GEOGRAPHICAL INDICATIONS AND EUROPEAN FOODSTUFFS PROTECTION

Lucia DI COSTANZO*

Abstract: *Labelling the foodstuffs on the market is a difficult task, especially if you move from one regional dimension reference to an external and global dimension. The recognition of food typical products within the European Union stems from the Council Regulations, which provide their protection and enhance the credibility of the products in all consumers, by virtue of the European mark and Geographical Indications. The latter enable recognition of foodstuff characteristics and offer the consumer a guarantee and an assurance of quality over time. They reflect the characteristics of the local culture and environment, understood as a combination of natural factors and human factor, direct expression of man's ability to develop production processes. Therefore, the differences between the different legal protections provided for geographical indications and trademarks in the food sector should be reduced, even beyond Europe. By providing a more uniform approach, such a framework will generate a greater sensitivity and attention to the value of agriculture as well as protection of the specificity of agri-food products.*

Keywords: *Protection; Origin; Foodstuffs, Regulation; Guarantee.*

1. Quality Schemes and consumer guarantee

Typical products, more than others, are characterized by informational asymmetry as regards their qualitative content. This phenomenon occurs when producers and consumers have imperfect information on product quality: the consumer hardly has the skills necessary to evaluate the intrinsic but also extrinsic characteristics of the product and is thus forced to rely solely on the manufacturer's instructions.

In this context, the guarantee that producers offer to consumers plays a particularly pivotal role. Attention is focused on the relationship between the product and the information stated on it, namely on the tools used to identify

* Associate professor of *Comparative Private Law* at the Department of Law, University of Campania "Luigi Vanvitelli" (Vanvitelli University), where lectures: *Comparative Law of Debentures and Contracts* and *Comparative Private Law of Cultural Heritage*. She is also lecturing *Civil Comparative Law* at the Postgraduate School of Civil Law, University of Camerino. She qualified as Full Professor of Comparative Private Law. She holds a Ph.D. in *Comparative and Civil Law*, University of Salerno. Member of the teaching body of the Ph.D. program in: "Legal and social sciences", University of Camerino; and from 2009 to 2016, Member of the teaching body of the Ph.D. program in "Comparative law and processes of integration", Vanvitelli University, Department of Political Sciences. Author of monographs in Italian language on: (2014) "Trust and its use in Italy"; (2010) "About Security Interests"; (2005) "Registration Systems"; (1998) "Damages from blood transfusion and infected blood products"; in English language on: (2018) "The Ownership of Cultural Heritage. Public-Private Partnership". She published several articles in Class A Italian Juridical Reviews and Chapters of Italian and English edited books.

foodstuffs on the market. These are usually referred to as *quality schemes* or *signs of quality*, which set out the distinctive features of a product also within the same kind of food (oil, wine, cheese, tomatoes, etc.). In this sense, the concept of *quality* should be understood as "the set of properties and characteristics of a product, which enables it to meet the needs, expressed or implied, of potential users"[1].

The end user guarantee is tied to the truthfulness of those food features that have been promised on the market and that the purchaser will legitimately expect. In this perspective, any commercial communication connected to the product and which, to some extent, emphasizes its properties should be considered as a *sign of quality*. This may for example include labelling, through which the characteristics of a product are described, or *health claims*, which highlight its nutritional values[2], as well as the *Made in*[3].

The object of this guarantee is thus the level of trust of the consumer towards a producer or product, which leads to the proper functioning of the market and the loyalty of business relations[4].

However, there are several tools to protect agri-food products, with their relative distinctive signs of quality. A first distinction may be made between the rules that protect those expectations that can be framed within a *food safety* perspective, and those that can be traced back to the intellectual property realm.

In the first case, the notion of *safety* – and therefore the quality of the food – is entwined with health protection and has an objective and very wide scope[5]. The object of the guarantee is not only the hygienic-sanitary safety of foodstuffs, but also their toxicological (i.e. the composition of the food itself) and nutritional safety (i.e. the absence of risks for the health of the specific consumer), information

[1] See: UNI EN ISO 8402:1988, a standard introduced to offer a clear and complete definition of quality in the industrial field, and which has been repeatedly revised for an always current and comprehensive definition. See also, UNI EN ISO 8402:1995; UNI EN ISO 9000:2005.

[2] The latest jurisprudence of the Court of Justice in the field of food-related commercial communication holds the primacy of the fundamental rights of the individual, understood no longer as an economic factor or as a mere subject of a commercial relationship, but as a "person". Court of Justice, 4 June 2015, C-195/14, *Teekanne*, in *European Digital reports*, ECLI:EU:C:2015:361, commented by: González Vaqué (2015) 43; Mahy (2015) 363. On "*health-claims*", see Court of Justice, 6 settembre 2012, C-544/10, *Deutsches Waintor e G.C. Land Rheinland – Pfalz*, in *European Digital reports*, ECLI:EU:C:2012:526, commented by: González Vaqué, (2012) 20; Inglese (2013) 409; van Der Meulen (2013) 41.

[3] On the use of geographical indications, as an element that qualifies the characteristics of a product, in commercial practices, see: Morello (1984) 5; Hoekman (1993) 81; Franzosi et al. (1996) 613; Falvey & Reed (1998) 209 ff.; Di Maria, Finotto (2008) 179. In the Italian doctrine, see above all Rubino (2017) 64 ff.

[4] Modern nutrition labeling is meant to allow consumers to make informed decisions about what they are eating. Over the last century, federal regulation of food branding and labeling has adapted to address evolving scientific understanding about nutrition, primarily ensured that food is safe to eat. See: M. Sova McCabe (2009) 493 ff.; Halabi (2012) 325 ff.; Dhyani (2016) 1 ff. European legislation ensures that product labels must not mislead consumers. It achieves higher levels of health protection and guarantees their right to information, see: Nilsson (2012) 22-27; Meisterernst (2012) 170-180.

[5] On the notion of *food safety*, see: Strauss (2011) 353 ff; Fu Lin (2012) 694 ff.; Tarr Oldfied (2015) 488 ff.

security (i.e. the adequate communication to the consumer about the characteristics of the food and its mode or amount of consumption[6], traceability[7]).

In the second case, the origin-quality connection is the object of protection. Here it seems that the substantial nature of the concept of quality changes, since food quality parameters derive from external factors. On the one hand, in the case of an individual brand, they derive from the entrepreneurial skills of the entrepreneur, who identifies the link between: quality and origin, nature and the production process of products[8]. On the other hand, they are set out by certifications, provided by ad hoc control and certification bodies, which guarantee that what is described by the manufacturer corresponds to the truth[9].

2. The Conditions for Legal Protection

"Quality schemes" become legally relevant in conjunction with the presence of a predetermined pattern of protection requisites and reaction tools set by the legislator. In altri termini, la tutela giuridica viene concessa sulla base di presupposti oggettivamente preesistenti riconosciuti dall'ordinamento giuridico. In other words, legal protection is granted on the basis of objective prerequisites recognized by the legal system. There is, from this perspective, a difference in the conditions of protection.

On the one hand, these requisites are linked to the quality of the food, i.e. the correspondence to the characters communicated in the market, e.g. claims that emphasize any nutritional value ("reduced fat content", "contributes to the reduction of..."). The nutritional indications would allow the consumer to identify the food as "adequate" to their needs, and thus to make an informed use and make choices according to their health and dietary needs. In these cases, there are expectations to be protected in relation to the actually beneficial food characteristics and, therefore, verifiable on the basis of relevant scientific data[10].

[6] Baker (2018) 294 ff. On this topic see also *supra* n. 4.

[7] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. As mentioned in recital 13, "Experience has shown that it is necessary to consider the production, manufacture, transport and distribution of feed given to food-producing animals, including the production of animals which may be used as feed on fish farms, since the inadvertent or deliberate contamination of feed, and adulteration or fraudulent or other bad practices in relation to it, may give rise to a direct or indirect impact on food safety".

[8] Feigenbaum (2016) 185 ff.

[9] van Couter, d'Ath (2016) 290-308.

[10] The Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, entrusted the European Food Safety Authority (EFSA) to carry out the scientific assessment of the advertised health claims. On the interpretation and application issues of the Regulation, see González Vaqué (2013) 7 ff.

On the other hand, the conditions for protection are created by the applicant for the registration, and the degree of connection to certain food characteristics descends only from private legal acts. In these cases, to be protected is the link between a distinctive sign and the work of the owner / entrepreneur, who has been able to create a product appreciated and recognized on the market through a brand with an attractive capacity, founded on a mere idea of quality[11].

However, when the reputation of a product on the market is tied to a preexisting, constant and intense link between this reputation and a production process rooted in a specific territory and to which its name refers, a pre-existing and objective economic and sociological fact emerges, common to a potentially open number of products and producers.

This has prompted European national legislators, first, and subsequently the European Union, to recognize the need to create a public protection scheme for signs with an objective and pre-existing protection value[12]. Otherwise, in fact, the risk of an appropriation of the name through brands would have been high, with the sole purpose of exploiting the quality evocation and the commercial advantages connected to it[13].

"Quality schemes", when it is the legal system that officially recognizes and protects the objective characteristics of foodstuffs, takes on a public nature and relevance. This means that it is not the mere exclusive right to a name that deserves protection. Rather, they aim at preventing the creation of an exclusive right/monopoly, granting the name full accessibility, but subject to precise conditions and controls.

3. The Geographical Origin of Agri-Food Products

Here we limit the discussion to the recognition and the public protection – i.e. granted by national legal systems - of the distinctive signs connected to particular qualities of the product, which in turn are traced back to a common geographical

[11] Heh (2015) 688 ff.

[12] At Community level, the protection of geographical indications and designations of origin for agricultural products and foodstuffs was introduced for the first time by the Council Regulation (EEC) No 2081/92 of 14 July 1992, repealed and replaced by the Council Regulation (EC) No 510/2006 of 20 March 2006, until it reached the Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. The current regulatory system is therefore based on three regulations: Regulation (EU) No 1151/2012, cit.; Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialities guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules; Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012.

[13] Allowing private companies to obtain trademark registration in such public interests inhibits competition by prohibiting other merchants from using these once public marks. See Page (2017) 1 ff.

origin. In this case, the object of protection is the existence of a "connection criterion" between a product and / or its production process and a territory. This criterion must be verifiable in concrete terms and must be the prerequisite for the presence of distinctive characteristics of the product.

A number of issues can be identified in this regard, but one above all: the lack of a uniform international regulation which safeguards quality agricultural products. Such regulation would, however, be necessary since these products are placed on a global market. Moreover, supranational regulations are supplemented by a number of national laws, or by some private forms of protection (brand), which are independent from supranational regulations.

Since addressing the problem of the severe gaps in supranational regulations would require an entire essay, the focus of analysis will be a single aspect of the European model: the need for a more rigorous safeguard of typical products, to be implemented through ad hoc regulations, urged by those Member States characterized by deeply-rooted local production traditions, especially in the agri-food sector (above all France and Italy).

From the very early years of the European Economic Community, Member States began to provide legal recognition and protection to distinctive signs, in consideration of their central role in evoking and preserving local traditions and identities. This recognition also allowed products to acquire added value as it was linked to the creative, cultural and touristic assets of the territory. However, in terms of intra-Community circulation of products, national protection systems suffered from considerable difficulties of mutual recognition.

In the *Sekt / Weinbrand* case[14], the European Court of Justice for the first time recognized the legitimacy of such forms of national legal protection. These, in fact, aim at creating and protecting intellectual property rights of legislative creation, justified by the presence of an effective relationship between the characteristics of a product and its territorial origin. This would also ensure the smooth functioning of the internal market, avoiding the emergence of situations of market distortion[15].

The result was a profound need for harmonization, culminating in Regulation (EU) n. 1151/20121[16] "on quality schemes for agricultural products and foodstuffs". This EU regulation protects distinctive signs marked as PDO (Protected Designations of Origin) and PGI (Protected Geographical Indication) against any commercial use of non-coincidental, but confusing or comparable

[14] Court of Justice, 21 February, 1975, C-12/74, *Commission of the European Communities v the Federal Republic of Germany*, in *European Court Reports*, 1975, p. 181.

[15] Court of Justice, 20 February 1979, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, *Cassis de Dijon*, in *European Court Reports*, 1979, p. 649. In this ruling the Court also confirmed that the geographical indication constitutes an intellectual property right with the consequent application of the principles and rules of specific protection.

[16] *Supra* n. 12.

products with those subject to registration. Protection is implemented through a system of official controls on compliance with product specification[17].

4. Protected Designations of Origin (Pdo) and Protected Geographical Indications (Pgi)

The intensity of the link between the production process and the territory of origin is what marks the difference between PDO and PGI. In fact, whilst for a PDO, the properties of the product deriving from the geographical environment (e.g. the traditional know-how in the area, the micro-climate, the raw materials, etc.) must be intrinsic characteristics (e.g. taste, colour, aroma, link to a tradition, etc.); PGI certifications apply to products whose "reputation", deriving from a particular territory, is protected by European law for its economic value, as a source of income for the producer[18].

Furthermore, in the case of PDO, all phases (preparation, processing and production) must take place in the defined geographical area, whilst in the case of PGI at least one of those stages must take place in that area, so as to confer some of the characteristics or give the product its specific reputation[19].

These signs are recognized an almost absolute primacy compared to other kinds of indications and their protection rests with Member States, which are

[17] Articles 13, 36-40, Regulation (EU) No 1151/2012, *supra* n. 12.

[18] See Articles 5, Regulation (EU) No 1151/2012, *supra* n. 12, "Requirements for designations of origin and geographical indications". The European jurisprudence, from a certain point, has provided an interpretation of the concept of "quality" not only linked to the material characteristics of the product, but also to its intangible elements, such as its reputation. See, Court of Justice, 10 November 1992, Case C-3/91, *Exportur SA v LOR SA and Confiserie du Tech SA*, in *European Court Reports*, 1992, I-05529: "The protection of geographical names extends to names, commonly known as indications of provenance, used for products which cannot be shown to derive a particular flavour from the land and to have been produced in accordance with quality requirements and manufacturing standards laid down by an act of public authority. Such names may enjoy, just as do designations of origin, a high reputation among consumers and constitute for producers established in the places to which they refer an essential means of attracting custom and are therefore entitled to protection. […] However, in so far as those prohibitions do not apply to names which, either at the time of entry into force of the Convention or subsequently, have become generic in the State of origin, they are justified because they fall within the scope of the derogations authorized by Article 36 on grounds of the protection of industrial and commercial property. Their objective, which is to prevent producers of a Member State from using the geographical names of another Member State of the Community,thereby taking advantage of the reputation attaching to the products of the undertakings established in the regions or places indicated by those names, is intended to ensure fair competition".

[19] Article 5, §§ 1-2, Regulation (EU) No 1151/2012, *supra* n. 12.

therefore obliged to take appropriate administrative and judicial steps in order to counter the unlawful use of PDOs and PGIs within their borders[20].

Not so in other jurisdictions. In the United States, for instance, geographical indications are protected through trademarks[21] and individual legal systems have wide margins of manoeuvre as to the choice of the most appropriate safeguard measures in accordance with the Trips Agreement in this specific subject matter. This agreement, however, does not provide any specific indications on the actual measures to be enforced and its only purpose is the detection of deceptive behaviours[22].

EU law excludes the possibility of registering individual trademarks containing indications or signs that refer to the geographical origin of products. The functioning of the PDO and PGI systems, unlike that of trademarks, is based on the Member States' obligation to control, through domestic administrative and judicial means, compliance with product specifications.

5. The *San Marzano* case

The safeguard of geographical indications ensured by PDO and PGI may also favour agricultural diversification and the need for food quality, safety, and healthy eating. This means that it should not only be respected and protected, but also strengthened through the adequate interaction with other existing signs of quality.

The analysis of the case of San Marzano tomato, one of Italian traditional specialties, is particularly emblematic, as it helps to understand the usefulness of the above-mentioned safeguard measures.

---

[20] Article 13, Regulation (EU) No 1151/2012, *supra* n. 12, "*Protection*": 1. Registered names shall be protected 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. […] 3. Member States shall take appropriate administrative and judicial steps to prevent or stop the unlawful use of protected designations of origin and protected geographical indications, as referred to in paragraph 1, that are produced or marketed in that Member State. To that end Member States shall designate the authorities that are responsible for taking these steps in accordance with procedures determined by each individual Member State. These authorities shall offer adequate guarantees of objectivity and impartiality, and shall have at their disposal the qualified staff and resources necessary to carry out their functions.

[21] See Okediji (2007) 1329 ff., 1331.

[22] Article 22, Agreement on Trade-Related Aspects of Intellectual Property Right, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

San Marzano Tomato is a world-wide known variety of plum tomato which was first grown in

volcanic soil in the shadow of Mount Vesuvius. This tomato has had the PDO label since 1996[23] and, as such, it should not be grown and produced outside the boundaries of the specific geographic area, subject to the attribution of the Protected Designation of Origin[24].

The matter arose when it was discovered that tomatoes labelled as San Marzano, but not grown in Italy, were being marketed in Belgium. Without delay, Italian MEPs urged the European Commission to intervene and prompt Belgian authorities to comply with EU legislation, with the consequent ban on the sale of such tomatoes in order to protect both Italian producers and consumers. The latter would in fact be deceived by an irregular use of the Italian PDO sign.

The EU Commissioner for Agriculture replied that "the variety of *San Marzano* Tomato can be cultivated outside the delimited geographical area" and that "it is not a prerogative of Italian producers", adding that "the duty to identify any faults in the checks carried out rests primarily with Member States' competent authorities"[25].

This approach generated indignation and much controversy as it would undermine the existing legal "quality schemes for agricultural products and foodstuff", i.e. the essential link between agri-food products and their territory of origin.

Much more controversial was, however, the position of the European Commission. In fact, even if the duty to protect the rights of its citizens against any misleading evocation of a PDO rests with Member States[26], it is also true that the European Commission - the guardian and guarantor of EU law - may exercise its powers for the purpose of verifying the effective compliance with EU rules[27].

Indeed, as its product specification outlines, one of the main characteristics of *San Marzano* tomato, as a PDO-labelled agricultural product, is that it can not be cultivated outside the "delimited geographical area".

Therefore, even if it were possible to grow it outside the Vesuvian area, the name of this tomato should be far from imitating or evoking the PDO-labelled *San*

[23] Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the "Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs". *Supra* n. 12.

[24] Article 5, para. 1, Regulation (EU) No 1151/2012 (*supra* n. 12), "Requirements for designations of origin and geographical indications": For the purpose of this Regulation, 'designation of origin' is a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.

[25] See Cerciello Renna (2016).

[26] On misleading conduct of juxtaposition and confusion as to the origin and identity of products, see Rubino (2017) 326 ff.

[27] This role is also played by the Commission through infringement procedures, Articles 258 and 259, Treaty on the Functioning of the European Union (TFUE) - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

Marzano[28]. In this regard, *Coldiretti* (the leading organization of farmers at Italian and European level) reported that the production of *San Marzano* tomatoes outside the delimited geographical area, set out in the product specification, may be considered as identity theft of *Made in Italy*.

However, the EU Commissioner for Agriculture expressed his view in accordance with the existing EU legislation. In fact, a measure preventing the cultivation of a plant variety in the Union's territory, as it is considered to be the exclusive prerogative of certain infra-Community territories, contradicts a fundamental principle of European law: the principle of the free movement of goods[29].

Furthermore, the Council Directive 2002/55/EC "on the marketing of vegetable seed" specifies that the seeds of certified vegetable varieties may be freely marketed[30] and cultivated outside the delimited territory without any restrictions. The same aspect informs Regulation (EU) No. 1151/2012, whereby PDO and PDI certifications designate and protect the intrinsic link between the characteristics of the product or food and its geographical origin.

Thus, to be subject to the Protected Designation of Origin is not the tomato variety in itself, which can be freely grown even outside the delimited territory, but its specific origin (the Agro Sarnese-Nocerino area, in the case of San Marzano tomato). Therefore, a Belgium-originating San Marzano is acceptable, as long as its indication - as a horticultural variety - does not evoke Italian goods or territories.

Against this view, the San Marzano Tomato Consortium[31] claimed that tomatoes should be wholly grown and produced in one of the 41 municipalities listed in the product specification, in order to be eligible for PDO[32]. This aspect should not be neglected, since the Italian fruit and vegetables sector has the largest number of PDO and PGI-labelled products in Europe.

---

[28] Para. 32, Regulation (EU) No 1151/2012 (*supra* n. 12): "Protection of designations of origin and geographical indications should be extended to the *misuse, imitation* and *evocation* of the registered names on goods as well as on services in order to ensure a high level of protection and to align that protection with that which applies to the wine sector. …".

[29] Articles 26, 28-37 TFUE, *supra* n. 27.

[30] Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed, Para. 12, provides: "Seed of varieties listed in the common catalogue of varieties should not be subject within the Community to any marketing restrictions relating to variety". Moreover, Court of Justice, C-59/11, 12 July 2012, Association Kokopelli v Graines Baumaux SAS, in *electronic Reports of Cases*, ECLI:EU:C:2012:447, confirming the obligation to officially register a horticultural variety before marketing it, has stated that "Directive 2002/55 is also intended to establish the internal market for vegetable seed by ensuring its free movement within the European Union. In the present case, the acceptance regime laid down by that directive contributes to the attainment of that objective, since such a regime ensures that seed marketed in the various Member States will satisfy the same requirements" (Point 47).

[31] *The Consortium for the Promotion and Protection of the PDO "Pomodoro San Marzano dell'Agro Sarnese-Nocerino"* was introduced with Law No. 526, 21 December 1999, article 14:15.

[32] See, Article 2, Product specification of the Protected Designations of Origin "Pomodoro San Marzano dell'Agro Sarnese-Nocerino" (entry in the "*Registro delle denominazioni di origine protette e delle indicazioni geografiche protette*" under Commission Regulation (EC) No 1263/96 of 1 July 1996 supplementing the Annex to Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EEC) No 2081/92), published in G.U. n. 238 del 13 ottobre 200.

6. The quality of food as an expression of the culture of the territory and the environment

The improper use of protected geographical indications risks jeopardizing the cultural and economic values of hundreds of protected denominations based on the close link between food quality and territory. Moreover, the existing safeguard mechanisms of geographical indications, as outlined in Regulation (EU) No. 1151/2012, aligns the objectives of the European Common Agricultural Policy (CAP) with a uniform protection of intellectual property rights[33].

However, at the core of the controversy there is a misunderstanding with regard to the difference between the industrial production of the tomato and the original *cultivar*. The *Pomodoro San Marzano dell'Agro Sarnese-Nocerino* is the first is the first processed vegetable product to have been granted the designation of origin indication. This means that the product sold on the consumer market must cover only those tomatoes grown and processed by agricultural and industrial farms within the territorial areas indicated in the product specification[34].

The whole production cycle is marked by extraordinary anthropogenic environmental factors, thanks to which the *Pomodoro San Marzano dell'Agro Sarnese-Nocerino* can in all respects be recognized as part of Italy's intangible cultural heritage[35].

The EU certification has certainly played a key role in this process by further stressing and protecting the importance of those values which constitute both a competitive advantage and a reason for product differentiation of *San Marzano* tomatoes. The so-called "Promise of quality" is not related to fresh consumption, but to the unique ability of *San Marzano* tomatoes to keep all their essence and properties in the jar. Therefore, it is the *San Marzano* processed into peeled tomatoes, not the fruit, to be identifiable as a cultural and historical good of our country.

The real issue is that fresh *San Marzano* tomato, with its own specific and precious organoleptic properties, has seen the introduction of many new cultivars and hybrids, morphologically similar to the (original) *San Marzano* type. This has generated confusion between the *San Marzano* tomato varieties which are listed in the National Register and those allowed in the product specification, in accordance with the corresponding EU Regulation.

This problem has negative repercussions not only on the precious organoleptic characteristics of the original *San Marzano* tomato, but also on its production. In fact, farmers buy seedlings directly from specialized nurseries to subsequently

[33] Regulation (EU) No 1151/2012 (*supra* n. 12), Article 1, para. 1(c), "Objectives".

[34] See: Product specification of the Protected Designations of Origin "Pomodoro San Marzano dell'Agro Sarnese-Nocerino", *supra* n. 32.

[35] On April 17, 2017, a legislative proposal was presented to the Italian Parliament for the recognition of *Pomodoro San Marzano dell'Agro Sarnese-Nocerino* as PDO and of its territory of origin as national cultural heritage" (available at http://www.consorziopomodorosanmarzanodop.it/wp-content/uploads/2017/11/C.4417.pdf).

transplant them. In this regard, the traceability of the route followed by the tomato from the seed to the box is not subject to any control because it is not required[36].

In essence, European regulations do not prohibit the use of seedlings from geographical areas other than Sarnese-Nocerino in the agricultural production of *San Marzano*. Therefore, traceability, for the purpose of properly informing the consumer on the origin and provenance of the product, is yet another issue that needs to be addressed.

For this reason, some Italian MP's have recently presented a law proposal which would guarantee a stronger protection of the genotype, in other words the *San Marzano* tomato as such, as a product with geographical indication of the Vesuvian area where it originates[37].

Finally, the supply chain of *San Marzano* PDO tomatoes is characterized by deep informational asymmetry, due to the stratified branding actions, i.e. the "voluntary certifications of quality", aimed at differentiating the given product by communicating to the consumer its alleged authentic nature. Voluntary certifications of agri-food products are a formal declaration through which a reference body certifies the conformity of a product to the standards identified by a technical document, in this case, by the product specification of *San Marzano* tomatoes.

This trend would seem to weaken the credibility of the entire certification system, which has been established with the aim of guaranteeing consumers the compliance with the peculiar qualitative characteristics of foodstuffs – specifically *S. Marzano* PDO tomatoes - as outlined in the product specification, thus undermining the integrity of those cultural values that underlie the quality of foodstuffs and their link with the territory.

7. The case for an international legal guide for the protection of the geographical indications of agri-food products

The issue of providing foodstuffs with a uniform legal protection may be addressed thanks to a Legal Guide[38] that harmonizes the numerous existing regulations in this matter.

The European Union has increasingly been relying on bi- or multilateral agreements that allow it to strengthen the protection of geographical indications at international level, moving beyond what has been envisaged in the TRIPs agreement[39].

---

[36] The rules on food traceability are contained in Regulation (EC) No 178/2002, *supra* n. 7, which however does not provide for sanctions. The lack of sanctions has meant that, at least in Italy, until the entry into force of Legislative Decree no. 190, April 5, 2006, the law-enforcing Authorities did not have the power to ascertain the sanctions.

[37] *Supra* n. 35.

[38] On numerous and different set of instruments for transnational governance of food supply chain, see: Cafaggi, Iamiceli (2014) 131-173. The authors discuss the different mechanisms for the enforcement of safety and sustainability standards in global food supply chains and advance the idea of a Legal Guide on contract farming to define the links between multiple remedial regimes in food chains.

[39] See O'Connor, Richardson (2012) 39 ff.

In this regard, Regulation No. 1151/2012[40] states that it is possible in the EU to register as PDOs and PGIs those geographical indications originating from third countries but protected by bilateral agreements. This regulation allows the geographical indications originating from third countries to bear the European PDO/PGI logo or symbol. These agreements provide for the mutual protection of geographical indications in the respective markets.

However, the recognition of geographical indications from third countries takes place in the negotiation stage of these agreements, by verifying compliance with EU law. Controls during this phase are, notoriously, not as thorough as they would be if applications for registration were submitted directly to the European Commission. Therefore, while this measure provides the European Union with an effective means of negotiation with third countries, it is likely to undermine the credibility of the whole system, since, with the equivalent of a registration, it could reward brands that do not meet all the necessary requirements.

An example of the weak international legal protection of foodstuffs could be the *Comprehensive Economic and Trade Agreement* (CETA)[41] which was fiercely criticised by *Coldiretti* for its negative impact on European agricultural production.

This agreement is in fact suspected to break the existing balance between European farmers and farms and North American companies for the benefit of the latter, for two reasons. On the one hand, for their enormous industrial dimension. On the other hand, because they enjoy almost unrestricted economic freedom, that is, not bound by a strict system of regulations and limits on doing business. Conversely, European farmers and businesses are subject to the huge and ever-growing amount of European "rules" which, among their purposes, serve to protect European citizens and their environment[42].

---

[40] Article 11, Para. 2, Regulation (EU) No 1151/2012 (*supra* n. 12)

[41] Signed on 30 October 2016 at a summit in Brussels by the European Union and Canada and provisionally entered into force on 21 September 2017. For its full recognition, it will have to be approved by national parliaments.

[42] Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed; Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety; Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance; Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs; Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code; Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007; Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialities guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules; Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012.

To be precise, on the other side of the Atlantic there are companies with car parks for agricultural "machines" that alone are as large as the land of a Mediterranean firm; and there are crops that are industrially developed with machines driven by computers and satellites; and there are crops that can be developed with "stop and go" mechanisms, following market cycles or determining them.

In most cases, European crops for their size, nature and history, have smaller dimensions and less "capital" intensity. From an industrial mass-scale perspective, the typical European quality is overwhelmed and marginalized, and with this everything that identifies Europe. Agriculture, in fact, is not just a matter of goods. It is also about history and traditions, landscapes and civilizations, different crops and qualities, which can not be reduced to the market, especially if this claims to be "global".

Furthermore, only a few Italian geographical indications are recognized in CETA (41 out of 288). This hinders the growth, development and dissemination of quality products that have had the misfortune (or weakness) of failing to enter the list of "the (s)elected ones", as updating the list will be allowed in order to remove or add new IG products recognized *ex-novo* from now on.

As a result, CETA seemingly eliminates any idea of "fair trade" in agriculture and does not even activate something similar to the old "free trade", hence introducing a "pro-globalization" approach that tends to penalize local production in favor of large commercial groups[43].

The conclusions are obvious. The creation of a uniform level playing field serves, above all, to protect the specificity of agri-food products. In fact, some of the quality characteristics of products, material and / or immaterial, are to be considered unique, as they are an expression of a particular territorial context, and are irreproducible outside that economic, environmental, social and cultural context in which the product is made. This is the only possible way to place a product on the market and not to place the "global" market within a product, deviating and deforming its nature.

Bibliography

Baker R., *The Global Status of Food Allergen Labeling Laws*, (2018) *54 California Western Law Review* 294.

Cafaggi F., Iamiceli P., *Supply Chains, Contractual Governance and Certification*, (2014) 37 *European Journal of Law and Economics* 131.

Cerciello Renna L., *Il caso pomodoro san marzano le controverità giuridiche*, in *Agricoltura Moderna*, 28 December 2016, available at http://www.agricolturamoderna.it/articolo/luigi-cerciello-renna-agriethos-unione-coltivatori-italiani-il-caso-pomodoro-san-marzano-le.

Dhyani J., *Science-Based Food Labels: Improving Regulations & Preventing Consumer Deception Through Limited Information Disclosure Requirements*, (2016) *26 Albany Law Journal of Science and Technology* 1.

[43] See: Moncalvo et al. (2017).

Di Maria E., Finotto V., *Communities of Consumption and Made in Italy*, (2008) 15 *Industry and Innovation* 179.

Falvey R., Reed G., *Economic effects of rules of origin*, (1998) 134 *Review of World Economics* 209.

Feigenbaum A., *Cheers!: An Examination of "Vodka" Under Legal Regimes for the Protection of Geo-Graphic Indications and Appellations of Origin*, (2016) *44 Syracuse Journal of International Law & Commerce* 179.

Franzosi M., Lopez-Menchero J., Cazzaniga S., *'Made in…? – 'Made in Ruritania? – 'Made in Italy?*, (1996) 11 *European Intellectual Property Review* 613.

Fu Lin C.-, *SPS-Plus and Bilateral Treaty Network: a "Global" Solution to the Global Food-Safety Problem?*, (2012) *29 Wisconsin International Law Journal* 694.

González Vaqué L., '*El TJUE confirma y precisa su jurisprudencia sobre la eficacia informativa de la lista de ingredientes: la sentencia "Teekanne" de 4 de junio de 2015*, in *Rivista di diritto alimentare*, 2015, fasc. 2, p. 43 ss., *www.rivistadirittoalimentare.it*.

González Vaqué L., *El concepto "declaración de reducción del riesgo de enfermedad" prevista en el Reglamento (ce) n. 1924/2006: la sentencia "green - swan" de 18 de julio de 2013*, in *Rivista di diritto alimentare*, 2013, fasc. 3, p. 7 ss.

González Vaqué L., *El TJUE interpreta el Reglamento n° 1924/2006 relativo a las declaraciones de propiedades saludables en los alimentos: la sentencia "Deutsches Weintor"*, in *Rivista di diritto alimentare*, 2012, fasc. 3, p. 20 ss., *www.rivistadirittoalimentare.it*.

Halabi S.F., *International Trademark Protection and Global Public Health: a Just-Compensation Regime for Expropriations and Regulatory Takings*, (2012) *61 Catholic University Law Review* 325.

Heh W., *Who Certifies the Certifiers?*, (2015) *16 Vermont Journal of Environmental Law* 688.

Hoekman B., *Rules of Origin for Goods and Services. Conceptual Issues and Economic Considerations*, (1993) *27 J. World Trade* 81.

Inglese M., *Do Consumers Have the Right to Drink Healthy Wine? An Appraisal of the Deutsches Weintor Case*, (2013) 20 *European Journal of Health Law* 409.

Mahy A., *Arrêt "Teekanne": dans quelles circonstances un étiquetage alimentaire peut-il être considéré comme "trompeur"?*, (2015) 223 *Journal de droit européen* 363.

Meisterernst A., *No Oil on Carrots: 5 Years of Regulation (EC) No. 1924/2006 on Nutrition and Health Claims Made on Food*, (2012) 2012 *European Food and Feed Law Review* 170.

Moncalvo R., Petrini C., Camusso S., Chiavacci F., Lannutti E., Mostaccio A., Muroni R., Onufrio G., Trefiletti R., Di Sisto M., Cecere G., (2017) *Alla Ricerca di un Commercio Libero e Giusto (*Free And Fair). *Dal "sovranismo economico" ad un percorso di "reciprocità"*, available at https://wineinsicily.com/ceta-canada-niente-tutela-247-denominazioni-dop-igp-varie-follie-le/.

Morello G., *The 'made in' issue. A comparative research on the image of domestic and foreign products*, (1984) 5 *European Research* 68.

Nilsson K.L., *Misleading? To Whom?*, (2012) *2012 European Food and Feed Law Review* 22.

O'Connor B., Richardson L., *The legal protection of geographical indications in the EU's bilateral trade agreements: moving beyond TRIPs*, in *Rivista di diritto alimentare*, 4, 2012, p. 39.

Okediji R.L., *The International Intellectual Proprty Roots of Geographical Indications*, (2007) *82 Chicago-Kent Law Review* 1329.

Page A., *We the People(R): How the Liberalization of Federal Trademark Reg-Istration for Geographically Descriptive Marks is Monopolizing America's Heritage*, (2017) *19 Duquesne Business Law Journal* 1.

Rubino V., *From "Cambozola" to "Toscoro". The Difficult Distinction between "Evocation" of a Protected Geographical Indication, "Product Affinity" and Misleading Commercial Practices*, (2017) 2017 *European Food and Feed Law Review* 326.

Sova McCabe M., *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, (2009) *17 Journal of Law and Policy* 493.

Strauss D.M., *An Analysis of the FDA Food Safety Modernization Act: Protection for Consumers and Boon for Business*, (2011) *66 Food and Drug Law Journal* 353.

Tarr Oldfied M., *Enactment of the Food Safety Modernization Act*, (2015) *6 European Journal of Risk Regulation* 488.

V. Rubino, (2017) *I limiti alla tutela del "made in" fra integrazione europea e Ordinamenti nazionali*, Torino: Giappichelli.

van Couter Y., D'ATH F., *Protecting the Origin of Foodstuffs in the European Union*, (2016) *2016 European Food and Feed Law Review* 290.

van Der Meulen B., *"Through the Wine Gate". First Steps towards Human Rights Awareness in EU Food (Labelling) Law*, (2013) *European Food and Feed Law Review* 41.