

Geographic Indications – A Sheep in Wolf's Clothing

How Are Agricultural Products Protected?

The US has a form of trademark protection embodied within a system of certification for geographic product claims. This has allowed 100 percent Kona Coffee, Vidalia Onions and Wisconsin Real Cheese to be certified and protected. Part, not all, of that protection is geographic. The US allows foreign producers to register a trademark. However, it defines some terms as being generic and incapable of protection. Interestingly, in the recent wine negotiations, the US changed its position on champagne certification.

The US has State sponsored agricultural certification programmes like 'Idaho Preferred', 'A Taste of Iowa', 'Fresh from Florida', and 'Get Real Get Maine'. Vidalia Onions is a certification owned by the State of Georgia.

The rather pragmatic US system allows some European GIs protection without formal certification. For example, Cognac is protected because US consumers recognise that Cognac is linked to the Cognac region of France.

The EU scheme operates in addition to trademark protection. The 1992 EU Council Regulation on the Protection of Geographical Indications and Designations of Origin (2081/92) created two forms of certification: Protection of Designations of Origin (PDOs) and Protection of Geographic Indication (PGIs). A PDO must be produced, processed and prepared within a specific area and its characteristics must be 'essentially due to the area'. A PGI must be produced, processed or prepared in a specific area whose quality, reputation or other characteristics are in some way attributable to that area alone. The EU effectively creates collective trademarks for regions or groups of producers.

The difference between the two schemes was of little relevance prior to the Uruguay Round. Article 22 of the Trade Related Aspects of Intellectual Property Rights (TRIPs) stated that 'Geographical Indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the goods is essentially attributable to its geographical origin (WTO 1994)'.

Where Do GIs Come From?

The idea of Geographic Indications as trade and consumer protection measure has been enshrined in a number of international treaties. For example, both the Paris Convention for the Protection of Intellectual Property and the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods have specific provisions relating to border measures that can be used to halt trade in goods whose geographic origin was deceptively identified.

Many consumer protection laws also contain provisions on 'unfair competition'. While such provisions can be controversially applied to things, such as below cost selling or indeed to firms negotiating discounts on volume purchases

the form of deception that GIs seek to deal with is quite naturally aligned with such provisions.

Exemptions, Exceptions and History

The main protagonists in the GI debate are countries that, on the one hand, experienced large-scale emigration, and those, on the other hand, that were the recipients of that emigration. In essence, on the one side is Europe, and on the other, former colonies of Europe.

The increasing demands from producers in the EU for specific protection for their products have had a number of routes to resolution. Under the TRIPs agreement, Article 24.4 allows the 'continued and similar use' of GIs for wines and spirits by 'nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services'.

Other possible routes to conflict resolution rest on challenges to trademarks. As the GI lobby in Europe is keen to point out, a private firm has a trademark on Parma Ham in Canada. One wonders why this trademark has not been challenged.

There has been a concerted effort on the part of the European Union (EU) and its allies to put Geographic Indications (GI) into the Doha Development Round. This effort is part of a wider push by the EU to stop common terms being used in third countries for wine products and indeed any foodstuff that the EU produces. What is interesting is the degree to which the debate has avoided discussion on competition issues in agricultural markets. The role of the Common Agricultural Policy (CAP) and the general 'exception' that agriculture has in the EU from competition law has rarely been mentioned.

Competition Issues in Agriculture

One of the most difficult elements of the GI 'problem' is the collective versus individual nature of the protection offered. Existing trademark law fits relatively neatly into competition law in terms of abusive practices and dominance issues. However, the collective nature of the GI requires members to meet and discuss 'standards' for the awarding of a label. One would expect any agreement that, at its core, restricts production and excludes existing producers from the market, to have to seek an exemption from competition law.

The normal process for deciding whether an agreement is anticompetitive is to look to Article 81(1) of European competition law.

However, agreements that do breach any of these conditions can be allowed to continue provided that they meet two criteria – firstly, they can be exempted from the provisions of Article 81(1) if they meet all four criteria of Article 81(3).

Under this article the agreement must:

1. Improve the production or distribution of goods or lead to a technical improvement or advance economic progress
2. Offer a fair share of the benefits gained to consumers
3. have no dispensable restrictions
4. involve no substantial elimination of competition

To pass, any agreement must meet all four conditions. Agreements that eliminate competition have restrictions that can be achieved in another less anticompetitive manner and that offer few obvious benefits to consumers are unlikely to pass muster.

The second set of conditions that must be met is that the agreement does not

1. 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

Regulatory Issues

Of course, agriculture is 'different', and applies to 'normal' sectors of the EU economy. The original European Commission (EC) Treaty, in Articles 32 to 38 specifically, singles agriculture out for special treatment. Agriculture is essentially governed by different rules to non-agricultural markets and Article 36 specifically states that competition policy will only have an impact upon agriculture in specific circumstances to be decided by the Council. The main provision excluding significant parts of European agriculture from competition regulation is Council Regulation 26 of 1962.

This Regulation applies a number of conditions to the application of Articles 81 and 82 of competition law. The first article states that competition law applies to agricultural products listed, except for Article 2 limits. Those limits are essentially of two types, although a third is used for illustrative purposes. Those two general exemptions are for activities carried out under the CAP (including the desire to allow farmers a reasonable income). The second specific exemption is for activities integral to national market organisations.

While the exemption for national market organisations has been overtaken by events, with a large number of them gone, the exemption for CAP activities is both broad and active. The objectives that are thus exempt from Article 81 are covered by roughly five headings; increasing agricultural productivity, ensuring a fair standard of living for farmers, stabilising markets, ensuring the availability of supplies and ensuring consumers get access to agricultural produce at reasonable prices. Such conditions are incompatible with

normal competition law. The only condition that remotely approaches normal competition law is the provision on consumer interests.

The last exception built into Article 26 is one for the activities of cooperatives. This exception covers agreements between farmers or groups of farmers that cover either production or sale of agricultural produce or provide joint facilities for storage, treatment or processing of agricultural products. Such an exemption almost exactly describes a body such as the Parma Ham consortia. There are limits to the cooperative exception. These include no allowance for price fixing, it does not apply to abuse of dominance cases, and it only applies to cooperatives within a member state.

While European competition law has been hobbled, at the national level competition authorities have had more room for manoeuvre. The Italian competition authority (the Autorita Garante della Concorrenza e del Mercato) has conducted a number of investigations into different agricultural groupings. These include IGOR the consortium for producing gorgonzola cheese in 1998, the prosciutto di Parma and prosciutto di San Daniele, Parmigiano Reggiano cheese and Grana Padano in 1998 and the Grano Padano again in 2003 and 2004.

The Italian authorities experience in almost every case they took involved consortia members discussing matters other than quality standards. Indeed most inquiries concerned production limits imposed by GI bodies. The limits were claimed to be for 'quality' purposes.

Conclusion

The claim for Geographic Indications to be included in the WTO system is weak. Different countries have different food cultures, an issue complicated by the fact that many have originated in Europe. Existing EU GI regulations eschew normal competition analysis and could be argued to encourage anticompetitive behaviour by GI owners. There is also a clear lack of evidence of a global problem of such magnitude that a WTO solution makes sense.

The EU-GI agenda must be resisted if we are to see European agricultural markets properly liberalised rather than balkanised. What the EU wants to do is to open the low value markets to trade while tying up almost any processed product name that means anything to Europe's consumers.

The food imperialism of the Commission has, however, thrown light on the anticompetitive nature of their own GI system. Once the anticompetitive nature and effect of these rules has been dealt with, then the Commission has a case to persuade World Intellectual Property Organisation (WIPO) to develop a central database and registration process, which allows for a low cost arbitration system to stop inappropriate or misleading GI trademark or registration schemes at the national level.

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