

COVID-19 and Geographical Indications: Is the Promise of ‘Quality’ in ‘Quality Schemes’ Undermined?

Abstract

Faced with lockdown measures, European producers, who are marketing their products under the PDO / PGI quality schemes, had to temporary amend their production processes. For instance, such temporary amendments to product specifications allowed them to use frozen, and not fresh milk, or to freeze the meat, produced during the lockdown. This essay analyses whether these drastic changes in methods of production, although provisional, negatively affected the so-called ‘promise of quality’, as regulated under the EU’s regime for protection of geographical indications.

Setting the Scene

The global health crisis, caused by the 2019-nCoV acute respiratory disease, has put a spotlight on the mechanisms, embedded in the international patent law with a view to preserve balance between public health and interests of right holders. Issues, such as patentability of pharmaceutical products, compulsory licensing or eventual investor-to-state disputes over the use of yet-to-be-invented vaccines, are now discussed outside of the closed academic circles¹. While the world at large was not ready for the new coronavirus pandemic, it seems that the international patent law already included all the necessary basic safeguards. Instruments, such as Arts 31 and 31 *bis* of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), or the Doha Declaration on the TRIPS Agreement and Public Health, which was negotiated in the aftermath of the HIV / AIDS crisis², seem to allocate sufficient policy space for governmental action, when it comes to public health emergencies.

Yet in Europe the coronavirus pandemic and the resulting lockdown had also an impact – albeit less immediate – on the law of geographical indications. Local newspapers from France, Italy or Spain³ reported how farmers, who market their products under the Protected

¹ Jane Croft, *Pandemic reopens wounds on IP rights*, Financial Times (June 18, 2020), <https://www.ft.com/content/9ed5ca5e-9360-11ea-899a-f62a20d54625>;

Andreas Becker, *Is compulsory licensing of remdesivir a feasible option?*, Deutsche Welle (July 9, 2020), <https://www.dw.com/en/is-compulsory-licensing-of-remdesivir-a-feasible-option/a-54103280>;

Boston25News.com, *Scientists, activists call for Moderna to 'free the vaccine' for COVID-19*, Boston25News (August 28, 2020), <https://www.boston25news.com/news/health/scientists-activists-call-moderna-free-vaccine-covid-19/EN2VQIFIABB6NEFEQPG5XHZSVY/>.

² Margo A. Bagley, *Legal Movements in Intellectual Property: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS*, 17 Emory Int'l L. Rev. 781, 781 (2003);

Duncan Matthews, *WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: a Solution to the Access to Essential Medicines Problem?*, 7 JIEL 73, 73 (2004).

³ Maruxo Alfonso Laya, *Ternera Gallega podrá congelar su carne mientras dure la crisis*, La Voz de Galicia (April 20, 2020), <https://www.lavozdegalicia.es/noticia/somosagro/2020/04/17/ternera-gallega-podra-congelar-carne-dure-crisis/00031587133784040612112.htm>;

Prosciutto di Parma, perso il 30% del fatturato. Dal Governo 10 milioni per sostenere la filiera, La Repubblica (August 4, 2020),

Designation of Origin / Protected Geographical Indication (PDO / PGI) quality schemes, had to change their traditional production processes, when faced with movement restrictions and labour shortages. In doing so, the association of producers had to make use of the so-called ‘temporary amendment’ procedure, provisionally modifying the production requirements for their products. Foreseen under Art. 52.3 of Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs⁴, this procedure allows associations of producers to temporarily amend the product specifications (e.g. farming or processing methods), while maintaining their status under either PDO, or PGI quality schemes. Such temporary amendments result in more flexible production rules, thus permitting the producers to cope with the lockdown. For instance, the producers of the Italy’s most famous PDO, ‘Mozzarella di bufala Campana’, were allowed to use frozen instead of freshly milked milk⁵, for the duration of the lockdown and under strict preservation conditions. In France, public authorities reported that out of around one thousand products, registered as the EU-wide PDOs/PGIs, originating from France, as well as a local French quality sign ‘Label rouge’, approximately sixty made use of the temporary amendments’ procedure⁶.

From a legal perspective, such drastic changes in the methods of production pose the question of whether amended PDOs and PGIs still guarantee to the consumer the specific

[https://parma.repubblica.it/cronaca/2020/08/04/news/prosciutto di parma perso il 30 del fatturato dal governo 10 milioni per sostenere la filiera-263704525/;](https://parma.repubblica.it/cronaca/2020/08/04/news/prosciutto_di_parma_perso_il_30_del_fatturato_dal_governo_10_milioni_per_sostenere_la_filiera-263704525/)

Bleu d’Auvergne, comté, saint-nectaire... des appellations de fromages modifiées en raison de la pandémie due au coronavirus, Le Monde (April 19, 2020), https://www.lemonde.fr/economie/article/2020/04/19/bleu-d-auvergne-comte-saint-nectaire-des-appellations-de-fromages-modifiees-en-raison-de-la-pandemie_6037090_3234.html.

⁴ 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, *OJ L 343, 14.12.2012, p. 1–29*

⁵ Ministry of Agricultural Policies, Food and Forestry, Departmental Decree on Temporary Amendment of Product Specifications, No 899 of 19 March 2020, <https://www.politicheagricole.it/flex/cm/pages/ServeAttachment.php/L/IT/D/e%252F9%252F9%252FD.bf7a99539086a9faf8a0/P/BLOB%3AID%3D8079/E/pdf>.

⁶ *Modifications temporaires de cahiers de charges*, INAO (April 30, 2020), <https://www.inao.gouv.fr/A-la-Une/Modifications-temporaires-de-cahiers-des-charges-FOIRE-AUX-QUESTIONS>.

characteristics of the products, as prescribed by Regulation (EU) No 1151/2012⁷. To put it differently, is the ‘quality’ of ‘quality schemes’ preserved despite the temporary amendments? To answer this question, one will have to look into how the promise of quality is shaped in the European Union’s *sui generis* system for protection of geographical indications.

Product Specifications, Permanent and Temporary Amendments

In the EU law of geographical indications, product specifications are one of the core elements. In order to benefit from protection under either the PDO, or the PGI quality scheme, products shall comply with the requirements laid down in product specification, as defined by the association of producers during the registration of the respective right. Under Art. 7 of Regulation (EU) No 1151/2012, currently in force, a product specification shall include the name, chosen to be protected as a protected designation of origin or a protected geographical indication; a description of the product, including the raw materials; the definition of the geographical area delimited with regard to the link to origin; evidence that the product originates in the defined geographical area; a description of the farming or production method, as well as information concerning packaging and labelling; and contact and administrative information on the producers. Additionally, a procedure for verification of compliance with product specification, before placing the product on the market, is regulated by Art. 37 of Regulation (EU) No 1151/2012. The rationale behind such an exhaustive procedure for product specifications is to provide consumers with clear and reliable information on products with specific characteristics linked to geographical origin, thereby enabling consumers to make more informed purchasing choices⁸.

Since the adoption of Council Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs,

⁷ Recital 47.

⁸ Recital 18 and Art. 1.1(b) of Regulation No 1151/2012.

associations of producers were allowed to request permanent amendments to the product specification. Under its Art. 9, such permanent amendments were granted ‘*in particular* to take account of developments in scientific and technical knowledge or to redefine the geographical area [emphasis added]’. The procedure was further elaborated in Council Regulations (EC) No 510/2006 and (EU) No 1151/2012, and no longer includes specific examples of grounds for requesting a permanent amendment. Under Art. 53 of Regulation (EU) No 1151/2012 amendments to product specifications are divided into minor and non-minor ones. For an amendment to be considered minor, it shall not relate to the essential characteristics of the product; alter the link to origin; include a change to the name, or to any part of the name of the product; affect the defined geographical area; or represent an increase in restrictions on trade in the product or its raw materials⁹. Depending on their status, such amendments shall either undergo a simplified procedure of approval by the European Commission, or shall be subject to a fully-fledged registration procedure, established by Arts 49 to 52 of the Regulation and regulating the initial registration of a PDO or a PGI. Similar amending procedures are also foreseen in legal acts, regulating quality schemes for other categories of products, including the wine sector¹⁰.

Several studies have looked into the dynamics of product specifications’ amendments, focusing on dairy products¹¹, but also analysing processed meat products¹² and fruit and

⁹ Art. 53.2

¹⁰ Art. 105 of 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, *OJ L 347*, 20.12.2013, p. 671–854.

¹¹ Colinet et al., *Comté case study [France]*, DG JRC/IPTS (30 November 2006), <https://hal.inrae.fr/hal-02821752/document>.

Arfini et al., *Sustainability, Innovation and Rural Development: the Case of Parmigiano-Reggiano PDO*, 11 Sustainability 4978, 4978 (2019).

¹² Maurizio Crupi, *Innovating within tradition: are PDOs and PGIs loosening their link to origin?*, ECTA (19 June 2020), <https://ecta.org/ECTA/documents/MaurizioCrupi1stStudentAwardwinner20202148.pdf>.

vegetable sector¹³. One of such empirical studies has shown that geographical indications, originating from France, Italy, and Spain, are more likely to undergo an amendment procedure of their initial product specification¹⁴; according to the authors of this study, this may be explained by an institutional legacy, whereby southern EU countries have a longer experience in geographical indications¹⁵ and are hence more used to apply this and similar procedures. A similar tendency was later observed with regards to temporary amendments, granted during the coronavirus health emergency.

Unlike permanent amendments, the procedure for temporary amending the product specification was first introduced in Art. 9.4 of Council Regulation (EC) No 510/2006. Under this provision, which remained essentially unchanged in Regulation (EU) No 1151/2012¹⁶, such amendments are allowed where a temporary change in the product specification results from the imposition of obligatory sanitary or phytosanitary measures by the public authorities. The Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013, supplementing Regulation (EU) No 1151/2012, further develops the procedure for temporary amendments. Under its Art. 6.3, temporary amendments are not subject to any formal approval by the Commission due to their urgency, and shall only be communicated by the Member States' public body, in charge of approving the temporary amendment, to the Commission, together with the reasons for it, no later than two weeks following approval. Art. 6.3 of Delegated Regulation additionally specifies that temporary amendments may also be granted in cases of natural disasters or adverse weather conditions formally recognized by the competent authorities. Art. 14.2 of Commission Delegated Regulation (EU) 2019/33, supplementing

¹³ Andrea Marescotti et al., *Are Protected Geographical Indications Evolving Due to Environmentally Related Justifications? An Analysis of Amendments in the Fruit and Vegetable Sector in the European Union*, 12 Sustainability 3571, 3571 (2020).

¹⁴ Xiomara F. Quiñones-Ruiz et al., *How are food Geographical Indications evolving? – An analysis of EU GI amendments*, 120 BFJ 1876, 1876-1887 (2018).

¹⁵ *Ibid.*, 13.

¹⁶ Art. 53.3.

Regulation (EU) No 1308/2013, allows for temporary modifications to product specifications for wine products, under essentially the same conditions.

Even before 2020, temporary amendments to product specifications were granted, under exceptional circumstances, by national authorities to associations of producers. For example, unfavourable weather conditions justified the temporary modification of the Italian PDO ‘Colline Teatine’ for extra virgin olive oil, anticipating the start date of the olive harvest from 20 October to 5 October¹⁷. The use of procedure was, nevertheless, limited and rarely occurred simultaneously for multiple PDOs and PGIs.

During the coronavirus pandemic, temporary amendments were namely granted to producers from Italy, Spain, France - countries most affected during the lockdown measures, but also most active in the European market for PDOs and PGIs. It is important to bear in mind that these temporary amendments concerned methods of production, and not other elements of product specifications, such as the product name or the geographical area of its production. For instance, producers of the Spanish PGI for veal, ‘Ternera Gallega’, were authorized to exceptionally congeal the surplus of certified meal, which was not sold as the result of restrictions in the hospitality industry¹⁸. Previously not permitted under the specifications of this PGI, congelation would allow the producers to gradually dispose of the surplus, which shall, in any case, be sold before 31 December 2020. For PDOs and PGIs, which require planting or harvesting during a specific time period, such dates were pushed forward, in order to face the labour shortages. This was notably the case of the French PDO ‘Oignon de

¹⁷ Ministry of Agricultural Policies, Food and Forestry, Departmental Decree on Temporary Amendment of Product Specifications, No 67105 of 39 September 2019, <https://www.politicheagricole.it/flex/cm/pages/ServeAttachment.php/L/IT/D/d%252Fe%252F5%252FD.4c33f318990036bf44d7/P/BLOB%3AID%3D8079/E/pdf>.

¹⁸ Official Gazette of Galicia, Council of Rural Environment, DOG Num. 74, Order of 15 April 2020, which temporarily modifies the specifications of the PGI “Ternera Gallega” (April 17, 2020), http://www.terneragallega.com/pdf/es/modificacion_temporal_pliego_condiciones_es.pdf.

Roscoff’, the deadline for the planting period of which was exceptionally extended from 10 April to 20 April¹⁹.

As previously mentioned, the producers of the PDO ‘Mozzarella di bufala Campana’ were allowed to use frozen instead of freshly milked milk²⁰. With lockdown measures gradually being lifted, the Italian Ministry of Agriculture published an order, which ends the validity of the temporary amendments²¹. In a similar vein, temporary amendments granted in France allowed for modifications during the duration of the lockdown and a reasonable, but short period after its ending.

Similarly, temporary amendments to product specification were also granted in the field of viticulture, covered by Regulation (EU) No 1308/2013. Here, the European Commission issued a specific legal act, Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013, inviting national governments of the Member States to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic²² and suggesting anti-crisis measures, including increased financial aids to the winemaking sector.

What is the Promise of Quality for ‘Quality Schemes’?

When announcing temporary amendments to French-originating PDOs and PGIs, the French National Institute of Origin and Quality (INAO), the public body in charge of quality

¹⁹ Journal of the French Republic, JORF No 0086, Decree of April 6, 2020 relating to the temporary modification of the specifications of the PDO “Oignon de Roscoff” (8 April 2020), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041786096&categorieLien=id>.

²⁰ *Ibid.*, 5.

²¹ Ministry of Agricultural Policies, Food and Forestry, Departmental Decree, which Ceases Temporary Amendment of Product Specifications, No 36857 of 2 July 2020, <https://www.politicheagricole.it/flex/cm/pages/ServeAttachment.php/L/IT/D/d%252F7%252Fb%252FD.c9cbc41104d6812e89a7/P/BLOB%3AID%3D8079/E/pdf>

²² Commission Delegated Regulation (EU) 2020/592 of 30 April 2020 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it, *OJ L 140*, 4.5.2020, p. 6–12.

schemes, specifically addressed the question of whether such temporary amendments ‘have an impact on the promise of quality of the products’²³. The INAO namely stated that requests for temporary amendments underwent a strict examination by a commission, composed of experts in the field, who considered the amendments’ effect on the product’s quality to be none or limited²⁴. From a legal perspective, a different question shall nevertheless be asked: *what is a promise of quality in geographical indications’ law?*

It will come as no surprise that Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs is filled with references to ‘quality’. Notably, Art. 1.1 of the Regulation lists the support for producing ‘high quality products’ as the overarching objective behind the quality schemes’ system. This observation is confirmed by the Court of Justice of the European Union (CJEU), generally stating that ‘EU legislation displays *a general tendency to enhance the quality of products* within the framework of the common agricultural policy [emphasis added]’²⁵.

The definition of quality as a legal criterion is nevertheless not provided in the Regulation, and shall be found in the requirements for protected designations of origin and protected geographical indications²⁶. Depending on whether the product is qualified as a PDO, or as a PGI, the quality of a product is either essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, or such quality is essentially attributable to the product’s geographical origin²⁷. Although the origin link, required from the PDO, is stronger than the one mandated for the PGI, the definition of quality for both quality schemes is articulated in terms of geography. This reflection is further reinforced by the wording, used to define the PDOs’ and PGIs’ specific objective: that of providing the

²³ *Ibid.*, 6.

²⁴ *Ibid.*, 6.

²⁵ Case C-367/17, *S v EA and others*, para. 24 and the case-law cited.

²⁶ On the definition of quality in the international geographical indications law, *see also* Anke Moerland, *Geographical Indications and Innovation, What is the Connection?*, 61 (Josef Drexl, Anselm Kamperman Sanders eds., *The Innovation Society and Intellectual Property*, 2019).

²⁷ Art.5.1 and 5.2 of Regulation No 1151/2012.

consumers a clear information on ‘products with *specific characteristics linked to geographical origin*, thereby enabling such consumers to make more informed purchasing choices [emphasis added]’²⁸.

In the paradigm of Regulation (EU) No 1151/2012, the quality of a PDO / PGI-protected product is thus *geographically-defined* and does not include subjective parameters, such as taste, smell or other product characteristics. The Court of Justice of the European Union supported this interpretation in *Case C-478/07 Budějovický Budvar*. According to the CJEU, the rationale behind the PDO / PGI quality schemes is to assure consumers that agricultural products, bearing such a sign, ‘offer a guarantee of quality *due to their geographical provenance* [emphasis added]’²⁹.

Consequently, from a legal perspective, the promise of quality will not be affected by temporary changes to the product’s farming or processing methods, unless such changes also affect the geographical area of production. In the case of temporary amendments, granted during the coronavirus health emergency, such amendments did not concern the geographical provenance of products, and thus would not affect the products’ quality. Although temporary amendments, granted during the lockdown, mainly concerned products, protected under the quality schemes from the Regulation (EU) No 1151/2012, a similar conclusion on the *geographically-defined* quality may also be reached with regards to wines, the quality schemes for which are covered by the Regulation (EU) No 1308/2013³⁰.

An open conclusion

Temporary amendments to product specification of PDOs and PGIs were, as a procedure, neither new, nor unusual in the pre-COVID-19 times. Under Regulation (EU) No 1151/2012, their need is justified by the occurrence of sanitary or phytosanitary measures, imposed by

²⁸ Recital 18 of Regulation No 1151/2012.

²⁹ Case C-478/07, *Budějovický Budvar*, para. 111.

³⁰ See Recital 92.

the public authorities, or by natural disasters or adverse weather conditions, all of which might have an important impact on farming and production processes. It was the coronavirus health emergency that brought local newspapers' attention to this procedure.

Faced with an exceptional situation, producers of PDO/PGI-protected products were forced to modify their production methods, so as to cope with the lockdown restrictions. Such temporary modifications included, for example, the use of frozen milk in cheese production or a change in planting dates, otherwise restrictively defined in product specifications. Nevertheless, as this essay has shown, because the amendments would not concern the geographical areas of PDOs' / PGIs' production, the Regulation No 1151/2012 does not perceive such changes as a threat to products' quality.

Still, the Regulation No 1151/2012 is less concerned by the consumer's perspective on temporary amendments. Now that the PDO- / PGI-protected products, which were produced during the lockdown, are entering the market, the question of consumer's take on their quality arises. If the changes in production processes remain essentially unnoticed to the consumer, it would show that a better flexibility could, in theory, be allowed to those marketing their products under the PDO / PGI quality schemes.

While European producers take pride in how selective their production processes are, the COVID-19 crisis might have shown that geographical indications might as well be less restrictive on trade.

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