

Agro Food's Quality Signs and Free Movement of Goods. What Strategies for the European Operators?

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Abstract— Several recent cases judged by the Court of Justice of the European Communities have raised interesting issues on the possibility for operators of food chains to use national quality signs indicating a territory of origin, different from the European regulatory ones (Protected Geographical Indications). These various attempts from France, Germany and Belgium were all condemned as protectionist policies contradicting the free movement of goods between Member States in the European Market. However, the condemned national policies can be seen as defending the viability of specific kinds of activities (of small enterprises) in specific places (rural areas). These cases as a consequence, form a good illustration of the difficulty that a government faces while trying to make compatible the protection of certain traditional activities with free markets. Exploring this idea, the presentation of the court rulings is developed in the first section. In the second section, the economic theoretical categories these cases raised are investigated. This helps to answer to the question of the best way to ensure market niches through products' quality in the context analysed. Collective trademark as a form of intellectual property right is in particular highlighted. The third section considers the Court decisions on this basis.

Keywords— Free Movement of Goods, Geographical Indications, Collective Trademarks.

I. INTRODUCTION

Several recent cases judged by the Court of Justice of the European Communities (the Court) have raised interesting issues on the possibility for operators of food chains to use national quality signs indicating a territory of origin, different from the European regulatory ones. These later are known as Protected Geographical Indications (PGI) and form intellectual property rights protected with the European Regulation 510/2006 (the European Regulation[1]). The various attempts from France¹ (a list of quality signs as 'Salaison d'Auvergne' for example that did not point out a specific product but a class of products), Germany² ('Markenqualität aus deutschen Landen' sign)

and Belgium³ ('Walloon' sign) were all condemned as protectionist policies contradicting the free movement of goods between Member States in the European Market.

These national policies however can be seen as defending the viability of specific kind of activities (of small enterprises) in specific places (rural areas). These cases, as a consequence, form a good illustration of the difficulty that a government faces when it tries to make compatible the protection or the viability of certain traditional activities with free markets. Interestingly, supporting the rural economy development is also an aim for the European Regulation. Together with the concern of delivering information on goods quality to consumers, attention is paid to rural economy in the European Regulation's preamble with particular consideration for less-favoured area: "the promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas."⁴

Are these ideas taken into account into the Court decision? How could they be considered in its ruling? The paper explores these questions. For that purpose, the presentation of the cases is developed in the first section. A link between the 'national heritage' that a PGI would represent and the concept of public good is proposed in order to highlight the Court decisions. This however clearly asks the question of the theoretical categories involved in the Court decisions. If the geographical indications (GIs) at stake in these cases cannot be considered as PGI, what should be their legal statute? This question can be stated in another way: what should be the best way to ensure market niches through products' quality for producers in the context analysed (i.e. where the public good aspect is not straightforward)? In order to answer to these questions, the second section presents the cases. The third section proposes to interpret the condemned names and regional labels as 'clubs'. This will allow to present 'collective trademarks' as an alternative way to protect the club's intellectual property rights. On this basis, the fourth section

¹ Cases C-321/94, C-322/94, C-323/94, C-325/00, C-255/03, C-6/02

² Case C-280/01

³ Case C-255/03

⁴ Council Regulation (EC) No 510/2006, Point (2) of the preamble.

considers the Court decisions out of the free movement of goods rule. It studies the implications for society of shifting the protection mode of names and label from national policies to collective trademark regime.

II. PRESENTATION OF THE CASES

The cases studied in this paper share a lot of characteristics. First the parties are always the same. The applicant is the Commission of the EC whereas the defendant is a Member State of the EC (France, Germany, Belgium depending on the cases). Second, the matter at issue is all the time the same: a national legal protection afforded to names or regional labels containing a geographical indication, explicitly (Salaisons d’Auvergne, Savoie, Franche Comté...) or implicitly (Montagne for example, where ‘Montagne’ means ‘French mountains’). Third, the judgement is always the same. In every case the national legal protection is found to violate the provisions of Article 28 EC stipulating that “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. Finally, the Court always refused to consider that the different national legal protections at stake came under Article 30 EC⁵ which lists possible exceptions to Article 28 EC among which ‘the protection of industrial and commercial property’. Here is the heart of the matter.

GIs are indeed recognized as intellectual property rights in the TRIPS Agreement of the World Trade Organization. In this international institutional context, the European Union (EU) is generally considered as a strong supporter of GIs (see [2]). The Court did not however acknowledge the status of industrial and commercial property to the names and regional labels at stake in these cases since they were not registered as PGIs under the European Regulation 2081/92⁶ on the

⁵ Article 30 states that “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

⁶ Now European Regulation 510/2006.

protection of GIs. Furthermore, because these names and regional labels referred to classes of products rather than to single products, the Courts pointed out that they could not be considered as PGIs in the European framework anyway.

What lesson can be drawn from these cases? In the cases judged no harm consisting of economic or financial loss was directly at stake. Each time, the national legal protections were attacked by the European Commission as such, because of their potential to discriminate on ground of nationality. The repetition of the same reasoning and judgement from the Court in front of these repeated cases asserted, on the one hand the European legal standard of free movement of goods between Member States, and on the other hand the registered GIs as the only possible exception when origin signs are involved. Outside the European regulatory framework on GIs, a national legal protection mentioning the geographical origin of a product or of a class of products will always be considered as interfering with the free movement of goods between Member States. In order to be considered as an exception to the free movement of goods, a national legal protection of a quality sign mentioning a geographical origin has to be in keeping with the European regulatory framework of regulation 2081/92, that is to say has to protect intellectual property represented by a registered PGI. This position may seem odd. It can be seen as in contradiction with the attempt of the EU to promote the protection of GIs at the international level.⁷ However national legal protection for geographical origin signs outside the European legal framework constitutes, par excellence, a threat of a policy of discrimination in favour of a country’s own products. The aim of producing information for consumers (see section III) would therefore be of secondary importance. Requiring that national protection afforded to geographical origins signs complies with the European regulation on GIs protection the Court points out intellectual property rights, rather than quality per se, as the subject of

⁷ At the international level the attachment of the European Commission to the European model of protection of Geographical indications is strong too however. [2] showed how the European will of unilateral harmonization of the international systems of protection of geographical indications on the European model contradicted National Treatment and raised the dispute over GIs arbitrated by the WTO.

matter of the legal protection. This base, compared to quality, is considered to be less likely to cause withdrawal behaviours on national products.

In order to comment these decisions of the Court on substantive aspects, the reference to registered PGIs is explored. A PGI in the European Regulation is a name of a region given to an agricultural product or a foodstuff meeting three cumulative requirements (Article 2.1 of the European Regulation): (i) originating in that region, (ii) possessing “a specific quality, reputation or other characteristics attributable to that geographical origin”, and (iii) whose “production and/or processing and/or preparation” take place in that region. To be eligible for a PGI, an agricultural product or foodstuff shall comply with a product specification (Article 4 of the European Regulation). This document has also to identify the authorities or bodies verifying compliance with the product specification. Together with the definition two important features are underlined and highlight the ‘nature’ of a PGI. First, only a group (any association of producers or processors working with the same agricultural product or foodstuff, irrespective of its legal form or composition) shall be entitled to apply for registration (Article 5.1 of the European Regulation). Second, a name registered under the European Regulation may be used by any operator marketing agricultural product or food stuffs conforming to the corresponding specification (Article 8.1 of the European Regulation).

These two characteristics show that in the spirit of the European regulator PGIs are defined, from the point of view of operators, as non rival (from the first characteristic) and non excludable (from the second characteristic) goods, or in other words, when considering these later properties, as purely public goods. As soon as an operator conforms to the product specification of a PGI, he can use this PGI without being able to prevent another operator conforming to the product specification from using it too. In a given area the number of operator marketing an agricultural product or foodstuffs corresponding to a PGI cannot be limited as a consequence. This clearly shows that the property rights represented by a PGI cannot be appropriated by an operator even if he is the only one marketing the corresponding product. Interpreting PGIs as ‘public goods’ is furthermore perfectly in line

with the idea expressed in the European Regulation (in its Article 2) according to which the quality of the agricultural product or foodstuffs is essentially (or exclusively) due to the geographical origin, that is to say to human and natural factors historically constructed by the society, inherited and therefore escaping from the strict ability of the operators. An operator marketing a PGI benefits from the pre-existing reputation of the PGI, and cannot be seen as its creator. The difference with a private owned trademark is here very clear. The reputation of a trademark is constructed by its owner. In line with this, a trademark owner can lose his property right if he ceases to exploit his trademark. A PGI, on the contrary, ‘never die’: the production of PGI can stop for many years and revives.

The main consequence for the analysis of the Court’s judgements of this interpretation of PGIs underlining their public good dimension is straightforward. Sentencing the different Member States to pay the cost in the different cases, the Court did two things. First, it explicitly refused to consider the names and regional label at stake as intellectual property rights of the kind of PGIs. Second, it implicitly did not recognize the ‘status of public good’ to the concerned names and regional labels. If the status of intellectual property rights can be reached through other channels (such as trademark or collective trademark), the dimension of public goods is clearly lost. These remarks raise a series of questions. Shall we restrain the specific legal protection for origin sign that can be considered as public goods? What are the consequences (both private and social) of turning to trademarks in order to find a legal protection of intellectual property rights on geographical signs? Is this option always ‘economically’ feasible? Can collective trademarks be considered as having a public good dimension too? If not, what are the consequences? Answers to these questions are given and their consequences explored in the next two sections.

III. THE THEORETICAL CATEGORIES IMPLIED BY THE CASES

In order to answer to the questions raised by the rulings of the Court presented in section II, the

possibilities of protection of the names and labels at stake, other than the national legal condemned protections, have to be explored. The history of the cases shows that some products, initially protected under the condemned national policy, became PGIs. Other products found protection under the auspices of national legal quality signs.⁸ These two possibilities of protection clearly correspond to official quality signs for agricultural products and foodstuffs. They cannot however be considered as a haven of protection for all the products concerned by the ruling of the Court. For the products not corresponding to these quality signs, trademarks can be considered as another way of protection. A trademark can be owned by a single individual or by a legal entity representing a group of operators. This latter case is especially interesting when a single agricultural product is produced by several operators of small size which cannot run alone a trademark because of financial constraints. The grouping allows facing the financial cost of advertising in order to build or maintain a reputation for the trademark. It implies however coordination cost. We choose to focus on this form of protection since it underlines well the characteristics that, very likely, created the need for the national legal protections condemned by the Court in the cases presented in this paper. These trademarks owned by legal entities exist with ‘marques collectives de certification’ in France or ‘collective trademarks’ within the Office for Harmonization in the Internal Market (OHIM) at the European level for example. We call them indistinctly ‘collective trademarks’ in this paper.

Interestingly, collective trademarks and PGIs are very close to each other. Both are intellectual property rights and meet, furthermore, on several points. A collective trademark such as the French ‘marque collective de certification’ is defined making reference to the origin of the product. Only a producers group is entitled to register a collective trademark as in the case of a PGI and the product specification that is so important for PGIs in the European Regulation, exists is an imperative too for collective trademarks and is now called ‘rule’. The idea according to which an

operator can use the collective trademark as soon as he complies with the requirements of the ‘rule’ is also present.

The use of a collective trademark would therefore be non rival and non excludable. Shall we conclude in the public good dimension of collective trademark as a consequence, as we concluded in the case of PGIs? The answer is negative. To become a PGI, a GI has to apply for registration. The European Commission in order to accept or reject it has to evaluate two things. The first one is a series of points (Article 5.3 of the European Regulation) relating to the legitimacy of the product as a GI: the definition of the product, the definition of the geographical area, the description of the link between the product and the geographical environment and, “where appropriate, the specific elements of the product description or production method justifying the link”. The second one (Article 7 of the European Regulation) consists in verifying the existence of objections to the proposed registration (due for example to conflict with generic names, existing trademarks etc.), the admissibility of these objections, and in taking a decision if needed. Compared to PGIs, the application procedure in the case of trademarks (and therefore “collective trademarks”) is less cumbersome in national regulations or in the directives of the OHIM at the European level. The appreciation of the legitimacy of the collective trademarks is rather general (novelty of the trademark, product with individual character, a denomination that shall not be contrary to public policy etc.) and the guidelines of the OHIM concerning proceedings before the OHIM focus rather on opposition procedures (the trademark shall be justifiable in the preceding sense and not in conflict with prior trademarks) than on the authenticity of the geographical indication *per se*. As a consequence, demonstrating the existence of a link between the quality of the good and the natural and human environment of its origin is not compulsory in the rule of a collective trademark. More latitude is given to operators of collective trademarks. This latitude can be exploited in order to obtain rules far more restrictive than PGIs’ product specifications. Here, the group of producers can be very restrictive limiting the access to other producers, erecting constraints on the production area and on techniques, in order to increase profits.

⁸ Saucisson sec d’Auvergne was protected under the regional label “Auvergne” and got the French quality sign ‘Label Rouge’ after the ruling of the Court.

This clearly shows that a collective trademark is 'congestible'. As a consequence, we leave the pure public good dimension where, ideally, such congestion cannot appear to obtain club goods attributes (non rival, non excludable and congestible) for collective trademarks. These characteristics stand halfway between purely public good (non rival and non excludable) and purely private good (rival and excludable). What are the consequences for the cases under scrutiny? The next section deals with this point.

IV. ANALYSIS OF THE CASES

The key word in the decisions of the Court was always the same: the preservation of the 'free movement of goods' between Member States. Is this rule a guarantee for the maximisation of the wellbeing of the society? This question is considered in this section looking first at informational problems and, second, with the help of the relation established between PGIs and public goods on the one hand and collective trademarks and club goods on the other hand.

A. Free movement of goods, competition and information provision

The rule of free movement of goods between Member States has normative roots. It is seen as a necessary condition for the competition on markets. In that perspective, the Court's decisions clearly consider the national legal protections to names and regional labels in these cases as policies implying or favouring withdrawn attitudes of domestic consumers on national products. This kind of behaviour is seen as equivalent to implicit entry barriers and is banished. However names and regional labels are quality signs that give information to consumers in context of asymmetric information. A number of theoretical results points out the utility of a public intervention in such a context, since without signalling the market for high quality goods can collapse. The case of 'credence goods' ([3]), that is to say goods for which consumers cannot determine the quality neither before nor after purchasing them, is particularly sensitive. The geographical origin is typically a credence attribute for a good. Signalling to consumers this origin, when a demand for this attribute exists, is thus essential. The

provided information allows transforming a credence good into a 'search good', that is to say a good for which consumers can check the quality before the purchase. Without signalling, the variety of goods available on the market would diminish, decreasing the consumers' welfare.

Signalling credence attributes is however puzzling [4]. Because these attributes can never be experienced by consumers signalling through prices or producers' reputation hardly works. The certification of the credence attributes forms a way to provide the missing information to consumers. Here stands, as a consequence, an important aspect of the national legal protections of names and regional labels of the analysed cases. Making certification available, these national policies can be seen as organizing information delivery and would be therefore useful in a wellbeing maximisation perspective. Simultaneously, however, such policies protect producers from competition giving them a market power that increases their surplus but generating fewer exchanges than what would be optimal. As a result, the legal protection of the geographical origin would be justified if their net effect on the society's wellbeing is positive. Something that has to be evaluated case-by-case has the economic literature shows.

In order to characterise this situation, [5] considers a situation where producers of high quality goods (with high quality considered as a credence attribute) bear higher cost of production than producers of low quality goods, but can certificate the high quality and create a cartel allowing to diminish quantities delivered to the market so as to increase the price. Controlling that way the quantities of high quality goods supplied on the market creates incentives for producers to differentiate their production with high quality goods. Certification allows consumers to choose the quality they want and increases therefore their surplus. Considering a situation where the certification cost is high, the authors show that the positive effect of the certification is bigger than the negative one of the increased producers' market power if the product differentiation allowed by quality certification is sufficiently high. This idea underlining that a sufficiently high product differentiation is necessary to make national protective policies and quality certification welfare improving can also be

found in [6]. The authors show furthermore that in a situation characterised by a high fixed certification cost and a large difference between the marginal costs of a high quality product and a low quality product, protecting geographical indications can lessen the society's total surplus.

These various results of the economic literature dealing with GIs protection can be used to consider the reference to free movement of goods used in the analysed Court decisions. They effectively show that the protection of GIs can be defended even if it alters competition on the market, since it can furnish valuable information to consumers. This property shall not be considered however as automatic and has to be evaluated case-by-case, with the certification cost, the degree of differentiation between the level of quality and the difference in marginal cost of production as key elements.

B. Collective trademarks as club goods

Once the national legal protection condemned by the Court, the affected producers can find protection under trademarks as underlined in section III. Collective trademarks are of particular interest in that perspective. They can mention the geographical origin of the product and they form a way to share the cost of the management of the brand image among operators. The latter characteristic is especially interesting for small businesses. The question of the feasibility of this strategy and the question whether, compared to the protection delivered by national regulations, this strategy is neutral from the society point of view have to be addressed. Answering to these questions allows better appreciating the consequences of the Court decisions. This issue is explored first considering the latitude offered to operators in the elaboration of the 'rule' of a collective trademark and second taking account of the cost of the protection mode.

As underlined in section III, one of the main consequences of turning to collective trademarks rather than PGIs in order to find protection is the latitude given to operators when setting the rule defining a collective trademark. This latitude allows the group of producers to adopt restrictive dispositions in order to limit the access to other producers in order to increase profits. Not only can the production area be

limited but also the eligible techniques. The consequence of these practices can be highlighted. [7] for instance compare the different legal forms of production organisation allowing controlling the supply of high quality products (in order to make it profitable to producers): controlling the cultivated surface areas, implementing restrictions on the production process, combining the two formers. They show that these various modes of organisation of the supply impact differently on the total surplus of the society. A regulation that would favour restrictions on the production process without any other form of limitation can give incentives for producers to choose production techniques more restrictive than necessary to obtain high quality goods, and would imply an unnecessary social cost as a consequence. Looking at the sole free movement of goods in order to rule against the national protection of names and regional labels ignores this kind of effects that cannot be put apart as soon as the society's surplus is taken into account. Another way to demark from the free movement of good criteria is to consider the comparative costs of the different forms of protection.

The organization of the supply of goods that have in common a certain kind (here names or regional labels) of specificity but produced by different operators implies costs. These costs are different from the operating costs, concerning specifically coordination aspects between producers: product specification establishment, expenses in order to maintain the reputation etc.). Following [8], confronting these costs calculated per person to the benefits per person enables to determine the optimal size of the club. This is graphically presented in figure 1 (from [8]) where the number N of producers constituting the club is presented on the X -axis and the cost and benefit per person are measured on the Y -axis. The concavity of the benefit curve B is explained by the congestion (first increasing and decreasing once a certain size of the club is reached), while the form of the cost per person curves C_s is explained by the cost per person function C/N . The situations of the national legal protection and of collective trademarks are respectively represented with the cost curves C_1 and C_2 . The optimal size of the club is reached when the derivatives of the cost and the benefit functions are equal.

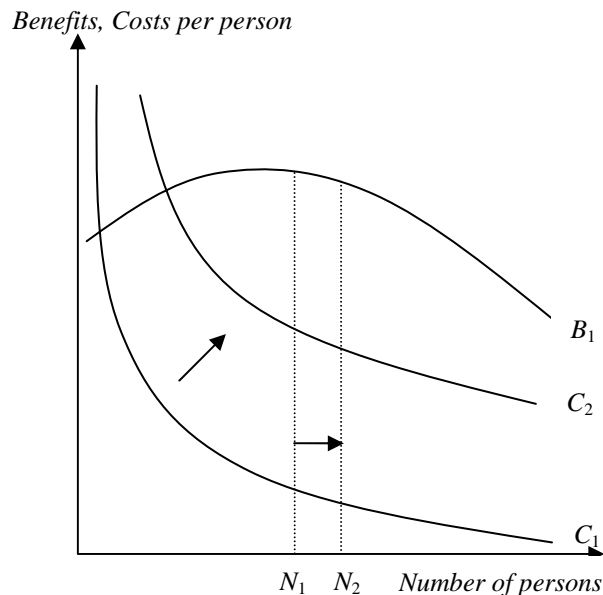


Fig. 1 The optimal club size

Banning legal national protection of the names and regional labels creates an external shock on the concerned activities. The operators' coordination framework has to be reinvented and other forms of protection have to be found. Collective trademarks for example have to be created, their 'rules' specified, their brand images formed etc. This has the effect of raising the cost of coordination of producers (from C_1 to C_2) which, in turn, implies an increase in the optimal producers club's size (from N_1 to N_2). More producers should be protected as a result, and those who were already protected under national legal protection will have lower market power as a consequence. This can be seen as a good new. The availability of these needed additional producers can be questioned however, especially in remote rural area. It can be noted that if the cost of protection becomes too high no producers club will emerge because of this availability constraint. These effects of the Court's decision on the number of producers protected highlight another aspect of the problem than the mere free movement of good. Note that the benefit curve could have been affected too by the decision of the Court. If the information on goods' quality produced by the collective trademark is less reliable

than the one delivered under the national legal protection of names and regional labels, the benefit curve will move down with eventually a change in its slope. The overall effect on the optimal size of the producers club should therefore be evaluated case-by-case.

V. CONCLUSION

The relation established in this paper between PGIs and public goods on the one hand, and between collective trademarks and clubs on the other hand, highlights the ruling of the Court. Exceptions to the free movement of goods between Member States shall only be given to PGIs because of their implicit public characteristics. However the paper shows that when collective trademarks are recognized as a way for protecting the names and regional labels in the considered cases, alternative to the condemned national protections and to the European PGI, other criteria than the free movement of goods could have been taken into account in the Court decisions. An analysis that would focus on the maximisation of the society's wellbeing would give weight to the information delivered to consumers, the latitude offered to producers to restrain their production and to the achievability of the producers club looking for protection under a collective trademark. Case-by-case studies would be of course necessary with probably divergent conclusions in the end. The invariability of the approach chosen by the Court along the different cases and the uniqueness of its conclusions underline well, in contrast, the primacy given by the Court to the free movement of goods over any other criteria.

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