in the last chapters of this work.

700 See Martin Senftleben, 'Trademark Law and the Public Domain' in Dana Beldiman, *Access to Information and Knowledge* (Edward Elgar Publishing 2013) <http://www.elgaronline.com/view/9781783470471.00012.xml> accessed 17 April 2023. Mazé considers GI characterisation as a 'positive approach to public domain' from the economic perspective, therefore focusing on free accessibility of toponyms, as material subjected to social dilemmas. See Mazé (n 109). My considerations are complementary to this approach and refer to public domain 'as a legal status'. From this perspective, the toponyms in public domain are freely accessible *because they are non-distinctive, therefore ineligible for protection*. In GIs, defining the ineligibility of the generic status of a name, including toponyms, is more controversial. Gangjee, *Relocating the Law of Geographical Indications* (n 3) 247.

701 Donner et al. identify the potential of place branding analysing case studies belonging to the French and Moroccan context. They recognise the potential of CTMs as a 'more flexible' and 'cross-sectorial' tool able to enhance local development, but recognise its limits with regard to (a) the exclusionary effects embedded in the draft of the specification or regulations of use; (b) the fact that public/publicly owned CTMs are not necessarily associated with a direct economic benefit for producers; (c) the difficulty of maintaining stakeholders' motivations and the involvement, as well as cooperation strategies. For more insights see Mechthild Donner, Fatiha Fort and Sietze Vellema, 'From Geographical Indications to Collective Place Branding in France and Morocco' in William van Caenegem and Jen Cleary (eds), *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development*, vol 58 (Springer International Publishing 2017) 173 <http://link.springer.com/10.1007/978-3-319-53073-4_7> accessed 13 April 2023.

generate public goods and maximise the public interest. This statement is more blurred when geographical CTMs are owned by public bodies, for example regions or municipalities. In these cases, the public nature of the owner and its 'missions' often do not grant sufficient safeguards for providing objective justifications of the 'appropriation' of the denomination.

Despite these conceptual differences between GIs and CTMs, the strict interpretation and implementation of the evidence-based approach permeating the EU GI *sui generis* system is not harmonised at the national level, and less present in the EU phase of the application. Because of these inhomogeneities, and of the absence of adequate mechanisms preventing collective action issues, the risk that the GI is managed 'as a trademark' is still present.[702]

Table 20: Comparison between CTMs and GI functions.

GI functions		CTM functions
Market related	Communication and distinctive (*excludability gradient concerning access/non ownership*; open-door principle)	Communication and distinctive (exclusive channel of communication); *exclusivity/ownership*; open-door principle.
	Consumer protection	Consumer protection
	Guarantee (*geographical* origin and distinctive characteristics AND quality essentially due to that origin)	Guarantee (*commercial* origin with some implications on quality standards attached to the commercial origin/for CTMs is the membership to an association; granting origin OR quality)
	Investment and advertising	Investment and advertising
Non-market related	Resource production (*public goods spill-overs*) under specific conditions (i.e., commons type of management)	Could be less performant than GIs because more prone to arbitrary boundary rules (i.e., less tied to the evidence-based approach to the making of the regulations of use). Encouragement of private or club good management.
	Local development (*public goods spillovers*) under specific conditions (i.e., commons type of management)	Could be less performant than GIs because more prone to arbitrary boundary rules (i.e., less tied to the evidence-based approach to boundary rules). They could favour cross-sectorial collective action dynamics, even though more exposed to the risk of dealignment from bottom-up or endogenous processes.[703]

702 According to my reconstruction, 'managed as trademarks' conceptually corresponds to club goods type of management. It will be shown later that this concept can also apply to public CTMs or CTMs owned by persons governed by public law, where rule-crafting is not (fully) a bottom-up process. Rather, rule-crafting in these types of CTMs evokes some features of club type of management following a top-down pattern where public bodies are the main decision-makers. This affirmation takes into account the 'blurred' or 'porous' classification of goods provided by Ostrom.

703 Donner, Fort and Vellema (n 701).

3.5.1.1 Access to the use of the sign and open door principle

Art 75 Reg (EU) 2017/1001, states that the regulations of use of geographical CTMs shall include, as a 'minimum content', 'the conditions of membership of the association and the conditions of use of the mark, including sanctions. The regulations governing the use of the mark **shall authorise any person whose goods or services originate in the geographical area concerned to become a member of the association,** which is the proprietor of the mark'.

Art 11(4) Italian Industrial Property Code states that 'notwithstanding Article 13(1), a collective mark may consist of signs or indications which in trade may serve to designate the geographical origin of the goods or services. Any person whose goods or services come from the geographical area in question is entitled both to use the mark *and to become a member of the trade association* owning the trade mark, provided that all the requirements of the regulation [of use] are met.[704] In that case, however, the Italian Patent and Trade Mark Office may refuse, by reasoned decision, registration when the trademarks applied for are liable to create **situations of unjustified privilege** or otherwise prejudice the development of other similar initiatives in the region. The Italian Patent and Trademark Office has the right to request, in this regard, the opinion of the public administrations, categories and bodies concerned or competent bodies. The successful registration of the collective mark consisting of a geographical name does not entitle the proprietor to prohibit third parties from using the name in trade, provided that such use is in accordance with the principles of professional correctness' (translation provided by this author).

The duty to provide access to membership to any potential user established in the geographical area and compliant to the trademark regulations, has often been evoked in this research and defined as the **'open-door principle'.** It is an element of *overlap* between GIs and CTMs as access to membership should be granted by anyone who complies with the specifications. The principle of access to membership in GIs is further specified with the compulsory or optional connotation of the membership to the producer group. In CTMs membership is compulsory, and it is at the core of the message conveyed through the sign.

3.5.1.2 Geographical CTM ownership and impact on the communication and guarantee function

CTMs can be owned by legal persons governed by public law. Art 74 Reg 2017/1001 states that 'associations of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued, as well as **legal persons governed by public law**, may apply for EU collective marks'. According to art 11 Italian

704 Amendments to Article 11 of Legislative Decree 10 February 2005, n. 30.

industrial property code: '*Legal persons **governed by public law** and associations of category of manufacturers, producers, service providers or traders, excluding the companies referred to in Book Five, Title Five, Chapters fifth, sixth and seventh chapters, of the Civil Code, **may obtain the registration of collective marks which they may license to manufacturers or traders** […]'* (translation provided by this author).[705]

In private CTMs (both according to the EU and Italian rules) the guarantee function (i.e., the message to be conveyed through the sign) is represented by the membership to an association; for CTMs owned by legal persons governed by public law **this membership requirement seems lacking** (even though the CTM registration *per se* does not preclude the creation of an association constituted by all trademark users). While it is uncontested that the relationship between the owner of private CTM and the users is participatory and associative, it is recognised that this type of relationship does not exist when the owner is a legal person governed by public law.[706] One might therefore question the nature of the relationship between the CTM owner and the users-licensees. In this regard, the duty to provide information in the 'purpose for which the legal person under public law has been constituted', specified in art 157-1 bis lett b) Italian industrial property code,[707] seems suggesting that the legal person under public law and the users should be linked by a 'functional relationship', meaning that there should be consistency between the responsibilities of the public body, the objectives of the CTM, and the activity carried out by the users. As a matter of fact, the activity of some legal persons regulated by public law, such as regional authorities in Italy, have as purpose the legislative rulemaking power and enactment of (public) policies aimed to territorial development. The anchorage to place so expressed, might create further ambiguities as to the cumulation of information on geographical origin *and* quality, the latter embedded in the regulations of use. More generally, it raised concerns on the overlap between GI and national CTM, the latter being used as alternative tools to communicate and guarantee quality *and* geographical origin in the marketplace. When detected in the agri-food sector, this overlap has been resolved by

705 Article amended with the implementation of Legislative Decree 20 February 2019 n. 15 emanated in compliance with Directive (UE) 2015/2436.

706 Annette Kur and Martin Senftleben, *European Trade Mark Law: A Commentary* (First edition, Oxford University Press 2017) 518; Marco Ricolfi, *Trattato dei marchi: diritto europeo e nazionale* (G Giappichelli 2015) 1758–1826.

707 Art 157 1-bis Italian Industrial Property Code: 'The regulations on the use of collective marks referred to in in Article 11 shall contain the following indications (a) the name of the applicant (b) **the purpose of the trade association or the purpose for which the legal person under public law has been constituted**; (c) the persons entitled to represent the trade association or legal entity governed by public law (d) in the case of a trade association, the conditions of admission of members; (e) the representation of the collective mark (f) the persons entitled to use the collective mark (g) any conditions of use of the collective mark, as well as sanctions for regulatory infringements; (h) the goods or services covered by the collective mark, including, where applicable, any limitations introduced as a result of the application of the regulations on designations of origin, geographical indications, traditional specialities guaranteed traditional terms for wines; (i) where applicable, the authorisation to become a member of the trade mark association referred to in Article 11, paragraph 4'.

the preference of the PDO/PGI protection, while CTMs can be used to designate the provenance *or* quality of the goods.[708]

One example is the trademark 'Qualità Controllata' (in English 'Controlled Quality'), owned by Emilia-Romagna Region established through Regional Law 28/99.[709] It guarantees to consumers that the covered product classes reflect specific quality standards (i.e., environmentally, and health-friendly integrated production). The possibility of using the trademark is open to any Italian producer who is compliant with the regulations of use, *independently from the region of origin*. In other words, its use is not formally restricted to the producers based in the geographical area of the Region (Figure 16, left). The trademark, semi-figurative, presents the wording 'Qualità Controllata', in the foreground, specifying that it refers to some sort of quality standards, and in smaller characters, the specification about the legislative basis, meaning the Regional Law, explicitly referring to the Emilia-Romagna Region. Moreover, the Guide for Applicants related to the trademark specifies that 'the font used and the colours green and red, *which coincide with those of the logo of the Emilia-Romagna region*, expresses the 2 important meanings of the quality concept: –green refers to the natural element and therefore to production techniques that respect the environment and health; – red, a colour with highly attentional frequencies, expresses the rationality of the Integrated Production methodologies. Finally, the light green colour of the background recalls the field in which the sector in which the label is used, namely that of agriculture' (translation provided by this author).[710]

708 Roberto Franco Greco, 'I Marchi Territoriali Pubblici Di Qualità Dei Prodotti Agroalimentari: Profili Critici e Prospettive Evolutive' [2018] Rivista quadrimestrale di Diritto dell'Ambiente 31 <https://www.rqda.eu/roberto-franco-greco-i-marchi-territoriali-pubblici-di-qualita-dei-prodotti-agroalimentari-profili-critici-e-prospettive-evolutive/> accessed 29 March 2023; Nicola Coppola, 'Lo Studio Della Questione Della Competenza Degli Stati Membri in Materia Di IG Agroalimentari Da Parte Dei Membri AIDA: Lezioni e Sviluppi' [2015] Rivista di Diritto Alimentare 61. The authors highlight that at present the orientation of the ECJ and national courts is in line with privileging the use of the PDO/PGI system when origin and quality are cumulated.

709 The ensemble of the documents, including the text of the Regional Law is available at <https://agricoltura.regione.emilia-romagna.it/dop-igp/temi/marchio-qc>.

710 Regione Emilia-Romagna, *Manuale Di Applicazione. Guida per Il Corretto Utilizzo Del Marchio Collettivo Regionale*, pp 18–27.

Figure 16: Logos of the semi-figurative CTMs 'Qualità Controllata' owned by the Region Emilia-Romagna the 'Qualità Controllata dalla Regione Abruzzo' owned by the Abruzzo Region.

Despite the regulations of use do not refer to the obligation of establishment in the geographical area, the communication and guarantee functions might imply the simultaneous presence of quality *and* geographical origin (*de facto*, the majority of the trademark users are established in the geographical area of Emilia-Romagna). A more flagrant example is represented by the trademark 'Qualità controllata dalla Regione Abruzzo' (Figure 16, right), registered as CTM at the EU level and established with Regional Law 13 January 2012 n.6.[711]

Legal scholars recognise the problematic nature of these types of trademarks, attributing these overlaps to a delay in the modifications of regional laws existing before 1992 (entry into force of the first GI Regulation).[712] In particular, a differentiation is made by Italian legal scholars between 'first generation' and 'second generation' regional CTMs. As to first generation CTMs, 'the Regions have essentially renounced to indicate the geographical origin of the product and have retained the reference to the territory only in the name of the region, which appears, however solely as the body accountable for licensing the mark or certifying the conformity of the product to the specifications'. Regarding second generation CTMs, legal scholars affirm that 'in addition to being registered as Community CTMs, they regain, at least in part, the function of indicating origin, which appears in the trademark as a secondary indication with respect to the main message of indication of quality'.[713] According to this classification, the semi-figurative CTMs 'Controlled Quality' owned by the Emilia-Romagna Region would belong to the 'first generation'. It is currently registered before the Italian Intellectual Property Office as certification mark.[714]

711 The regulations of use are available at <https://trasparenza.regione.abruzzo.it/content/marchio-qualita-controllata-dalla-regione-abruzzo-concessione>.

712 Clelia Losavio, 'Marchi regionali di qualità e origine per la tutela e la valorizzazione dei prodotti agroalimentari' [2015] Italian Papers on Federalism <https://www.ipof.it/marchi-regionali-di-qualita-e-origine-per-la-tutela-e-la-valorizzazione-dei-prodotti-agroalimentari/> accessed 1 February 2023.

713 ibid.

714 The convergence between collective and certification marks is accentuated when the owner is a public entity (because of the dissociation between the owner and the users). The distinction' between collective and certification marks is blurred, given by the presence of the regulations of use which identify (more or less precisely) common standards of production subjected to a control system. See Kur and Senftleben (n 706) 516.

The EU Commission states that 'where the activity concerns products covered by quality schemes other than schemes for Union-recognised denominations, the origin of the products may be mentioned *provided it is secondary in the message*. In order to determine whether the reference to origin is secondary, the Commission will take into account the overall amount of text and/or the size of the symbol including images as well as the general presentation referring to the origin as compared with the text and/or symbol referring to the key sales pitch, that is to say, the part of the promotion not focused on the origin of the product.'[715] This precision does not seem to be resolutive of the overlap between GIs and CTMs, also considering that the regulation of use do not envisage any duty to provide objectively verifiable evidence of the link between quality and geographical origin.[716] Moreover, it needs to be contextualised with the history of infringement procedures undertaken by the Commission against Member States, including Italy, concerning the infringement of art 34 TFEU (today art 28 TFEU). A strict approach has also been shown by the ECJ, while a less straightforward position has been assumed by the Italian Constitutional Court regarding regional CTMs. [717] In all these cases, the *leitmotiv* seems to be represented by an evaluation on whether the 'open door principle' (i.e., the accessibility and non-discriminatory nature of the use of the trademark open to actors established outside the regional administrative boundaries) is used to hide a (more or less explicit) cumulation between quality *and* origin.

Some CTMs might not be registered at the national nor at the EU level. In these cases, the competent authority preserves its independence in the management of the sign. It seems therefore appropriate distinguishing between **public CTMs** (meaning those established by regional or national law and managed, exclusively and autonomously, by the competent authority) and **CTMs owned by legal persons governed by public law** (still qualifying as private law instruments but owned and managed by persons governed by public law). Both these types of CTMs are currently used in Italy to valorise and protect denomination of non-agricultural origin products. More specifically, the CAT trademark belongs to the first category, the Murano Glass and Corallium Rubrum ad Alghero trademark to the second category. As such, and by analogy to those identifying agri-food products, they should be put in relation with art 28 TFEU and the (exclusive or cumulative) significance of the forthcoming GI protection extended to industrial products and crafts.

715 European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, para 466, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0701(01)&from=IT>.

716 In similar cases the Italian Constitutional Court for Italian CTMs had intervened to signal the incompatibility with the principle of free movement of goods See Corte Cost. 66/2013 (*Marchio di qualità ARSIAL*). For other examples, also outside the Italian context, see Greco (n 708).

717 Reference here is to other public CTMs registered by Tuscany Region and Puglia Region. For more insights on this examples see ibid.

3.5.1.3 The bundle of rights in public CTMs, CTMs owned by persons governed by public law, and GIs

As to the input and management of public CTMs and CTMs owned by persons governed by public law, various combinations (bottom-up or top-down) are possible: the input might come from producers but enacted by local authorities, or it might come exclusively from local authorities. The sign can be jointly managed by state actors and producers, it can be centralised on the State. From the point of view of distribution of rights, the model of the **bundle of rights** of Schlager and Ostrom would suggest the pattern showed in Table 2, Chapter 1. The owner (municipality, or region) normally has a full right to exclude and the right to manage the sign (the management might include monitoring and sanctioning).[718] Input for the management of the sign might come from the licensees, sometimes only informally, sometimes setting requirements to product specification design for potential applicants.[719] Licensees have the right to access and use the sign, once compliance with the regulations of use is verified. Public or publicly owned CTMs generally do not recognise the right to alienation upon the licensees.

Compared to the distribution of rights in GIs, the bundle of rights approach allows to observe a different pattern (Table 21). Firstly, the 'dissociation' between the owner and the user-licensee in CTMs is substituted by the **distinction between the GI producer group and the individual operator.** In public or publicly owned CTMs the owner is often identified with the public actor (region, or municipality), which establishes through national law and/or registers the sign ('appropriation'). The public actor is never the trademark user, which justifies the separation between the right to appropriation. **In GIs neither the producer group nor the individual operator are formally considered as the 'owner'.** However, the producer group, after the application for GI registration, formally has the collective right to appropriation, use of the name *and* the power to decide on the boundary rules (right to exclude). Secondly, in CTMs, the individual producer might have, informally, the power of influencing the content of the specification or regulations of use, depending on how the rules on rulemaking are written, and on the level of informality allowing spontaneous interactions between stakeholders. In Italian private CTMs, which are also used for identifying origin non-agricultural products, this analysis might lead to different conclusions. For example, individual producers, as members of the association or Consortium, could have much more discretional power.[720] In GIs, each operator, individually, has little decision-making power to

718 In the agri-food sector, the compliance with the specification can be verified by an external control body (third party control). The request is filed before the Ministry of Agriculture. See art 7, product specification, Qualità Controllata Abruzzo.

719 See ibid., art 6.

720 See, for example the experience of the Consortium 'Liutai "Antonio Stradivari"' for Cremona Violins. Constituted by the by the violin makers, it manages the CTM 'Cremona Liuteria'. See interview with representative Consortium, Cremona Liuteria CTM, 22 December 2021, para 8. A deep analysis of this experience is outside the scope of this book.

craft the rules, and the rules governing the decision-making might be precisely codified. He has an individual right to access and use the sign, if compliant with the product specification.[721] Thirdly, I identified in CTMs a 'full' right to exclude, while in GIs I consider it as 'mitigated', to highlight that GI applicants' decision-making power is limited by the evidence-based approach and State intervention. In both CTMs and GIs, the open-door principle does not impede the identification of arbitrary conditions for the use of the sign in the specifications or in the regulations. This means that **the right to exclude has important repercussions on the right to access**. In CTMs the owner has no specific constraints as to the content of the specification and regulations. In GIs, instead, the discretional rule-making power of the producer group encounters three limits: (1) the open-door principle; (2) the duty to provide objectively verifiable evidence of the link between the product characteristics and origin *and* compliance with the mandatory contents of the specification; (3) depending on the degree and modality of national authority intervention during the pre-application and application processes, the duty to modify the content of the specification taking into account the feedback received after a technical inquiry, public inquiry or consultation and the national opposition procedure; (4) the duty to comply with representativeness, fair representation and democratic functioning requirements, formally or informally assessed (and eventually monitored) by national rules. Finally, public or publicly owned CTMs, as GIs are usually non-transferable (right to alienation). Conversely, transferability might be an option when the CTM is privately owned.

Table 21: comparison between the distribution of rights in public and publicly owned Italian CTMs and GIs, according to the bundle of rights approach.

Type of right	**CTM (public) owner**	**CTM User/Licensee**
Access		x
Management	x	(x)
Appropriation	x	
Use		x
Exclusion (*full*)	x	
Alienation		
Type of right	**GI applicant (collective)**	**operator (individual)**
Access		x
Management	x	
Appropriation/use	x	x
Exclusion (*mitigated*)	x	
Alienation		

721 GI holders can be different from GI users depending on their role in the value chain.

This quick overview allows to better understand the Italian practice of protecting and valorising the denominations for non-agricultural origin products, in the absence of an EU wide GI protection.

3.5.2 When the rubber meets the road: analysis of Italian CTMs through the 'ex ante' A-P-O approach

The following analysis is based on the data collected through semi-structured interviews involving producers, local authorities, professional associations, and organisations who have participated in the debate on the extension of GI protection to industrial products and crafts (or have considered the GI as a possible tool for protecting their intangible assets).

The criteria used for the selection of case studies are the followings: (1) the interest for the extension of the GI protection to industrial products and crafts, demonstrated by the engagement in discussions on the reform at the national, EU, and international levels; (2) the identification of the characteristics of non-agricultural origin products and their contexts, as potentially benefiting from the GI protection.

The contribution given by the Italian cases is particularly interesting for two reasons: (a) to have an idea of the state of the art of current non-GI solutions for the valorisation and protection of 'GIable' origin products; (b) to highlight, though the *ex ante* approach, the gaps to be filled at the national level to reach the requirements of the GI protection when the national GI protection for non-agricultural origin products is not (yet) available. This analysis is contextualised to the Italian national system, a country with a long-standing tradition in GI protection. However, some considerations and approaches could be extended to EU countries with a younger tradition, equally concerned by the reform.

3.5.2.1 'Actors': producers' and external actors' involvement in publicly owned CTMs

In the following paragraphs, I will focus on axis of inquiry 'Actors' (heterogeneity of interest, motivation, role, and involvement can influence the rule-making process), defined in Chapter 2. I will mobilise the following parts of the GKC framework: (a) community attributes; (b) participants; (c) high-level external actors and (d) rules-in-use, which in this case include the national laws establishing and governing the CTMs. The following methodological questions will guide the *ex ante* analysis:

- Who are the *actors involved in the input and management of the CTM*? What are their roles, motivations, and interests regarding the *management of the sign and a potential* GI registration?
- Does this definition include actors who *are not* producers-users of the CTM? How does it affect the initiative?

- What is the role of national and regional authorities? Can local community members different from the applicants participate in rule-crafting? How?
- What are stakeholders' *feedbacks* on the legal performance of the *collective trademark*?

3.5.2.1.1 CAT trademark

The CAT trademark is identified, in national law, as a CTM. Not being registered before the Italian Intellectual Property Office, it can be assimilated to public CTMs because it is autonomously managed by the **Ministry for Businesses and Made in Italy**. The legal framework is represented by Law 188/1990 which describes a multi-level system. However, it does not specify who the owner of the trademark is, which brings this tool closer to the legal and institutional setting embedded in GIs.[722] This similarity is also supported by the identification of the CAT trademark as 'designations of origin for ceramic products in order to protect and preserve their technical and production characteristics'. Surprisingly, the multi-level system described by the Law does not replicate the bottom-up approach characterising the PDO/PGI systems. The input for the identification of the origin product and the actors comes from the **National Ceramic Council**, composed by state actors and operating exclusively at the national level.[723] It is also competent for giving input for the modifications of the specification, which follows a top-down pattern. The law states that the application for the use of the trademark is filed by 'the **Regional authority**, after having consulted the **local entities** and the **producers' organisations** established in the area' (art 8, Law 188/1990). The users of the trademark are **craftsmen** established in the 'area of established ceramic tradition' recognised by the National Ceramic Council and compliant with a product specification. Despite local specificities, producers can be more or less involved in the management of the tool. However, in all cases, key is the role of municipalities which often are the main drivers for collective action.

At the local level, the **product specifications committees,** nominated by the Ministry and designated by the National Ceramic Council, is composed by experts. Representation of voluntary consortia and professional categories considered most representative at the national level are also present (art 7 Law 188/1990). The product specifications committees are in charge of examining the application for registration and the control for the compliance with the product specifications; **voluntary consortia** can be recognised, although their presence is not compulsory for using the trademark; craftsmen do not need to be formally organised in an association for obtaining the trademark.

722 This similarity has also been recognised by Zappalaglio, who defines the regime designed by Law 188/1990 as 'quasi-public'. Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 21) 223.

723 5 members of representing state bodies, 5 members representing the Regions having major tradition in ceramic craftsmanship, 7 members of the municipalities having traditional ceramic craftsmanship (art 5 Law 188/1990).

3.5.2.1.2 Vetro artistico di Murano Collective trademark

The collective trademark protecting the name 'Vetro artistico Murano' ('Murano artistic glass') is established through Regional Law 70/1994. The trademark is registered before the EUIPO and internationally, it is a CTM owned by a legal person governed by public law (Veneto Region) and managed by the Consortium within the limits identified in the Deliberation of the Regional Council n. 1975 of 6 December 2016. The Region licenses the use of the trademark to the operators who are compliant with the regulations of use.

The first important actor involved in the management of this CTM is the **Veneto Region,** which gave the input for the creation of the Consortium, approves the modifications of the regulations of use and it can participate to the controls on the correct use of the trademark by the actors concerned.[724] The Regional Committee approves new applications within 60 days upon the presentation of the applications by the Consortium. It also receives oppositions in case the application is rejected, and it is in charge of approving the renewal of the license, every 3 years.

The tasks and responsibilities of the **Consortium** are defined by Regional Law 70/1994 and it is constituted by the producers concerned representatives of the professional associations. Created primarily to coordinate the promotional activities of the trademark, it 'is the point of reference for companies that produce the final product according to the rules of craftsmanship'; it manages the inquiry for the assessment of new applications and the register including all the trademark users. It pursues controls on the correct use of the trademark and can also propose sanctions in case of misuses of the trademark. It is important to note that the Consortium is composed by producers, and of representatives of the professional associations considered most representative at the national level. The Consortium has also been nominated for coordinating activities in the industrial district of Murano, and of Venice and surroundings. The industrial district is officially recognised by the Deliberation of the Regional Council n. 1796/2015, which also contains a formal definition of the industrial district.[725] The geographical delimitation of the district, grounded on statistical data, suggests a less strict perspective on the delimitation of the area where the glass production takes place. This is not irrelevant, as it could challenge the geographical boundaries defining the origin product, especially from the perspective of a GI registration.

Art 6 of Regional Law 70/1994 establishes that a **Protection Committee** ('*Comitato di Tutela*') shall be constituted by 7 experts operating in the island of Murano to monitor the activity of

724 Regulations of use, Murano Glass trademark, art 21.

725 'Local production system, within a defined part of the regional territory, characterised by a high concentration of artisan and industrial manufacturing enterprises, with a prevalence of small and medium-sized enterprises, operating in specific production chains or in related chains relevant to the economy'. See Deliberation of the Regional Council n. 1796/2015).

the Consortium. It is established through regional decree, and it has a mandate of 5 years. It shall also propose the content of the regulations of use and, eventually, its modifications. 3 members of the Committee are nominated by the craftsmen professional association, 2 members are nominated by the industrial professional association and 2 members are nominated by the *Stazione Sperimentale del Vetro*, an international research centre specialised in the supply value chain of glass. The participation of the local community of producers of the origin product to the decision-making process concerning the regulations of use is limited to those who are part of the Protection Committee.

The **actors allowed to use** the trademark are primarily those who 'produce artistic glass *in the territory of the island of Murano*' (art 3 Regional Law 70/1994). The application needs to be filed to the Regional Council through the Consortium (para 7 regulations of use) and the license is granted after the inquiry conducted by the Consortium (art 3 and art 5 bis para 3 Regional Law 40/1994). This rule implies that all glass producers based outside the area (e.g., Venice and surroundings) are not eligible for using the sign, even though they produce according to the traditional techniques described in the regulations of use. There are no obstacles in the Law for semi-processed product suppliers to join the Consortium.

Producers can sell their products themselves or through third parties. **Retailers** selling products identified through the CTM can be recognised by the Consortium as 'authorised shops'. Paragraph 18 of the regulations of use, states that 'retailers must prevent branded products from being sold, either by themselves, by their own staff and employees as well as by dealers promiscuously with other unbranded glass products. The latter shall always be visibly and clearly separated from the previous ones and without any possibility of confusion or deception of consumers'. The same rule is restated by art 8 lett b) Regional Law 70/1994. Additional searches showed that further obligations upon retailers are established for example the duty to display at least 80 per cent of the glass produced by Murano manufacturers authorised to use the mark.[726] Authorised shops can be identified with a specific logo, indicating the number of the license and the logo of the Consortium.

3.5.2.1.3 Corallium rubrum ad Alghero

The Municipality of Alghero is the owner of the CTM 'Corallium Rubrum ad Alghero'.[727] Since the trademark is registered before the Italian Intellectual Property Office, it can be identified as a CTM owned by a legal person governed by public law. The trademark registration responds to the following declared objectives: 'support and valorise activities that make and market handicrafts using *corallium rubrum*; create a distinctive graphic identity that allows consumers to immediately

726 For more insights see <https://www.regione.veneto.it/web/attivita-produttive/negozi-autorizzati>.

727 Regulations of Use, Corallium Rubrum ad Alghero, Art 2.

identify activities that sell products made from red coral and distinguish them from activities that market imitations. Provide craft and commercial businesses with communication and promotion tools with which to build their image and reputation.'[728] The 'dilemma' stimulating the institution of the CTM is also explicitly stated in the regulations of use, being the 'widespread marketing of products made from imitations of coral. This phenomenon has resulted in a decrease in the perceived value of red coral and related handicrafts, thus damaging the traditional craft economy and the tourist economy of Alghero in terms of identity and image.'[729]

The peculiarity of the CTM 'Corallium Rubrum ad Alghero' is that artisans and/or retailers are the identified as 'users'. They have the obligation, *inter alia*, to sell crafts exclusively made with authentic red coral harvested in the Mediterranean see, being subjected to controls, obligations to provide consumers clear indications of the CTM, on the product and on the shop and to avoid the use of other signs which could mislead consumers, and the obligation to comply with the regulations of use and with the product specifications.[730] They can propose modifications to the regulations of use, 'provided that they do not alter the artisanal character of the product and the tradition it conveys'.[731] The requests are evaluated by the Municipality with or without experts' opinions.

The Regulations also identify a **Guarantee Committee,** it is nominated every two years and it is composed by one representative of the municipality, one expert on the traditional local craftsmanship, one representative of the professional associations. The Committee is in charge of examining the applications after assessment on the 'cultural or artistic commercial relevance of the applicants' activities'.[732] Furthermore, it nominates the Control Committee and examines its reports, decides on the application of sanctions in case of non-compliance, monitors the activities related to the management of the CTM and manages the licensees register. Finally, it has a consultive role as to the valorisation and promotion of the commercialisation of the red coral.

The **Control Committee**, instead, is in charge of on-site inspections at the retailers-artisans premises for the verification of the compliance with the regulations of use. It is composed by one municipal employee, one local police employee, one sector representative, technical expert from within or outside the sector.

728 ibid., art 1.

729 ibid., p 1.

730 ibid., art 4.

731 ibid., art 20.

732 ibid., art 6.

3.5.2.2 Implementation of the national legislation

3.5.2.2.1 CAT Trademark: towards the empty shell?

Despite the original virtuous intent of Law 188/1990 to operationalise a multi-layer governance system it remains, for many aspects, unapplied. One example of the operational weakness of the Law resides in the inactivity of some of the key actors concerned, namely the voluntary consortia and, in some contexts, the product specifications committees. This situation varies on a case-by-case basis, and it is impacted by contextual specificities at the local level. The input for the establishment of the sign is top-down, while the management is formally shared between producers and state actors at the local, regional, and national level. However, during the focus group, participants used the expression 'life cycle' of the CAT trademark to explain the evolution of stakeholders' proactivity and motivation characterising the early stages of the registration by the applicants, which rarely persists over time. Currently, the 'functional performance' of the CAT trademark is not considered satisfactory especially from a valorisation perspective in the marketplace.[733]

An intermediate governance level between the operators and the national authority has been constituted, regrouping the municipalities sharing a tradition in ceramic craftsmanship. This governance level is very proactive in driving collective action initiatives at producer level, and it is formalised by the Italian Association of the Cities of Ceramics (AiCC). The mediation of AiCC, which is aware of collective action dynamics happening at the local level is crucial, especially during the process of construction of the product specifications. The contribution of AiCC is also important, given the purely documental assessment made by the National Ceramic Council in evaluating the product specifications. The National Ceramic Council, whose activity is important for the functioning of the CAT trademark, is not regularly appointed by the Ministry, which contributes to the fragilities of the system. [734]

I will take Faenza and Impruneta as examples of two municipalities involved in the use of the CAT trademark and characterised by different patterns of collective action. These experiences could be positioned at different starting points of a potential GI application.

In Faenza the product specifications committee is not assiduous in its meetings, and there is no control on the effective operationalisation of its functions;[735] consortia are not constituted.[736] Collective action at the local level is driven by the municipality which has currently the lead of the

733 Focus group, CAT trademark, 27 September 2021, paras 6, 26, 57.

734 Interview with representative AiCC, 28 September 2021, para 16.

735 ibid., paras 10-12.

736 Focus group, CAT trademark, 27 September 2021, para 55.

association *Ente Ceramica Faenza*.[737] However, 40-45 operators joined the association (out of 50). The activity undertaken by the municipality through the *Ente* is oriented towards the valorisation of the traditional local craftsmanship in the broad sense, without a specific focus on favouring collective action dynamics aimed to the creation of common standards of production. Yet, the variety of motivations driving producers' choices and explain some weaknesses of the functioning of the CAT trademark in this municipality. Some of the artisans can be considered 'innovation enthusiasts', others can be identified as 'tradition perpetrators'. This difference is relevant because it could shape stakeholders' expectations and interest towards a potential GI registration. Yet, the dilemma of resource depletion (for non-use) is only faced by the craftsmen that I defined 'tradition perpetrators', while the innovation enthusiasts aim for the promotion and valorisation of the place-based reputation, which is already conveyed through their individual trademarks, as identifiers of culture-based productions. Since this sector seems not to be affected by the issue of counterfeiting, the interest in registering the GI would be represented by the communication, investment and advertising functions combined with the local development function (relevance of the commercialisation of the ceramics for tourism). This specific stakeholders' position is also evident from their manifested interest in registering the name 'Ceramica italiana', much more oriented towards promoting the branding image of the Italian ceramic manufacture at large than to valorise and protect localised resources.[738] In Faenza the use of the CAT trademark is currently weak, and little known among consumers, and it has proven to be not so effective in maintaining collective action dynamics over time. Hence, the use of the CTM is not linked to economic benefits for producers.

In **Impruneta**, the operators involved in the management of the CAT trademark are the 7 terracotta kilns. 3 of these kilns are very ancient family-run businesses focused on traditional artistic craftsmanship, carried out integrally by hand. The product specifications for the CAT trademark mentions the inclusion of industrial producers, who mainly focus on the production of tiles and bricks. As mentioned earlier all the phases of the production must take place in the geographical area, including the sourcing of the raw materials, the key factor giving to the final product its specific characteristics and quality. The clay used has been extracted from excavation sites located in the geographical area, owned and managed by private companies, who are raw material suppliers of the kilns. Industrial producers own excavation sites and, in some cases, sell the clay to third parties. The clay can be supplied to the kilns ground or unground. It is to be pointed out that, compared to the past, there is no excavation site currently active in the geographical area, and the production activity pursued by the kilns is ensured by the stocks of clay accumulated over

737 Interview with representative municipality Faenza, 18 November 2021, para 2.

738 This aspect has also been confirmed by the Study on control and enforcement requested by the EU Commission. See Michaelsen and others (n 16) 50. However, one cannot affirm that it is a qualifying element of non-agricultural products since other products belonging to the same class face counterfeiting issues.

time through previous excavations or bought from suppliers based in the administrative boarders of the municipality of Impruneta. The major raw material supplier (who was at the same time an industrial producer) entered bankruptcy. The excavation site is currently closed, and its trademarks have been acquired by industrial producers established just outside the Impruneta administrative borders. From interviews emerged that four areas located in the municipality of Impruneta are formally considered as clay deposits, which can be potentially activated when the available stocks are exhausted.[739]

Coherently with the governance configuration suggested by Law 188/1990, the municipality of Impruneta has a key role in giving input and coordinating decision-making processes at the local level. The municipality representatives also hold the presidency of the committee, instituted by Regional Law 10/2008, dedicated to the promotion and valorisation (especially from a touristic, economic, and cultural perspective) of the terracotta production in Impruneta and federating various associations including the kilns.

These heterogeneous actors are all interested, in the first place, in the protection of the name 'Impruneta' against misuse. In particular, the input to collective action was represented by the use of the name by craftsmen established outside the geographical area and to identify (a) products effectively made using the clay coming from Impruneta or in its surroundings; (b) products made with the clay coming from outside; (c) products made without clay. The threats to the place-based reputation based on erosion for dilution is the main dilemma currently faced by stakeholders. The CAT trademark is currently perceived as not adequate to protect and promote the place-based reputation attached to the geographical name. In parallel to the dilution for misuse there is a need to valorise and promote this specific craftsmanship in the area, to avoid its disappearance (place-based reputation erosion for non-use). These interests and motivations are shared by both state actors and kilns and are the baseline for a strong collective action at the local level and drive the motivations and interests towards a possible GI registration. Participants would benefit both from the market and non-market functions of the sign: the **guarantee function** is embedded in the need to ensure that the pottery produced in Impruneta is made according to traditional practices, but most importantly, with the local clay; the distinctiveness of the product characteristics and quality deriving from the geographical origin would justify the reservation of the use of the name (**communication function**) and the development of targeted investments (**investment and advertising functions**). The need to valorise and further develop adjacent activities such as local tourism would justify the local development function and the interest in the resource production function is justified both regarding intangible resources (**local traditional know-how – cultural**

739 The quantity of clay necessary for the volume of production of the 7 kilns (as a whole) is of around 800-1000 cubic meters, while the industrial production of one enterprise alone requires 1000 cubic meters of clay Interview with representatives municipality Impruneta, 4 January 2023, para 4.

heritage preservation) and tangible resources, meaning the availability of the local clay over time, at present regulated by specific rules which target the resource units which is possible to subtract to avoid erosion (**environmental preservation**).

The terracotta producers participate, together with the local and regional authority representatives, to the product specification committee. As it will be shown later,[740] this configuration affects the nature of controls, which could be identified as prevalently following, at least theoretically, a peer-to-peer pattern.

The CAT trademark seems have stimulated collective action among the kilns. This initiative, which remains prevalently municipality-driven, favoured collaborative processes and the convergence of stakeholders' motivations and interests towards the valorisation and protection of the name 'terracotta of Impruneta'. However, the structural limitations embedded in the multi-level governance and in the nature itself of the CTM seem to poorly respond to current stakeholders' needs.

3.5.2.2.2 'Vetro artistico Murano' trademark: one response to multiple dilemmas

The Regional Authority had a key role for giving the input to the constitution of the trademark and of the bodies in charge of its management (Protection Committee and Consortium). However, its involvement in the management phase is weaker. Together with the municipality and with the contribution of the Chamber of Commerce, the core activities of these actors are the promotion and valorisation of authentic Murano Glass. Less present are the activities leading to the protection of the trademark (actions against counterfeiting), although perceived by stakeholders, users and non-users of the trademark, as a necessity.[741]

At present, the CTM is used by about 37 producers,[742] while the total number of operators based in Murano are way more numerous. The operators involved in the glass production in the area can be very heterogeneous in dimension, roles, motivations, and interests. A first factor of heterogeneity is **dimension** (family businesses coexist with big and well-known firms), a second factor is the **variety of manufactures** produced, according to the regulations of use, as 'traditional and local techniques' (this is the work of the kilns, identified by the red label as 'first stage manufactures',

740 See *infra* outcomes, control configuration.

741 Interview with producer n. 1, non-member non-user, Vetro artistico Murano, 22 November 2021, para 8; interview with representatives Consortium, Vetro artistico Murano, 22 November 2021.

742 List updated to November 2022, available on the official website of Veneto Region <https://www.regione.veneto.it/web/attivita-produttive/aziende-concessionarie>. Inquiries (dating back to 2015) report that in Murano are established about 150 craftsmen. See Regione del Veneto, 'I Distretti Industriali' Aggiornamento 1/2020 Quaderno n. 2 20 <https://www.innoveneto.org/wp-content/uploads/2020/12/QUADERNO-DISTRETTI-agg.-1_2020.pdf>.

and 'second stage manufactures', a lot more variegated, regrouping craftsmen specialised in the use of the grinding mill, the production of mirrors, pearls, etc.). Another factor of heterogeneity of the actors involved is their **role in the value chain**, as some actors produce only **semi-processed products** such as coloured glass blocks, frits, roads, *millefiori*, tubes rolled glass sheets and a typical manufacture technique called *reticello*. These semi-processed products have very specific characteristics and are issued of traditional local traditions and are sold to third parties, in Murano, in Venice and surrounding areas and internationally. Semi-processed products suppliers do not use the CTM, even though they are members of the Consortium, and they are among the licensees.

The manufacturers-users believe in the capacity of the CTM to reinforce the reputation of already existing individual trademarks considering the widespread use of misleading indications of provenance for non-authentic glass. The use of expressions as 'Murano', 'Murano Glass', 'local glass masters only' (to cite only some examples) are often accompanied by unofficial versions of authenticity certificates. This creates major ambiguities because, in addition to labelled productions that are not made in Murano, the number of manufacturers producing in Murano or Venice and surroundings who allude to the denomination is considerable. In this complex context, the dilemma primarily perceived by craftsmen is the erosion of the place-based reputation for dilution, which harms the capacity of the term 'Murano glass' to convey information on the geographical provenance of the goods and guarantee their authenticity (**communication and guarantee function**). This is also due to the weak power and financial resources of the Consortium for taking legal action against widespread misuses of the name.[743] The lack of trust in the performance of the CTM is the main reason justifying the low number of users compared to the total number of glass craftsmen. Producers who do not choose to apply for the CTM lament the high costs for obtaining the license,[744] and the absence of adequate benefits (i.e., actions against counterfeiting).[745] Other non-users (generally the biggest and most reputed manufacturers) do not believe in the capacity of the trademark to communicate on the place-based reputation, an objective already achieved by individual trademarks identifying culture-based productions. This

743 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, para 64.

744 250 euros max for preliminary inquiry pursued by the Consortium; the calculation of the annual fee is based on the number of employees: around 770 euros for enterprises with only one employee, 1100 euros for enterprises with 2 to 5 employees; 1650 euros for enterprises with 11-20 employees and 70 euros per employee for enterprises with more than 20 employees. The stickers are also paid by the users (for 500 stickers 125 euros, for 1000 stickers 160 euros, for 3000 stickers 360 euros, for 5000 stickers 500 euros, for 10000 stickers 950 euros, for 20000 stickers 1700 euros. This information result from the documentation shared by the Consortium. The costs (of the inquiry and the annual fee) that need to be sustained by the applicants-users is perceived as a barrier to access to the use of the trademark, especially for small manufacturers. See survey available at: <https://www.comune.venezia.it/sites/comune.venezia.it/files/page/files/documento_finale_anchioProgettoMurano_24_10_12.pdf>.

745 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, para 80 also confirmed by Luca Fratton, Vetro Di Murano: Autenticità e Comportamenti d'acquisto (Università Ca' Foscari Venezia) 29 <http://dspace.unive.it/bitstream/handle/10579/11755/842253-1213339.pdf?sequence=2>.

argument is reinforced by the fact that the CTM does not explicitly define quality standards, a potentially harmful element for high-quality, niche, productions. As it happens in Faenza for ceramics, owners of reputed individual trademarks are not convinced by the added value of the CTM, even though it is supposed to communicate on the collective identity embedded in local craftsmanship.[746] Other actors do not trust the Consortium as a management body.[747]

Another important factor is misleading information during the product commercialisation. I have already mentioned the possibility for the Consortium of certifying authorised shops allowed to sell authentic Murano glass. Currently 16 shops are recognised (11 in Murano, 4 within the municipality of Venice, and one in China). These numbers are extremely low, considering that in Murano, Venice and surrounding areas shops displaying Murano glass are many more.[748]

Last but not least, tendency of mitigating artisans' migration from the island of Murano, especially to Venice and its surroundings, reveals the public interest of the regional authority and municipality in achieving local development goals and to aliment traditional local know-how in the area (**local development and resource production function**). Nevertheless, the trademark did not completely succeed in decreasing this phenomenon, given the higher costs imposed by producing on the island and the incentives to use the trademark might not be enough to build a strong collective action among the glass producers.[749] This migration could potentially amplify conflicts between 'outsiders' and 'insiders', amplify the polarisation between industrial and artistic productions (the latter being still prevalent in the island), and question the legitimacy to use the sign, especially in view of a potential GI registration. This situation is also amplified by the willingness of the Consortium to federate only producers based in Murano, despite being in charge of the coordination of the entire district.[750]

3.5.2.2.3 Corallium rubrum ad Alghero: concerted efforts of municipality and producers

The institution of the CTM was a first response to an urgent need perceived by the craftsmen and retailers of Alghero, meaning counteracting misleading information as to the commercialisation of manufacts made with bamboo coral, cheaper and less valuable than those made with red coral.

746 Interview with producer n. 2, member non-user, Vetro artistico Murano, 23 November 2021, para 21-24.

747 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, para 80.

748 Data updated in December 2018 and available on the website of Veneto Region: <https://www.regione.veneto.it/web/attivita-produttive/negozi-autorizzati>; see also <https://www.promovetro.com/news/rassegna-stampa/i-negozi-autorizzati-marchio-vetro-artistico-murano-una-garanzia-in-pi-per-il-consumatore/>.

749 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, paras 26-28; Interview with producer n. 1, non-member non-user, Vetro artistico Murano, 22 November 2021, para 2; Interview with producer n. 2, non-member non-user, Vetro artistico Murano, 24 November 2021.

750 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, paras 26-42.

However, some issues can be raised concerning the aptitude of the CTM to convey information on the provenance of the red coral and the valorisation of local craftsmanship.

The municipality remains the leader of the constitution of the regulations of use of the trademark, despite a strong participation of retailers and artisans. The registration of the trademark was input for the creation of the Association Corallium Rubrum which gathers 18 licensees, among which 6 are both craftsmen and retailers.[751] The remaining members are only retailers.[752] Participants include both craftsmen and retailers, the latter being at the core of the initiative; there is almost full overlap between the community members and participants.

The red coral manufacts are crafted starting from raw materials of animal origin, which can be found only in some areas of the Mediterranean Sea, because of peculiar natural conditions. However, coral fishing is a traditional activity in Alghero. It is done manually, upon authorisation by the competent authority, and is subject to strict rules at the national and regional level as to the quantity of resource units which can be extracted, period of fishing, modalities, and control mechanisms, including traceability. Those elements, currently not at the core of the CTM, could be fully valorised through a GI characterisation, if specific additional rules were envisaged by the stakeholders.

3.5.2.3 'Process': traces of representativeness, representation, democratic functioning, and access to membership in the rulemaking of CTMs

In the next paragraphs, I will focus on axis of inquiry 'Process' (principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing product specifications design and GI management), as defined in Chapter 2. I will look at the following components of the GKC framework: (a) main action situation (product specification design), (b) rules-in-use. I will answer the following questions:

- What are the legal rules and principles *currently* governing the *regulations of use of the trademark*?
- How are these rules interpreted, operationalised, and enforced by the stakeholders involved at the national and local level? *How do these rules or principles impact on the outcomes?*

751 Interview with municipality representative, Corallium Rubrum ad Alghero, 1 December 2021, para 24.

752 About 21 retailers/producers established in the city of Alghero. 2 retailers decided to not to apply for the license of the CTM.

3.5.2.3.1 CAT Trademark

The representativeness and fair representation requirements are specified only for the product specifications committees (art 7 Law 188/1990), while for the National Ceramic Council and voluntary consortia only representativeness requirements are defined. The principle of democratic functioning seems to emerge in the wording of the law, which refers to the voting system 'one member one vote' (e.g., the representatives of the Regions participating to the National Ceramic Council have deliberative vote, according to art 5).

3.5.2.3.2 Vetro artistico di Murano Collective trademark

The **regional authorities** have a key role, but there is no explicit information on the rules governing the decision-making process. They are involved in the formal administration (including the coordination of promotion initiatives) but seem to be not directly involved in the decision-making related to the management of the sign. Rather, they supervise the activities undertaken by the Consortium (art 5 ter, para 2, Regional Law 70/1994).

The **Consortium** is constituted according to art 2602 cc and seq.[753] Membership to the Consortium is not compulsory to access the use of the trademark. Are admitted to membership, the manufacturers *'artisanal and industrial*, operating in the Murano artistic glass sector and related sectors in any legal form, as well as their professional associations. All the members must have their glass production site on the island of Murano'.[754] It is not explicitly stated that retailers are not allowed to become members. Additional requirements for membership are 'not being banned, incapacitated, bankrupt or subject to compulsory liquidation' and 'offer a guarantee of morality, professional skills, commercial seriousness'.[755] The latter criterion reflects the intent of encouraging virtuous practices among the users. However, the criteria of assessment of some requirements remain implicit and leave room for discretional evaluation by the Consortium. The governance structure of the Consortium is rather simple, and does not include any specific committee for granting the representation of the heterogeneous stakeholders involved. However, the fair representation requirement concerns the professional associations involved in the glass manufacture and mostly representative on the national territory. There is no specific rule on representativeness. The democratic functioning is shown by the equal repartition of the votes, one vote being assigned to each member.

The rules on the **Protection Committee** qualify its composition (art 6 Regional Law 70/1994) but they do not explicitly specify how the decisions are taken (e.g., formal vote or consensus).

753 Regional Law 70/1994, art 5 bis.

754 Statutes of the consortium, Vetro artistico Murano, art 6.

755 ibid.

3.5.2.3.3 Corallium rubrum ad Alghero

Stakeholders do not have to be members of the Association 'Corallium Rubrum ad Alghero' to use the CTM.[756] Founding, ordinary and honorary members are specifically identified in the statutes, while the access to membership is granted to the municipality. No specific rules are provided on representativeness nor fair representation. The decisions are taken by vote and follows the principle ('one member one vote'), while the decision-making of all the other collective actors involved in the management of the sign and compliance is not specified.

3.5.2.4 Implementation of the national legislation

3.5.2.4.1 CAT Trademark: informality of the pillars

Despite the presence of traces in the pillars in Law 188/1990, their formulation is sufficiently vague to leave their operationalisation to informal arrangements at the local level. In this context, AiCC plays an important role as intermediate actor between the municipalities (and the producers) and the higher-level governing bodies. The higher level of proximities and deeper knowledge on local collective action dynamics is decisive in this regard.[757]

In **Faenza,** membership to the *Ente Ceramica Faenza* is not necessary for using the CAT trademark. Membership is open to producers, but also to connoisseurs, associations or other institutional actors. The Association *Ente Ceramica Faenza* is free to reject applications for membership, based on the discretional assessment of the Scientific Committee. The democratic functioning is ensured by the rule 'one member one vote'. The product specifications committee in Faenza is inactive and the activities of the *Ente Ceramica Faenza* are not fully targeted on the valorisation of the CAT trademark.

In **Impruneta,** the access to the use of the CAT trademark is not subordinated to the rule on compulsory membership, but producing the manufacts entirely in the geographical area is a strict requirement for having access to its use. All the production phases must be carried out within the borders of the municipality of Impruneta. The kilns are members of the product specifications committee, together with some representatives of the industrial producers and of local and regional authorities.[758] Raw material suppliers are not represented in the product specification Committee, nor in other associative realities such as the promotional committee 'Road of Terracotta' (instituted by Regional Law 10/2008). State actors are always represented together with the operators, while raw material suppliers do not seem to participate in the governance

756 However, the statutes of the Association explicitly state that if a member loses the right to use the trademark it automatically loses the right to membership (art 6, Statutes of the Association Corallium Rubrum).

757 Interview with representative AiCC, CAT trademark, 28 September 2021, para 16.

758 See Statutes product specifications committee of Impruneta, source provided by the municipality.

structure, despite the provenance and quality of the raw materials is key for determining the distinctive characteristics of the product.[759]

3.5.2.4.2 Vetro artistico di Murano Collective trademark: complex contextual peculiarities

The rules governing the decision-making processes involved in the constitution and management of the CTM remain for the most part informal. This circumstance makes it particularly difficult to decode collective action in this specific case. Interviews show that the supporting role of the regional authority is essential for structuring collective action. However, it also emerged that the different degree of proximity to the local context of Murano between the Region and the Consortium and the wider scope of the missions of the regional authority engendered asymmetries with the strategies proposed by the Consortium.[760] The involvement of the regional authority should guarantee the impartiality of the decisions taken by the Consortium. The status of owner confers to the regional authority stronger powers of taking decisions, while residual powers are assigned to the Consortium in this regard.

It is interesting to note that the heterogeneity of the actors involved identifies different categories of users: (1) the users-participants, (2) the users-non participants, (3) the participants-non users. The first category of stakeholders regroups those actors who are at the same time members of the Consortium and licensees of the trademark (about 30, according to the official list displayed on the Consortium website). The users non-participants are about 11.[761] The users (regardless their participation to the Consortium) cover both the first and second stage manufactures. Only one participant is a non-user of the trademark, as he produces semi-processed products.[762] The retailers are not members of the Consortium, even though they are subjected to specific rules contained in the regulations of use. The governance structure of the Consortium does not currently reflect the nuance between heterogeneous stakeholders, in particular their representation in specific committees.

3.5.2.4.3 Corallium rubrum ad Alghero: a consensual initiative of heterogeneous actors

As already mentioned, the input for the establishment of the CTM has come from the operators, while the municipality has a key role in coordinating decision-making for amending the regulations

759 Interview with representatives municipality of Impruneta, CAT trademark, 4 January 2023, para 9.

760 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021, paras 26-28.

761 This number has been generated comparing the list provided on the website of the Consortium with the official list of licensees available on the website of the Veneto region and updated to November 2022. The existence of users/non-participants recalls the governance structure of the Italian GI system (where membership is not compulsory). However, in the case of the CTM it adds nuances concerning the content of the guarantee function of the trademark. Yet, the belonging to a group constitutes the main information being conveyed by the trademark. It can be questioned if for publicly owned CTMs, adjustments to the content of this function are needed.

762 Interview with producer n. 2, member non-user, Vetro artistico Murano, 23 November 2021, para 36.

of use and specification, as well as on monitoring and enforcement of sanctions. The right to membership to the Association (which is voluntary) is accessible to both producers and retailers, which are users and participants of the activity undertaken by the Association. Therefore, it can be considered, for the current purpose of the CTM, representative (only 2 retailers did not join the CTM). Fishermen, despite having a pivotal role in fishing local coral, are currently not (formally) involved in the governance of the trademark.[763]

At present, the governance structure of the Association, which remains the sole actor federating producers, does not provide specific committees, even though differentiated membership status is assigned to founder members, ordinary members, honorary members (without the specification on consultive and deliberative vote). The decision-making within the Association is regulated by the rule 'one member one vote' and following the majority rule.

3.5.2.5 'Outcomes': boundary rules, control system and impacts on collective action

In this final part, focus on the axis of inquiry 'Outcomes' (clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration), as explained in Chapter 2. I will consider first level (product specification, and adjacently statutes and control plans, *where present*), second level (governance and control configuration) outcomes and corresponding rules-in-use within the GKC framework applied to GIs. As in Section I and in Chapter 2 Section II, the second level outcomes are analysed taking into account the outcomes of adjacent action situations (i.e., statutes and control plan design). I will answer the following questions, from an *ex ante* perspective:

- **1st level outcomes:** what are the solutions found by the participants (with the involvement of the external actors) to solve or mitigate the social dilemma affecting the resource? How do actors justify these choices? *How would they need to be rephrased to meet GI standards?*
- **2nd level outcomes:** How are the rules of the specification controlled and enforced? How does this frame impact the governance configuration of the sign? *Would these rules and control mechanisms be enough to operationalise the GI functions?*

3.5.2.5.1 CAT trademark

The objective of the CAT trademark is to valorise artistic productions which have a form of anchorage to local traditional know-how. It is therefore more general than the objective embedded in a GI. The requirements provided by Law 188/1994 are not strict as to the formal justifications (i.e., evidence) for proving the **causal link** between the specific characteristics of the product and local tradition, although some formal requirements are specified for the content of the product specifications. Art 8 (para 1 and 2) affirms that, in addition to a geographical delimitation of the

763 Interview with producer, Corallium Rubrum ad Alghero, 20 December 2021, para 31.

area of production 'the product specification for artistic ceramic of an area with an established tradition describes and defines *the fundamental characteristics* of the ceramics of that area, with particular reference to patterns, shapes, styles and decorations considered typical, processing and production techniques, the materials used and their origin'. It also 'indicates the *technical solutions for the incontestable proof of the origin of the product as well as the evaluation criteria*, for the purposes of art 11 [the control for certification]'. No specific rules provide **controls** on the representativeness, fair representation, democratic functioning, and access to membership of the governance at the local level since the presence of an organised producer group is not necessary for using the CAT trademark. The rules on the controls for verifying the compliance with the product specifications are defined by the National Ceramic Council (art 6 Law 188/1990), and the product specifications committees are in charge of the control activity. However, no specific and harmonised control plans for compliance with the specifications must be submitted by the applicants.

3.5.2.5.2 Vetro artistico di Murano Collective trademark

The regulations of use 'define the *fundamental characteristics* of Murano artistic glass with particular reference to models, shapes, styles, typical or innovative decorations that can be attributed to *typical ones*, to processing and production techniques as well as the types of materials used' (emphasis added, translation provided by this author).[764] This rule refers to the main features of the variegated production rooted in Murano. The models, shapes, styles 'that can be attributed to typical ones' including 'processing and production techniques' and materials, are not described in detail. Regional Law 70/1994 explicitly refers to 'artistic and production *criteria* that, although innovative, respect the Murano tradition such as, *but not limited to*: a) first-stage glass manufactures; b) engraved, decorated and ground glass; c) mirrors; d) articles for lighting; e) beads, *conterie* and *murrine*; f) lamp glass'. The mentioned 'artistic and production criteria' are not explicitly mentioned in the regulations of use, nor it is required by Regional Law 70/1994. Moreover, the list provided on the production consistent with the Murano tradition (although innovative), is not exhaustive. To understand the reasons for keeping the definitory boundaries so blurred, one needs to consider the rationale behind the creation of the CTM. The main declared objectives of its institution reside in giving information to consumers concerning the authenticity the glass sold in Murano and in Venice through an efficient traceability system (which uses a QR code), used directly on the products. The trademark 'Vetro artistico Murano' is defined by the stakeholders as simple 'indication of provenance' and not as a trademark conveying simultaneously on the origin and quality of the products. However, it might still be questioned to what extent the criteria used to identify eligible local productions implicitly reflect an assessment on product quality. As a matter of fact, the message to be conveyed to consumers through the trademark is on the authenticity of

764 Regulations of use, Vetro artistico Murano, art 8.

the glass made in Murano as a factor of distinctiveness from the glasses imported from elsewhere (for example from extra-EU countries). Therefore, local production should *de facto* have distinctive characteristics from non-local production.

The **delimitation of the geographical area** is defined autonomously by the Region, that can set the threshold for providing the necessary evidence to justify the rules having exclusionary effects. In practice, however, the establishment of restrictive geographical boundaries is in contrast with the current situation of local glass craftsmanship in Murano. The boundaries defined by the trademark, at present, do not coincide with the boundaries of the district, which extends beyond Murano, in the area of Venice and its surroundings, where some Murano masters have migrated over the years.

The absence of explicit quality measurable standards (i.e., additional specificities connotating the 'traditional method of production') impacts on the control system. No requirement in the law specifies which are the specific checkpoints and actors controlled on the technical steps of the method of production. The activity of the Consortium is verified by the Protection Committee, but this verification seems to happen informally, as no codified parameters orient its monitoring.

3.5.2.5.3 Corallium rubrum ad Alghero

In the product specifications the **description of the raw materials** is particularly detailed and includes measurable parameters. Despite the generic mention of historical sources proving the higher quality of the coral present near Alghero coast, the provenance of raw materials is extended to the whole Mediterranean Sea. The physic, chemical and biological characteristics of the red coral are objectively identified, as well as the determinants of its typical natural colour. In the product specification no specificity is added as to the characteristics typical of the red coral of Alghero.

It is important to mention that the red coral fishing in the Italian territorial waters is currently regulated, at the national level, by strict rules[765] and by even stricter rules at regional level.[766] These rules are particularly interesting as they are aimed to 'implement the precautionary approach to coral harvest management; combat and prevent over-exploitation to ensure long-term yield by maximising population size within biologically sustainable limits; establish management

765 Ministry of Agriculture, Decree 21 December 2018 n. 26287, Adozione del Piano nazionale di gestione per la raccolta del corallo rosso (Corallium rubrum) nelle acque marine del territorio nazionale.

766 Decree n. 936/DECA/15 of 24 March 2021 (regulatory framework for red coral fishing in region Sardinia). See <https://www.regione.sardegna.it/documenti/1_38_20210325111106.pdf>.

measures to adjust exploitation rates and harvesting capacity to sustainable levels'.[767] These rules are not recalled in the product specification, as the main focus of the trademark is protecting the *commercialisation* of coral crafts without specific reference to their provenance. However, they play a fundamental role for the preservation of the raw materials and the related natural environment and can be interesting from a GI perspective.

The description of the final product is not particularly detailed. Some rules generally define the processing techniques and most frequent shapes. However, no specific anchorage of these shapes and techniques to the cultural local and traditional environment is included.

Checks on the effective *commercialisation* of red coral handcrafts is regulated through the control plan established by the Guarantee Committee. The Regulations of use (at art 11-13) provide graduate sanctions in case of non-compliance. A warning follows minor non-compliances, a fine of up to 3,000 euros follows repeated serious or minor non-compliances and suspension from the use of the CTM (which might be accompanied by a fine) in case serious non-compliances.

3.5.2.6 Implementation of the national legislation

3.5.2.6.1 CAT Trademark: between expectations and inefficiencies

In practice, each **product identified** with the CAT trademark must be compliant with specific product specifications, which follow a standard template. The **controllability** of the rules contained in the product specifications is not an explicit requirement, and the expression 'technical solutions for the incontestable proof of origin and evaluation criteria' does not automatically ensure that the product specifications are detailed enough to envisage check points and graduated sanctions. The same can be inferred as to the evidence of the anchorage to traditional tradition in ceramic craftsmanship.

Structured controls are envisaged (but rarely applied) as to the compliance with the product specifications, while they are absent for the governance structure, which is left to informal patterns. It is important to highlight that role played by the municipality in the management of the sign seems to relieve producers from their responsibilities as to maintaining a structured organisation over time. This configuration can (negatively) affect their empowerment and self-organisation capacity. The control system is entirely managed by product specification committees, but in

767 See art 2, Decree 21 December 2018. From the perspective of the environmental conservation, particularly interesting are the rules concerning the maximum quantity of resource units which is possible to harvest (e.g., quantity not exceeding 2.5 kg per day, which needs to be cumulated with rules on the minimum size of the branch diameter allowed), traceability, identification of the geographical area allowed and forbidden, and control mechanisms enacted by the competent authority.

practice they are not always operational.[768] As a consequence, the strictness and regularity of controls on the operators' compliance with the product specifications depends on the context.[769]

In **Faenza**, the product specification mentions the distinctive attributes of the product as anchored in traditional, local know-how.[770] The prevalence of the 'human component' results in distinctive traditional decorations and shapes/product types (garlands, faience etc.). It is more and more frequent however that artisans depart from these traditional characteristics to adapt to the current consumer's preferences. This causes, on the one hand, the increase of productions based on innovative designs and techniques (unique pieces) well known to consumers for their quality. Provenance, although indirectly, still plays an important role in building the reputation of the products which are characterised by virtuosity and experimentation.[771] On the other hand, it is more difficult to devise common characteristics and quality standards anchored to traditional craftsmanship.[772] This aspect can be particularly challenging in view of a GI application. However, it seems to be not particularly significant for the CTM.[773] The fact that Law 188/1990 allows to use semi-processed products coming from outside the geographical area (and the 'network' of certified 'CAT' productions) can potentially dilute the origin link.

The **choice of the name** 'Ceramica Artistica Tradizionale di Faenza' seems not enough performant to valorise the local production in the marketplace and interview showed a stakeholders' preference to be identified, with a possible denomination registered as a GI, as 'Italian ceramics'. This argument is significant as it shows that operators are more interested in investing on a denomination which, referring to the whole country rather than to a specific place, dilutes the origin link. While a more general denomination can, sometimes, communicate more efficiently on the place-based reputation to consumers, a careful analysis should be ensured to avoid excessively relaxed attitudes towards the duty to provide verifiable evidence on the origin link. Similarly, a stricter approach might be required for assessing producers' representativeness and fair representation.[774]

768 Interview with representative AiCC, CAT trademark, 28 September 2021, paras 13-14.

769 ibid., para 40.

770 The Study on control and enforcement requested by the EU Commission highlights, with regard to Faenza Ceramics, that 'The link between the product and the place, when not obvious like in the case of stones, is often established by making reference to the history of the product and the traditional features of its production techniques.' Michaelsen and others (n 16) 43.

771 Interview with representative AiCC, CAT trademark, 28 September 2021, para 8.

772 Interview with representative municipality Faenza, CAT trademark, 18 November 2021, paras 39-40.

773 Interview with representative AiCC, CAT Trademark, 28 September 2021, para 10.

774 The *Savon de Marseille case* (Cass com., 16 March 2022) is an emblematic example, resolved by the *Cour de Cassation* with a negative assessment on the completeness of the specification as to the delimitation of the geographical area. I mentioned some counterbalancing safeguards to the identification of region-wide geographical areas: the Tuscan Olive Oil and Alsace Pottery cases suggest a possible use of a sub-mention to preserve product specificity.

In **Impruneta** the requirements of the product specification have been interpreted more strictly. The distinctive characteristics of the product are less debatable and derive from the use of the local clay and the presence of traditional local know-how (encompassing both handmade and industrial productions). However, the **chemical-physical characteristics of the local clay** are not mentioned in detail, despite several studies have been undertaken to identify its properties. They impact on the distinctive quality and characteristics of the products, including the changing colour of the pottery due to chemical composition of the clay, and the type of grounding.[775] Similarly to what observed in the *Absolue Pays de Grasse* case, a wide characterisation of the distinctive attributes of the product *in addition to* the provenance of the raw materials might represent a gap to be fulfilled to meet GI standards.

The method of production is described referring to product types and includes industrial products. Applying the GI logic to this specific aspect, might raise debates on the legitimacy of the applicant. The presence of long-standing industrial productions and excavation sites just outside the administrative boarders of Impruneta, could impose the extension of the **geographical area**.[776] The modification of the geographical area would be subordinated to the following conditions: (1) a technical assessment proving the uniformity of the geological characteristics of the clay in the delimitated geographical area (2) the homogeneity of the production standards operationalised by producers in the two adjacent areas. This aspect is particularly critical from a collective action perspective, as it would limit the decision-making power of the 'artisanal' operators. However, it clearly highlights how an independent assessment carried out for gathering objectively verifiable evidence justifying the origin link (impacting on the delimitation and product characteristics) can avoid arbitrary enclosures. Moreover, it can prevent the ex-post occurrence of outsider issues.

Interviews reveal that the **denomination** currently used to identify the products is 'Terracotte d'Impruneta', considering that the name 'Terra d'Impruneta' has been the core of the marketing strategy of both the kilns and industrial producers (in Impruneta and in its surroundings) for a very long time. Those names are currently exposed to usurpations and misuses, outside the currently identified geographical area.[777]

A formal control plan is lacking. The difficulty in identifying external technical expertise for pursuing controls on the compliance with the product specifications pushed for a direct participation in

775 The product specification states that raw material producers are 'forbidden to sell clay outside the geographical area'. In practice this rule is ineffective. The lack of an explicit correlation between the locality requirement and the generic quality of the raw material raises some questions on the compatibility of the current version of the specification with the principle of movement of goods (especially if maintained as such in the GI specification).

776 Interview with representative municipality of Impruneta, 4 January 2023, paras 4-5, 7.

777 ibid., paras 8-9.

product specifications committee of the operators themselves.[778] Consequently, the control configuration (informally) seems to follow a peer-to-peer pattern. This choice bears the risk of informally weakening the rigorousness of controls. The issue of identifying technical expertise seems commons to various non-agricultural products. However, in view of the implementation of the GI protection, the identification of an independent body in charge of third-party control for certification represents another gap to fill.[779] Targeting check points on governance would also help verify the permanence of enduring structure, as well as democratic and non-discriminatory decision-making processes.

3.5.2.6.2 Vetro artistico di Murano: is provenance self-sufficient to grant authenticity?

The formulation of the product specifications responds to the specific objectives of the CTM. However, an *ex ante* approach to GI characterisation imposes to further inquire on the specific characteristics and qualities derived from place. Interviews reveal different viewpoints: some participants clearly state that the **provenance *per se* can grant the authenticity of the product**. Despite this affirmation, it seems particularly difficult, at this stage, for the operators, to devise explicit common standards of production, given the considerable variety of manufactures defined as 'Murano glass'.[780] Another important aspect which might dilute the territorial specificity of the product is the fact that **semi-processed products**, including the traditional *murrina*, is exported all over the world as well as the specific production techniques.[781] Nevertheless, some participants recognise that Murano glass could still be recognised for its distinctive features, consisting in the characteristics of the raw materials and the styles.[782] Given these elements, it could be possible identifying some minimum quality standards, despite different elements and parameters would need to be set for each type of manufacture.[783] All participants describe, as a common distinctive character of Murano glass, the virtuosity, precision, and ductility of the techniques, which are specialised and mastered for an wide range of products. In Murano, glassmaking is a real business (in terms of volumes of production and time of production) rather than a one-time artistic experience and, as such, it requires considerable manual skills.[784] However, these factors are vague, raising questions on the formulation of rules and their controllability. Similarly, the reference in the regulations of use of the CTM to 'criteria which, despite innovative, are coherent

778 Interview with producer n. 1, CAT trademark, Impruneta, 13 December 2021.

779 ibid., para 88.

780 Interview with representative Consortium, Vetro artistico Murano, 22 November 2021, paras 48-53 and 19-23; interview with producer n. 2, member and non-user, Vetro artistico Murano, 23 November 2021, paras 45-50; interview with producer n. 1, member and user, Vetro artistico Murano, 23 November 2021, para 7.

781 Interview with producer n. 2, member and non-user, Vetro artistico Murano, 23 November 2021, paras 54-58.

782 Interview with producer n. 1, non-member non-user, Vetro artistico Murano, 22 November 2021, paras 27-28.

783 Interview with producer n. 1, member and user, Vetro artistico Murano, 23 November 2021, paras 17-22.

784 ibid., para 25-28. See also interview with producer n. 1, non-member non-user, Vetro artistico Murano, 22 November 2021, para 26.

with the tradition of Murano' seems affected by the heterogeneous **quality standards** and a lack of minimal requirements in this regard.

Interviews showed that **a documental and visual type of control** is pursued by the Consortium and representatives of the regional authority.[785] This control does not require technical expertise and is only aimed to verify that a specific type of production is effectively carried out in Murano.[786] As in Impruneta, the identification of an impartial body which carries out a technical assessment would be required, from a GI perspective. Differently from Impruneta, however, the *Stazione del vetro* is an actor already recognised for its technical expertise in the area.

3.5.2.6.3 Corallium rubrum ad Alghero: provenance beyond quality?

The prevalence in the product specifications of information related to the specific characteristics of the **raw materials** used, confirms that this trademark is aimed to convey, *notwithstanding provenance*, information on the *quality* of the products commercialised in the city of Alghero.

One important aspect characterising coral craftsmanship is the **difficulty to define '*a priori*' the shapes and technique** since the craftsman's creativity is heavily influenced by the shapes of the natural branches. This characteristic is particularly relevant in the perspective of the identification of common standards of production and their controllability.

As mentioned above, some of the red coral used for craftsmanship is currently fished in Alghero and can be distinguished by 'the compactness of the texture. Intermolecular spaces are almost absent. The coral consists of microscopic calcareous spicules that are then channelled inside the branch and cemented with an organic substance (made by the animal). Here, it is very compact. So, our coral has always been favoured for making the incisions, the artistic work'.[787] Given this reputation attached both to the local natural and cultural environment, a project of certification of the 'Red Coral *of* Alghero' is currently discussed. One of the most challenging issues of a certification of manufacts entirely produced with local coral is the insufficient quantity of raw materials available for responding to the demand, which at present consists of both artistic carving and serial production.[788]

785 Interview with representatives Consortium, Vetro artistico Murano, 22 November 2021; interview with producer n. 2, member non-user, Vetro artistico Murano, 23 November 2021, paras 60-64.

786 Interview with producer n. 2, member non-user, ibid., Interview with producer n. 1, member and user, Vetro artistico di Murano, 23 November 2021, para 19.

787 Interview producer, Corallium Rubrum ad Alghero, 20 December 2021, para 21.

788 ibid., para 9.

Some interesting aspects also emerge as to the **name** chosen for the CTM which might create some ambiguities. The expression 'ad Alghero' (in English 'in Alghero') is semantically different from 'di Alghero' ('of Alghero'). It associates the geographical origin to a product, which is part of the localised cultural heritage. Yet, the fact that the raw materials are not sourced in the geographical area can raise some questions as to the functions (communication and guarantee) currently assigned to the trademark.[789] This issue might also affect processing, which at present can be de-localised.[790]

Coherently with the current objectives of the CTM, the checks on the type of coral used are exclusively made during the commercialisation phase, at the retailers' premises. This means that the checkpoints are not distributed along the different steps of the production process. No controls on functioning of the Association are envisaged, neither formally nor informally.

This case study is particularly interesting from a GI perspective for the following reasons: (1) it shows the need to counteract a problem of counterfeiting perceived by stakeholders; (2) it shows that the CTM encouraged collective action and partially mitigated the problem of misleading information at the commercialisation of authentic red coral in Alghero; (3) it identifies some limits of the CTM, especially concerning the reduction of information asymmetries, the valorisation and protection of local natural and cultural resources. Moreover, local red coral, as well as traditional shapes and techniques, are not sufficiently valorised: each artisan is free to choose the type of red coral (local or non-local) to use in his production, and if valorising traditional local techniques or more standard or innovative forms.

3.5.3 Conclusions on Italian CTMs

Table 22 summarises the comparison between the French IGPIA and the Italian experiences of CTMs for the protection of origin products following the A-P-O approach within the GKC applied to GIs. It should be recalled that the diagnostic approach has been applied *ex post* for IGPIAs and *ex ante* for Italian CTMs. It is followed by conclusions guided by the axes of inquiry.

789 Yet, both these phases of production can take place in the geographical area. However, at present, the labelled crafts can also be processed (integrally or in part) in other regions (e.g., Torre del Greco) and/or made with coral sourced in other geographical areas (e.g., Corsica, Campania and North Africa). The guarantee provided by the CTM (through the regulations of use, the specification and specific guarantee certificates) is that the manufact is made by red coral and it is not made by bamboo coral. The setting provided by the CTM, however, risks to attribute a meaning (guarantee function) not fully correspondent to the communication function which can be attributed to the name 'Corallium rubrum ad Alghero'.

790 Interview with representative municipality Alghero, 1 December 2021, para 22.

Table 22: Summary of the FR and IT models of protection of denomination for non-agricultural origin products.

A-P-O	French IGPIA model	Italian CTMs
Actors	**Producers** at the core of the pre-application and application process, other **external actors at the local level** can intervene for support. **National authorities**: hands-off purely legal approach, complemented with public inquiry and informal exchanges with the applicant.	At the local level key role of **municipalities, regional and national authorities** as main drivers, initiators of valorisation/protection initiatives. **National authority**: high degree of discretionary power in setting the conditions for access, use and management of the sign, depending on the tool used (public CTM or publicly owned CTM). Predominant top-down approach with blurred (informal) assessment criteria.
Process	**Principle of access to membership:** compulsory membership of the operators to the PDMO and non-discriminatory access. Different types of memberships can be provided depending on the self-organising efforts of the producer group. **Principle of representativeness:** defined by law as a requirement but intertwined with the principle of **fair representation**, which is absent in the legal framework and not object of a specific assessment in practice. In practice issues of representation and representativeness might require a stricter assessment (e.g., disjoint territories, presence of sub-mentions). Representativeness identified in itinere but the modifications of the application file might be minimal, due to the purely legal hands-off approach of the INPI and the absence of a national opposition procedure as defined in the PDO/PGI system. **Principle of democratic functioning** not mentioned in the French Intellectual Property Code, in practice discretional solution by producer groups. When different types of memberships are involved, voting rights are differentiated (consultive vs. deliberative). Formal assessment on PDMO eligibility in parallel with the application for registration. The assessment on the representativeness requirement is made based on the product specifications and the documents provided by the applicants.	**Principle of access to membership:** membership is not required to use public CTMs and publicly owned CTMs. Various types of stakeholders (users, non-users, participants, non-participants, etc.) are involved. This heterogeneity is often not reflected in different types of membership. **Principle of representativeness and fair representation:** no specific requirements are provided at the local level, even though traces of representativeness and representation can be found in the multi-layer governance of the CAT trademark. Principle of democratic functioning: it depends on specific cases.

A-P-O	French IGPIA model	Italian CTMs
Outcomes	**1st level outcomes**: art L. 721-7 French Intellectual Property Code defines the content of the specification (reputation of the name *or* the product; description of the origin link based on the PGI model; explicit reference to the traditional know-how; environmental and social engagements; geographical area *not to be considered* as coincident with the whole country). Control plan and statutes of the PDMO as part of the dossier, public available and object of public inquiry. Less strict evidence based-approach and quality-locality requirement correlation, less precise boundary rules). **2nd level outcomes (governance)**: the PDMO formally recognised only at the registration phase.	**1st level outcomes**: as to the content of the **PS/regulations of use** of CTMs, **distinctive product characteristics** identifiable in shapes, decorations, rarely physic and chemical properties (linked to local raw materials), or more generally versatility of the method of production; **method of production** defined as traditional with some general requirements on verifiable evidence; **geographical area** identified without strict requirements on objectively verifiable evidence on its delimitation, the locality requirement, and the causal relationship shaping the **origin link. Choice of the name** not supported by specific evidence on prior use in trade or common language but often able to convey information on the geographical origin of the product (i.e., to reinforce and/or protect place-based reputation).
Outcomes *(Cont'd)*	**2nd level outcomes (controls):** controls on compliance with the product specification external third-party control (private control body). No internal control, self-control sometimes more detailed than external control (non-uniform checkpoints). No duty to submit a controllability document. **Controls on governance of the PDMO** after the registration, duty to present a report (documental control – self declaration); control body can exercise (if agreed with the PDMO) a control on the fulfilment of the functions provided by the French Intellectual Property Code.	The control plan is not always provided or available or aimed to certify quality and origin. Statutes not necessarily available and not systematically structured according to the four pillars. **2nd level outcomes (governance):** no obligation to be organised/structured in any associative form. **2nd level outcomes (controls):** heterogeneous control systems, often informal or documental, sometimes inefficient, sometimes concentrated at the commercialisation. Control features are linked to how the rules are written in the specification. No check points on governance.

3.5.3.1 Axis of inquiry 'Actors'

Axis of inquiry 'Actors': heterogeneity of interest, motivation, role and involvement can influence the rule-making process.

The participation of stakeholders belonging to the local community, **different from producers**, can **facilitate and support** collective action in the pre-application and application phases. However, when all the producers concerned by the product specifications are the **main participants and decision-makers** it is easier to convert interests and motivations in common operational rules, as well as to choose the legal form and governance structure suitable to sustain commitment to these rules. The **technical multidisciplinary assistance** provided by state actors, control bodies and experts, especially through on-site inspections, can help set the conditions for a sustainable management of the sign and to ensure that the GI initiative is aimed to satisfy the collective interest of the local community at large.

The CAT trademark is managed by the national authority. Therefore, it can be identified as a public CTMs, which assesses the application files proposed by the municipalities showing a tradition in ceramics craftsmanship. The formal absence of a 'owner' and its objective of protecting 'denominations of origin' identifying ceramics and similar manufactures, seem to be the Italian experience closest to PDOs/PGIs. This similarity, however, does not mean that the governance structure favours a bottom-up producer-driven approach to devising endogenous rules, as in GIs. Yet, state actors at the local and national level play a key role in devising the final product specifications. Context-dependent factors might hinder the proximity between public entities and the operators, which in practice means that (a) the main decision-makers are not aware of the collective action issues happening at the local level (b) different levels of collective action determine the inhomogeneous performance of the CTM, affecting the alignment of producers' motivations and interests concerning common standards of production and the objectives behind the use of the sign. Yet, despite formal legal rules describe an articulated governance structure, important aspects of the Law 188/1990 remain unapplied and create structural fragilities. For example, the product specifications committees, in charge of monitoring the compliance of the operators with the product specifications, are not always summoned and operational, hindering the capacity of the sign to perform its guarantee function. Despite context-dependent specificities, the use of the CTM is generally perceived by the operators and other stakeholders (e.g., municipalities) as not enough performant to protect and valorise the names-infrastructure and place-based reputation. It does not currently provide a direct economic benefit for producers and is not known to consumers. In some contexts, these factors might impact on the capacity of fostering local development and resource production.

This research showed how the experiences of **Faenza** and **Impruneta** represent two types of stakeholders' engagement for obtaining the CAT trademark and managing the sign.

In Faenza, the producers' involvement and the commercial vocation characterising the early phases of the CAT trademark led to inefficiencies. Consequently, the municipality took the lead as a strong political and supporting actor. Notwithstanding the intervention of the municipality, the CAT trademark is not at the core of producers' communication strategies, oriented towards individual trademarks. Consequently, the CAT trademark is not known among consumers, and it is used by few operators and does not lead to a real economic advantage (price premium). At present, producers are more interested in the valorisation potential of the CAT trademark (and future GIs) rather than in protection objectives as counterfeiting is not a concern. Finally, producers are interested in preserving sufficient margin of manoeuvre for introducing innovation, which pushes more towards individual differentiation strategies than in finding an agreement on common quality standards.

In Impruneta, the interpretation of the national law on the CAT trademark led to a different scenario. The involvement of the municipality, which is mainly political, represents the main driver for collective action, which is centred on producers. Its mediation activity is fundamental to align producers' interests towards the common goal to counteract resource depletion due to the misuse and non-use of the name. The structure of the value chain in Impruneta is interesting because (a) industrial and artisanal producers coexist on the same territory and both take advantage from the place-based reputation. The presence of heterogeneous (industrial vs artisanal) producers in the geographical area (and in its immediate proximity) also determines conflicting ideas of the product identified by the name; (b) Impruneta pottery is one example of non-agricultural origin product which mainly derives its specific characteristics and qualities from the physic and chemical properties of the raw materials. The management of excavation sites are therefore important for the sustainability of the production in the long run. All these elements brought to the creation of informal rules in partial contradiction with Law 188/1990. For example, the composition of the product specifications committee is constituted by the producers themselves. In this position, the producers perform informal controls on the compliance with the product specification, reproducing a pattern similar to peer-to-peer control. This configuration is different from the third-party control provided in formal legal rules.

In the case of Murano Glass the regional authority, owns and co-manages the CTM with the operators (regrouped in a Protection Consortium). Its initiative was also determinant for its creation if the CTM. The objectives of the CTM are the valorisation and protection of the glass produced on the island of Murano to counteract widespread counterfeiting and to avoid the

craftsmen migration, especially towards the mainland. The creation of the CTM did not solve but mitigated these 'dilemmas' and generated new issues, including those related to the justifications for the exclusion of producers who studied in Murano, but decided to leave the island. These issues of inclusion and exclusion (e.g., legitimacy) impact on the delimitation of the geographical area and on the product characterisation.

The high heterogeneity of the stakeholders is a major factor of complexity for collective action in this case. One of its determinants is the variegated type of production and quality heterogeneity (some operators are identified as first-stage manufacturers and others as second-stage manufacturers, some of them only produce semi-processed products); another determinant is the coexistence between small and big firms; lastly the geographical location of operators of the glass value chain, which over time, gradually migrated on the mainland. The first point is critical for product characterisation, which makes the choice of the product to be identified as 'Murano Glass' particularly challenging; the second point is relevant to measure the operators' interests and motivations in using the CTM. Yet, the bigger firms decided to not to join the CTM and the Consortium, as they do not believe in the performance of the sign, especially in the market-related functions (communication, guarantee, consumer protection, investment, and advertising functions).

In **Corallium Rubrum ad Alghero** the CTM is owned by a person of public law, namely the municipality, which maintains a key role of coordinator and mediator. It has the major function of avoiding consumer to be misled as to the characteristics and quality of the coral commercialised in Alghero. The main stakeholders' concerns were not to valorise origin of the manufacts, despite part of the red coral commercialised in Alghero is fished and crafted in the geographical area and some productions involve traditional know-how. The users of the trademark are retailers, but some of them are also craftsmen. Fishermen, instead, are currently not involved in the CTM. An association regrouping the CTM users plays a major role in the valorisation initiatives of the sign, which is used by almost the totality of the retailers in Alghero.

3.5.3.2 Axis of inquiry 'Process'

Axis of inquiry 'Process': principles of representativeness, representation, democratic functioning, and access to membership as structural pillars governing product specification design and GI management.

When the principles of representativeness, representation, democratic functioning, and access to membership shape the GI initiative, are **clearly stated**, **assessed**, and efficiently **monitored over time**, independently from the legal nature and complexity of the governance structure of the producer group, stakeholders can show higher awareness and long-term engagement in the management of the sign. **Compulsory membership** of GI producers concerned by the product specifications can favour producers' involvement in the draft of the product specifications and in the management of the sign as established in the statutes. If GI users-participants directly involved in the product specifications design are also involved in the design of the control plan, that would set favourable conditions for rule compliance. Reflecting stakeholders' heterogeneity with **different types of memberships** to the producer group can encourage **fair representation, representativeness,** and information **transparency** in the decision-making, which empowers actors if accompanied by mechanisms to ensure **democratic functioning**.

The four pillars are not systematically codified in the analysed CTMs. More generally, this shows that formal safeguards to the principles inspiring fair, democratic and inclusive decision-making are not perceived as core for generating and operationalising high-quality outcomes.

Interviews were determinant to understand who can legitimately **access the use of the name and enjoyment of place-based reputation**. Sometimes the right to access is subordinated to producing in a restrained geographical area independently from objectively measurable quality standards (Murano Glass); sometimes stricter informal conditions provide the cumulation of quality standards and provenance (Impruneta), sometimes the right to access only relates to the quality of the raw material used, a quality which is formally independent from provenance (Alghero). In all cases, membership is **not compulsory** for using the denomination and associations regrouping producers are spontaneous and not necessary to use the sign. This element increases heterogeneities as to the solutions found by each community to meet their needs and deviates from the importance of enhancing active participation to the decision-making of heterogeneous actors. Collective action at producer level can be fragilized by this type of setting, which still relies a lot on the role of public bodies.

The principle of **representativeness** is not a necessary requirement for the legitimate reservation of the sign/denomination by a group of operators. In the case of the CAT trademark, some requirements are stated for the composition of the National Ceramic Council. Other than being

perceived as a legitimating factor for deciding on the 'rules of the game' having exclusionary effects, representativeness seems more perceived as a factor of success of CTMs. In Murano and Faenza less than half of the producers use the sign, while in contexts such as Impruneta and Alghero the sign is used, respectively, by all or and the majority of producers. In the case of Murano Glass, the basis for identifying the representativeness of the Consortium creates some ambiguities, as it is formally in charge of supervising the glass production district both characterising both the mainland and Murano. Informally, the representativeness is assessed only in relation to the operators based in Murano.

The same can be affirmed for the principle of **fair representation**, which is not perceived by stakeholders as determinant for setting legitimate boundary rules. Often in public and publicly owned CTMS the creation of the boundary rules can only partially be considered an endogenous process, as the formal rule-maker does not coincide with the rule takers, and the rule takers could informally give inputs for the rule crafting. Some formal rules regulate the composition of the product specifications committees, but these requirements are not followed by an ongoing monitoring, nor they are graduated sanctions in case of non-compliance. Therefore, especially at the local level, these formal rules they might be unapplied or might be replaced by informal setups (as in Impruneta). In Alghero, given the aforementioned rationales of the trademark, the decision-making process involved only retailers, no formal distinction has been made between craftsmen and retailers, nor between these categories and fishermen.

Democratic functioning might be codified in formal legal rules or arrangements at the local level (the statutes of the producers' associations or consortia). However, lacking precise guidelines and a duty to provide an organisational structure to the trademark users, it is not considered as core. In the case of the National Ceramic Council and of organisations spontaneously developed at the municipality level (in the case of the CAT trademark) informal configurations are preferred by the stakeholders involved.

CTMs might formally grant openness, but they (a) might not be immune from favouring a club good type of management, being more exposed to arbitrary conditions for use and (b) more generally, they could limit producers' empowerment, favouring a polarisation between rule makers and rule takers and creating favourable conditions for power imbalances in favour of some stakeholders, including public owners.

3.5.3.3 Axis of inquiry 'Outcomes'

Axis of inquiry 'Outcomes': clear evidence-based boundary rules are the outcomes of the decision-making process, and they are operationalised through a specific control and governance configuration.

The formulation of the rules contained in the product specifications reflect stakeholders' motivations and interests in the GI registration (valorisation or protection) and the effectiveness of the mechanisms ensuring democratic and inclusive decision-making. The content of the product specifications impacts on the conditions of access to the use of the name, and they are **justified**, **non-arbitrary** and **non-discriminatory** when they are supported by solid **verifiable evidence**. When the rules are **not ambiguous**, efficient **monitoring, control, and sanctioning mechanisms** can be envisaged and facilitate their enforcement. The operationalisation of the product specifications affects, temporarily or permanently, the governance and control configuration. **Evolutions in the governance structure after the registration** implies a redefinition of the type of actors involved and can affect the rules governing the decision-making process. The **type of interaction of producers with the control body** (individual or collective) the **control type** (multilevel, external, internal, and self-control; public, private, or mixed) and its **targets** (controls on the compliance with the product specifications and/or on the governance of the producer association/organisation) can affect collective action, including the capacity of the sign to perform its expected functions.

The 'umbrella' CAT trademark is operationalised in various local contexts, and it identifies historically rooted place-based productions. The content of the product specifications is standardised across the various denominations. While in Faenza operators avoided to codify precise quality standards based on tradition to informally give room to practices fostering innovative techniques, in Impruneta the operators codified clearer rules, to protect the place-based reputation, mainly due to the distinctive properties of the local clay. In Murano, the product characterisation led to the formalisation of rules wide enough to embrace a considerable variety of manufactures; in Alghero it led to rules setting strict requirements identifying the red coral (i.e., its quality), although they are less strict on the provenance.

The fuzziness of the rules defining the distinctiveness of the product have important implications, especially looking at these examples from an *ex ante* perspective to GI registration: (1) the link between the product and place is, at present, not required and considered difficult to prove; (2) identifying criteria for the delimitation of the geographical area based on specific verifiable evidence (and not on an arbitrary decision of the trademark owner) might be challenging; (3) the generic attributes of the products do not currently allow the performance of efficient controls. This is

particularly relevant in cases (as Faenza and Impruneta) where the control plan is not required, and controls are not ensured or managed evenly by the product specifications committees nominated in each municipality. Moreover, in cases where the specificities of the products involved and the conditions of productions are not described through technical and measurable parameters (such as in Murano), the control system is reduced to a documental verification aimed to check the provenance, but not origin-based quality of the production. This is might formally be coherent with the declared aims of the trademark (i.e., certifying the provenance of the manufacts), but in practice it collides with the restraining the use of the trademark to goods made with traditional production techniques, historically rooted in Murano. This aspect as well, should be reworked in view of a possible GI characterisation.

The Impruneta and Alghero cases reveal that the standard description of the origin link for non-agricultural products, based prevalently on historical and human factors, might be inadequate to valorise and protect denominations identifying origin products which derive their characteristics and qualities from the raw material used. These productions are interesting, from a GI perspective, for the positive impact of rulemaking on the preservation of natural resources (in these specific cases, clay, and red coral).

The threshold for providing evidence legitimising the use of CTMs (whether public or publicly owned) is, in all cases studies, discretionally set by the trademark owner, which exposes the rule crafting process to the risk of arbitrary exclusion. Impruneta and Murano cases, where the initiatives are strongly animated by the interest in setting restrictive boundaries to the geographical area of production, are more exposed to collective action issues at the local level. These issues might also have repercussions on the willingness of some operators to use the sign. This more flexible and owner-centred operationalisation of the evidence-based approach to rule crafting, extends also to the choice of the name, which in the case of Faenza is more linked to valorisation than protection strategies. In the case of Murano, Alghero and Impruneta it is also driven by exigencies of protection against counterfeiting.

The governance and control configuration do not seem core issues for the institution and operationalisation of the analysed CTMs. In Faenza, this approach led to structural collective action fragilities, which can be measured with the inertia of the product specifications committee and on the low number of producers using the trademark. In Murano and Impruenta, informal settings have been developed by stakeholders to continue to invest in reinforcing place-based reputation attached to the sign. However, the control configuration, heavily affected by the generic formulation of the rules, is not homogeneous and efficient in all cases (in particular in Faenza and Impruneta), raising issues concerning the implementation on the guarantee function of the sign. All the analysed case studies, although diverse, reveal the perceived stakeholders' need to give

input, at various levels, to the protection of denominations of non-agricultural origin products. The valorisation and protection strategies, however, denote a younger history of collective action in the non-agricultural sector if compared to the agri-food sector, which implies major efforts for devising common rules and maintaining structured organisation.

The Italian long-standing practice of establishing public CTMs or CTMs owned by legal persons governed by public law in the agricultural sector, is key to understand similar experiences in the non-agricultural sector. It explains why these configurations have been chosen, in the first place, to compensate the temporary lack of a national GI protection for industrial products and crafts.

Yet, after the entry into force of the extension of GI protection to non-agricultural products some consequences might affect existing CTMs: (a) public CTMs and CTMs owned by legal persons under public law could be converted in Certification Marks or CTMs provided that the message conveyed (communication and guarantee function) does not result in a cumulation of quality and geographical origin. For example, the CAT trademark could behave as a 'first generation' public CTM and be converted in registered certification mark, certifying *only* the quality of the product. If it behaves as a 'second generation' CTM, concerns could be raised as to functional overlaps with potential GIs. This overlap should also be assessed considering that the regulations of use follow different (and often looser) requirements than those demanded by the GI system. From a collective action perspective, existing Italian CTMs (especially those where producers are proactive in the initiative and/or management – i.e., Red Coral in Alghero) represent a useful exercise for a potential GI registration. However, additional challenges could arise when the PDO/PGI logic is applied to these experiences: in particular, more precise formal rules on the product characterisation, the description of the method of production, and the delimitation of the geographical area would need to be complemented by informal and less demanding arrangements at producers' level. Alternatively, it would be difficult to pair generic rules with an efficient and effective control system able to ensure the guarantee function of the GI.

Finally, the producer-driven process embedded in the GI initiative suggest that where in CTMs public bodies are (formally or informally) the main actors involved on decision making and rule-crafting. Following a PDO/PGI logic, the power of initiative and management should be redistributed from public bodies to producers. On the one hand, it would imply producers' empowerment in drafting the rules and taking decisions on their modifications. On the other hand, envisaging rules and graduated sanctions on the functioning of the governing bodies of the sign, would encourage a higher level of producers' commitment to compliance. Introducing guiding principles regulating the functioning of producer groups would valorise the importance of a structured governance structure in charge of taking decisions on the management of the sign. Monitoring and enforcing mechanisms would avoid collective action breakdowns after the GI registration.

Chapter 4

FUTURE PERSPECTIVES

My research showed that combining the legal analysis and the institutional perspective on the commons to study GIs, can be useful to understand their functioning as multi-faceted tools and as identifiers of complex systems. It allowed me to 'dissect and harness complexity, rather than eliminate it from such systems'.[791] This new approach aims to avoid a compartmentalised and monodisciplinary understanding of GIs.

From a theorical point of view, it encouraged me to deepen the conceptual proximity between GIs and the commons and pushed me to explore relevant legal issues with social significance. Investigating critical issues at the interplay between collective action and IP law, gave me the input to reframe GI theory and uncover new insights (through the model of place-based reputation, the name infrastructure, and the bundle of rights).

From a diagnostic point of view, Ostrom and colleagues approach inspired me to target, through a rigorous method, critical aspects involving the actors, the process, and the outcomes of the GI initiative, emerging from the practice and impacting on the objectives and rationales of the sign. These aspects, for a very long time, did not seem to represent a concern for policymakers. Moreover, they are often let aside in the legal academic discourse and condemned to belong to other disciplinary fields. My work aims at showing that they deserve a place in the legal scholarship as important consequences of the configuration given by national and EU legal frameworks. As such, they can signal systemic efficiencies and inefficiencies.

This chapter is divided in two parts. In Part I, I isolate and summarise the most relevant issues emerging from the theoretical analysis: place-based reputation as the protected intangible, the role of the name as infrastructure, and the legal consequences of the commons or club type of management in GIs.

In Part II, I summarise the observed problems and lessons learned from the French and Italian experience in the agricultural and non-agricultural sector and propose suggestions for the future evolution of the EU GI system. My intent is to inform policymaking, based on empirically grounded findings. To this end, I will focus on the Proposals of 31 March 2022 reforming the current PDO/PGI system for agricultural products and foodstuffs (hereinafter 'agri-Proposal') and the Proposal of 13 April 2022, extending the GI protection to industrial products and crafts (hereinafter 'non-agri Proposal').

791 Elinor Ostrom, 'A General Framework for Analyzing Sustainability of Social-Ecological Systems' (2009) 325 Science 419, 420 <https://www.sciencemag.org/lookup/doi/10.1126/science.1172133> accessed 15 March 2023.

4.1 PART I – General

The general part focuses specifically on three points: (a) the legal consequences of considering place-based reputation as the protected nested resource; (b) the outsider issue; (c) the legal implications of commons or club management for GIs. They derive from the theoretical approach used in this research.

4.1.1 The legal consequences of considering place-based reputation as the protected nested resource

This inquiry has been framed considering the GI initiative as a collective action process aimed to regulate access and management of tangible and intangible localised resources. This conceptualisation leads to considerations which contribute to the GI theory. Moreover, they enrich with a legal perspective the interdisciplinary debate on GIs and the commons.

- **In GI settings, the object of the commons type of management is represented by the place-based reputation, necessarily combined with the name-infrastructure. This implies that the main objective of the applicants is to support the application with adequate justifications on the capacity of the name to function as information infrastructure for origin and quality. The national authority must verify the robustness of the arguments supporting the eligibility of the name for registration. This approach limits cases where the name is constructed only for the purpose of the registration, and cases where the identification of the object of protection exceeds the registered name.**

The legal consequences of identifying place-based reputation as *the* complex and nested resource valorised and protected through the GI recentre the debate on the general interest (which complements the producer-specific, market-related interest) embedded in the sign. The maintenance of the place-based reputation as the resource protected through the sign requires both individual and common efforts, and the benefits stemming out from an efficient functioning of the sign are addressed not only to the GI users, but also to the local community at large (in the form of positive externalities, associated to the resource production and local development functions).

The close *and necessary* relation between the reputation and the name should remain at the heart of the legal protection, and this could partially avoid falling in the trap of considering GIs as a passepartout and substitute of other legal tools (e.g., copyright protection or design protection). The registration procedure has the objective of recognising the name as a protection or valorisation

facility.[792] Therefore, the inquiry and assessment conducted by the national authorities should remain faithful to this objective. Yet, elements such as the product characteristics, the method of production and the origin link should be considered as *functional to validate the eligibility of the name* for registration. Borderline cases where the name was not used before the registration should be carefully examined, and national authorities should verify that the product was known at least in the geographical area of production. This entails that the assessment on place-based reputation is case-specific and targets, for example: (a) the extent of the prior use of the name; (b) the presence of a long-standing established production in the area; (c) the presence of a tangible formal recognition of the origin-based quality of the product (through competitions, prizes, socio-cultural events, etc.); (d) how much consumers, locally, nationally, or internationally, are able to recognise that the product originates from a specific place and its specific characteristics and quality (e.g., through surveys).

- **Considering the place-based reputation as a nested resource leads to a more fluid conceptualisation of the origin link.**

Kur observed that 'the notion of strictly terroir-based protection has been undercut by increasing emphasis being placed on human (instead of natural) factors accounting for the specific quality of products designated by a PDO. There is at least a silent understanding among those dealing with the subject that today, protection under the EU *sui generis* regime – including protection of PDOs – is more about tradition than *terroir*'.

Our research at the Max Planck Institute concluded that the boundary between PDO and PGI is blurred, as the description of the physical and environmental type of link, typical of PDOs, could also be found in PGIs. Moreover, we observed that PDO specifications were often complemented by reputational elements (including historical elements, socio-economic elements, and evidence of the fact that the product was known to the public for its characteristics and qualities).[793] A more flexible approach should be privileged to the traditional monolithic bipartition between *terroir* and the reputational links. It would also counteract the trend, encouraged by ECJ,[794] that GI reputation

792 *Facilities* in commons scholarship is used to identify the tool through which information is accessed. This concept, firstly used by Ostrom and Hess in their first conceptualisation of knowledge commons, is often paired with the notions of *artifacts and ideas*, the former identifying the physical form encapsulating information; the latter referring to the 'nonphysical flow units' of the resource. Translating these concepts to GI contexts, one can easily recognise the name as the facility-infrastructure, the artifact as the origin product and the intangible component as the place-based reputation as complex and nested resource. See Charlotte Hess and Elinor Ostrom, 'Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource' [2003] Law and Contemporary Problems 111 <https://scholarship.law.duke.edu/lcp/vol66/iss1/5>.

793 Zappalaglio and others (n 92) 41.

794 See *supra* Chapter 1; see *inter alia* Case C-3/91 Exportur SA v LOR SA and Confiserie du Tech SA EU:C:1992:420 [1992] ECR I-5529; Case C-388/95 *Kingdom of Belgium v Kingdom of Spain* EU:C:2000:244 [2000] ECR I-03123 (Rioya); Case

per se is self-sufficient to characterise the origin link, independently from the tangible product characteristics. This (erroneously) endorsed the idea that the 'reputational link' is an independent and weak type of link, compared to the *terroir* link.

The characterisation of GI products as a type of origin products and the qualification of *terroir* suggested by Casabianca offers the possibility of qualifying reputation as *necessarily place-based*, and embraces its complex, nested, and context-dependent nature by expressing its linking factors as components. Referring to 'necessarily place-based' reputation, would also serve to differentiate it from trademark reputation.[795] Consequently and more pragmatically, if in a specific case it is difficult to justify and prove place-based reputation through one or several anchoring components (despite the technical assistance provided by national authorities and/or external actors during the application for registration) it might be the sign that GIs are not appropriate to protect the denomination. These considerations are relevant for non-agricultural GIs, where some national experiences have been tailored on the more flexible standards of CTMs.

The model of the origin link as a bundle of ties is heavily impacted by this characterisation, and can, at least theoretically, predispose to stronger grounding for future PDOs or PGIs. Maintaining the possibility to choose between different anchoring factors for product characterisation, as long as they are sufficiently grounded, can offer a coherent frame for the registration of denominations notwithstanding the product class and sector involved. Marie-Vivien showed that considering the human and natural factor as independent or cumulative, leads to a uniform type of assessment that can be applied to all types of goods.[796] However, further quantitative inquiry supported by empirical evidence, including non-agricultural products, is needed to confirm or adjust this theoretical approach.

C-469/00 *Ravil SARL v Bellon import SARL and Biraghi SpA* EU:C:2003:295 [2003] ECR I-05053; *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* EU:C:2003:296 [2003] ECR I-05121.

795 Gangjee concludes his analysis by recognising the specific characteristics of the GI reputation identifying history as one possible anchoring factor: 'This historical turn is worth engaging with because the historic basis for reputation should inform the definition of acceptable production techniques, whereas in this case the reputation is instead viewed as an autonomous, commercially valuable intangible. Such a reputation can certainly be protected as certification marks or against unfair commercial practices, but not as a GI insofar as a meaningful link to the region of origin is required'. Gangjee, 'From Geography to History' (n 162) 60. The model of place-based reputation as complex and nested resource implies that the justification of place-based reputation through human factors and history might occur, but it also admits the possibility of other types of connections, as long as they are adequately proven (e.g., place-based reputation in addition to human and/or natural environment and/or socio-cultural environment). The evidence-based approach to place-based reputation reflects some national authorities' practices, which require to prove the use of the name, independently from the quality scheme.

796 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11).

- **If place-based reputation is *the* nested resource object of management, it should always be present, independently from the quality scheme, and it should not be considered as a less solid or residual ground for GI protection. However, tangible elements of consumers' recognition of origin-based qualities should be supported by objectively verifiable evidence. A strict interpretation of the evidence-based approach implies justifying (1) why the 'GIable' product is an origin product, meaning the verifiable aspects giving to the product its typicality; (2) why the denomination proposed for registration has the capacity to function as infrastructure for conveying information on the place-based reputation.**

Marie-Vivien recognises that reputation is the entry door for extending the GI protection to non-agricultural products, while Gangjee acknowledged the absence of guidelines provided by the Commission for assessing GI reputation. The attribution of a core role to reputational aspects should not imply admitting the mere statement in the product specifications that the product is well-known (e.g., because of the traditional methods of production used or historical references). Conversely, a strict interpretation of the *evidence-based approach should also be applied for grounding reputational elements*. Gangjee warns against the dangers of an 'inappropriate transplant' of the trademark approach for assessing place-based reputation. Assessing whether the reputation is 'essentially attributable' to origin, in GI settings, should not only imply an inquiry on contemporary reputation, but also on 'why it arose in a particular place'. In other words, Gangjee highlights that the peculiar objective of reputation assessment in GIs is measuring 'its ongoing vitality' or 'continuity' in time, rather than the extent of the product's fame or renown at a specific point in time.[797] He also admits that 'in the absence of a more appropriate reputational link between product and place, *sui generis* GI protection becomes unjustifiable'. Moreover, he asserts: 'if contemporary commercial reputation becomes the benchmark, the boundary with trademark or unfair competition law breaks down and the justification for GIs, as a separate regime based on the causal connection between product and place, collapses'.[798] The ECTA Position Paper on reputation in GIs seems to be aligned with these arguments. More specifically, it states that 'generally speaking, to avoid that GIs degrade to a pure (and cost free) marketing tool departing from their intrinsic nature and from its indication of quality/origin function, in situations where the link is mostly based on the history/tradition of the product and in general on reputation, a *serious verification of the reputation link should be carried out*. The applicant should submit *clear and convincing evidence*, including for instance sworn or affirmed statements, decisions of Courts or Administrative authorities, decisions of the IP offices (and especially from the IP Office of the Member State of origin), polls and market surveys, audits and inspections, certifications and

797 Gangjee, 'From Geography to History' (n 162) 54–59.

798 ibid 59. According to the author 'reputation as a form of linkage between product and place is presently both a cause for concern – because its loose application undermines the justifications for GI protection – and a potentially flexible option to incorporate non-agricultural products, which demonstrate an appropriate historic connection with a place'. ibid 39.

awards, articles in the press or in specialised publications, annual reports on economic results, advertising, and promotional material, etc'.[799]

The same perspective is embedded in the model of place-based reputation as complex and nested resource, where I characterised place-based reputation as 'the tip of the iceberg' derived from the cumulative presence of the components of typicity of the GI product. These components derive from producers' choices (human factor), embedded in a specific socio-cultural and/or natural environment. The creation dimension of the place-based reputation represents the producers' investments and contributions to building the place-based reputation.

However, I also mentioned a recognition dimension of the place-based reputation, meaning the consumers' capacity to recognise the name as identifier of origin products (i.e., products produced in a specific place and having specific place-based characteristics and qualities). Independently from the quality scheme, both the creation and recognition dimension of the place-based reputation should be proven at the registration. Therefore, the objectively verifiable evidence of the maintenance of the distinctive characteristics should be paired with the evidence that consumers have been recognising the product, identified through a specific name, for a considerable amount of time. In line with Gangjee's approach, both the contemporary and historical facets (of the creation and recognition components) of place-based reputation should be proven.

Taking the evidence-based approach seriously, would therefore mean raising the threshold of proof upon the applicants, and applying it independently from the quality scheme and the product class. This setup, although being more demanding for the applicants and national authorities (which should have a specific technical expertise for the examination of the applications), would be coherent with the strong protection attributed to these distinctive signs. It would also imply that, at the infringement phase, a reverse burden of proof would be established upon the claimant who wish to challenge the genericness of the denomination or indication.

- **The absence of grounding elements of place-based reputation can more easily lead to fuzzy boundary rules concerning the product characterisation, the method of production, the delimitation of the geographical area and the description of the origin link. It also affects the controllability of these rules and collective action.**

This work showed that a weak characterisation of reputation in GIs might dangerously lead to the creation of fuzzy rules during product specifications design, which sometimes hide the difficulty

799 ECTA, 'Position Paper on the Concept of "Reputation" in Geographical Indications' (2020) 10 <https://ecta.org/ECTA/documents/ositionPaperontheconceptofreputationingeographicalindications2523.pdf>. It has been shown in this work that this is a current practice carried out by national authorities, both for PDOs and PGIs.

to identify the product designated through the proposed name and to describe its distinctive characteristics, as shown in the analysed case studies on non-agricultural origin products. *This inefficiency might be caused by the disagreement between producers as to the type of product identified by the name*. It might also imply *national authorities' inertia in favouring the codification of existing practices*. The absence of sufficiently precise rules would also negatively affect the identification of checkpoints for adequate controls, and lead to the inoperability of the control system with impacts on the guarantee and consumer protection functions of the GI.

4.1.2 Outsider issue: the legitimacy of applicant producer group and exclusionary effects of boundary rules

It is interesting and pertinent to focus on the 'outsider issue', meaning the effect of exclusion as a consequence of boundary rules. This issue is rarely tackled in the legal scholarship, and legal mechanisms and safeguards are currently lacking in the legal system. At the national level, competent authorities are confronted with the outsider issue during the pre-application and application processes. Depending on the approach adopted (hands-on or hands-off or hybrid), they might or not intervene.

- **The 'outsider issue' occurs as the inevitable effect of fencing (i.e., the action of rulemaking for regulating access to the use of the name). However, real-world cases suggest that the causes of exclusion or inclusion are complex and might reside, *inter alia*, in: (1) the low attractiveness for operators to join the group and use the GI; (2) arbitrary enclosure by the already constituted producer group.**

Kur pointed out: 'What are the consequences if one or several local producers from that one-third faction fall below the newly agreed standards? Obviously, the relevant PDO or PGI may no longer be used by them, even though the relevant locality as well as the method of production previously observed may not have changed. But is it really acceptable that non-compliance with (new) standards also means that any reference to geographic origin, even in an indirect, allusive form is forbidden? A strict prohibition of that kind would arguably risk resulting in a disproportional encroachment on the fundamental rights to impart and receive information, and to conduct one's business'.[800]

Although the role of non-market functions is pivotal for understanding GIs (and their differences with other distinctive signs), this should not be misunderstood as encouraging 'interests of those

800 Kur (n 699) 91–92.

who are negatively affected by a system which risks being imbalanced in its scope'.[801] Kur et al. more recently identify the expansion of exclusive rights coupled with the absence of limitations as rising 'concerns about insufficient checks and balances'. The authors point out the risk that the current versions of the Proposals limit the 'freedom of expression' and encourage 'undistorted competition'. In this regard, they alert on the necessity to introduce in the Proposals appropriate safeguards such as the permitted use of one's personal name and address in business as appropriate and coherent with art 13(2) of the Geneva Act and essential for the preservation of the 'right to provide truthful information to consumers about the locality of one's establishment' as stated by art 11 and 16 of the EU Charter of Fundamental Rights'.

The collective action perspective provides some tools to better understand the outsider issue, firstly because its insurgence originates in collective action dynamics, especially when outsiders are based in the same geographical area (or in its surroundings) and manifest their position (favourable or against the rules contained in the product specifications) during the GI application. Secondly, the collective action perspective allows to question the attractiveness of the GI (i.e., the expected performance of the GI functions) for the stakeholders involved and the related incentives to join, independently from their role of participants in the decision-making process. In other words, inquiring on the outsider issue encourages to shift the focus from the consequences to the causes of the misfunctioning of the sign.[802] Reframing the outsider issue on a collective action perspective would therefore mean reflecting on the questions: who are the 'outsiders'? Could have they been included during early collective action? What can the presence of outsiders tell us about the evaluation of the success of the GI initiative and rulemaking?

It has been recognised by Casabianca and Marie-Vivien that the definition of boundary rules entails including/excluding as a necessary counterpart.[803] I added to this argument that inclusion and exclusion are a consequence of fencing, and the positioning of the type of management on the excludability spectrum, depending on how local arrangement are devised by the participants of

801 Kur and others (n 48). In the same vein, Annette Kur had previously affirmed: 'while the importance of those goals cannot be doubted, it would be wrong to infer from them a blanket permission to disregard the interests of those who are negatively affected by an unfettered bolstering of protection'. See Kur (n 699) 90.

802 A collective action approach can also be innovative and can, at least theoretically, allow to build arguments in to avoid 'the trap of quality exclusion'. Belletti et al., in this regard, analyse the case of the Penja pepper looking at the GI initiative as highly impacted from the decision-making process. They show that inclusivity can be paired with a quality improvement, provided that specific attention is reserved to the shift between product specifications and the actual practices, the reliability and effectiveness of the control system, the involvement of state actors and other local stakeholders as supporters. See Belletti, Chabrol and Spinsanti (n 84).

803 François Casabianca and Delphine Marie-Vivien, 'The Limits of Inclusion in Geographical Indications – Should We Exclude Any Exclusion?', *Worldwide Perspectives on Geographical Indications* (Centre de Coopération Internationale en Recherche Agronomique pour le Développement [Cirad] 2022) <https://hal.archives-ouvertes.fr/hal-03791628> accessed 5 November 2022.

the rule-making process. It follows that the outsider issue will always be 'the other side of the coin' of eligibility governing access and use (i.e., restricted access). Yet, the concept of legitimacy of the producers' group identified through the boundary rules does not *per se* exclude the possibility that some producers, although established in the geographical area, *might not want* to or *might not be able to* take advantage from the sign. *In other words, the existence of a legitimate producer group does not automatically imply the inclusion of all the producers established in the area*. Sainte Marie and Casabianca, back in 1999, pointed out that 'the contours of the local action system are not given independently from the instruction process, they gradually emerge'. Moreover, they affirm that 'identity is judged in relation to "strangers", which questions the generality or specific nature of the product'.[804]

It can be interesting to consider if outsiders' location in the geographical area indirectly and inevitably ties them to the place-based reputation, qualifying them automatically as free-riders. This conclusion would stem from the assumption that they perceive, in any case, the benefits originating from the GI.[805] Put it differently, should one consider that outsiders dilute place-based reputation independently from their intention to act in bad faith? If this is the case, the status of 'outsider' should be automatically tied, as in a deterministic perspective, with 'minor investments' for and 'undue advantage' of the place-based reputation.[806]This perspective (which presumes the bad faith upon outsiders) might resonate with situations where the social dilemma stimulating the GI initiative is solely the resource depletion due to the misuse of the name. However, it can be not as straightforward when the social dilemma behind the GI registration is the valorisation objective, especially considering that conflicting interests might be more difficult to detect among stakeholders. More generally, the outsider issue is highly affected by the difficulty of setting boundaries typical of intangible resources.

804 See Christine de Sainte Marie and François Casabianca, 'The Work of Scientific Valuation in the Justification of the Geographical Origin of Food Products under PGI: Constitution and Collective Appropriation of Local Knowledge.' (1999).

805 Referring to the Italian system, the duty upon non-members of Protection Consortia compliant to the product specification to pay for the costs related to the *erga omnes* functions carried out by the Consortium de facto echoes this rationale, even though users non-members take advantage of the place-based reputation and, at the same time, contribute to its maintenance being also subjected to controls on the compliance with the specifications.

806 This perspective would resonate with Ostrom's perspective on outsiders vs insiders as considered as opposing and competing categories. The idea of 'defending the resource from outsiders' clearly emerges in her work. See *inter alia* Ostrom, *Understanding Institutional Diversity* (n 270) 262. This characterisation, at least in tangible common-pool resource settings, should not surprise, as the dilemma stimulating collective action responses always lies in resource exhaustion given from outsiders' encroachment. Sanfilippo et al. reflect upon the potential of the GKC diagnostic framework to identify questions of legitimacy and its impacts of collective action as 'the interests of outsiders may sometimes, but not always, be legitimately accounted for by exogenous rules or norms that constrain the development of rules-in-use'. Sanfilippo, Frischmann and Strandburg (n 137) 15.

It therefore would be over-simplistic assuming that the producer group intention beyond rule-crafting is *always* animated by good faith. Similarly, it would be a mistake considering that all outsiders are free-riders willing to take advantage and hinder the place-based reputation attached to the registered name. The presence of outsiders can be justified by various case-specific reasons: there might be a history of conflict among producers, some producers might want to preserve their specific quality standards[807] and/or they might believe in the strength of their trademarks rather than on the GI potential (the examples of Murano Glass, and Faenza in the non-agricultural sector already flag these issues). Outsiders might also simply not be in the capacity of sustaining the costs associated with the status of GI user and prefer to opt out. Identifying their motivations and interests not to use the sign and understanding the reasons of the non-alignment of these interests with the GI producer group is therefore essential and case specific.

- **To understand if exclusion is due to the lack of incentives or to arbitrary enclosure it could be useful assessing if outsiders' standards of production (different than those codified in the specifications) are stricter than those codified in the product specifications. That would be paired with the fact that the outsider uses, directly or indirectly, the registered name. Investigating on the rules governing the functioning of the producer group and the history of interactions between 'insiders' and 'outsiders' during the early stages of the GI initiative might also be of use.**

To understand the causes of exclusion, it might be useful to consider the following contextual elements if: (1) outsiders produce according to stricter standards of production than those identified in the product specifications; (2) they produce according to lower standards of production than those identified in the product specifications; (3) they use the registered name or make direct or indirect reference to the registered name. When outsiders produce according to stricter or different standards of production, and do not identify their products through direct or indirect explicit reference to the registered name, it might already exclude an effective

807 The Bitto case analysed by Edelmann et al. is an example of departure from the PDO by a group of producers to preserve stricter (more traditional) standards, which were not embedded in the specification of the PDO after the proposal of amendment. The amendment of the specification created a situation where Protection Consortium and the *Storico Ribelle* group coexisted. Edelmann and others (n 75). This situation seems more frequent when the product specification is not devised to 'adequately mark a difference', to 'be source of diversity' between the 'niche' and 'socio-technical regimes', intended as 'networks that frame the evolution of technology'. These cases expose the niche, according to Belmin et al., to exogenous and endogenous tensions which can challenge its robustness if not counteracted with 'proactive governance capable of mitigating undesirable changes'. See Belmin and others (n 166). Another example is Rooibos tea, reported by Biénabe and Marie-Vivien, where the product specification design was aimed at 'finding a balance between not excluding local actors and avoiding lock-in in practices and, on the other hand, ensuring a sufficient origin-based quality standard for EU recognition and maintenance of Rooibos reputation'. This approach, confronted to the outsider issue, brought to an inclusive approach to the product specification design. See Biénabe and Marie-Vivien (n 6).

outsiders' dilution of place-based reputation and outsiders' bad faith. Furthermore, it might also be useful considering, from the collective action perspective, if (a) outsiders have been informed early enough by the applicant producer group about the GI initiative and if they have been put in the conditions to join; (b) if they filed an opposition; (c) the process carried out by the producer group leading to product specifications design complies with the pillars, meaning that it has been conducted avoiding arbitrary exclusionary fencing issues; (d) if consumer behaviour has change in favour of the non-GI product as a consequence of the use of the name or indication.[808] These elements could show the effectiveness of the principle of access to membership, and the operators availability to engage in collective action.

These arguments might give some insights on outsiders' attitude towards appropriation/use and provide elements for avoiding 'disproportional encroachment on the fundamental rights to impart and receive information, and to conduct one's business' provided that outsiders' behaviour conforms to 'honest business practices'.[809] This topic is fascinating but yet under-researched and further empirically supported inquiries are needed.

- **The level of investments and actual contribution for the maintenance of the place-based reputation could legitimise exclusion, if paired with an appropriate assessment on the legitimacy of the group to craft boundary rules.**

Antagonistic interests and needs are to be managed by higher-level legal rules: one is the protection of insiders; the other is the protection of outsiders. In GI contexts, independently from the type of origin products involved, outsiders should maintain the freedom in pursuing their productive activity pre-existing to the GI protection when this is done in compliance with honest commercial practices, while insiders want to protect product typicity through the preservation and valorisation of place-based reputation. A balance between these opposing interests might be represented on the one hand by envisaging limitations to the right to exclude upon the 'insiders' (GI users), by codifying and enforcing the duty to legitimate their initiative based on objectively verifiable evidence, systematically checked by adequate (i.e., independent, technical, and uniformly defined) assessment criteria. This would mean limiting the risk for the producer group of setting unjustified burdens on outsiders and arbitrary selective criteria for potential insiders (i.e., privileging a club good type of management instead of a commons good type of management).[810] On the other hand, one should consider that 'rarely do all participants using a resource have identical investment or

808 Kur and others (n 48) 3.

809 Kur (n 699) 92.

810 Lee Anne Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 International Journal of the Commons 9 <https://www.thecommonsjournal.org/article/10.18352/ijc.252/> accessed 2 March 2023.

harvesting power'.[811] Therefore, as a distinction based on this criterion should be made between different types of membership within the producer group to distribute benefits proportionally to the costs sustained by heterogeneous stakeholders, *a fortiori* a distinction between outsiders and insiders should be based on the level of contribution to the creation and maintenance of the shared resource. To recall Sainte Marie and Casabianca 'it is clear that the current issues are generated by the value of the name that originates from the efforts of few and that can become common to all' (translation provided by this author).[812] They suggest that there is a direct link between the legitimacy of producer group and representativeness and that it is also measured with the volumes of production and investments made on the product by local producers.

This way of looking at the outsider issue opens a very interesting point tackled by Marie-Vivien, namely the possibility that, for GIs whose place-based reputation is mainly anchored to the human factor (such as in the majority of non-agricultural products), the local know-how might migrate. She argues that 'GI products are not only local, but part of the local culture due to the existence of a group of producers exploiting the same product in the same place for a certain time. Individuals isolated from the community, or even small groups cut off from the main community, will not be able to execute this know-how with equal proficiency and with the same reputation. This underlies the prominent collective dimension of GIs, resulting from a group of producers sharing their know-how and cross-controlling the quality of the product'. [813] This point underlines, once again, the context-dependent complexity of product specification design. More generally, it challenges the modalities of assessment of the legitimacy of the producer group to exercise the rulemaking process with exclusionary effects. I observed that, in France, the assessment on the representativeness of the producer group is made contextually (*in itinere*) to product specification design; in Italy, an in-depth inquiry is pursued *ex post* the draft of the product specifications, and only for Protection Consortia. However, while in the former case the exclusionary effects are not permanent (as the rules refer to the 'candidate product' as defined by the 'draft' product specifications) in the latter, the exclusionary effects have already been produced by the rules. One could question if it is possible to objectively assess who the legitimate rule maker is, especially when multiple (competing) groups are involved in the production of similar products. As shown by the Murano Glass case, the Impruneta case, and the Laguiole case, this problem is very frequent in practice; however, no safeguard or indication is currently provided by the legal system to avoid 'unjust exclusions'.

811 Elinor Ostrom, 'Building Trust to Solve Commons Dilemmas: Taking Small Steps to Test an Evolving Theory of Collective Action' in Simon A Levin (ed), *Games, Groups, and the Global Good* (Springer 2009) 222.

812 de Sainte Marie and Casabianca (n 805).

813 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11) 243.

The public consultation and inquiry (in France), or the public hearing (in Italy) paired with the national opposition procedure are moments where third partis having a legitimate interest or knowledge might intervene to propose modifications to the specifications. Their intervention might mitigate some effects of arbitrary exclusion. However, the evidence-based approach might be useful to anticipate, preliminary or contextually to the draft of the product specification, possible inaccuracies in the identification of the operators. The evidence-based approach alone might still not suffice to this purpose because depending on its targets it might lead to contradictory results. For example:

(1) The inquiry targets the producers who first started to produce the origin product as defined in the specification, according to traditional methods of production and using the name proposed for registration. This option might identify as 'legitimate' a restrained group of operators, and exclude other actors yet involved in the production of similar products. The output of the inquiry might not take into account the actual situation at the local level.

(2) The inquiry targets an enlarged group of operators, which includes the producers who first started the production in the area, and who first identified the product with a specific name. However, evidence is also gathered on the establishment, for a considerable amount of time, of similar methods of production involving variants. This 'inclusive' option would require the participants to find a compromise on the inclusion of multiple variants of the product, or on more flexible rules regarding the conditions of production.

The consequences of the GI registration on outsiders are a hot topic in practice, and they are inevitably linked to the assessment on representativeness of the applicant. However, the quantitative type of assessment for representativeness, which I identified as a consolidated practice in both the Italian and French systems, might not be totally resolutive of the question of legitimacy to exercise rulemaking. To avoid that representativeness becomes a meaningless formal requirement, a serious evidence-based inquiry could be pursued considering (1) the operators who have been producing the product the longest, and who first started using the name proposed for registration; (2) taking into account the evolution of the production in the area and its surroundings, as documented through objectively verifiable sources; (3) that all the operators involved have been using the name in good faith for a sufficient amount of time. In other words, pairing the quantitative assessment with the evidence-based approach for evaluating representativeness, would mean mapping, through objectively verifiable sources, the continuity of the production and its evolutions in the area, and identifying the producers who have been contributing to alimenting and sustaining the place-based reputation. This is however a type of assessment that producers alone might not be able to pursue without biases. Therefore, the technical multidisciplinary hands-on approach of the competent national authority (or the involvement of external actors different from producers equipped with technical or scientific knowledge and enabled to exercise

a proactive power of inquiry) is essential. Thus, the approach used by the INAO is considered efficient in this regard, even though the case-based approach should be complemented by clear and explicit assessment criteria. The INPI hands-off type of assessment, instead, is considered less efficient, as it is based exclusively on the documentation provided by the applicant themselves.

- **In the Italian PDO/PGI system, operators allowed to use the name do not automatically participate in the decision-making. The status of 'user non-member' derives from the principle of voluntary membership to the Protection Consortium. On the one hand this configuration allows more flexibility to GI producers who might decide how much they want to invest in the management of the sign; on the other hand, it could represent the institutionalisation of a condition in-between 'insiders' and 'outsiders'.**

The boundary between insiders and outsiders is affected not only by the availability (or capacity) of the operators concerned to comply with the product specifications, but also by their willingness to join membership. In France the principle of **necessary membership** might make the distinction between insiders and outsiders easier as all producers wishing to enjoy the benefits deriving from the use of the registered name are entitled *ex officio* to participate in the decision-making. In Italy, **optional membership** institutionalises the role of **users non-members**. These users comply with the product specification but are not entitled to actively participate in the decision-making of the Protection Consortium. In parallel, they are subjected to the payment of *erga omnes* fees to finance activities considered of public interest, such as the post-commercialisation control. Users non-members benefit from the right to access the use of the sign but are 'impaired' because they cannot participate in the decision-making. This situation of 'impairment' distinguishes them from users-members, who are always participants of the decision-making process. From this perspective, users non-members belong to a virtual 'intermediate' category, they are not insiders nor outsiders. They might also be considered as 'latent outsiders', meaning operators who preferred adhering to the product specifications *and* to be subjected to controls, rather than avoiding conflicts with the GI holders.[814]

814 These actors must financially contribute to the activities carried out by the Protection Consortium according to art 14(15) Law 526/1999 through the payment of the *erga omnes* fees. The justification of this contribution lies in the general/public interest embedded in those activities that are 'effectively pursued by Consortia, as constituted by the actors directly involved in the value chain with a specific knowledge of the product characteristics'. This position of the Italian legislator can be questionable, as despite admitting legal forms different from Protection Consortia, it assigns different functions to producer groups *treating them differently on the basis of their legal form*. Based on this distinction, they are treated differently *and* implicitly associated with a less effective capacity to manage the sign. Indirectly the system, as it is today, seems legitimise the two-speed system and its inefficiencies, and validate the idea that some producer group, by default, are 'better' than others.

This is a prerogative recognised in Italy only to Protection Consortia, which through the formal recognition are assigned *erga omnes* functions if they comply with strict governance requirements. According to the Italian legislator, governance requirements allow those producer groups to better serve the general interest and, in the meantime, legitimate extra-powers and responsibilities towards members and non-members. This argument is explicitly mentioned in Italian Ministerial Decree 12 May 2010, on the control of the activities attributed to Protection Consortia: 'considering that the exercise of the functions assigned to the Protection Consortia, *if carried out properly*, generates goods for stakeholders and the rural economy, increasing the economic value of individual denominations of origin and geographical indications, an asset which is also enjoyed by non-members of the Consortium' (emphasis added, translation provided by this author).

4.1.3 Legal implications of commons or club type of management in GIs

The commons type of management as an alternative to club goods type of management has been frequently evoked during this research. Here below, I summarise why the type of management of the place-based reputation, formalised in GIs through the product specifications, is relevant from a legal perspective.

- **The commons type of management allows to serve the general interests embedded in the protection of the place-based reputation and, more generally, to maximise the social value of the GI. The participants' decision-making as to rule-crafting is therefore limited by the duty to provide objectively verifiable evidence. The boundary rules should be 'reasonable' meaning resulting from the balance between the need of protecting the resource and avoiding the risk of arbitrary exclusion. Reasonable boundaries grant a degree of openness sufficient to ensure the conditions to generate positive externalities (public goods).**

The EU legislator only recently started to value the importance of collective action. Among the objectives of the future Regulation on GIs for agricultural products and foodstuffs: 'producers acting collectively have the necessary powers and responsibilities to manage their geographical indications, *including* to respond to societal demands from products resulting from sustainable production in its three dimensions of economic, environmental, and social value, and to operate in the market'. The word 'including' suggests that collective action might be related to activities *other than* the local development and resource production functions of the GI. I showed that collective action issues cannot be compartmentalised and restrained only to non-market related functions. Rather, the collective management is primarily focused on place-based reputation. As the shared and complex resource, it embeds various components related to the market and non-market context, which are all concerned by the specific types of management. Depending on the

chosen type of management, all the functions performed by the sign are affected, independently from the product class.

The type of management resulting from structured collective action corresponds to commons type of management when the maintenance of the place-based reputation depends on producers' compliance with the product specification, intended as producer-driven '**reasonable boundaries'**[815] legitimated by objectively verifiable evidence. The difficulty of identifying reasonable boundaries can be attenuated by national authority or experts' intervention, which can help stakeholders' to objectively formalise existing practices. This is better achieved when competent authorities are sufficiently aware of value chain dynamics and are proactive in suggesting solutions (without substituting to producers' as main decision-makers). When external actors support the operators in codifying existing practices in the pre-application and application phases, the outsider issue can be mitigated. Another element which highlights profiles of commons management in GIs is the **social value potentially embedded in the sign**, which should not legitimise a disproportionate power of producer groups over outsiders.[816] Rather, it should suggest that the 'exclusive rights' deriving from registration are limited by the necessity of **granting a minimum level of openness** (i.e., a sharing obligation or structured openness). In practice, this can **reduce stakeholders' margin of manoeuvre** in deciding on boundary rules (rooted in objectively verifiable evidence) and in a **better predisposition of the sign to produce public goods**. This entails the configuration of a 'mitigated right to exclude', and strong management rights, which *per se* does not necessarily mean departing from the classical definition of property.[817] As to management rights, commons type of management is inspired by non-discriminatory access to the use of the name (i.e., absence of arbitrary and restrictive rules on membership) but also by the compliance of the composition and functioning of the group with the principles of representativeness, fair representation and democratic functioning. The French IGPIA cases show the repercussions of a loosened legal approach to governance at legislative level which, in turn, influences the practices of the national authority. The type of assessment of the rules of the specifications and the formal recognition of

815 This expression has been used by Elinor Ostrom in Ostrom, *Understanding Institutional Diversity* (n 270).

816 The example of *Absolue Pays de Grasse* showed how the resource production and local development functions were among the declared goals of the GI initiative. The localisation of the raw materials inscribed within a quality strategy encouraged the re-establishment of aromatic plants producers in the area, despite the initiative is not (yet) inclusive of all raw material producers and targets mainly the industrial processing of the absolute. The GI initiative was an opportunity to boost this activity, which was at risk of disappearing, because of the competition with foreign markets. (Interview with, organic raw material supplier n. 1, 21 April 2021, para 2 and Interview representative PDMO Absolue Pays de Grasse, 22 April 2021, para 18). The same resource maintenance objectives were embedded in the case of *Poterie d'Alsace* and *Liffol*. To some extent, the same objectives can be detected in *Couteau Laguiole*, where a major factor of complexity is given by the conflicts derived from the presence of disjoint territories.

817 Hanoch Dagan, 'Doctrinal Categories, Legal Realism, and the Rule of Law' (2015) 163 University of Pennsylvania Law Review 29. For more insights see *supra* Chapter 1.

applicant producer groups as PDMOs are affected and might leave room for more 'exclusive' types of management (i.e., club good management).

- **Rulemaking as a fencing process, affects the degree of excludability of the GI. Lacking legal safeguards on product specification design, GIs are not neutral to arbitrary enclosure and can share attributes with the club goods type of management. In these cases, the cost of exclusion is perceived as low, meaning that the appropriators/users can exclude others without justifying their choices; the conditions for membership are stricter and discretional and the benefits are addressed specifically to a closed group of stakeholders. Club goods type of management might not be detected by national authorities using a hands-off type of assessment.**

The property regime does not affect the definition of commons or club type of management. Instead, **fencing** (meaning the artificial 'construction' of virtual arrangements, setting of high or low barriers to access and use) can affect the degree of excludability attributed to the sign. When the repartition of benefits between actors is shared solely among the members of the 'club', instead of being open to a larger community, it can lead to arbitrary enclosure. **Commons and club goods types of management can be identified looking at the cost of exclusion** (i.e., how easy it is to exclude others from the use of the good). In club goods the cost is low, as it would be for private goods. A low cost for exclusion means that users/appropriators can exclude others without particular justifications or obligations. **Club good type of management** is less open in terms of membership, and less aimed at producing benefits for the community at large. According to Frischmann, in club good management 'owners may favor uses reasonably expected to generate appropriable returns at the expense of uses more likely to generate positive externalities'.[818] GIs are *not immune* to this type of management. As highlighted by Fournier et al., 'the reality of GIs is sometimes far from this ideal type [of commons management]. Individual strategies and highly competitive relationships can strongly limit coordination between actors. GIs can be **appropriated by small groups**, or even, institutional contexts, by a single dominant actor or the product specification can be dead letter.' Moreover, the authors state that 'too many opportunities for of valorisation lead to strategies of appropriation of collective resources by particular actors and to club and club logic, while **uncertainties about these possibilities can limit investment** in the construction of these potential commons.'[819] I add to these remarks that the 'appropriation by smaller groups' can result in devising **boundary rules which restrict access on a discriminatory basis**. When GIs are managed as club goods it means that fencing issues have been resolved with arbitrary enclosure. In these cases, the rules governing inclusion and exclusion

818 Frischmann (n 189) 308.

819 Fournier and others (n 63).The translation from French for both citations has been provided by this author.

might respond to stakeholders' commercial strategies but are not necessarily heavily grounded on objectively verifiable evidence. In these cases, the outsider issue is more likely to emerge. The **pillars** can be affected by club type of management as well, as the exclusion of potentially legitimate stakeholders can have repercussions on the representativeness of the producer group, on fair representation, and consequently on democratic functioning. Moreover, I add that these inefficiencies do not necessarily emerge from a **one-time documental assessment and absence of control on governance** by the competent authority (hands-off approach), while they can be detected more efficiently by a hands-on or hybrid approach to the examination of the application. Moreover, on-going checks are crucial to verify coherence of the governance structure to the pillars.

- **The collective action approach requires shifting perspective from the traditional legal approach on the classification of goods and focusing on the distribution of rulemaking power among participants (e.g., between producers and actors different from producers, including state actors). It means focusing on how actors' participation to decision-making affects the outcomes. Considering these elements is fundamental to understand and evaluate the outcomes.**

Ostrom's approach to state-driven initiatives raises interesting issues which merit further attention. In her view, state as 'organisational devise'[820] implies that 'institutional change must come from outside and be imposed on the individuals affected'.[821] This also means that the initiative comes and is led by an ' "external" leader who obtains most of the benefits'.[822] She showed however, that State-driven governance can result to be inefficient when faced with a collective action problem. However, she proved that community-based initiatives performed better in 'solving the problem of supplying a new set of institutions [i.e., rules, arrangements], making credible commitments, and mutual monitoring'.[823] It is important to avoid the misleading conception that state intervention means *automatically* that goods are managed as open access resources, which 'lack effective rules defining property rights by default'. That would erroneously imply that the resources involved are *always* subjected to open-access regimes. Ostrom and Hess affirm that state governments can also create forms of co-management.[824] Moreover, the theories of the State and the firm imply, by default, that State management or privatisation might intervene to best respond to collective action dilemmas affecting common-pool resources. Highlighting the efficiencies observed in community-based management of specific resources suffering from erosion, Ostrom

820 Ostrom, *Governing the Commons* (n 114) 29.

821 ibid 14.

822 ibid 222.

823 ibid 44.

824 Ostrom and Hess (n 115) 56.

identifies bottom-up community-driven and self-sufficient type of management as *one possible way* (eventually combined with others) to manage these resources. This shows how the type of management is to be conceived as another way of looking at the attribution of rights, powers and responsibilities, among resource users and not as an automatic attribution of a specific legal status to the resources involved, even though '*jus publicum* applies to their formal status'.[825]

Things become more complicated when intellectual goods are involved. When resources are *treated as commons*, as highlighted by Madison et al., 'commons arrangements usually must create a governance structure within which participants not only share existing resources but also engage in producing those resources'.[826] This interpretation is complemented by the identification of (a) *how* different rights are allocated and exercised by different actors; (b) *who* has the main decision-making power; (c) *how* this decision-making capacity is exercised; and, ultimately, (d) the *legal consequences* of the type of management on the legal performance of the tool. This approach can be valuable for intellectual property jurists to diagnose efficiencies and inefficiencies emerging by the stakeholders' use of the tools made available by the legal system, provided that this observation does not have direct normative implications. Instead, normative conclusions derive from the legal reasoning stimulated by this type of observation and might encourage policy adjustments to prevent recurrent management issues.

Hence, GIs can also be managed by the State, but it does not automatically mean that they are managed as public goods (non-exclusive and non-subtractable). Pick and Marie-Vivien show, for example, that in Vietnam GI management mostly follows a top-down approach as to the GI initiative and management of the sign. The State, 'establishes itself as representative of the local stakeholders'[827] and is the owner of the GI, meaning that it can register the name, and allow stakeholders to join as organisations or individuals (access is therefore regulated by the decision-making power of the state authorities). The product specifications design is assigned to an expert recruited by the State who makes the choices as to the name to be registered and crafts the boundary rules.[828] In Vietnam, 'collective action dynamics do not usually precede the creation of associations but rather are instigated by an external expert under the supervision of state authorities'.[829] Producers have the sole right to use the GI (right to access), while management and exclusion are by default rights attributed to the state. In this context, the protection of the denomination is not part of the GI objectives. Marie-Vivien studied the functioning of the GI system in India, where similar patterns emerge and are applied to agricultural and non-agricultural

825 ibid. This is coherent with considering property as a bundle of rights.

826 Madison, Frischmann and Strandburg (n 146) 681.

827 Pick and Marie-Vivien (n 75).

828 ibid.

829 ibid 16.

products.[830] In India, the 'authorised registered users' have the right to use the GI, while the right to take action against counterfeiting is upon the owner and the users.[831]

Some of these characteristics can be detected in Italian public and publicly owned CTMs for industrial products and crafts, where the role of national and local authorities is key and 'instigates collective action' among producers, even though it can be nuanced by some producer-driven contributions. Depending on the case, these contributions might affect either the initiative or the management of the sign. However, they are not resolutive of management inefficiencies, involving low producers' awareness as to the commitments required by exogenous or semi-endogenous rules. These commitments include being subjected to monitoring and controls, and might imply maintaining a form of governance structure.

The Italian case studies, therefore, reveal a prevalent top-down approach in both public CTMs and publicly owned CTMs. In the CAT trademark, municipalities constitute an important intermediate level of governance between producers and the Ministerial bodies. The Ministry has the right to exclude (to determine who will have access to the use of the name), and the right to manage. Producers have the right to access (and to use the sign), but regional or local public bodies are identified as the applicants. Since Law 188/1990 does not explicitly individuate a trademark 'owner', it is reasonable to distinguish this experience from the other analysed CTMs: treated as a public trademark it is the experience closest to GIs in Italy. Conversely, the Murano Glass and Alghero experiences, more traditionally in line with the model of public and publicly owned CTMs, identify the municipality or Region as the 'owner', having the right to access, manage, and exclude (in addition to control and sanctioning). Alienation/transferability is not contemplated.

In all Italian cases, producers seem more conceived as 'standard takers' than 'standard makers', to use Marie-Vivien and Biénabe's expression, which means that bottom-up collective action initiatives are absent, or weak, or remain implicit, and the decision-making power is concentrated on state actors. This setting sacrifices proximity between public bodies and producers and risks either to engender inertia or arbitrary one-fits-all solutions to specific collective action issues affecting the

830 In her book *'La Protection des Indications Géographiques: France, Europe Inde'* she highlights that 2/3 of GIs in India are registered directly by the State. The remaining 1/3 is registered by producer groups managed as associations or cooperatives. However, she affirms that in the majority of those cases, the State has participated to their protection. Moreover, she highlights a dissociation between the applicant ('registered proprietor') and the 'registered authorised user', attributing to this top-down configuration a lack of awareness from the producers' side as to their specific role (and the related management inefficiencies of the sign). Marie-Vivien, *La protection des indications géographiques* (n 199) 165–168.

831 ibid 167.

resource, i.e., place-based reputation, which is almost never 'treated as a commons'.[832] This can be considered a major factor of difference, at least from a legal standpoint and notwithstanding inefficiencies emerging from practice, between the GI and public or publicly owned CTM systems.

- **The classification of goods, mirroring issues resulting from the type of management, implies nuances. Similarly, the setup devised by the rules implies nuanced degrees of excludability.**

The classification of goods provided by Ostrom is not strict, meaning that types of management prevalently considered as club, might present some features of commons management and *vice versa*, as if they were positioned along a gradient.[833] Coriat restates, with incontestable clarity, that 'knowledge commons are not based on an absence of rights, but on another form of use and distribution of the different types of rights attached to IP.'[834]

Context-specific specificities might make particularly challenging the task of encapsulating resource governance in one category, especially because categorisation is the result of the simplification of real-world situations. Therefore, it seems more reasonable to affirm that real-world examples of GI governance can possess some attributes of the commons and some attributes of club type of management.

- **The right to management qualifies 'ownership' in GIs, more than the right to alienation or the right to exclude.**

Rulemaking responds, on the one hand to the need to comply with legal requirements. On the other hand, it is problem-driven, meaning that it arises from the need of 'defending' the shared resource from the risk of erosion implicitly devising a type of management. The core importance of the right to management in GIs is often overlooked by legal scholarship and leads to the denial of ownership. Yet, some legal scholars redefined the concept of ownership by giving priority to governance, over the right to transfer (alienation) or the right to fully exclude. I propose this alternative perspective to discuss the qualification of GIs as intellectual property, and to put the accent on the distribution of these rights among individual or collective actors.

832 In the case of CAT trademark, these are considered by stakeholders some of the major fragilities of Law 188/1990 and its inability to effectively promote the relevant denominations.

833 This position seems coherent with Ostrom's approach, which identifies graduated scale of excludability and rivalry from high to low, and it is shared by other scholars. See *inter alia* Mazé (n 109).

834 Coriat (n 126) 16.

4.2 PART II – Coherent transitions

In the following paragraphs I summarise the main issues observed through the A-P-O approach within the GKC applied to GIs to recall the lessons learned from the French and Italian agricultural and non-agricultural experiences. I use this summary as starting point to inform public policies, namely the agri-Proposal and the non-agri Proposal. My analysis of the proposal aims to assessing whether they are aligned in addressing, effectively, the legally relevant collective action issues identified in the previous chapters.

I propose suggestions, driven by general principles of equity, fairness, and social justice, but most importantly by the principle of coherent transitions. This approach is mentioned *inter alia* by the EU Parliament in its Resolution on the possible extension of the GI protection of the EU to non-agricultural products and in the Commission Staff Working Document on the *Evaluation of Geographical Indications and Traditional Specialities Guaranteed*.[835]

With the 'coherent transitions' paradigm I intend looking at the evolution of policy prescriptions and their implementation in a realistic way, meaning considering the feasibility of change in national contexts. It allows to contextualise change to the national specificities (for example the capacity of stakeholders to work together in a specific sector, the tradition in GI protection and the specificities of the systems already in place) and avoids the risk of proposing recommendations of reform based on naïve assumptions on 'good' or 'bad' national models. It is coherent with the idea, put forward by Ostrom's and colleagues, that one-fits-all solutions and panaceas should be avoided. At the same time, it allows to flag which ameliorations are possible, and if and why harmonisation efforts are difficult to implement.

4.2.1 Scope of protection

As already discussed in Chapter 3, significant overlaps still exist between the definition of 'agricultural products and foodstuffs' and 'industrial products and crafts'. These overlaps hinder legal certainty as to the scope of the reform. More specifically:

(a) according to art 5 of the agri-Proposal and art 2 Reg 1151/2012 agricultural products and foodstuffs are products 'issued from agriculture, ***including*** **foodstuffs**, and fisheries, and aquaculture products'. The use of the preposition 'including' implies that the current GI protection applies also to some non-food products issued from agriculture which are 'closely

835 'The system must be based on best practices' and based on 'the lessons learned from the experience gained in the agricultural and food sectors'. See European Parliament resolution of 6 October 2015 on the possible extension of geographical indication protection of the European Union to non-agricultural products (2015/2053(INI)) available at <https://www.europarl.europa.eu/doceo/document/TA-8-2015-0331_EN.html>; See also European Commission (n 44).

linked to agricultural production or to the rural economy' (Recital 15 Reg 1151/2012). Therefore, ambiguities still exist on how to consider non-food 'industrial products and crafts' *issued from agriculture*. The ambiguity seems to persist in the agri-Proposal, where the reference to the combined nomenclature does not seem resolutive. Therefore, further clarifications might be needed as to the extent to which products, different from foodstuffs, fisheries and aquaculture products are still considered 'linked to agricultural production or to the rural economy', and therefore potentially overlapping with 'industrial products and crafts'.

(b) 'Borderline' cases (i.e., the Absolute Pays de Grasse case) have until now been solved by looking at the nature of the processing steps involved in the value chain (i.e., the prevalence of an industrial type of processing on agricultural activities, such as harvesting and basic transformation steps) and should not be considered as isolated cases. Yet, I showed that the GI characterisation entails specific choices of the producer group. If not adequately supervised by national authorities and grounded on solid verifiable evidence, it might encourage opportunistic behaviours by the applicants, especially considering the much more flexible procedural rules governing non-agricultural GI registration.

(c) I showed that denominations identify origin products are eligible for GI protection, if there is an objectively verifiable link between the specific qualities and place which justify a place-based reputation. This link is more likely to happen when the production is embedded in a context favourable for collective action dynamics (e.g., districts). The direct reference to origin products in the Regulation might be helpful to exclude all the products whose specific characteristics and qualities do not result from inter-generational and infra-generational exchanges between producers and a localised cultural and natural ecosystem. In other words, it would avoid the risk that weak or non-eligible denominations are artificially constructed *for the sole purpose* of GI protection.

It might be worthy to consider if a distinction based on product classes is justified at all, also considering that 'craft' and 'industrial' might refer to a method of production and used in both the agri-food and 'non-agricultural' sector.

The current formulation of the Geneva Act, which does not make any distinction with regard to the product class, seems to go on this direction.[836] Moreover, the simplification of the EU *sui generis* system is among the declared aims of the inclusion of wines, spirits, and agricultural products and foodstuffs in the same Regulation, and it could be a good opportunity to include non-agricultural origin products.

836 Zappalaglio considers that the minimum level of GI protection required by art 9 and 10 of the Geneva Act to the contracting parties 'is significantly high' and that this might considerably impact the level of commitment of the EU in crafting the future legislation for non-agricultural products. For more insights on this point see Zappalaglio, The Transformation of *EU Geographical Indications Law* (n 21) 228–233.

This would however imply the harmonisation of the assessment procedures which would apply independently from the product class. Eliminating the distinction between product classes would imply, as suggested by Marie-Vivien and pointed out in Chapter 1,[837] an assessment based on the strength to the origin link and eventually the cumulation of human and natural factors justifying place-based reputation.

4.2.2 Actors: producer-driven approach to the GI application

Main findings: The interdisciplinary scholarship on GIs seems unanimous in considering that when the producers and processors concerned by the product specification are the core decision-makers, they can craft rules measured with their own level of commitment. The data gathered in this work confirmed the importance of this principle in the French and Italian PDO/PGI context.[838] The practice of GIs teaches us that more efficient outcomes are reached when groups are constituted by producers, and regional and public authorities are the facilitators and supporters of the initiative. Conversely, situations where actors external to the value chain informally have the decision-making power over the rules, the GI system is more exposed in the long run to collective action breakdowns.

In the non-agricultural context, the French IGPIA system replicates the scheme of producer-driven initiatives, while some gaps need to be filled when the valorisation and protection of the denomination is performed through public or publicly owned CTMs (all Italian CTMs cases). In Italy, the initiative for the valorisation and protection of denominations of non-agricultural origin products through CTMs is taken over by public authorities (i.e., municipalities or regional authorities), which might affect stakeholders' commitment to drafting enforceable product specifications.[839]

The findings of this work also revealed that, in the French and Italian PDO/PGI context, stakeholders might spontaneously self-organise in more complex structures than single producer groups in charge of a single denomination. Producer groups federations and multi-denomination producer groups imply the inclusion of intermediate levels of governance between the producers and the national authorities and aim to mutualise the costs for advertising and investment, and

837 Marie-Vivien, 'Do Geographical Indications for Handicrafts Deserve a Special Regime?' (n 11) 221.

838 See the *Pecorino di Picinisco* PDO case, essentially driven by the municipality initiative at the beginning and impacted by the sustainability of the GI governance after the registration.

839 A core group of producers in Impruneta and Alghero participated actively to the CTM initiative, but remain, to various extent, 'dependent' from the municipality. In Faenza, while the municipality contributed to federate producers and to stimulate promotional initiatives for the general interests. However, it also redirected the focus of action far from the identification of common standards of production.

to enhance knowledge sharing, which might also benefit the guarantee function.[840] In the IGPIA context cooperation and collaboration is not yet sufficiently developed for multi-product PDMOs, and one national association federating the majority of PDMOs of non-agricultural GIs has been created in 2015. In Italy, experiences are limited to single CTMs and is characterised by a certain level of complexity.

Table 23 compares the legal rules regarding the actors as proposed by the European Commission in the context of the future reforms of the PDO/PGI system and extension of the GI protection to industrial products and crafts.

Table 23: Comparison between the rules of Reg 1151/2012 and of the Proposals targeting the 'actors-participants'.

Reg 1151/2012	Agri-Proposal	Non-agri Proposal
Art 3: 'group' means any association, irrespective of its legal form, *mainly* composed of producers or processors working with the same product.	**Art 2**: 'producer group' means any association, irrespective of its legal form, *mainly* composed of producers or processors of the same product. **Art 8**: an authority designated by a Member State may be deemed to be an applicant producer group; single producer application. **Art 32 and 33**: difference between producer groups and recognised producer groups.	**Art 3**: 'group' means any association, irrespective of its legal form, *mainly* composed of producers. **Art 6**: official submission should be made by the producer group; an authority designated by a member state may be deemed to be an applicant producer group; single producer application. **Art 40**: Member States may provide that public officials and other stakeholder, such as consumer group, retailers and suppliers, 'also participate in the work of the producer group'.

From this comparison the following considerations can be formulated. As to the agri-Proposal:

- The definition in art 2 of 'producer group' remains unchanged from art 3 Reg 1151/2012. The Proposal further specifies that 'producer' is intended as 'an operator engaged in any production step of a product protected by a geographical indication, including processing activities, covered by the product specification'.
- Art 32 and 33 of the agri-Proposal differentiate between 'producer groups' and 'recognised producer groups', which are subjected to different requirements as to their constitution and

840 The difference between the two configurations emerged clearly in the French system, where federations (not formally recognised as PDMOs, one example being the CNAOL) play a key role in fostering, at the national level, knowledge sharing and collective action among producers belonging to the same product class. Instead, multi-product PDMOs, are complex governance structures, aggregating pre-existing and smaller PDMOs to mutualise the costs of the GI initiatives. One example is Vendée Qualité.

tasks and responsibilities. This distinction is a specificity of the future EU PDO/PGI system for agricultural products, wines, and spirit drinks.

- In the same vein, art 32 affirms that national authorities should verify that 'producer groups', need to 'set up on the initiative of interested stakeholders, *including* farmers, farm suppliers, intermediate processors and final processors, as specified by the national authorities and according to the nature of the product concerned'. Therefore, the initiative might also involve stakeholders such as 'public officials and other stakeholders such as consumer groups, retailers and suppliers', potentially implied in the decision-making process.

Concerning the non-agri Proposal:

- 'Producer' in art 3 means an 'operator engaged in any production step of a product the name of which is protected as a geographical indication, including processing activities covered by the product specifications'. The applicant producer group is constituted by the 'producers of a product the name of which is proposed for registration' (Art 6 non-agri Proposal). However, art 40 of the non-agri Proposal explicitly admits the participation of 'public officials, and other stakeholders such as consumer groups, retailers, and suppliers, in the work of the producer group', suggesting the attitude of the EU legislator in favouring a 'broad participation' to the decision making, without specifying if this participation should entail a deliberative or consultive vote. The broad participation to the producer group of heterogeneous actors might favour the consideration of multiple interests involved but it might also engender power asymmetries.

Elements common to both Proposals:

- Both in the agri-Proposal and non-agri Proposal the system envisages the possibility that a 'designated authority' is considered an applicant producer group 'if it is not feasible for the producers concerned to form a group by reason of their number, geographical location or organisational characteristics' (art 8 and art 6 non-agri Proposal). The current formulation of the rules leaves room for ambiguities and favouring a top-down rather than a bottom-up approach to the rulemaking. The implication of a 'designated authority' in the GI initiative implies the acceptance that some producers are not in the conditions to apply themselves, by reason of their number (are they too many or too few?) or organisational characteristics (are they not sufficiently structured to act together and take decisions?). In other words, it seems that the legislator assumes that sufficient levels of collective action might not be attained at producer level. Admitting flexibility over this condition at the early stages of the application means not favouring optimal conditions for the successful registration *and* management of the sign.

- No requirements concerning the **legal form** of producer group are added, envisaging the willingness of the EU legislator to preserve national specificities.
- The non-agri Proposal focuses on the possibility of '**single producer' applications**, requiring little evidence to prove the legitimacy of the applicant, while it does not sufficiently acknowledge the possibility that a producer group might be in charge of **multiple denominations**.

Suggestions:

Any 'substitution' in the decision-making process by actors different from producer groups (i.e., formal, or informal legitimacy of their decision-making capacity as to the rule-crafting) can cause inefficiencies, detrimental for producers' empowerment and impacting on the maintenance of the guarantee of quality. Moreover, the identification of the applicant producer group is particularly important for identifying the future GI product *and*, as such, it might influence the basis for assessing the legitimacy of the applicants. Contrarily to the stricter Italian and French approach to the identification of the producer group, the EU legislator, in both proposals, seems to be more flexible, implying that in the composition of the group might *include* actors *different from* producers, or that the applicant producer group is *substituted* by a designated authority.

The success of GI initiatives where producers are the core drivers and participants suggest exigencies of coherence at the national and EU legislative level:

(a) the producer group, both in the agri-food and non-agricultural GI system, should be *exclusively* composed by the producers, while actors different from producers should clearly be identified as facilitators or supporters of the GI initiative (which operatively means that they are not entitled to the deliberative vote during the decision-making).

(b) To achieve an endogenous, producer-driven GI initiative, in contexts similar to the Italian CTMs non-agricultural system, a governance shift should imply the devolvement by state actors of their decision-making power as to right to exclude and the right to management to the operators, changing their role from trademark owners and co-managers to facilitators/ supporters.

(c) Following the same logic, the possibility that *delegated* authorities might be considered as applicant producer groups should be eliminated in the future non-agricultural GI system.

(d) Single producer applications should be considered, in both the agricultural and non-agricultural GI system, as residual and subject to stricter requirements,[841] while more complex and multi-layered governance structures (e.g., multi-products producer groups) should be

841 Currently, one of the requirements to be met according to the proposal is that the producer is the only one 'willing to submit an application'. This requirement seems not enough strict and can dangerously expose the initiative to unsupported and discretional uses of the sign, especially if not accompanied by an adequate verification by the national authority. Additional (and more meaningful) requirements could be proving the representativeness of the producers in

explicitly envisaged in the future Regulations to reflect the current trends and to provide adequate safeguards for avoiding power asymmetries and arbitrary exclusions.[842] Within these configurations, external actors (different from regional and public bodies) should play the role of facilitators or supporters of the GI initiative, while bottom-up cooperation and coordination efforts at producers' level should be preserved. Moreover, a careful assessment on the compliance with the pillars should be undertaken.

4.2.3 External actors: the role of national authorities

Main findings: the EU legal framework has always given to each competent national authority the freedom to manage the national phase of the application procedure, and if necessary to apply additional requirements.

I observed that when the national authorities work in proximity with the value chains, producers are more aware of the consequences of the GI registration, in the level of engagement required for the rulemaking process and in the exclusionary effects derived from the rules as outcomes. In the Italian system (which I define as 'hybrid hands-off/hands-on') regional authorities supervise the applicants. In France, this proximity is granted through a 'hands-on' approach by the territorial departments of the INAO and the commission of inquiry, and a multidisciplinary technical approach is operationalised to contextualise the GI initiative and provide better guidance. Despite the declared efficacy of the French hands-on approach in the agricultural sector, in the French non-agricultural sector the INPI applies a purely legal hands-off approach. It relies on the documentation provided by the applicant (not implying on-site inspections) and might leave uncovered some blind spots on the justifications of producers' choices and modalities of the decision-making process. More generally, it might not lead to a deep understanding of the collective action dynamics at the local level. These approaches are also extended to the verifications of the eligibility requirements on the applicants, which involve a formal recognition, both in the French and Italian system. In France (both in the agricultural and non-agricultural system) this recognition is made *in itinere* (i.e., during the application process, when the content of the specification is proposed by the applicant but not yet crystalised); in Italy, after a documental check on the composition of the applicants' association, a more rigorous formal recognition is undertaken after the GI registration, and only for Protection Consortia. The specific legal rules applicable to Protection Consortia lead to the development of a two-speed system based on the legal form of the producer group after the GI registration, which hinders the harmonisation of the conditions necessary to manage the sign.

the geographical area and concluding that the applicant is the *only operator* actively producing in the area according to objectively verifiable and authentic standards of production.

842 Conversely, art 8 of the agri-Proposal, states that 'applications for the registration of geographical indications may only be submitted by a producer group of a product, the name of which is proposed for registration'.

The Italian system of CTMs considers state actors as owners and/or, depending on the context, co-managers of the CTM. On the one hand, this grants that the initiative might be driven by the general interest; on the other hand, it does not automatically mean that proximity to the value chain is granted, and technical multidisciplinary support is provided. This configuration is the main cause, in some contexts, of the non-application of formal legal rules or its substitution with informal less exigent practices. Sometimes it might lead to a disincentive in using the CTM and in a low performance of the sign as to its expected functions.

Table 24 illustrates the legal rules envisaged by the Proposals targeting the role of national authorities and third parties during the national application phase.

Table 24: Comparison between the rules of Reg. 1151/2012 of the Proposals targeting the 'actors-national authorities'.

Reg 1151/2012	Agri-Proposal	Non-agri Proposal
Art 49: Examination of the application to the national authorities. The examination is aimed to check that the application is justified and meets the conditions of the respective scheme.	**Art 8**: Regional or local public bodies may help in the preparation of the application and in the related procedure. **Art 32:** Member States shall verify the functioning of the producer group.	**Art 6**: Regional or local public entities may help in the preparation of the application and in the related procedure. **Art 11 and 12**: designation of the competent national authority and the examination which targets the content of the product specification. **art 15**: it is possible that the Member State is exempted from designating the national authority (direct registration). **art 40:** Member States shall verify the functioning of the producer group.

In the agri-Proposal:

- the verification undertaken by the national authorities on the functioning of the producer groups and recognised producer groups represents one of the main novelties. It is however not specified if this verification occurs at the registration phase or later. The object of this verification is explained more in detail in the following paragraphs.
- Currently, the proposal specifies that the national authority is in charge of verifying that the GI initiative is carried out by the interested stakeholders, defined broadly as explained in the previous paragraph.
- The proposal seems to leave space for national specificities as to the type of approach to be used during the national phase of the procedure.
- It institutionalises the role of regional authorities in helping the preparation of the application (a practice already consolidated in some national systems, such as the Italian system).

In the non-agri Proposal

- The national authority should check the functioning of the producer group. As in the agri-proposal, it is not specified if the verification is preliminary to the registration.
- Art 11 and 12 of the non-agri Proposal refer to the designation of the national authority and its role in examining the GI application during the national phase of the procedure. While the designation is still left to the Member State, the designated national authority 'shall examine the application and shall check that the product complies with the requirements for geographical indications referred to in Article 5 and provides the necessary information for registration referred to in Articles 7, 8 and 9'.
- Art 15 specifies that Member States might be exempted by the Commission to designate a competent authority at the national level, upon the following conditions: (a) the Member State is deprived of a national *sui generis* system for GIs for crafts and industrial products; (b) the local interest for protecting craft and industrial products is low. The EUIPO would be, according to the Proposal, in charge of examining registration, cancellation or amendment of the product specification.

In both proposals:

- An important novelty is the institutionalisation of the power of the regional authorities and public bodies, which might 'help in the preparation of the application'.

Suggestions:

The hands-on approach has proven to be efficient in understanding contextual elements influencing rulemaking and leading to product specifications, statutes, and control plans. [843] Therefore, the technical multidisciplinary competences of the national authority, coupled with producer proximity, might be more effective in strictly interpreting the evidence-based approach as a criterion for drafting the product specification.

Given heterogeneous traditions in GI protection in the Member States, and taking the principle of coherent transitions seriously, it might be unrealistic imagining a full harmonisation of the approach used by national authorities and the related administrative setups (whether the adjustments would require to all Member States 'upgrades' to meet complex systems as the French or Italian one, or 'downgrades' to simplify existing national specificities).

843 It is important to highlight that the hands-on approach should not be interpreted as a 'directorial approach', but as a facilitating and support approach where producers remain the core decision-makers. Some power of intervention might however be necessary to verify, through on-site inspections, the situation at the local level and give input to the ongoing rule-crafting (for example, the presence of potential 'outsiders' could stimulate a re-assessment of the delimitation of the geographical area or reframing the method of production or product characteristics because of the ascertained presence of variants).

I highlighted that, independently from the sector involved, there is a direct relationship between the method of examination and assessment used by the national authority, the quality of the first-level outcomes (i.e., product specifications, control plan, and statutes of the producer association or organisation) and effectiveness of the second-level outcomes (governance and control configuration). Independently from the type of national authority involved (i.e., Ministry of Agriculture or Intellectual Property Office), *a technical multi-disciplinary approach where the legal focus is an indispensable (but not exclusive) component*, would allow to build a deeper knowledge on the functioning of the value chain concerned and of issues related to certification. This expertise implies assisting the producer group in a systemic way, interpreting the GI initiative as embedded in (and influenced by) a much more complex context. The awareness of the contextual elements of the GI initiative is crucial to (a) intervene during the pre-application phase and prevent arbitrary rules, not sufficiently supported by evidence and favouring the insurgence of conflicts related to the outsider issue; (b) evaluate, eventually *ex officio*, the reliability and appropriateness of the evidence provided by the applicants based on an objective assessment;[844] (c) ensure a minimum level of accuracy of the outcomes of all GIs, including small and medium-sized GIs.

The technical multidisciplinary approach, strictly evidence-based, can minimise the occurrence of 'weak applications', or applications which denote a propension for a club good type of management of the shared resource.

The devolution of competences to EUIPO for the examinations of GI applications could question the prevalence of a purely legal approach over the multi-disciplinary technical approach. Leaving aside political arguments, this innovation could negatively impact on the quality and effectiveness of the outcomes *if* technical and multidisciplinary expertise is not ensured. In this case, mechanisms to grant proximity to producers and to the dynamics of the value chain would be appropriate to avoid governance inefficiencies of the signs.[845] This argument is even more relevant if the direct

844 As mentioned earlier, solutions such as the French public inquiry might not be enough to grant impartiality, and ensure completeness and exhaustiveness of information, while the expertise of independent experts might better ensure this task.

845 Art 15 of the non-agri Proposal specifies that the EUIPO, in case of a direct application, shall be in charge of the 'examination of *specific aspects* of the application, lodged by the applicant', 'verifying certain information in the applications', 'issuing declarations concerning such information and replying to other requests for clarification'. These tasks, vaguely identified, require a technical evidence-based approach which should be ensured by the Office. Moreover the 'verification on information' does not specify if the targets of examination extend to all first level outcomes, meaning the specification, the control plan, and the statutes of the producer groups. If the national phase of the procedure is bypassed, it might be important to clarify that the assessment on the governance of the producer group (and eventually its monitoring *after the registration of the sign*) is ensured (especially on the compliance of its functioning with the principles of representativeness, representation, democratic functioning and necessary membership). The formulation of art 40 of the Proposal seem to discharge the EUIPO of the task, by leaving the competence to the Member State, and increasing ambiguities. The same considerations might be extended to the actor nominated as 'point of contact' by the Member State.

application (or one-step procedure) is maintained. The examination exclusively at the EU level, is justified by the need to make the EU GI protection available to countries with a younger GI system of protection. Nonetheless, a balance should be found between ensuring a less complicated procedure and the risk of denying the necessary diagnostic and supportive tools, more effective at the national level. Independently from the type of national authority involved (Intellectual Property Office or Ministry) they are much more aware of the national and local contexts than the EU authorities and are in the condition of interacting more easily with the stakeholders involved in the application.

Beyond cases where the one-step procedure is preferred, *in countries currently deprived of a system of GI protection at the national level*, the extension of the GI protection to non-agricultural products might imply:

(a) situations where the competence for the evaluation of the applications will be devoted to the Intellectual Property Office, despite a long-standing practice of the Ministry of Agriculture for the evaluation of PDOs and PGIs. This solution would imply the creation of a parallel track, based on the competence on the product classes involved. In countries as Italy and France, a the more exigent agricultural GI system could coexist with a more flexible and 'fast-track' system for non-agricultural GIs. Consequently, applicants might adopt opportunistic behaviours, shaping the product specifications as 'industrial and craft' instead of 'agricultural', taking advantage of the 'less demanding' registration procedure and the uncertainty derived from the blurred scope of protection of the reform (see *supra* scope of protection). More generally, the consolidation of different parallel approaches in the GI applications, coexisting in the same national system, countertrends the exigency of harmonisation.

(b) situations where the Member State already designated the Intellectual Property Office as a competent authority for examining the applications of PDOs and PGIs. This situation could imply the need of acquiring new technical competences on the relevant productions or, especially in countries with less established traditions in GI protection, a downward adjustment favouring the documental verification as a main method of assessment of the application ('trademark-like' application).

More generally, this scenario might create an unjustified diversification of national approaches,[846] and consequently different levels of accuracy and awareness in constructing the 'rules of the game', both from applicants and national authorities' perspective. In the worst case, it would imply

846 To some extent this difference is already present in the agri-food sector, as revealed by the Max Planck Institute 'Study on the functioning of the GI system'. The findings of this research might also be useful to stimulate the debate on the need of pinpoint possible common grounds for harmonising the methodological approach of national authorities in the agri-food sector (which should be inspired by a strict interpretation of the evidence-based approach and proximity to the value chains), independently from their identification in the intellectual property office or Ministry of Agriculture.

an unequal treatment reserved for GI applicants, based on the sole product class (agricultural vs non-agricultural), and a different level of 'reliability' of the sign in the marketplace. It might be interesting to consider the following options:

(1) The formal delegation to regional/local authorities or other public bodies of the task of providing technical assistance complemented by the centralised supervision of the national authority (hybrid hands-on/hands-off approach, similar to the Italian PDO/PGI system).
(2) The attribution of the competence to the Intellectual Property Office, with the possibility of externalising technical consultancy to impartial and independent experts available to grant proximity to local communities and technical expertise on the product classes involved.
(3) The controls undertaken by the national authority on the functioning of the producer group (currently envisaged only for the new PDO/PGI system for agricultural products, foodstuffs, wines and spirit drinks) should target, firstly, the presence of all the operators in the group (strict approach to the composition of the producer group - see *supra* in this chapter). Secondly, it should be aimed to assess if the rules governing its functioning are compliant with the four pillars (see *infra*). This type of assessment of the producer group is crucial for evaluating its legitimacy as to the rulemaking process. For both agricultural and non-agricultural GIs, it should be specified *when* this type of assessment takes place (see *infra* second level outcomes).

4.2.4 Actors: the role of third parties

Main findings: the intervention during the GI application of actors different from the applicants is aimed at enhancing third parties' participation to the product specifications design. It represents a moment of contribution of the community at large to the draft of the product specifications. This participation responds to the general interests embedded in the GI despite and it is handled differently in Italy and France.

In the French PDO/PGI system, the public consultation can lead to a new assessment pursued by the commission of inquiry. The national opposition procedure, which implies an exchange between the applicant and the opponents, can lead to modifications of the content of the 'project of product specifications' before the GI registration.

In Italy, the public hearing represents a national specificity, it is summoned upon the initiative of the applicant, and it is followed by the national opposition procedure. On this occasion, the content of the product specification is discussed and can evolve upon the input of the State and non-State participants. The national opposition procedure represents an exchange between the opponent and the applicant followed by the decision of the Ministry on the registration or rejection of the application.

In the French IGPIA system, the consultation of selected stakeholders and the public inquiry is aimed to involve stakeholders different from the applicants, who can express their opinion on the content of the application file (i.e., the product specifications, the statutes of the producer organisation, and the control plan). Differently from the agricultural sector, there is no direct exchange between the applicant and the opponents. The INPI receives the observations (which can be submitted by 'anyone') and summarises them in a document which is publicly available. Then, it shares, exclusively with the applicant, its recommendations based on its evaluation of the observations. This exchange between the INPI and the applicant might lead to the modifications of the product specifications and is followed by the INPI decision on the registration or rejection of the application. The legislator does not expressly state the functions of the public inquiry, and my conclusion is that it is aimed at gathering the technical expertise to complement the purely legal assessment of the INPI. From this perspective, since the experts' intervention is left to their spontaneous initiative, their exhaustiveness and impartiality are not ensured. Nevertheless, since a national opposition procedure preceding the GI registration is not explicitly provided in the French Intellectual Property Code, one might envisage that these functions are pursued as well by the public inquiry. In this case some adjustments might be needed for harmonising the opposition procedure with its homologue in the French PDO/PGI system.

In the Italian experiences of CTMs for non-agricultural origin products, third parties' involvement is differently interpreted, as the content of the product specifications are often established through the direct or indirect participation of public actors. Associations representing, at the national level, the professional categories involved in the value chain might also play a role in defining the product specifications of specific products. However, as already observed, each experience has its specificities as defined by the national laws establishing the CTM.

Table 25 shows the legal rules of the Proposals involving third parties' participation in the construction of the application file.

Table 25: Comparison between the rules of Reg. 1151/2012 of the Proposals targeting the actors different from the applicants and the national authorities.

Reg 1151/2012	agri-Proposal	non-agri Proposal
Art 49: 'the Member State shall initiate a national opposition procedure that ensures adequate publication of the application and that provides for a reasonable period within which any natural or legal person having a legitimate interest and established or resident on its territory may lodge an opposition to the application'. 'The Member State shall examine the admissibility of oppositions received'. 'If, after assessment of any opposition received, the Member State considers that the requirements of this Regulation are met, it may take a favourable decision and lodge an application dossier with the Commission'.	**Art 9:** • national application procedure is managed by the Member State; • it is subjected to publicity requirement and the Member State has discretional power on deciding modalities; • the opponent should have a legitimate interest; • a period of consultation should be granted to the applicant and opponent; • the Member State assessment should consist in a verification of the compliance with the Regulation; • possible appeal of the Member State decision	**Art 13:** • the Member State has the duty to conduct the national opposition procedure; • discretion of the Member State as to the modalities; • consultation between the applicant and opponent should be granted; • after the opposition changes might be made from the applicant and a report including these changes should be submitted to the Commission. **Art 14:** • changes of the application should be agreed from the national authority and the applicant; • national authority assessment based on the compliance with the requirements of the Regulation; • possibility to appeal Member State decision.

In the agri-Proposal:

- The national stage of the opposition procedure is a competence of the Member State (differently from the worldwide stage of the procedure, for which the Commission is competent, with possible partial devolution of this competence to the EUIPO);
- Modalities of assessment are at the discretion of the national authority.

In the non-agri Proposal:

- The national opposition procedure is compulsory, although modalities can be decided by the national authority;
- The national opposition procedure is not applicable in case of direct application;
- The national opposition procedure should consist in an exchange between the applicant and the opponent, mirroring the current PDO/PGI system.

Suggestions

The French IGPIA system currently does not seem to fully satisfy the conditions set by the non-agri Proposal for the national opposition procedure. In particular:

(a) ambiguities persist as to the **procedural aspects** of the public inquiry and consultations. Even considering the public inquiry as the current equivalent of the national opposition procedure, it does not represent a direct confrontation between the opponent and the applicant. The INPI intervention is not limited to an admissibility assessment of the observations received. It is aimed to summarise the content of the observations in the synthetic report, which implies an evaluation on the merit by the national authority. After the publication of the summary, the exchange is exclusively between the national authority and the applicant.

(b) The public consultation and public inquiry are moments where actors different from the applicants can participate in the registration process of the GI. However, **their functions should be clarified** (e.g., gathering technical expertise; collecting observations based on legal issues such as the generic nature of the name or the non-compliance of the application file with the legal requirements). If it is confirmed that the public inquiry is aimed at gathering technical expertise, a more thorough examination of the impartiality and a strict evidence-based approach should be applied to the observation received by the applicant. For example, the French INPI should dispose of adequate technical expertise to assess the evidence supporting the observations and in any case the objectives of the public inquiry should be clarified.

In the Italian non-agricultural context, theoretically, there is no obstacle for envisaging a public hearing as in the Italian PDO/PGI system, followed by a national opposition procedure. The two moments of third parties' involvement can coexist, independently from the identification of the competent national authority (Intellectual Property office or Ministry).

4.2.5 Process: reasserting the importance of the four pillars for enduring GI governance

Main findings: stakeholders' interaction impacts on the content of the product specifications, and adjacently of the control plan and statutes of the producer association or organisation. The decision-making for rule-crafting should be, formally or informally, regulated to avoid asymmetric distribution of power, arbitrary exclusions from participation, non-democratic decisions. Looking at the information given by the legal texts and codified practices in the Italian and French contexts, I identify four main principles, which I call 'four pillars', namely the principles of representativeness, representation, democratic functioning, and access to membership. These principles are not always clearly defined in the legal framework and this impacts on applicants' and national authorities' perception and interpretation as to their operationalisation. Here they are used to systematise knowledge, compare different legal regimes, and provide suggestions for harmonisation. Beyond the challenge of finding common definitions and understanding, the national authority approach for assessment, monitoring, and sanctioning needs clarifications.

The French and Italian PDO/PGI system tackles the issues of collective action and governance of the producer group in different ways, the former being more oriented towards a case-by-case assessment (and supported by codified consolidated practices), the latter clearly structured as a top-down regime defined by Ministerial Decree and informal interactions with the applicants. But these are not the only differences. The main problems observed in this research are summarised here below:

(a) In the PDO/PGI Italian and French legal frameworks, the principle of representativeness and fair representation are clearly identified as distinct concepts and subject to specific assessment criteria. In practice, their meaning and implementation might be blurred.

(b) I describe representativeness as the producer group's capacity to gather a considerable number of producers of the 'candidate GI product', established in the geographical area. The method of assessment formally linked to representativeness is a quantitative approach based on the volumes of production.

(c) I describe 'fair representation' as a principle guiding the composition of the producer group, which should mirror the structure of the value chain 'in a fair way'. The type of assessment, in practice, is two-fold: firstly a 'qualitative' mapping of the heterogeneous stakeholders of the value chain; secondly a quantitative assessment to determine the 'fairness' of the distribution of the seats in the governing bodies of the producer group. For this specific function, the principle of fair representation is deeply linked with the principle of democratic functioning.

(d) I pointed out that the conclusions drawn by the assessment on representativeness and fair representation might be affected by the time at which the evaluation occurs. Yet, if it occurs after the specifications is set, it might be biased by the characterisation of the GI product made by the applicants' group (which, for example, could have already excluded through strict boundary rules, possible variants present in the geographical area). In France, the assessment on the representativeness and fair representation is undertaken by the INAO when the specifications are at the stage of a 'project' (i.e., subjected to changes) and independently from the legal form of the producer group. In Italy, instead, the qualitative and quantitative type of assessment occurs *ex post* the GI registration, only for Protection Consortia. Thus, the assessment on the pillars (in particularly on representativeness and fair representation) is not considered as a legitimising criterion for the rulemaking process undertaken by the producer group. Rather, it legitimises the attribution to specific types of groups of additional powers and responsibilities considered 'of public interest' (art 14, Law 526/1999). Therefore, while in France the representativeness and fair representation involve all the operators of the value chain, in Italy the assessment is 'selective' not only because it is addressed exclusively to Protection Consortia, but also because it privileges the category of 'producers and users' (as defined *ex lege* for each type of value chain). This approach does not favour the participation

and engagement of other producers interested in the PDOs and PGIs, considered as a residual category, despite their contribution to the maintenance of the place-based reputation.

(e) In the Italian PDO/PGI system, the principle of democratic functioning is interpreted as a top-down a weighted vote rule, based on the quantity of the certified production. The rule privileges those who invest more in the PDO/PGI, which detain more decision-making power. In practice, especially for processed products, this rule has negative repercussions on the participation of the agricultural side of the value chain (raw material producers) and privileges the processing side. This conclusion is reinforced by the fact that (1) producers and users have the majority (66%) of the seats in the governing bodies of the Consortium (according to the principle of fair representation); (2) the actors different from producers and users are not incentivised in expressing their representation in the governing bodies of the Protection Consortium because, anyway, they would not have enough bargaining power. For groups different from Protection Consortia the democratic functioning principle is not defined, monitored, and sanctioned in case of non-compliance, giving rise to inhomogeneities and fragilities. In France, the definition of democratic functioning is left to the operators and evaluated by the national authority on a case-by-case basis.

(f) I also identified an important difference between the principle of access to membership and the necessary or voluntary membership of the operators. The access to membership coincides with the open-door principle. In France, membership is qualified as compulsory, meaning that all the GI operators are members of the PDMO. Instead, in Italy the membership is voluntary. The Italian approach to membership reveals that the producer group is not obliged to maintaining an inclusive structured organisation after the GI registration. This is also confirmed by the 'stability requirement' characterising the applicant association (which can be terminated after the registration of the sign). I showed that collective action and democratic decision-making might be negatively affected by voluntary membership, because it increases actors' heterogeneity (users can be members or non-members) without benefiting active participation to the GI governance of all operators.

(g) In the IGPIA system, the legislator seems to have transposed the formal structure of the PDO/PGI French system. However, looking closer, the representativeness and fair representation principles are not identified as distinct concepts in the French Intellectual Property Code. Instead, they are clearly intermingled. The fair representation is not mentioned in the Intellectual Property Code, with repercussions on the stakeholders' interpretation of the legal requirements for registration.

(h) The Italian non-agricultural case studies showed that cooperation between producers is less established than in the agricultural sector. This might influence the stakeholders' capacity to overcome the challenges of establishing a structured organisation, able to survive in the long run (i.e., implying enduring commitments to stricter rules). In the Italian experiences involving

CTMs, the pillars are not key, therefore they are not systematically codified or implemented. Given the diversity of experiences (regulated by specific laws), I refer to the more detailed analysis of chapter 3 section II. I will limit myself here at mentioning that, when the legal framework describes a complex and 'proceduralised' system (such as in the 'CAT' trademark system), informal arrangements might arise as more adapted to address local specificities. These informal rules end up replacing the codified higher level legal rules, which remain often unapplied. Trademark users do not need to be formally organised in associations or organisations (i.e., membership is voluntary). Therefore, these collective actors are rarely present, affecting inclusive coordination and collaboration. Representativeness is considered, informally, as an indicator of success of the trademark among producers (more than a legitimisation criterion for rulemaking).

Table 26 shows the rules governing the decision-making process at the EU level.

Table 26: Comparison between the rules of Reg. 1151/2012 of the Proposals targeting the rules governing the decision-making process within producer groups.

Reg 1151/2012	agri-Proposal	non-agri Proposal
No rule	**Art 7, 32 and 33:** Distinction between producer groups and recognised producer groups.	**Art 40:** Member States shall verify that the producer group operates in a transparent and democratic manner and that all producers of the product designated by the geographical indication enjoy right of membership in the group

In the agri-Proposal:

- The agri-Proposal introduces substantial innovations as to the pillars, which were absent in Reg 1151/2012. In particular, when referring to standard producer groups, art 32 mentions that they 'should operate in a transparent and democratic manner' (principle of democratic functioning) and that 'all producers of the product designated by the geographical indication enjoy right of membership in the group' (principle of access to membership). Moreover, art 33 refers to recognised producer groups ('formal association having legal personality and recognised by the competent national authority as the sole group to act on behalf of all producers') by setting representativeness requirements for their constitution. The representativeness requirements (quantitative approach) are set on the GI product as 'referred to in the product specification'.
- No representativeness requirements are imposed for the constitution of 'standard' producer groups.
- The assessment on the compliance of the governance structure of the producer group with these principles should be undertaken by the national authority. The formal recognition

as recognised producer groups might take place anytime (before, during or after the GI registration).

Table 27: Requirements for constitution of 'producer group' and 'recognised producer group' in the agri-Proposal and non-agri Proposal.

Producer group (art 32 Agri Proposal)	Recognised producer group (art 33 Agri proposal)
Input for constitution: initiative of interested stakeholders, including farmers, farm suppliers, intermediate processors and final processors, as specified by the national authorities and according to the nature of the product concerned'.	**Input for constitution:** 'a producer group may be designated as recognised producer group subject to prior agreement concluded between at least two-thirds of the producers of the product bearing a geographical indication, accounting for at least two-thirds of the production of that product in the geographical area referred to in the product specification'.
Recognition requirements: the producer group should operate 'in a transparent democratic manner' and 'all producers of the product designated by the geographical indication [shall] enjoy right of membership in the group'	**Recognition requirements**: No specific requirements concerning the internal functioning of the group.
Modalities of recognition: not compulsory formal recognition procedure	**Modalities of recognition**: 'upon a request of producer groups', formal designation by Member States, in accordance with their national law.

In the non-agri Proposal:

- The distinction between producer groups and recognised producer groups is not replicated and only producer groups are envisaged;
- The pillars are indirectly mentioned for the producer group, which should 'operate in a transparent and democratic manner' (principle of democratic functioning) and 'all members of the product designated by the geographical indication enjoy right of membership in the group' (principle of access to membership);
- No specific criteria are mentioned for the constitution of the producer group (representativeness/fair representation).

In both Proposals:

- It is not clear if the formulation 'all producers of the product designated by the geographical indication enjoy right of membership in the group' refers to compulsory or voluntary membership.

Suggestions

Given the importance of the pillars in GI registration and management, it is necessary to provide at the EU level harmonised definitions, *independently from the product classes and sector*

involved (agricultural or non-agricultural). To favour a minimum level of harmonisation, at the implementation level, these definitions could be accompanied by an indication of the type of assessment (quantitative and qualitative) which the competent authorities should undertake. This indication would not standardise or alter case-based specificities. Rather, it would increase applicants' awareness on the construction of the application file, reduce the occurrence of the outsider issue and predispose the condition for enduring collective action as a basic condition for the performance of the sign according to its objectives and rationales. To date, it might be unrealistic aiming for a full harmonisation of heterogeneous types of national authorities approaches on the pillars (e.g., bottom-up, hands-on and case based or fragmented, hybrid and top-down), especially in the countries with older traditions in the GI protection. However, more clarity on the definitions and operational criteria on the rules governing decision-making could already offer a common baseline for harmonisation. Moreover, they could encourage countries with younger traditions to consider governance issues as necessary preconditions to generate high-quality outcomes. As such, they should be adequately assessed and monitored. These considerations are appropriate in view of the extension to non-agricultural products.

As suggested by the findings of this research, **representativeness**:

(a) should be identified as a binding requirement for all producer groups (including multi-product producer groups), independently from their legal form;
(b) it should be subjected to a quantitative type of assessment based on *all categories of operators*;
(c) The assessment made *ex ante* or *contextually* to the construction of the product specifications and safeguards should ensure that its content can still be modified by the input of third parties or of the national authority. This rule should reduce the biases of arbitrary exclusion, which might be embedded in the consolidated specifications as submitted by the applicant, and should consider the assessment on the pillars as an evaluation on the 'legitimacy to exercise the right to exclude'. This aspect will also be influenced by the implication and type of approach used by the national authority in the early phases of the GI initiative and by how the direct contribution of third parties to the construction of the specification is conceived in the national system. As already mentioned, the hands-on type of approach might be appropriate to target relevant elements emerging from collective action dynamics at the local level and it allows, if necessary, to suggest tailored corrections. Still, clear assessment criteria mobilised in the *ex ante* or *contextual* type of assessment regarding representativeness should be clarified by the national authority, as they might lead to different results. As already mentioned, a possible solution could be giving priority to the group who first used the name proposed for registration, combined with the evidence-based approach (objectively verifiable evidence on the place-based reputation and its components) including elements on the anteriority and continuity of production or use of the denomination. Case-specific conditions should be carefully evaluated by the national authority or experts.

Fair representation:

(a) Should be binding and clearly identified as the aptitude of the producer group to mirror the structure of the value chain.

(b) It should be subjected to a qualitative type of assessment based on *all categories of operators*.

(c) The qualitative type of assessment should be followed by a quantitative type of assessment of the 'faireness' of representation. The fairness assessment aims to the repartition of the seats based on the structure of the value chain, and depending on the product, they might give priority to the agricultural component or the processing component. As such, these general criteria preserve case-by-case specificities.

(d) Should be explicitly identified as a necessary condition for operationalising the principle of democratic functioning of the producer group.

(e) Together with the principle of representativeness, it should qualify the legitimacy of the applicant to exercise the rulemaking process having mitigated exclusionary effects and should be made *ex ante* or *contextually* to the construction of the product specifications, independently from the legal form of the applicant producer group. It might or not be followed by a formal recognition of the status of producer group.

(f) The structured organisation of the producer group should be verified, both for the agricultural and agricultural GIs, at the registration. Additional safeguards should ensure that organisation (1) is *not temporary*, meaning that it should persist after the registration of the sign; (2) is inspired by *minimum requirements* of representativeness and fair representation, which should be *adequately monitored* over time, independently from the legal form (see *infra* outcomes control configuration).

Access to membership and voluntary or compulsory membership

(a) It is preferable that the formulation of legal rules in both proposals concerning the 'right to membership' is substituted by the formulation 'right to access membership'. That would imply that the national authority and the applicant must make sure that any barrier (in the specification, but also in the statutes) impede new operators to join the group. As already mentioned, compulsory membership would set better conditions for the active participation of all the operators to the management of the sign and would entail a more equitable correspondence between the investments made for contributing to the maintenance of place-based reputation and the decision-making power regarding the management of the sign.

Democratic functioning

(a) The principle of democratic functioning operationalises the principle of fair representation. This relationship should be explicitly mentioned in the Regulations.

(b) Considering the principle of fair representation as binding means ensuring that *all the operators* of the value chain are represented in the governing bodies of the group (qualitative type of

assessment) and that this representation is 'fair', namely that it mirrors the structure of the value chain.

(c) Systems (as the Italian one) promoting the weighted vote based on the quantity of certified production seems to favour big firms (usually processors), who invest more in the GI and most likely cumulate multiples roles in the value chain (and have determinant vote in decisions). This model encourages investments and productive strategies oriented towards innovation, and the incrementation of the size of the GI. Conversely, the agricultural component of the value chain is less valorised and discouraged to actively participate in the decision-making. For processed products, rarely it is capable of influencing decisions.

(d) The rule 'one member one vote', *if necessarily paired with the 'fairness' assessment on representation*, might suffice to equally distribute the decision-making power among the operators. The 'fair' (meaning proportional) distribution of the seats in the governing bodies is, in fact, already undertaken considering, qualitatively and quantitatively, the professional categories involved in the value chain. This solution might be more 'equitable' than the weighted vote, while being flexible to respond to case-by-case needs. However, it might discourage bigger firms to join, especially in contexts where the decision-making power is valued through the investments made in the GI (and *vice versa*). Some Italian non-agricultural experiences already allow to predict these fragilities.

(e) The rules 'one member one vote' and the weighted vote and are two possible (and legitimate) ways of interpreting the principle of democratic functioning. It would therefore be unrealistic to ask the EU legislator to impose one of them to all Member States identifying it as 'the best way' to interpret the democratic functioning principle. This assessment should be led by national legislations and authorities (whether they prefer to use a top-down or bottom-up approach), considering the national and local specificities.

(f) Codifying the principle of democratic functioning according to letter (a) and (b) of this paragraph would however be important to formally asserting its importance for GI governance. Moreover, monitoring compliance of all producer groups, independently from their legal form, would foster legal certainty and provide a minimum level of harmonisation. For these purposes, the system of formal vote seems to be in any case more preferable than informal 'consensus'.

4.2.6 First and second-level outcomes

Main findings: I will focus on the first level outcomes and second level outcomes as identified through the A-P-O approach. As to the first level outcomes:

(a) The content of the product specification, independently from the sector, revealed some challenges for the GI applicants. In particular, they might encounter difficulties in proving the prior use of the name, especially when the registration is motivated by valorisation more than

protection objectives, which emerged more evident in the non-agricultural experiences.[847] This might lead to situations where the denomination is 'constructed' for the purpose of the GI application. In Italy the requirement of anteriority of the use of the name or production (25 years) is codified in the Ministerial Decree 14 October 2013, independently from the quality scheme. In France, the INAO applies a strict evidence-based case-by-case approach supported by the orientation of the *Conseil d'Etat*. Evidence of the prior use of the name should be provided, and multidisciplinary technical expertise is mobilised to this purpose. When the prior use of the name cannot be proved, evidence on the established production in the area should be provided. These cases are considered as exceptions. The INPI seems to follow the same rule for IGPIAs, even though it does not mobilise its direct power of inquiry (e.g., in the form of on-site inspections and scientific technical expertise) and relies mainly on the documentation provided by the applicants.

Producers' motivation to register might also affect specific choices on the name, such as the inclusion of sub-mentions, a solution adopted in the French and Italian agricultural and non-agricultural sectors, to take advantage of the communication, consumer protection, investment, and advertising potentials of a more 'general' name. Instead, the local development and resource production functions are ensured by more specific sub-denominations.[848] This choice might require the attention of the applicants and national authorities, as it affects both as to the evidence of the origin link, and the delimitation of the area. In addition, it might require a thorough assessment on the representativeness and fair representation of all operators involved at the GI registration.[849]

(b) The description of the product and of the method of production is another crucial part of the specification, which implies choosing the type of product designated by the denomination. This choice is determinant for assessing the legitimacy of the applicant through the pillars. Yet, in

847 The *Siège de Liffol* case and the GI *Linge Basque* show that in the non-agricultural sector this situation can occur, as a shared reputation of the product might be less established or limited to the geographical area of production. This exposes the GI registration to the risk of on arbitrariness and the (most likely) insurgence of outsider issues (arbitrary reconstruction by the applicants of 'what the most authentic practice is' for that specific origin product). When the motivation to register resides in the protection against counterfeiting (meaning that there are, within or outside the territory, actual threats to the place-based reputation attached to the name), producers' choice might fall on the denomination which 'speaks the most' to consumers. The name infrastructure should be able to convey efficiently truthful information on the authenticity of the product (and it would most likely be the most misused or evoked).

848 This was evident in the *Olio Toscano* PGI case, where the general 'umbrella' denomination (referring to the Tuscany region) is complemented by sub mentions (having prevalently promotional/valorisation functions of territorial specificities). The case of *Poterie d'Alsace Betschdorf-Soufflenheim* shows that the choice fell on the name-infrastructure which 'speaks to consumers' to increase place-based reput**ation common to Soufflenheim and Betschdorf potteries. However, to avoid that the denomination 'Poterie d'Alsace'** represented an artificial 'construction' detached from the product specificities, the sub mentions were added. In *Couteau Laguiole*, the choice of the name has been justified by historical factors, even though the geographical area involves two distinct territories, located far from each other.

849 Reference here is to the cases on *Couteau Laguiole* and *Poterie d'Alsace Betschdorf-Soufflenheim*. See Chapter 3 Section I.

the younger experiences involving non-agricultural origin products (IGPIAs and Italian CTMs), the boundary rules constituted by the product description are more exposed to fuzziness, mainly because the distinctive characteristics of the product are not enough specified. This weakness might hide collective action fragilities (e.g., the difficulty of the operators in finding a compromise or the reluctancy in sharing information on producer-specific product characteristics/method of production). They might also reveal a weak groundwork, sometimes not accompanied by a solid scientific inquiry, on the distinctive characteristics of the product common to all variants located in the geographical area.[850] The fuzziness of the rules and a less strict application of the evidence-based approach, expose the GI initiative to not sufficiently supported arguments for justifying the origin link and to higher risk of arbitrary enclosure.

(c) In France, sustainability undertakings are specifically mentioned as a section of the specification for IGPIAs. For PDOs and PGIs, they are explicitly considered in the French Rural Code as voluntary practices led and monitored by the PDMO. In Italy, the formalisation of the rules in this regard seem to rely exclusively on the stakeholders, while the legislator (for the moment) remains silent.

(d) The absence of precise and objectively measurable distinctive elements has repercussions on the effectiveness of the control system, and on the guarantee and consumer protection functions. This factor, in the French PDO/PGI system, is partially mitigated by the producers' obligation to enclose the controllability document in the application file. This document is a tool for the national authority to evaluate the quality of the specifications and a way for producers to envisage, by themselves, possible checkpoints and modalities of control related to the proposed rules. The controllability document has not been transposed in the IGPIA system (where the role of the control body is crucial to envisage the content of the control plan), nor it is required in the application file at the EU stage of the procedure.

(e) The GI can be considered as a response to a 'dilemma' which I identified as the dilution of the place-based reputation due to non-use or misuse of the denomination. I pointed out that, independently from the sector, protection objectives are coupled with valorisation and promotional objectives. In non-agricultural GIs, the promotional objectives seem to be prevalent, where counterfeiting issues are absent. Labelling rules can be impacted by these

850 Sometimes, the fuzziness of the rules does not result in tangible place-based characteristics or processes, but generally refer to the 'robustness' (*Poterie d'Alsace Betschdorf-Soufflenheim*) or 'versatility' of the manufacture (Murano Glass). Moreover, in-depth case study analysis (as Faenza and Murano Glass) revealed the producers' willingness of not bearing the constraint of strict rules and abandon traditional decorations or shapes to align with consumer taste. This might further challenge product characterisation by making it harder to reply to the question: why are these products so special, unique? Why, through their name, are they currently different and recognisable, among comparable products? How is the origin link tangibly evident, apart from the historical component, linking traditional local know-how to its socio-economic relevance? The same questions persist for the *Absolue Pays de Grasse, Siège de Liffol*, where the operators' qualification is the sole provenance of the raw materials, a general 'compliance to traditional method of production', or vaguely described as 'functionality of use'.

motivations, as stakeholders who are less concerned about counterfeiting issues might be less worried about displaying the GI logo and the name on the product. Some non-agricultural *and* agricultural GIs might be exposed to the non-use or under-use of the sign, because of the technical constraints of the production and because they are commercialised business-to-business (i.e., the GI operators are not the final 'users' of the logo and denomination, but this is done in agreement with intermediaries, which sometimes detain the bargaining power). In Italy, this is a major point of concern for regional authorities in charge of supervising agricultural GIs, as the decision-making power of intermediaries (i.e., actors different from producers), does not allow to understand the discrepancies between the controlled and the certified production. In practice, these data are important for national authorities to understand if a GI is effectively used in the marketplace or if it is a sleeping or half-sleeping.

This research highlighted the differences between the Italian and French system on second-level outcomes, key to operationalise the specification. They are the governance configuration, the **control on the compliance with the specification and the control on the governance of the producer group**. The basic characteristics on the governance configuration have been anticipated in the paragraphs related to the process and the pillars. In this part, I will summarise the most critical points regarding the possible evolutions of the governance configuration after the GI registration and identify differences among national legislations and practices.

(a) While in France the **governance configuration** remains generally unchanged from the application for registration phase, in Italy the system provides that the structure of the producer group evolves to meet the eligibility requirements for Protection Consortia. The diversification enhanced by the Italian system leads to a two-speed system, opposing GIs with Protection Consortia and GIs without Protection Consortia. This bipartition has consequences not only on the requirements on the pillars and on the complexity of the governance structure of the groups, but also and on the tasks and responsibilities that these group are able to undertake. The peculiarity of the PDO/PGI Italian system opens some possibilities as the governance forms that would be assumed by groups in charge of managing non-agricultural GIs. The association could be preferred as legal form of non-agricultural producer groups, without the possibility of formally recognising entities similar to Protection Consortia (and the attribution of additional tasks and responsibilities more compatible with the 'public interest'). This option would be justified by the younger history of cooperation between craftsmen. However it would imply an unjustified different treatment between the group managing PDOs and PGIs and those who manage non-agricultural GIs. This diversified treatment seems to suggest that *only* GIs managed by Protection Consortia in the agricultural sector can generate public goods. I underlined how, in the agricultural and in the non-agricultural sectors, the rule legitimising a

privileged position of Protection Consortia is misleading. Firstly, because the interdisciplinary scholarship shows that GIs without Protection Consortia can perform well *if* producers are able to self-organise, even without the 'supervision' of the national authority and effective monitoring.[851] Secondly, because it represents an unjustified discrimination between other producer groups that manage the same type of sign. Thirdly, it discretionally and erroneously subordinates the performance of some functions of the tool, such as the resource production and local development functions to the legal form of the producer group.[852] This differentiation is an Italian specificity, which is not replicated in France, where all formally recognised PDMOs are considered able to perform the tasks and responsibilities identified in the French Rural Code and Intellectual Property Code, independently from their legal form.

(b) The **controls on governance** are differently managed in France and Italy. For example, in France, the control on the governance of the PDMO is compulsory in the PDO/PGI system. It is performed by the control bodies as the verification of the fulfilment of the formal tasks and responsibilities of the PDMO defined by the French Rural Code. It is also targeted by the INAO through an on-going 'supervising' activity of the compliance to the statutes through the attendance of INAO representatives to the General Assemblies of the PDMO and to their participation to tripartite meetings. Additional control is ensured at a higher level by the INAO in the frame of the 'monitoring of the control bodies'.

Instead, in the IGPIA system, the functioning of the PDMO is object of documental control by the INPI (periodical report filed by the PDMO). The control body can (but it is not obliged to) check the fulfilment of the tasks and responsibilities defined by the Intellectual Property Code, while the INPI is not in charge of directly supervising the control bodies. Moreover, since the Intellectual Property Code does not expressly mention the principles of fair representation and democratic functioning, these are not object of a specific control by the INPI. This asymmetry between the agricultural and non-agricultural French system stresses, once more, the impact of the methods of assessment and involvement of the national authority on the outcomes. The documental assessment made by the INPI concerning governance, despite being coherent with the hands-off type of assessment, might not be enough to detect anomalies in the governance of the PDMO after the GI registration.

(c) In the Italian PDO/PGI system, before the registration, the Italian Ministry of Agriculture verifies through a documental assessment the presence of the applicants in the association, without undertaking a quantitative and qualitative evaluation. After the GI registration, a

851 One example is the Sorana bean case, a PGI managed by a producers' association, and analysed by Quiñones-Ruiz and others, 'Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications' (n 98).

852 These arguments counteract the introduction in the agri Proposal, of the category of 'recognised producer group' established 'in order to provide recognised producers groups with the right tools to better enforce their intellectual property rights against unfair practices' (Recital 24 agri-Proposal). This frame is accompanied by eligibility criteria and evokes the distinction typical of the Italian context.

thorough monitoring and control on the governance of the producer group is reserved to Protection Consortia. The monitoring is ensured by the presence of the minimum operational standards, while the formal control on the pillars is performed every three years and leads to the confirmation or denial of the formal recognition.[853] I recall that, differently from the French PDO/PGI system,[854] the formal recognition of the producer group is not indispensable for the GI producers to continue to use the sign. In practice, producer groups other than Protection Consortia, who decide not to file amendments, are never controlled and monitored as to their compliance with the pillars. For these reasons, those groups are more subjected to the risk of collective action breakdowns after the GI registration. It might lead, for example, to sleeping or half-sleeping GIs and/or to the decision to not to maintain a structured organisation after the registration.

(d) In France and Italy, the **controls on the producers' compliance with the product specification** are not managed in the same way. One specificity of the French system resides in the presence of internal control and a centralised management of controls, upon the PDMO, which also affects the relationships with the control body. Surprisingly, the same setting has not been adopted in IGPIAs, where internal controls are not among the tasks and responsibilities of the PDMO. This choice seems in contradiction with the idea that the PDMO is the collective actor in charge of facilitating exchanges for the improvement of quality standards. The absence of internal controls upon the producer group also characterises the Italian PDO/PGI system. In this case, however, this choice seems to be more coherent with the voluntary nature of the memberships to the producer group, the voluntary nature of the recognition of Protection Consortia, and the limitations of the 'stability requirement' of the applicant producer association. Moreover, Protection Consortia are already in charge of managing post-commercialisation controls, both by means of their direct cooperation with the ICQRF and their direct involvement though vigilant agents.

(e) Despite these differences, some common elements can still be traced between the French and Italian systems. Self-control has *always* been conceived in the PDO/PGI system as *complementary* to the external third-party control. Case study-analysis showed that this tendency is counteracted in some IGPIAs, for example *Absolue Pays de Grasse*, where the willingness to manage self-controls (i.e., olfactory tests) internally and individually by each processor, is a hindering factor for product standardisation *and* a symptom of low level of information sharing between producers. It seems reasonable to assume that, if the setup proposed by the Commission is maintained, these fragilities would be 'institutionalised'. In other words, if self-controls are kept as the main modality of assessment of producers'

853 In France, the ongoing monitoring/supervision, directly by the INAO and indirectly by the control bodies, is preferred to a formal recognition.

854 In France, the PDMO recognition and the use of the sign are indissociable. Yet, the rule concerning the withdrawal of the recognition for non-compliance with the pillars, is never applied.

compliance with the specifications at the EU level to ensure more flexibility, the relation between external third-party controls and self-control would be explicitly *reverted*.[855]

The analysis of the product specifications attached to the Italian CTMs reveal a sensibility of producers and public actors to social dilemmas involving the valorisation and protection of origin products in the non-agricultural sector. However, CTMs, which should define exclusively the geographical or commercial origin of the goods concerned, are currently perceived by the stakeholders as inadequate to maximise the full potential of origin products. This is shown by the fact that the message concerning a place-base distinctiveness and quality is not explicitly stated and enough detailed. This ambiguity has repercussions on the cumulative indication of origin and quality and might engender compatibility issues between CTMs and non-agricultural GIs, after the extension of the GI protection.

At the operational level and from an *ex ante* perspective, the configuration drawn by national laws establishing CTMs give the owners arbitrary full right to exclude. This might explain why uneven types of management and performance of these CTMs ('quasi-GIs', or 'potential-GIs'), occurred. Producers and national authorities in charge of the examination of Italian non-agricultural GIs will be at some point confronted with the need to adjust regulations of use and product specifications of CTMs to GI requirements. These requirements will impose a minimum level of cooperation and structured collective action, and a more rigorous approach to evidence-based examination of the arguments justifying boundary rules. Furthermore, existing rules will need improve the level of detail, in the perspective of their controllability and specific control plans will need to be drafted and enforced.

Table 27 summarises the rules of the Proposals targeting on the first and second level outcomes.

855 The *Study on Control and Enforcement* requested by the EU Commission puts forward that self-monitoring is sufficient for these product classes 'productions are considered extremely niche with a limited number of established producers' and seem to assert that 'the association is an important platform for facilitating this verification'. Michaelsen and others (n 16) 47. This research showed that the fact that the product is 'niche' can be generally asserted for both agricultural and non-agricultural products (if as 'niche' we intend specific types of origin products, opposed to mainstream productions). This argument, therefore, *per se* does not justify a less rigorous approach to controls. Rather it could be seen as an unjustified unequal treatment, based on the product class, which impacts on the reliability of the guarantee function of GIs. The role of the association in facilitating self-monitoring is not among the duties provided by the Intellectual Property Code. Therefore, it is left to the spontaneous willingness of the PDMOs and might be the cause of non-homogeneities.

Table 27: Comparison between the rules of Reg. 1151/2012 of the Proposals targeting first and second level outcomes.

Reg 1151/2012	Agri-proposal	Non-agri proposal
Art 7: product specification (minimum content)	**Art 51**: content of the product specification	**Art 46** verification of compliance with the product specification (internal controls introduced)
	Art 32 and 33: checks on governance standard and recognised producer groups	**Art 7** content of the product specifications
	Art 39: compliance with the product specifications (and introduction of internal controls)	**Art 40** (checks on governance producer groups and responsibility on internal controls)

In the agri-Proposal:

- Art 15 refers to the content of the **product specification** (a) stating that the name proposed for registration 'may be either a geographical name of the place of production of a specific product, or a name used in trade or in common language to describe the specific product in the defined geographical area'; (b) introduces the reference, in the **product description**, to plant varieties, and animal breeds; (c) it substitutes the reference to authentic and unvarying method of production of Reg 1151/2012 with the more general reference to 'traditional methods and specific practices used'. As the **description of the link for PDOs** art 15 specifies that 'the details concerning human factors of that geographical environment may, where relevant, be limited to a description of the soil and landscape management, cultivation practices or any other relevant human contribution to the maintenance of the natural factors of the geographical environment referred to in that provision'; **for PGIs** the components justifying the origin link remain unchanged from the text of Reg 1151/2012.
- Art 15 includes the reference to **sustainability undertakings**, detailed in art 12. They are defined as non-compulsory engagements, and which 'go beyond good practice in significant respects in terms of social, environmental or economic undertakings'. The rule specifies the requirement of specificity of these undertakings and shall be based on existing 'sustainable' practices. Reference to the agreement is contained in art 32 (producer groups) and, by interpretation, in art 33 (recognised producer groups).
- On the **controls on governance**: assuming that an initial check (for eligibility) on the governance configuration is performed *ex ante* or *contextually* to the registration, it is not clear if for standard producer group a system of monitoring or periodical controls on the *maintenance* of these requirements should be undertaken by the national authorities. For recognised producer groups, a type of monitoring seems to be envisaged as the loss of the representativeness requirements imply the loss of the status of recognised producer group. The proposal evokes quite clearly the Italian two-speed system.

- **On controls on the compliance with the product specifications**, the agri-proposal introduces explicit mention of internal controls, which are clearly a responsibility of producers (art 39), evoking the French model.

In the non-agri Proposal:

- Art 7 deals with the **content of the product specification**: the rules on the choice of the name are the same as art 51 of the agri-Proposal; the description of the product only refers to the possibility of including 'if appropriate' raw materials, while it **does not contain** references to physical, chemical and microbiological or organoleptic characteristics of the product or any other objectively measurable element more pertinent to the product classes involved; only the PGI scheme is adopted ('link between a given quality, the reputation or other characteristic'); the extension of the geographical area might cover a region or country.
- Sustainability undertakings are not identified as a component of the product specification (art 7), but they are only mentioned as a responsibility of producer groups (art 40).
- The requirements for describing the **method of production** are very general, and do not seem to give importance to traditional methods and specific practices, which can be added 'where appropriate'.
- The symbol used for identifying non-agricultural GIs is the PGI symbol already used for non-agricultural products.
- Art 41 on the **compliance with the product specifications** introduces the reference to internal controls which take place before the commercialisation of the GI product and are a responsibility of the producer group (art 40) and **self-control** is considered as the main type of control.
- Art 31 and 32 identify the tasks and responsibilities attributed to **producers groups** and **recognised producer groups**, the latter being legitimated to 'liaise with intellectual property enforcement and anti-counterfeit bodies and participate in intellectual property enforcement networks as the GI right holder; take enforcement actions, including filing applications for actions with custom authorities, to prevent or counter any measures which are, or risk being, detrimental to the image of their products; to recommend to the national authorities binding rules; register individual or certification trademark containing, as one of its prominent elements, a geographical indication outside the jurisdiction of the Union'.
- As the **control on governance**, art 40 does not precises if the verification on the governance of the producer group should be ongoing or one-time. Only standard producer groups have been transposed in the non-agri Proposal, while recognised producer group are not envisaged.

Suggestions:

(a) Requirements of the product specification

Throughout this work I stressed the importance of crafting sufficiently precise rules to allow their controllability and avoid ambiguities, notwithstanding the sector or product class.[856] Concerning the first point, requiring a controllability document prior and in addition to the control plan, might provide a useful tool for the national authorities (or the authority interacting directly with the operators) to evaluate the level of commitment of producers, and assess the quality of the specification. At the same time, it might encourage the collective discussion among producers on the operationalisation of their declared commitments. This aspect is particularly relevant for boosting collective action, especially in systems relying solely on external and self-control. Concerning the second point, the specification should be justified by objectively verifiable evidence to avoid arbitrariness. This principle draws from the attention generally given, in the agricultural sector, to the explicit mention of the scientific and measurable attributes justifying product typicity (as shown by the higher level of detail – indication of plant varieties and local breeds - envisaged by the agri-Proposal). By contrast, in the non-agricultural sector, the approach to product characterisation has been proven less rigours at the national level. The non-agri Proposal does not provide enough safeguards for correcting this inefficiency. The risk of fuzzy boundary rules is therefore not reduced by the art 7 of the Proposal, which sets a low threshold for the minimum content of the product specification. Conversely, I suggest including reference to measurable characteristics which can be precise while allowing sufficient levels of flexibility. They should be considered as non-renounceable elements of the **product description**. In the same vein, the **method of production** should better valorise the traditional component of the local know-how, which is one of the most frequent distinctive features of non-agricultural origin products. Assuming that the specificity of the industrial products and crafts does not (yet) allow a high degree of scientific accuracy in identifying the characteristics and quality derived from origin (social, historical and anthropological evidence and/or physical and chemical evidence), it should be possible to describe, with a sufficient level of detail, the main elements functionally tying the origin product to the place, and make it 'recognisable', through the name, by consumers. The product characteristics, the method of production, and the delimitation of the geographical area are the 'tangible' component of the relationship origin-quality and the inherent justifications to the place-based reputation. Thus, they are *functional to demonstrate the eligibility of the name to be registered as a GI*. For non-agricultural origin products, it might not be possible to exclude from this 'functionality paradigm' the aesthetic characteristics or specific visual attributes directly derived from a place-specific method of production. This feature, however, should not legitimate a disproportionate scope of protection (i.e., through evocation) attributed to the registered sign. The

856 One should be careful in considering this attribute of the rules as an equivalent of 'strictness', which rather position the GI along the 'excludability spectrum'. A rule can be sufficiently precise without setting restrictive boundaries.

scope of protection should be clearly limited to the registered name and should not be extended to patterns, decorations, or shapes.[857] A strict evidence-based approach should also be applied to the **choice of the name**, which letting aside exceptional cases, should be previously used in common language and trade. On the contrary, the current formulation of art 7 ('the name to be protected as geographical indication which *may be either* a geographical name of the place of production of a specific product, *or a name used* in trade or in common language') might be interpreted as allowing names 'not used in common language and trade'. Furthermore, **evidence** proving the long-standing production in the area should be provided to avoid the artificial constructions of the denomination for the sole purpose of the GI registration. The use **of sub-mentions** can be seen as an efficient practice in the non-agricultural sector, especially when the local specificities are not known outside the area of production, or a wider denomination is misused in the marketplace and it is difficult to provide common standards of production, due to the variety of manufacturing processes. The use of sub-mentions could favour the use of **region-wide** denominations. However, this solution should be carefully evaluated by the national authority with regard to the strength of the origin link and the compliance of the functioning and composition of the producer group with the pillars. Conversely, names identifying a whole country should be avoided.[858]Moreover, a **country-wide** delimitation might be incompatible with coherent scientific criteria justifying proved by objectively verifiable evidence. As already mentioned in the general part, the evidence-based approach 'taken seriously' should also drive the draft and assessment of the section related to the description of the **origin link**. Even though the PGI scheme has been clearly preferred to the PDO scheme for industrial products and crafts, the evidence of the grounding components of the place-based reputation should be proved at the registration and should embed the anchorage to human and/or natural factors.

The inclusion of **sustainability undertakings** is not a novelty in the France PDOs/PGIs (where they can be the object of best practices implemented by the spontaneous initiative of PDMOs) and in IGPIAs, (where they can be included directly in the product specifications). Given the voluntary and specific contents of these commitments they should be the object of consensus and supported by operationalizable and enforceable controls and sanctions. These rules might exceed the legal requirements provided by the current scheme for product specifications. Nonetheless, they should be the object of specific and commonly agreed commitments. In addition, appropriate incentives should be considered to provide access to technical/scientific support for groups of

857 This qualification could also serve to counteract the ever-extending scope of evocation, which might also concern non-agricultural products. The renowned place-based characteristics and qualities of the product are functional to justify the eligibility of the name (i.e., its distinctiveness); visual characteristics should be relevant as long as they consist in place-based characteristics and qualities of the product (i.e., they justify place-based reputation).

858 See also, for more insights on the Marseille soap case, Pick (n 33) 83.

small and medium-sized GIs, regardless of their legal form. This support should consist in devising sustainability commitments and the operationalisation of effective monitoring mechanisms.

It is important to spend few words on the nature of the link and the choice of excluding the PDO scheme from the non-agri Proposal. While in theory no obstacle in GI law impedes this choice, it is not excluded that origin products eligible for GI protection might derive their uniqueness from natural factor *and* human factors, in addition to reputation. It could therefore be questioned if the prevalence of this feature legitimises *per se* the exclusive extension of the PGI model. Before falling in the trap of providing one-size-fits all solutions, it seems appropriate to explore the consequences of the two possible scenarios using the principle of coherent transitions. Studies highlighted the gradual 'decline' of PDOs in favour of PGIs in the agri-food sector. However, since the PDO model seems to be maintained in the agri-Proposal, there is currently no reason to justify unequal treatment between agricultural and non-agricultural products. The extension of the sole PGI model, *in these circumstances*, would imply that non-agricultural 'GIable' products, by default, show a type of link is weaker and based only by human and reputational factors. Instead, applying the model of place-based reputation as nested resource, would allow more flexibility in the characterisation of the link. The PDO model would still be reserved to reputed products distinctive for natural and human factors; the PGI model would be reserved products whose place-based reputation is justified by characteristics and qualities essentially attributable to the human component.

Finally, the use of the PGI union symbol for non-agricultural GIs is coherent with the GI protection already in place for agricultural products. However, it might mislead consumers as to the expected functions performed by the sign (especially the guarantee function) *if* the level of commitment and constraint demanded to non-agricultural operators (taking into account the differences between the product classes) are lower than what is demanded for registering and maintaining a GI in the agricultural sector.

(b) Configuration and controls on governance

The choice of the Commission as to the governance configuration in the agri-Proposal seems to favour the coexistence between various types of producer groups. This solution evokes the Italian configuration, oriented towards the diversification of legal forms and regulatory framework on governance. It seems clear that Italian Protection Consortia would be eligible as 'recognised producer groups' and that other associations or non-recognised consortia would be considered as 'standard producer groups'. However, it is questionable how other Member States (for example France), not implementing this diversification in their national systems, will deal with this distinction. More generally, the implementation of this rule in systems different from Italy would

challenge the coherent transitions paradigm, imposing to some Member States rules and setups typical of other national systems.

Among the operational obstacles:

- It is unclear how Member States different from Italy will consider already recognised producer groups, and how, among them, they will identify those fitting in the definition of recognised or standard;
- national authorities that undertake formal recognition on a case-by-case assessment might be obliged to revisit their criteria and apply top-down standardised thresholds. I observed that, even in the Italian system, the binding threshold of 66% for representativeness of Protection Consortia is problematic as it privileges pre-determined categories of stakeholders, and it is difficult to be attained (and maintained) by many producer groups. I also observed that it is the main cause of the low number of Protection Consortia compared to the total number of PDOs/PGIs.

Groups would *de facto* be treated differently, and *only* recognised producer groups would be considered representative and able to perform tasks and responsibilities of general interest. This would imply spreading an inhomogeneous approach for implementing the pillars, based on the legal form of the producer group, the sector or the product class. Instead, it should be considered as essential for operationalising the GI functions.

If this bipartition is maintained in the future Regulation for agricultural products, foodstuffs, wines, and spirit drinks, it should be accompanied by appropriate safeguards to avoid the inefficiencies of the two-speed system that I identified in the Italian system. These safeguards could imply:

- a clear definition of the four pillars *for all types of groups* (independently from their legal form or sector) and the clarification that the compliance with the pillars is a necessary condition legitimising rulemaking and GI management.
- Appropriate monitoring and controls on governance should be implemented at the registration and after the registration. Moreover, graduated sanctions should be established in case of non-compliance.
- Assuming that producer groups do not have the same exigencies on the GI registration and management, a **system with modulated requirements on the pillars and graduated sanctions could be established**. This would allow to preserve different levels of engagement, but at the same time ensuring that a minimum level of regulated governance.

In the non-agri Proposal, the bipartition between recognised and non-recognised groups is not mentioned. This represents another factor of confusion and suggests that all producer groups

managing non-agricultural GIs are not assimilated to those in charge of the management of agricultural GIs (i.e., that they do not have the governance requirements to perform tasks and responsibilities of general interest). This assumption is incorrect, as the activities aimed to the creation of public goods are attached to the functions performed by the sign. The system with modulated requirements could avoid unjustified differences between producer groups in charge of managing agricultural and non-agricultural GIs. In the meantime, it would avoid the risk of setting too high standards of commitment, potentially discouraging for future applicants.

Similarly, unjustified distinctions are made between the powers of control and intervention to the competent national authorities in charge of agricultural and non-agricultural GIs. Currently, the INPI performs a more superficial control than the INAO. This affects the assessment on the compliance of the functioning of the PDMO with the principles of representativeness, fair representation, necessary membership and democratic functioning. *De facto* this asymmetry between the agricultural and non-agricultural sector affects the meaning given to the formal recognition as PDMO and does not ensure the maintenance of eligibility requirements after the GI registration.

(c) Controls on compliance with the product specifications

Internal controls performed by the PMDO are a specificity of the French PDO/PGI system. Despite their recognised positive impact on stimulating collective action towards quality standard improvements, this characteristic is not replicated in Italy, nor (surprisingly) in French IGPIAs. While implementing internal controls in IGPIAs might not be considered as incompatible with the current tasks and responsibilities given to the producer group *and* to mandatory membership, contextualising internal controls in countries, such as Italy, might be more difficult as the GI operators are not obliged to be members of the producer group. Operationalising internal controls in Italy would be difficult because the regulatory approach on the pillars in inhomogeneous and depends on the legal form assumed by the producer group. Their legitimacy to exercise internal controls on the compliance with the product specifications is not sufficiently proven, especially considering that the control activity should be addressed to both members and non-members. Voluntary membership should also be considered as a hindering factor of the implementation of internal controls by Production Consortia because it impacts on maintaining homogeneous quality standards. Moreover, introducing internal controls would increment the costs of *erga omnes* fees.

Another remarkable point for the control configuration, affecting particularly EU non-agricultural GIs, is the consideration that self-control would suffice to the grant the artisans' compliance with the product specification. The setup proposed for the Regulation might be too optimistic in this regard, as relying mainly on self-control without the guarantee of third-party certification

could encourage producers to develop informal inhomogeneous quality standards. Even though counterfeiting is not the main concern for some non-agricultural operators, the reliability of control would *in any case* impact on the guarantee function of the GI.

GENERAL CONCLUSIONS

With this research, I have shown that the commons approach can be a useful tool to reframe GI theory while taking into account the knowledge generated by interdisciplinary scholarship. Considering GIs as multifunctional and multidisciplinary tools allowed me to identify and study legally relevant collective action issues. My contribution to GI theory is, to use Cole's words, 'bringing law back in' to the debate on the proximity between GIs and the commons. My attempt was to provide terminological clarity and to bridge the gaps between the traditional legal approach and interdisciplinary GI scholarship. It led to a reframing of place-based reputation as *the* complex and nested resource that can be subjected to commons management, in response to dilemmas of depletion through misuse or non-use of the name. Within this frame, I clarified the role of the name as an infrastructure that enables information sharing for reducing asymmetries in market environments, and for alimenting public goods in non-market environments. I have reinterpreted the rights conferred by the GI as a bundle of rights to show that the right to manage can define property. Moreover, I qualify the right to exclude in GIs as necessarily 'mitigated' by the duty of the applicant to provide objectively verifiable evidence to justify restrictions on access to the use of the name. This theoretical analysis was necessary to frame my inquiry and provide the baseline for applying a diagnostic approach to the study of the commons. Meanwhile, it pushed me to overcome the challenges of interdisciplinarity, such as deciphering and simplifying field-specific terminology, and finding common grounds.

I have demonstrated that collective action is strongly influenced by national and legal frameworks, and I have highlighted the importance of its patterns for the functioning of GIs. I have shown that, notwithstanding the product class, the stakeholders' interpretation of legal rules has consequences for the distribution of bargaining power in rulemaking for product specification design. I argued that investigating on how this process unfolds is key to understand the exercise of the right to exclude and the extent of the exclusionary effects generated by the rules.

The analysis inspired by the IAD and GKC diagnostic frameworks, simplified by the A-P-O approach and the axes of inquiry, allowed me to identify aspects of the GI registration and management that usually elude studies with a traditional legal focus. These aspects are often overlooked by policymakers. Through the A-P-O approach within the GKC applied to GIs, I have highlighted that the implementation of the PDO/PGI systems in France and Italy (two leading countries in GI protection) are not harmonised. Differences can be observed in the approach of national authorities to product specification design, the role of producers and other stakeholders in the decision-making process, the general principles inspiring rulemaking, the governance and control configuration. The legal landscape is even more fragmented (and confusing) if one considers the existing national models of GI protection for crafts and industrial products. Currently, they do not seem to mimic the same level of commitment and guarantee characterising the PDO/PGI

system. The future EU legislation on GIs for crafts and industrial products seems to favour these differences, making it difficult to foresee the gaps that future applicants will have to fill to meet legal requirements.

Most importantly, I have shown that sustainable governance is essential for allowing the sign to function meaningfully and effectively. Systems in which decisions are taken in accordance with the principle of representativeness, fair representation, democratic functioning, and access to membership, create favourable conditions for allowing GIs to perform their functions. For this reason, favourable conditions for enduring governance must be maintained before and after the registration, regardless the product class and the legal form of the producer group. Therefore, governance issues deserve more attention from the applicants, from national authorities, from policymakers, and from researchers.

My intention is not to underestimate the capacity of groups to self-organise and find effective tailor-made solutions. Rather, I affirm that appropriate legal tools should be available to avoid non-democratic, discriminatory, and non-participatory behaviours. These inefficiencies can have an impact on rulemaking and lead to conflicts and arbitrary exclusions at producer level. National authorities are well-placed to guide stakeholders in this process: they are more effective when they are equipped with a technical and multidisciplinary expertise and direct powers of intervention, and they predispose appropriate monitoring and sanctioning mechanisms. Conversely, EU authorities have the opportunity of clearly identifying the principles governing governance and ensuring that national systems are effectively aligned. I have shown why improvements should be made in this respect, in both the agricultural and in the non-agricultural sectors.

From a methodological point of view, I showed that case study research can be useful for legal scholarship if it is accompanied by a theoretically grounded analytical framework, which is indispensable for giving scientific validity to the results. It was essential to inform public policy with empirically grounded findings that could show, as objectively as possible, the efficiencies and inefficiencies of selected national experiences.

The A-P-O approach within the GKC framework for GIs has the limitation of being applied to few cases. Using it to analyse other experiences in the agricultural or non-agricultural contexts and in other national systems may confirm these findings or reveal more nuances. Improvements to the framework will come from further use. Finally, it would be interesting to apply the A-P-O approach to action situations other than the design of the product specification in order to analyse different aspects of the GI governance.

EXTENDED SUMMARY

Governing governance: collective action and rulemaking in EU agricultural and non-agricultural geographical indications

Geographical Indications (GIs) are intellectual property tools used to identify a product whose reputation, characteristics and quality are essentially due to its geographical origin. Collective action (intended as the ensemble of individual and collective choices aimed to reaching a common objective) is recognised in interdisciplinary literature as being at the core of GI registration and management. However, despite its central role, it is still considered outside the scope of legal investigation and remains little regulated at the EU level. My research aimed to reconsider the importance of collective action in GIs from a legal perspective. Using a transdisciplinary approach combining comparative legal analysis and case study analysis, I highlighted the legal rules which affect collective action at the local level and govern the GI pre-registration and registration phases at the EU and national levels. I examined how the legal framework is interpreted and operationalised by the actors involved, and how these interpretation and operationalisation impact the ongoing functioning of the sign. I contextualised my inquiry both in the agri-food and in the craft and industrial sectors.

In **Chapter 1**, I described the GI *sui generis* system as a multi-level nested rule system, highlighting that both Protected Designations of Origin (PDOs) and Protected Geographical Indications (PGIs) are *identifiers* of products having specific characteristics due to their geographical origin. I then explored the contribution of interdisciplinary literature introducing the concept of 'origin products', meaning goods which have nurtured over time deep connection with the geographical natural and cultural environment. This concept is important because (1) it introduces the role of the localised community (a collective stakeholder and applicant for GI registration) key in settling traditional practices, shaping landscapes and favouring biodiversity conservation; (2) it embeds collective action as the main driver for the establishment of informal practices at producer level, a necessary precondition for their codification as formal arrangements (e.g., the product specification).

Policy documents and interdisciplinary literature acknowledge the capacity of GIs to perform various functions. I expressly devised them as complex multifunctional IP tools. I considered the communication, consumer protection, distinctive, advertising, and investment functions as market related; I identified the resource production and the local development functions as non-market related. The theoretical functional approach is useful to have a clear view of the potential performance of the name, once registered. However, this approach has some limitations: being theoretical, it is blind to the impact of collective action. In other words, registration is neutral to

the capacity of the sign to perform all its functions and, in practice, nuances and heterogeneities might exist. Instead, the operationalisation of the functions and the coherence of the sign to its policy objectives can be affected by the producer group capacity of ensuring inclusive, enduring, non-discriminatory, and democratic governance. A shift in perspective from the traditional legal approach is therefore needed.

To analyse collective action in GI contexts, I was inspired by the approach developed by Elinor Ostrom on human cooperation for the sustainable governance of tangible and intangible commons, characterised by issues deriving from low excludability and high subtractability. I pointed out that the contribution of legal scholarship is still limited in this regard, and I positioned my investigation as a possible response to this gap. I identified four methodological challenges. Firstly, I argued that abandoning a compartmentalised and monodisciplinary approach to the study of GIs would lead to more accurate methodologies for crafting empirically grounded targets of intervention at policy level. Secondly, I identified collective action as a suitable object of transdisciplinary dialogue for advancing the GI regulatory framework. Thirdly, I attempted to systematise the knowledge about commons management to explore the conceptual proximity between GIs and the commons. This topic, which still is an unsolved puzzle for the interdisciplinary scholarship, is little explored by legal scholars. I targeted the study of the 'rules-in-use' as the entry door for a transdisciplinary dialogue between legal and institutional analysis. Ostrom's definition of the rules-in-use includes all the codified and non-codified prescriptions affecting, directly or indirectly, stakeholders' behaviour (i.e., laws, regulations but also endogenous community-based arrangements emerging from the practice). This focus on the rules flagged the need of introducing a supplementary level of observation, i.e. the local level, to understand how the legal framework impacts the understanding, implementation, and enforcement of legal rules by the stakeholders involved during the pre-application and application phases of GI registration.

After introducing key concepts of the theory of the commons, I proposed my interpretation on the conceptual proximity between GIs and the commons. From the perspective of the EU *sui generis* GI system, the shared intangible resource in GI context is represented by the product reputation. Necessarily place-based, complex and nested, it results from the cultural and environmental conditions encouraging specific producers' choices, which justify product distinctiveness. The place-based reputation can be considered as an intangible commons because (a) it is 'owned' by no one, although managed by the producer group; (b) it is exposed to free-riding, being economically attractive for various actors who are interested in its appropriation leading to resource depletion (for misuse or non-use); (c) it should be created by producers before it can be exploited, but should also be recognised by consumers; (d) it is difficult to define its boundaries. The availability of the legal protection can be a response to the dilemma of resource depletion and requires the applicants

to codify informal practices in the product specification. The specification is constituted by context-specific endogenous arrangements, compliant to defined legal requirements, and recognised as binding by the community members. As 'boundary rules' resulting from a compromise, they define who has the right to access the name and the place-based reputation. Lacking clear guiding principles or safeguards, the rule-crafting process prior to the GI registration might be affected by the risk of arbitrary enclosure (meaning that producers might agree on strict rules with high exclusionary effects although not adequately supported by objectively verifiable evidence). The need of limiting the resource vulnerability to depletion is counterbalanced by the collective interest in safeguarding a certain degree of openness to the access and use of the resources for the social, cultural, and economic benefits arising from the productions concerned. Thus, depending on how collective action is shaped during the pre-registration and registration phases, each GI can be situated 'somewhere in between' the two extremes of exclusivity and openness, along an 'excludability spectrum'. Consequently, depending on the cases, the management of place-based reputation might share the features of commons and/or club goods types of management. In parallel, looking at the GI regulatory framework through the lens of the commons raised additional questions about the nature of the rights conferred by the sign and about the role of the name.

It is debated whether GIs can be considered as intellectual 'property' as, from the EU perspective, it is not possible to identify an 'owner' and the right to alienation is denied. Inspired by the re-interpretation of the concept of bundle of rights by Edella Schlager and Elinor Ostrom, I propose an overview of the distribution of rights in EU GIs. I highlighted that (a) the right to access is individually attributed to each producer, and is represented by the 'right to enter' the GI boundaries if compliance with the product specification is granted (sometimes membership to the producer association is also required); (b) the right to management is core and attributed to producers as a group; (c) the right to alienation is absent; (d) the right of appropriation/use is both individual and collective and means using the name and enjoying the place-based reputation; (e) the right to exclusion, i.e. the right to determine who has access to the use of the name and enjoy place-based reputation, is on the producer group. However, the arbitrariness in defining the conditions to access the resource should be 'mitigated' by specific conditions, such as the legal requirements and the need to provide adequate evidence grounding the devised claims. The concept of the bundle of rights allowed to stress the powers and responsibilities detained by the producer group, and the importance of GI management over alienation. Moreover, it allowed to distinguish and qualify the right to access and the right to exclusion. It also contributed to the debate on the possibility of identifying property features in GIs.

Previous analyses on GIs and the commons have not explored the role of the name and how it is affected by the management of shared localised resources. Inspired by the theory of

infrastructures proposed by Brett Frischmann, I devised a new theoretical configuration: the name is identified as a mixed intellectual infrastructure, where the commercial component coexists with the semi-public component. If managed in a specific way, the name-infrastructure can produce public goods, while maintaining a commercial vocation. When the place-based reputation and the name-infrastructure are managed as commons, GIs are more likely to create social and commercial benefits. Moreover, I highlighted how the proposed characterisation of the place-based reputation as a complex and nested shared resource might challenge the traditional characterisation of the origin link.

Chapter 1 enabled to fill the gaps between the legal and interdisciplinary perspectives on collective action and GIs. It also provided the theoretical foundations and justifications to analyse GI systems through the diagnostic tools developed by commons scholars.

Chapter 2 is divided in two Sections. In **Section I**, I explained the analytical approach used by commons scholars for case study analysis and I introduced the concept of diagnostic frameworks, meaning flowcharts in which sets of methodological questions and analytical variables are linked together and used for data collection and analysis involving specific case studies. I focused on the Institutional Analysis and Development (IAD) framework, generally used for studying tangible resources, and on the Governing the Knowledge Commons (GKC) framework, usually applied to intangible resources. In particular, the use of the GKC adapted to the peculiarities of the GI context, was crucial for objectively structuring the data collection (i.e., semi-structured interviews and focus groups) and the analysis of interview transcripts and documents. It also allowed cross-case and cross-country comparisons. Supported with specific methodological questions, the GKC framework applied to GIs allowed me to observe how heterogeneous actors involved in the pre-application and application processes interact at different levels to generate the product specification as outcome. I considered product specification design as the main action situation, simultaneous to the design of the control plan and of the statutes of the producer association/ organisation.

In the context of product specification design, I identified:

(a) The **actors** involved in the decision-making process. I distinguished them as the community (the local stakeholders external and internal to the value chain), the participants (the producers-applicants) and external actors (national authorities, control bodies, and universities, which operate at a national level and are not directly concerned by the collective action issues affecting the resource). I highlighted the importance of actors' heterogeneity, meaning (1) intra-group heterogeneity determined by stakeholders' motivations and interests in the GI

registration; and (2) extended heterogeneity referring to stakeholders' nature (State or non-State), their role in the action situation and in relation to the value chain (external or internal).

(b) The rules governing the decision-making **process**, which emerged from French and Italian national frameworks and practices. I synthetised them as four main pillars: the access to membership, representativeness, fair representation, and democratic functioning principles. Depending on how these principles are codified or informally applied at the national level, safeguards against arbitrary enclosure (i.e., club goods management) might be (formally or informally) provided.

(c) The **outcomes** derived from the decision-making process. I refer to first-level outcomes to identify the product specification, but also the control plan and the statutes of the producer organisation. The codified arrangements deriving from the first-level outcomes are the basis for the governance and control configuration, which I identified as second-level outcomes.

Based on these main components of the GKC framework, I offered a simplified approach, which I called the Actors, Process and Outcomes (A-P-O) approach to facilitate transdisciplinary dialogue. In **Section II**, I proposed a methodological test of the A-P-O approach within the GKC framework applied to French and Italian agri-food GIs. I explained the meaning of each block of the A-P-O approach referring first to the key concepts flagged by the commons scholarship. Then, I used the same concepts to systematise the knowledge gathered in the interdisciplinary scholarship on GIs. Once the meaning of each building block has been clarified, I analysed the legal EU and national rules-in-use relevant for the A-P-O approach. In the part related to the implementation of the legal rules, I described and analysed the data gathered from fieldwork and documental analysis concerning the French and Italian case studies. I referred to the formal and informal practices deriving from stakeholders' understanding, interpretation, and operationalisation of the national and EU legal framework regulating GI registration. The results of this methodological test allowed me to elaborate three axes of inquiry targeting the Actors, the Process, the Outcomes. The axes of inquiry generalise the features of the French and Italian PDO/PGI systems, some of them are listed below.

(a) The role of producer group is considered core, even though the participation of stakeholders different from producers in the rule-making process might be formally or informally allowed.

(b) French and Italian national legal systems present some similarities. However, important differences affect the participation of national authorities and actors external to the value chain, in rule-crafting. I identified the approach of the INAO (French competent authority for agri-food GIs) as 'hands-on', and the approach of the Ministry of Agriculture and regional authorities (Italian competent authorities) as 'mixed hands-on and hands-off'. This distinction has been key for better understanding the differences with the current protection regime of names for non-agricultural origin products.

(c) I highlighted that the approach to the four pillars is bottom-up in France, while it is essentially top-down in Italy, although not uniformly applicable to all types of producer groups.
(d) I stressed the importance of generating clearly defined boundaries as outcomes of the rulemaking. When the specifications are supported by objectively verifiable evidence, the risk of arbitrary enclosure (and club type of management) can be mitigated.
(e) In Italy a diversification of the legal forms assumed by the producer groups is a consequence of a selective application for the formal recognition as Protection Consortia, which happens *ex post* the GI registration. This might impact the capacity of all groups to set the basis for enduring collective action. Instead, in France, the system seems to push for uniform basic requirements for all producer groups, certified by the formal recognition as Producer Defence and Management Organisation (PDMO) and happening in parallel with the GI registration. Some important differences exist concerning the legal rules and practices governing democratic functioning, necessary membership, and fair representation.
(f) There are substantial differences between France and Italy in the control configuration (prior to the commercialisation of the GI product). For example, in France the PDMO is directly involved in internal controls and producers are encouraged to propose specifications that enable adequate controls. Instead, in Italy, controls prior to commercialisation have a strong external third-party vocation and internal control by the producer association or Consortium is absent.

In Chapter 3, the axes of inquiry constituted my working hypotheses for the analysis of valorisation and protection initiatives of denominations in the non-agricultural context. In Chapter 4, they are used as benchmarks for discussing the ongoing policy reforms, involving the GI protection for agri-food products and for crafts and industrial products.

Chapter 3 is divided in two sections. In **Section I**, I transposed the concept of origin product to industrial and crafts products, referring to the existing literature on cultural and industrial districts and culture-based productions. Then, mirroring the methodological test undertaken on agri-food GIs, I analysed French non-agricultural GI experiences using the A-P-O approach within the GKC framework. I used the methodological questions related to the *ex post* perspective to dive deep into the experiences of the registered GIs *Siège de Liffol*, *Poteries d'Alsace*, *Couteau Laguiole* and *Absolue Pays de Grasse*. I maintained the structure used in Chapter 2 Section II, distinguishing between the general legal rules-in-use and their implementation at the local level. Using the axes of inquiry, I compared the features of the French national GI system for crafts and industrial products to the French PDO/PGI system. This comparison identified differences, including the followings:
(a) the specific approach of the competent national authority for crafts and industrial products (the French Intellectual Property Office) appears to be 'hands-off';

(b) different tasks and responsibilities are attributed to the PDMO;
(c) the higher complexity of value chains and the heterogeneity of actors have an impact on the design of product specifications;
(d) the pillars governing the process are differently codified and implemented;
(e) the product specifications, less precise than the specifications of agri-food GIs, affect the GI governance and control configurations.

In **Section II**, I analysed more in depth the Italian legal framework for the protection of denominations of crafts and industrial origin products. I introduced collective trademarks, currently used in the absence of a GI national system of protection. I applied the axes of inquiry and methodological questions of the A-P-O approach from an *ex ante* perspective for analysing case studies involving Italian Collective Trademarks (CTMs). In particular, I focused on the following case studies: the experience of the *Ceramica Artistica Tradizionale* (CAT) trademark with specific reference to Ceramics of Faenza and Terracotta of Impruneta, Murano Glass, and Red Coral in Alghero. Some outcomes of this assessment are summarised below:
(a) the CTMs experiences are heterogeneous, but the input of state actors is generally core, with implications on producers' empowerment as rule-makers and rule-takers;
(b) the four pillars defined for the GI registration process are not key in CTMs legislative framework and implementation. This causes various levels of risk for arbitrary enclosure and club goods management, even when the rules are wide enough to virtually allow openness;
(c) the boundary rules show a higher level of fuzziness. It might embed ambiguities on the cumulative presence of provenance and quality requirements and might impact on the reliability of the control system. The governance configuration is not always considered a priority after the registration of the CTM.

Chapter 4 focused on the future perspectives of the GI system. **Part I** is dedicated to the theoretical implications of merging the legal approach with the commons approach. It focused specifically on three points: (a) the legal consequences of considering place-based reputation as the protected nested resource; (b) the outsider issue; (c) the legal implications of commons or club management for GIs. **Part II** offered an outlook of the main issues observed through the A-P-O approach within the GKC applied to GIs to recall the lessons learned from the French and Italian agricultural and non-agricultural experiences. I used my findings as starting point to inform public policies, namely the agri-Proposal and the non-agri Proposal, released respectively on 31 March 2022 and 13 April 2022. My analysis of the Proposals aimed to assessing whether the future legal framework is aligned with the GI practice and whether it addresses efficiently the collective action issues identified in the previous chapters.

Based on these considerations, I suggested political recommendations, driven by general principles of equity, fairness, and social justice, but most importantly by the principle of 'coherent transitions'. I referred to 'coherent transitions' as an envisaged evolution of policy prescriptions in a realistic way, avoiding panaceas. I considered from this perspective, the feasibility of change in national contexts, taking into account the practical facets of rule implementation.

In conclusion, this research highlighted that the implementation of the PDO/PGI systems in France and Italy are not harmonised. Moreover, the existing national models of GI protection for crafts and industrial products do not seem to replicate the same level of commitment and guarantee characterising the PDO/PGI system. The EU Proposals, despites some advances, might not have found appropriate solutions to favour harmonisation. This situation might accentuate the gaps that future applicants will have to fill for meeting GI legal requirements. At a more general level, this research has shown that legal scholarship can contribute to the debate on sustainable governance as a necessary precondition for GIs to function meaningfully and effectively in the long run.

UITGEBREIDE SAMENVATTING

Beheer reguleren: collectieve actie en regelgeving voor geografische aanduidingen voor agrarische en niet-agrarische producten in de EU

Geografische aanduidingen (GA's) zijn intellectuele-eigendomsinstrumenten die worden gebruikt om een product te identificeren waarvan de reputatie, kenmerken en kwaliteit voornamelijk te danken zijn aan de geografische oorsprong ervan. Collectieve actie (bedoeld als het geheel van individuele en collectieve keuzes gericht op het bereiken van een gemeenschappelijk doel) wordt in de interdisciplinaire literatuur beschouwd als de kern van GA-registratie en -beheer. Ondanks deze centrale rol wordt echter nog altijd aangenomen dat het buiten het toepassingsgebied van juridisch onderzoek valt en dus blijft het weinig gereguleerd op EU-niveau. Mijn onderzoek is gericht op het heroverwegen van het belang van collectieve actie in GA's vanuit juridisch oogpunt. Aan de hand van een transdisciplinaire benadering die een rechtsvergelijkende analyse combineert met een analyse van casestudy's, heb ik de wettelijke regels belicht die van invloed zijn op collectieve actie op lokaal niveau en die de (pre)registratiefase van GA's op EU- en nationaal niveau regelen. Ik heb onderzocht hoe het wettelijke kader wordt geïnterpreteerd en geoperationaliseerd door de betrokken actoren, en hoe deze interpretatie en operationalisering van invloed zijn op het functioneren van het logo. Ik heb mijn onderzoek gecontextualiseerd in zowel de agrarische sector als de ambachtelijke en industriële sector.

In **Hoofdstuk 1** beschrijf ik het *sui generis* GA-systeem als een ingebed regelsysteem met meerdere niveaus, waarbij ik benadruk dat zowel beschermde oorsprongsbenamingen (BOB's) als beschermde geografische aanduidingen (BGA's) *identificatoren* zijn van producten met specifieke kenmerken vanwege hun geografische oorsprong. Vervolgens heb ik onderzocht wat de bijdrage is van interdisciplinaire literatuur waarin het concept 'oorsprongsproducten' wordt geïntroduceerd, waarmee goederen worden bedoeld die in de loop van de tijd nauw verbonden zijn geraakt aan de geografische natuurlijke en culturele omgeving. Dit concept is belangrijk omdat het: (1) de rol van de lokale gemeenschap introduceert (een collectieve belanghebbende en aanvrager van GA-registratie), die een sleutelrol speelt bij het vestigen van traditionele praktijken, het vormgeven van landschappen en het bevorderen van biodiversiteitsbehoud; (2) collectieve actie integreert als de belangrijkste drijfveer voor het vestigen van informele praktijken op het niveau van producenten, een noodzakelijke voorwaarde voor hun codificatie als formele regelingen (bijv. de productspecificatie).

Beleidsdocumenten en interdisciplinaire literatuur erkennen dat GA's verschillende functies kunnen vervullen. Ik heb ze nadrukkelijk opgesteld als complexe multifunctionele intellectuele-eigendomsinstrumenten. Daarbij heb ik de functies communicatie, consumentenbescherming, onderscheidend vermogen, reclame en investering beschouwd als marktgerelateerd, en de functies grondstofproductie en lokale ontwikkeling als niet-marktgerelateerd. De theoretische functionele benadering is nuttig om een duidelijk beeld te krijgen van de potentiële prestaties van de benaming zodra deze geregistreerd is. Deze benadering heeft echter enkele beperkingen: vanwege de theoretische aard is ze blind voor de impact van collectieve actie. Met andere woorden: de registratie is neutraal voor het vermogen van het logo om al zijn functies uit te voeren en in de praktijk kunnen er nuances en heterogeniteiten bestaan. In plaats daarvan kunnen de operationalisering van de functies en de samenhang van het logo met de beleidsdoelstellingen worden beïnvloed door het vermogen van de producentengroepering om te zorgen voor inclusief, duurzaam, niet-discriminerend en democratisch beheer. Daarom is er een verschuiving nodig in het perspectief van de traditionele juridische benadering.

Om collectieve actie in de context van GA's te analyseren, heb ik me laten inspireren door de benadering die Elinor Ostrom heeft ontwikkeld met betrekking tot menselijke samenwerking voor duurzaam beheer van materiële en immateriële gemeenschappelijke middelen ('commons'), gekenmerkt door problemen die voortkomen uit lage exclusiviteit en hoge rivaliteit. Ik wijs erop dat de bijdrage van de rechtswetenschap in dit opzicht nog steeds beperkt is en heb mijn onderzoek gepositioneerd als een mogelijk antwoord op deze hiaat. Ik heb vier methodologische uitdagingen geïdentificeerd. Ten eerste stel ik dat het loslaten van een versnipperde en monodisciplinaire benadering van de studie van GA's zou leiden tot nauwkeurigere methodologieën voor het opstellen van empirisch onderbouwde interventiedoelen op beleidsniveau. Ten tweede heb ik collectieve actie geïdentificeerd als een geschikt object voor een transdisciplinaire dialoog ter bevordering van het regelgevingskader voor GA's. Ten derde heb ik geprobeerd de kennis over het beheer van commons te systematiseren om de conceptuele nabijheid tussen GA's en commons te onderzoeken. Dit onderwerp, dat nog altijd een onopgeloste puzzel is voor de interdisciplinaire wetenschap, is weinig onderzocht door rechtsgeleerden. Ik heb me gericht op de studie van de *rules-in-use* als ingang voor een transdisciplinaire dialoog tussen juridische en institutionele analyse. Ostroms definitie van *rules-in-use* omvat alle gecodificeerde en niet-gecodificeerde voorschriften die direct of indirect het gedrag van belanghebbenden beïnvloeden (d.w.z. wetten, voorschriften, maar ook endogene, op de gemeenschap gebaseerde regelingen die voortkomen uit de praktijk). Deze focus op de regels maakt duidelijk dat er behoefte is aan een extra observatieniveau, te weten het lokale niveau, om te begrijpen hoe het wettelijke kader van invloed is op het begrip, de implementatie en de handhaving van wettelijke regels door de belanghebbenden die betrokken zijn bij de fase voorafgaand aan de aanvraag van GA-registratie en bij de aanvraag zelf.

Na de introductie van de belangrijkste concepten van de theorie van de commons presenteer ik mijn interpretatie van de conceptuele nabijheid tussen GA's en de commons. Vanuit het perspectief van het *sui generis* GA-systeem van de EU wordt de gedeelde immateriële hulpbron in GA-context vertegenwoordigd door de productreputatie. Deze reputatie is noodzakelijkerwijs plaatsgebonden, complex en ingebed, en het resultaat van de culturele en omgevingsfactoren die specifieke keuzes van producenten stimuleren, wat het onderscheidende vermogen van het product verklaart. De plaatsgebonden reputatie kan beschouwd worden als een immateriële common, omdat zij (a) 'eigendom' is van niemand, hoewel ze beheerd wordt door de producentengroepering; (b) blootgesteld is aan meeliftgedrag, doordat dit economisch aantrekkelijk is voor verschillende actoren die geïnteresseerd zijn in de toe-eigening ervan, wat leidt tot uitputting van de hulpbron (door misbruik of niet-gebruik); (c) gecreëerd moet worden door producenten voordat ze geëxploiteerd kan worden, maar ook erkend moet worden door consumenten; en (d) het moeilijk is om de grenzen ervan te bepalen. De beschikbaarheid van wettelijke bescherming kan een antwoord zijn op het dilemma van uitputting van hulpbronnen en vereist dat aanvragers informele praktijken vastleggen in de productspecificatie. De specificatie wordt gevormd door contextgebonden endogene regelingen die voldoen aan gedefinieerde wettelijke vereisten en die door de leden van de gemeenschap als bindend worden erkend. Als 'grensregels' die het resultaat zijn van een compromis, bepalen ze wie het recht heeft op toegang tot de benaming en de plaatsgebonden reputatie. Bij gebrek aan duidelijke richtlijnen of garanties zou het proces van het opstellen van regels voorafgaand aan de GA-registratie beïnvloed kunnen worden door het risico van arbitraire uitsluiting (wat betekent dat producenten het eens kunnen worden over strenge regels met een hoog uitsluitingseffect, terwijl die niet voldoende worden ondersteund door objectief verifieerbaar bewijs). De noodzaak om de kwetsbaarheid van hulpbronnen voor uitputting te beperken wordt gecompenseerd door het collectieve belang om een zekere mate van openheid te bewaren voor de toegang tot en het gebruik van de hulpbronnen voor de sociale, culturele en economische voordelen die voortvloeien uit de betreffende producties. Dus afhankelijk van hoe collectieve actie wordt vormgegeven tijdens de pre-registratie- en de registratiefase, kan elke GA zich 'ergens tussen' de twee uitersten van exclusiviteit en openheid bevinden, langs een 'uitsluitbaarheidsspectrum'. Daardoor kan het beheer van plaatsgebonden reputatie, afhankelijk van het geval, kenmerken vertonen van het beheer van commons en/of clubgoederen. Tegelijkertijd roept het bekijken van het regelgevingskader voor GA's door de lens van commons aanvullende vragen op over de aard van de rechten die het logo verleent en over de rol van de benaming.

Er is discussie over de vraag of GA's beschouwd kunnen worden als intellectueel 'eigendom', aangezien het vanuit EU-perspectief niet mogelijk is om een 'eigenaar' aan te wijzen en het recht op overdracht wordt ontzegd. Geïnspireerd door de herinterpretatie van het concept bundel

van rechten door Edella Schlager en Elinor Ostrom, stel ik een overzicht voor van de verdeling van rechten in GA's in de EU. Ik heb aangegeven: dat (a) het recht op toegang individueel wordt toegekend aan iedere producent en wordt vertegenwoordigd door het recht om de GA-grenzen te 'betreden' indien wordt voldaan aan de productspecificaties (soms is ook lidmaatschap van de producentenvereniging vereist); (b) het recht op beheer de kern vormt en wordt toegekend aan producenten als groep; (c) er geen recht op overdracht is; (d) het recht op toe-eigening/gebruik zowel individueel als collectief is en het gebruik van de benaming en de plaatsgebonden reputatie inhoudt; (e) het recht op uitsluiting, d.w.z. het recht om te bepalen wie toegang heeft tot het gebruik van de benaming en de plaatsgebonden reputatie, bij de producentengroepering ligt. De willekeur bij het bepalen van de voorwaarden om toegang te krijgen tot de hulpbron moet echter worden 'afgezwakt' door specifieke voorwaarden, zoals de wettelijke vereisten en de noodzaak om voldoende bewijs te leveren ter onderbouwing van de opgestelde claims. Het concept bundel van rechten heeft het mogelijk gemaakt om de bevoegdheden en verantwoordelijkheden van de producentengroepering en het belang van GA-beheer boven overdracht te benadrukken. Bovendien kan zo onderscheid worden gemaakt tussen het recht op toegang en het recht op uitsluiting. Het heeft ook bijgedragen aan het debat over de mogelijkheid om eigendomskenmerken te identificeren in GA's.

In eerdere analyses van GA's en commons is niet onderzocht wat de rol van de benaming is en hoe die wordt beïnvloed door het beheer van gedeelde lokale hulpbronnen. Geïnspireerd door de infrastructuurtheorie van Brett Frischmann heb ik een nieuwe theoretische configuratie opgesteld: de benaming wordt geïdentificeerd als een gemengde intellectuele infrastructuur, waarbij de commerciële component bestaat naast de semipublieke component. De benamingsinfrastructuur kan bij specifiek beheer publieke goederen produceren en tegelijkertijd een commerciële functie behouden. Als de plaatsgebonden reputatie en de benamingsinfrastructuur worden beheerd als commons, is de kans groter dat GA's sociale en commerciële voordelen creëren. Daarnaast heb ik aangegeven hoe de voorgestelde omschrijving van plaatsgebonden reputatie als een complexe en ingebedde gedeelde hulpbron de traditionele omschrijving van de oorsprongslink op de proef kan stellen.

Hoofdstuk 1 maakt het mogelijk om de hiaten tussen de juridische en interdisciplinaire perspectieven op collectieve actie en GA's op te vullen. Daarnaast verschaft het de theoretische grondslagen en rechtvaardigingen om GA-systemen te analyseren aan de hand van de diagnostische instrumenten die door wetenschappers op het gebied van commons zijn ontwikkeld.

Hoofdstuk 2 is opgedeeld in twee delen. In **Deel I** ga ik in op de analytische aanpak die door wetenschappers op het gebied van commons wordt toegepast voor het analyseren van casestudy's

en introduceer ik het concept van diagnostische kaders, dat wil zeggen: flowcharts waarin reeksen methodologische vragen en analytische variabelen aan elkaar worden gekoppeld en worden gebruikt voor dataverzameling en -analyse met betrekking tot specifieke casestudy's. Ik heb me gericht op het Institutional Analysis and Development-raamwerk (IAD), dat gewoonlijk wordt gebruikt voor het bestuderen van materiële hulpbronnen, en op het Governing the Knowledge Commons-raamwerk (GKC), dat gewoonlijk wordt toegepast op immateriële hulpbronnen. Met name het gebruik van het GKC-raamwerk, aangepast aan de specifieke kenmerken van de GA-context, was essentieel voor het objectief structureren van de dataverzameling (d.w.z. semigestructureerde interviews en focusgroepen) en de analyse van interviewtranscripties en documenten. Het maakte ook vergelijkingen tussen verschillende gevallen en landen mogelijk. Ondersteund door specifieke methodologische vragen, stelde het GKC-raamwerk toegepast op GA's mij in staat om te observeren hoe heterogene actoren die betrokken zijn bij het proces voorafgaand aan en tijdens de aanvraag op verschillende niveaus samenwerken om tot de productspecificatie te komen. Ik beschouw het ontwerp van de productspecificaties als de belangrijkste actiesituatie, gelijktijdig met het ontwerp van het controleplan en van de statuten van de producentenvereniging/-organisatie.

In de context van het ontwerp van productspecificaties identificeer ik:

(a) De **actoren** die betrokken zijn bij het besluitvormingsproces. Die heb ik opgedeeld in de gemeenschap (de lokale belanghebbenden binnen en buiten de waardeketen), de deelnemers (de producenten-aanvragers) en externe actoren (nationale autoriteiten, controleorganen en universiteiten, die op nationaal niveau opereren en niet direct betrokken zijn bij de kwesties rond collectieve actie die van invloed zijn op de hulpbron). Ik benadruk het belang van de heterogeniteit van de actoren, dat wil zeggen: (1) heterogeniteit binnen de groep, bepaald door de beweegredenen en belangen van de belanghebbenden in de GA-registratie; en (2) uitgebreide heterogeniteit die verwijst naar de aard van de belanghebbenden (staat of niet-staat), hun rol in de actiesituatie en in relatie tot de waardeketen (extern of intern).

(b) De regels voor het **besluitvormingsproces**, die zijn voortgekomen uit Franse en Italiaanse nationale kaders en praktijken. Ik heb ze samengevoegd tot vier hoofdpijlers: toegang tot lidmaatschap, representativiteit, eerlijke vertegenwoordiging en democratisch functioneren. Afhankelijk van hoe deze principes op nationaal niveau worden gecodificeerd of informeel worden toegepast, kunnen er (formeel of informeel) waarborgen worden ingebouwd tegen arbitraire uitsluiting (d.w.z. beheer van clubgoederen).

(c) De **uitkomsten** van het besluitvormingsproces. Ik verwijs naar uitkomsten op het eerste niveau om de productspecificaties te identificeren, maar ook het controleplan en de statuten van de producentenorganisatie. De gecodificeerde regelingen die voortvloeien uit de resultaten

op het eerste niveau vormen de basis voor de beheer- en controleconfiguratie, die ik heb geïdentificeerd als uitkomsten op het tweede niveau.

Op basis van deze hoofdcomponenten van het GKC-raamwerk stel ik een vereenvoudigde benadering voor, die ik de APO-benadering noem (*Actors, Process, Outcomes* – Actoren, Proces, Uitkomsten) om de transdisciplinaire dialoog te vergemakkelijken. In **Deel II** heb ik een methodologische test van de APO-benadering binnen het GKC-kader introduceer, toegepast op Franse en Italiaanse GA's voor agrarische producten. Ik leg de betekenis uit van elk blok van de APO-benadering, waarbij ik eerst verwijs naar de sleutelconcepten die door wetenschappers op het gebied van commons zijn gesignaleerd. Vervolgens heb ik dezelfde concepten gebruikt om de kennis te systematiseren die in de interdisciplinaire wetenschap is verzameld over GA's. Na de betekenis van iedere bouwsteen verduidelijkt te hebben, heb ik de wettelijke EU- en nationale regels geanalyseerd die relevant zijn voor de APO-benadering. In het deel over de implementatie van de wettelijke regels beschrijf en analyseer ik de data die zijn verzameld aan de hand van veldwerk en documentanalyse met betrekking tot de Franse en Italiaanse casestudy's. Ik verwijs naar de formele en informele praktijken die voortvloeien uit het begrip, de interpretatie en de operationalisering door belanghebbenden van het nationale en EU-rechtskader dat de registratie van GA's regelt. De resultaten van deze methodologische test stelden me in staat om drie onderzoeksassen uit te werken, gericht op de Actoren, het Proces en de Uitkomsten. Deze onderzoeksassen generaliseren de kenmerken van de Franse en Italiaanse BOB/BGA-systemen, waarvan er hieronder enkele worden opgesomd.

(a) De rol van de producentengroepering wordt als essentieel beschouwd, ook al kan de deelname van andere belanghebbenden dan producenten aan het regelgevingsproces formeel of informeel worden toegestaan.
(b) De Franse en Italiaanse nationale rechtsstelsels vertonen enkele overeenkomsten. Er zijn echter ook belangrijke verschillen met betrekking tot de deelname van nationale autoriteiten en actoren buiten de waardeketen aan het opstellen van regels. Ik heb de aanpak van het INAO (de bevoegde autoriteit voor GA's m.b.t. agrarische producten in Frankrijk) geïdentificeerd als 'hands-on', en de aanpak van het ministerie van Landbouw en van regionale autoriteiten (de bevoegde autoriteiten in Italië) als 'een mix van hands-on en hands-off'. Dit onderscheid is essentieel voor een beter begrip van de verschillen met de huidige beschermingsregeling voor de benaming van niet-agrarische producten.
(c) Ik heb aangegeven dat de benadering van de vier pijlers in Frankrijk bottom-up is, en in Italië hoofdzakelijk top-down, hoewel ze niet uniform van toepassing is op alle soorten producentengroeperingen.
(d) Ik heb gewezen op het belang om duidelijk gedefinieerde grenzen op te stellen als resultaat van de regelgeving. Als de specificaties worden ondersteund door objectief verifieerbaar bewijs, kan het risico van arbitraire uitsluiting (en beheer van clubgoederen) worden beperkt.

(e) In Italië is een diversificatie van de rechtsvormen die de producentengroeperingen aannemen een gevolg van een selectieve aanvraag voor de formele erkenning als beschermingsconsortium, die *ex post* plaatsvindt na de GA-registratie. Dit kan gevolgen hebben voor het vermogen van alle groeperingen om de basis te leggen voor duurzame collectieve actie. In plaats daarvan lijkt het systeem in Frankrijk te streven naar uniforme basisvereisten voor alle producentengroeperingen, gecertificeerd door de formele erkenning als Producer Defence and Management Organisation (PDMO) en parallel lopend aan de GA-registratie. Er zijn enkele belangrijke verschillen wat betreft de wettelijke regels en praktijken voor democratisch functioneren, noodzakelijk lidmaatschap en eerlijke vertegenwoordiging.

(f) Er zijn aanzienlijke verschillen tussen Frankrijk en Italië in de controleconfiguratie (voordat het GA-product in de handel wordt gebracht). Zo is in Frankrijk de PDMO direct betrokken bij interne controles en worden producenten gestimuleerd om specificaties voor te stellen die adequate controles mogelijk maken. In plaats daarvan worden de controles voorafgaand aan het op de markt brengen in Italië juist uitgevoerd door externe partijen en vindt er geen interne controle plaats door de producentenvereniging of het consortium.

In Hoofdstuk 3 vormen de onderzoeksassen mijn werkhypothesen voor de analyse van valorisatie- en beschermingsinitiatieven voor benamingen van niet-agrarische producten. In Hoofdstuk 4 worden ze gebruikt als benchmark voor de bespreking van de huidige beleidshervormingen, waaronder de GA-bescherming voor agrarische producten en voor ambachtelijke en industriële producten.

Hoofdstuk 3 is opgedeeld in twee delen. In **Deel I** heb ik het concept van oorsprongsbenaming vertaald naar industriële en ambachtelijke producten, verwijzend naar de bestaande literatuur over culturele en industriële districten en cultuurgebonden productie. Vervolgens heb ik, in navolging van de methodologische test voor GA's voor agrarische producten, de Franse ervaringen met GA's voor niet-agrarische producten geanalyseerd aan de hand van de APO-benadering binnen het GKC-kader. Ik heb de methodologische vragen met betrekking tot het *ex post*-perspectief gebruikt om diep in de ervaringen van de geregistreerde GA's *Siège de Liffol*, *Poteries d'Alsace*, *Couteau Laguiole* en *Absolue Pays de Grasse* te duiken. Ik heb de structuur gehandhaafd die is gebruikt in Hoofdstuk 2, Deel II, waarbij onderscheid werd gemaakt tussen de algemene wettelijke *rules-in-use* en de implementatie daarvan op lokaal niveau. Op basis van de onderzoeksassen heb ik de kenmerken van het Franse nationale GA-systeem voor ambachtelijke en industriële producten vergeleken met het Franse BOB/BGA-systeem. Deze vergelijking bracht onder meer de volgende verschillen aan het licht:

(a) de specifieke aanpak van de bevoegde nationale autoriteit voor ambachtelijke en industriële producten (het Franse instituut voor intellectuele eigendom) lijkt 'hands-off' te zijn;

(b) verschillende taken en verantwoordelijkheden worden toegewezen aan de PDMO;
(c) de grotere complexiteit van waardeketens en de heterogeniteit van actoren hebben invloed op het ontwerp van productspecificaties;
(d) de pijlers van het proces zijn verschillend gecodificeerd en geïmplementeerd;
(e) de productspecificaties, die minder nauwkeurig zijn dan de specificaties van GA's voor agrarische producten, beïnvloeden het beheer en de controleconfiguratie van GA's.

In **Deel II** analyseer ik het Italiaanse wettelijke kader voor de bescherming van benamingen van ambachtelijke en industriële producten diepgaander. Ik introduceer collectieve handelsmerken, die op dit moment worden gebruikt bij gebrek aan een nationaal GA-beschermingssysteem. Ik pas de onderzoeksassen en de methodologische vragen van de APO-benadering toe vanuit een *ex ante* perspectief voor het analyseren van casestudy's met betrekking tot Italiaanse collectieve handelsmerken (CTM's). Ik richt me vooral op de volgende casestudy's: de ervaring met het handelsmerk *Ceramica Artistica Tradizionale* (CAT) met specifieke verwijzingen naar keramiek van Faenza en terracotta van Impruneta, Murano-glas en rood koraal in Alghero. Enkele resultaten van deze beoordeling worden hieronder samengevat:
(a) de ervaringen van de CTM's zijn heterogeen, maar de inbreng van staatsactoren is over het algemeen essentieel, met gevolgen voor de empowerment van producenten als regelgevers en regelnemers;
(b) de vier pijlers die zijn gedefinieerd voor het registratieproces van GA's zijn niet essentieel in het wetgevingskader en de implementatie van CTM's. Dit brengt verschillende risiconiveaus met zich mee voor arbitraire uitsluiting en beheer van clubgoederen, ook al zijn de regels ruim genoeg om openheid praktisch toe te staan;
(c) de grensregels vertonen een hogere mate van vaagheid. Ze kunnen dubbelzinnigheden bevatten over de totale aanwezigheid van oorsprongs- en kwaliteitseisen en kunnen van invloed zijn op de betrouwbaarheid van het controlesysteem. De beheerconfiguratie wordt niet altijd als prioriteit beschouwd na de registratie van het CTM.

Hoofdstuk 4 is gericht op de toekomstperspectieven van het GA-systeem. **Deel I** is gewijd aan de theoretische gevolgen van het samenvoegen van de juridische benadering met de commons-benadering. Specifiek is daarbij gekeken naar drie punten: (a) de juridische consequenties van het beschouwen van plaatsgebonden reputatie als de beschermde ingebedde hulpbron; (b) de kwestie van de buitenstaander; (c) de juridische gevolgen van het beheer van commons of clubgoederen voor GA's. **Deel II** biedt een overzicht van de belangrijkste kwesties die zijn waargenomen met de APO-benadering binnen het GKC-kader toegepast op GA's, om de geleerde lessen van de Franse en Italiaanse ervaringen met agrarische en niet-agrarische producten nogmaals voor het voetlicht te brengen. Ik heb mijn bevindingen gebruikt als uitgangspunt om openbaar beleid te informeren,

namelijk het Agricultural Proposal en het Non-Agricultural Proposal, die respectievelijk op 31 maart 2022 en 13 april 2022 zijn gepubliceerd. Mijn analyse van deze voorstellen is erop gericht om te beoordelen of het toekomstige wettelijke kader in overeenstemming is met de GA-praktijk en of het de in de voorgaande hoofdstukken geïdentificeerde kwesties met betrekking tot collectieve actie efficiënt aanpakt.

Op basis van deze overwegingen stel ik politieke aanbevelingen voor, gedreven door algemene principes van gelijkheid, billijkheid en sociale rechtvaardigheid, maar bovenal door het principe van 'coherente transities'. Ik verwijs naar coherente transities als een beoogde evolutie van beleidsvoorschriften op een realistische manier, waarbij panaceeën worden vermeden. Vanuit dit perspectief bekijk ik de haalbaarheid van verandering in nationale contexten, rekening houdend met de praktische facetten van regelimplementatie.

Concluderend heeft dit onderzoek aangetoond dat de implementatie van de BOB/BGA-systemen in Frankrijk en Italië niet geharmoniseerd is. Bovendien lijken de bestaande nationale modellen voor de bescherming van GA's voor ambachtelijke en industriële producten niet dezelfde mate van commitment en garantie te bieden die kenmerkend is voor het BOB/BGA-systeem. De EU-voorstellen hebben, ondanks enige vooruitgang, misschien geen passende oplossingen gevonden om harmonisatie te bevorderen. Deze situatie kan de hiaten accentueren die toekomstige aanvragers moeten opvullen om aan de wettelijke GA-vereisten te voldoen. Op een algemener niveau heeft dit onderzoek aangetoond dat de rechtswetenschap een bijdrage kan leveren aan het debat over duurzaam beheer als noodzakelijke voorwaarde voor het zinvol en effectief functioneren van GA's op de lange termijn.

ANNEXES

Annex 1: Overview on legal forms, governance structure and type of membership in IGPIAs.

Source: statutes of PDMOs of registered IGPIAs. IGPIAs highlighted in orange correspond to the cases analysed in this research.

IGPIA	Legal form of PDMO	Governance structure of PDMO	Different type of membership
Absolue Pays de Grasse	Association Law 1901	PDMO wider scope; no GI section; no internal committees.	*Membres producteurs de plantes à parfums* *Opérateurs initiaux de l'IG (*non-members)
Charentaise	Association Law 1901	PDMO created for the purpose of the GI; no internal committee	*Membres initiaux (opérateurs)*
Couteau Laguiole	Association Law 1901	PDMO created for the purpose of the GI; 7 internal committees (industrial knife makers, artistic knife makers, subcontractors, raw material suppliers, traders, supporters, institutional actors)	*Membres actifs (opérateurs)* *Membres consultatifs* *Membres sympathisants* *Membres d'honneur*
Granit de Bretagne	Association Law 1901	PDMO created for the purpose of the GI; no internal committees	*Membres actifs* *Membres associés* *Membres d'honneur*
Grenat de Perpignan	Syndicat	PDMO wider scope and explicit GI section; no internal committees	*Membres opérateurs*
Linge Basque	Syndicat	PDMO (not specified if wider scope); no internal committees	*Membres opérateurs* *Membres associés*
Pierre de Bourgogne	Association Law 1901	PDMO created for the purpose of the GI; no internal committees	*Membres actifs, de Membres bienfaiteurs, de Membres d'honneur et de Membres* *Membres associés*
Pièrre Marbrière	Association Law 1901	PDMO wider scope with an internal GI section; 3 internal committees of operators	*Membres actifs (operateurs)* *Membres associés* *Membres d'honneur*
Porcelaine de Limoges	Syndicat	PDMO created for the purpose of the GI; no internal committees	*Membres opérateurs* *Membres associés*

IGPIA	Legal form of PDMO	Governance structure of PDMO	Different type of membership
Poterie d'Alsace	Association Law 1901	PDMO wider scope not specified; no internal committees	*Membres actifs (opérateurs)* *Membres d'honneurs*
Poterie d'Arudy	Association Law 1901	PDMO wider scope, with explicit GI section; no internal committees	*Membres actifs (opérateurs)* *Membres Associés* *Membres d'honneur*
Siège de Liffol	Association Law 1901	PDMO with wider scope (without a specific section); no internal committees	*Membres adhérents,* *Membres de droit (opérateurs)* *Membres partenaires*
Tapis/Tapisserie d'Aubusson	Association Law 1901	PDMO wider scope with explicit GI section; no internal committees	*Membres opérateurs*

Annex 2: Listing of semi-structured interviews and modalities

Participants' names are substituted by pseudonyms, corresponding to their role, according to their preferences expressed in the Informed Consent form. One person preferred to remain anonymous.

Agricultural (France)

Participants	Date	Modality
Multi-product PDMO	1 July 2021	Online
Federation of producer groups	26 July 2022	Online
INAO representative territorial delegation	8 August 2022	Online
Control Body	24 June 2021	Online
INAO representatives Legal Department	16 September 2022	Online
Huile essentielle de Lavande de Haute-Provence PDO (2 producers and 1 PDMO representative)	6 July 2021; 12 July 2021	In-person and online

Agricultural (Italy)

Participants	Date	Modality
Producer Pecorino di Picinisco PDO	6 December 2021	In-person
Representative Protection Consortium Tuscan olive oil PGI	16 December 2021	Online
Regional authority Veneto	11 February 2022	Online
Regional authority Tuscany	19 July 2022	Online
Regional authority Lombardy	6 March 2023	Online
Regional agency Latium	24 February 2022	Online
Italian Ministry of Agriculture	28 January 2022	Online

Non-agricultural (France)

Participants	Date	Modality
Representative INPI	11 March 2021; 9 June 2021	Online
Representative PDMO GI Absolue Pays de Grasse	22 April 2021	Online
Organic raw material supplier n. 1 GI Absolue Pays de Grasse	21 April 2021; 8 July 2021	Online and in-person
Organic raw material supplier n. 2 GI Absolue Pays de Grasse	6 May 2021	Phone
Processor GI Absolue Pays de Grasse	17 August 2021	Phone
Organic raw material supplier n. 3 GI Absolue Pays de Grasse	12 July 2021	Online
Non-organic raw material supplier GI Absolue Pays de Grasse	17 May 2021	In-person
PDMO representative GI Siège de Liffol	20 March 2021	Online
Producer n. 1 GI Siège de Liffol	1 April 2021	Online
Producer n. 2 GI Siège de Liffol	13 April 2021	Online
Anonymous participant GI Poterie d'Alsace	10 August 2021	Online
Producer GI Couteau Laguiole	24 February 2022	Online

Non-agricultural (Italy)

Participants	Date	Modality
Focus group CAT trademark	27 September 2021	Online
Representative Faenza municipality	18 November 2021	Online
Representative AiCC	28 September 2021	Online
Representative Artex	28 September 2021	Phone
Representative municipality Impruneta n. 1 and 2	2 December 2021; 13 December 2021	Online and in-person
Producer n. 1 Impruneta	13 December 2021	In-person
Producer n. 2 Impruneta	13 December 2021	In-person
Representative n. 1 and 2 Consortium Murano	22 November 2021	In-person
Producer n. 1 (member and user) Murano	23 November 2021	In-person
Producer n. 2 (member non-user)	23 November 2021	In-person
Producer n. 1 (non-member non-user)	22 November 2021	In-person
Producer n. 2 (non-member non-user)	24 November 2021	In-person
Representative municipality Alghero	1 December 2021	Online
Producer Corallium Rubrum	20 December 2021	Online
Representative Consortium Cremona Liuteria CTM	22 December 2021	Phone

Annex 3: Synopsis of main codes and subcodes

The data processing and analysis has been undertaken using MAXQDA (*MAXQDA 2022*, [software], Berlin, VERBI Software, 2021, maxqda.com).

Main codes	Subcodes
ACTORS	National/regional authority involvement; motivations GI initiative (protection/valorisation); GI project initiative (all community members included/community members excluded/actors external to the value chain/municipalities); pre-existing association; multi-product producer group; number of operators; contractual relations (sub-contractors/raw material suppliers and processors); actors' heterogeneity (interest/motivations/role in the value chain).
PROCESS	Third-parties involvement; national authority involvement; compromise building; pre-existing labels or recognitions (UNESCO/EPV/pre-existing collective trademark); missions of the producer organization (wider scope than GI/exclusively created for the GI); governance structure (syndicat/association/interprofession/associazione proponente); exclusivity or openness; issues related to repartition of costs; representation of professional category (based on the value chain/based on professional committees); representativeness of producer association (in governing bodies/contested representativeness/other); rules on decision-making/democratic functioning (contested rules on decision-making/consensus/vote/consultive vote/deliberative vote/one member one vote/according to volumes of production); rules on membership (contested membership/additional criteria for membership/membership mandatory/membership non mandatory).
OUTCOMES	**Product specification;** rules on labelling; nature of the link (history/natural factor/human factor/evidence correlation locality and quality/reputation of the product/reputation of the name) locality requirement (not al production steps in the area/all production steps in the area); choice of the name (name not previously used in language or trade/previously used in language or trade); raw materials (sourced outside the geographical area/used to be sources in the geographical area); debated method of production (innovation/industrial and artisanal); debated issues geographical area; debated issues product characterisation (distinctiveness/product types). **Controls on governance;** role of national authority (in-person checks/documental checks); contract control body-producers; checks on tasks and responsibilities of the producer group. **Controls on compliance with the specification;** control type (third-party control/peer-to-peer control/self-control/internal control); private control body; public control body; accreditation **Governance configuration ex post registration;** federation of producer groups; association; nothing; other; Protection Consortium; Italian multi-product producer group.

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Governing governance: collective action and rulemaking in EU agricultural and non-agricultural geographical indications

Flavia Guerrieri

Geographical Indications ('GIs') designate a product whose reputation, characteristics and quality are essentially due to their geographical origin. They are identifiers of 'origin products', immersed in a specific local natural and socio-cultural ecosystem. Local tangible and intangible assets and the associated reputation are nurtured over time, but they are also vulnerable to erosion. GIs encourage stakeholders to codify arrangements (product specifications) as a response to this problem.

The importance of collective action issues in GIs has been demonstrated by interdisciplinary scholarship. However, it is mostly considered extraneous in the legal discourse and in policy prescriptions at the European level. Through a transdisciplinary approach this work combines comparative legal and case study analyses, illustrating the diversity of the protection and valorisation strategies of French and Italian agricultural and non-agricultural origin products.

Inspired by the theory and diagnostic frameworks of Elinor Ostrom's and colleagues for analysing human cooperation for the sustainable governance of tangible and intangible commons, it explores the potential of the conceptual proximity between GIs and the commons reframing key aspects of GI legal theory and embracing the collective action perspective. The analysis of how actors' interactions in rulemaking for product specification design affects the outcomes, reveals that the interpretation and implementation of national legal rules at the pre-registration and registration phases are not harmonised in Europe. Empirically grounded findings flag legally relevant collective action issues in GI settings and support suggestions for coherent policy transitions, measuring implementation feasibility and avoiding panaceas.