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The Protection of Traditional Foods in the EU: Traditional Specialities Guaranteed

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Abstract: *Since the dawn of the common market, the European Union has enacted abundant legislation regulating the employment of specific food names. This process has led to the introduction of a regulatory framework for wines and spirits, and four quality schemes for food products: protected denominations of origin (PDO), protected geographical indications (PGI), traditional specialities guaranteed (TSG), and optional quality terms (OQT). This paper focuses on the TSG. It will first determine the collocation of this quality scheme in the EU legal framework; second, it will conduct a legal exegesis of the norms regulating the TSG under the previous Regulation 509/06 and analyse the ways in which they have been interpreted and applied; third, it will suggest reasons for the limited success of this scheme in the past; and fourth, it will explore the recently enacted Regulation 1151/12, seeking to establish whether it addresses the pre-existing flaws that fettered the TSG.*

I Introduction

Union legislation reserving specific names for foods and beverages of a particular quality or reputation has been abundant since the dawn of the European integration process, eventually culminating in the introduction of a regulatory framework for wines and spirits,¹ and four quality schemes for food products: protected denominations of origin (PDO), protected geographical indications (PGI),² traditional specialities guaranteed (TSG),³ and optional quality terms (OQT).⁴

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¹ See Council Regulation 479/2008/EC on the common organisation of the market in wine, amending Regulations (EC) no. 1493/1999, (EC) no. 1782/2003, (EC) no. 1290/2005, (EC) no. 3/2008 and repealing Regulations (EEC) no. 2392/86 and (EC) no. 1493/1999, 2008 O.J. L148/1; Council Regulation (EEC) no. 1601/91 of 10 June 1991 laying down general rules on the definition, description and presentation of aromatised wines, aromatised wine-based drinks and aromatised wine-product cocktails, 1991 O.J. L149/1.

² Enacted by Council Regulation 2081/92/EEC on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 1992 O.J. L 208/1, subsequently repealed and replaced by Council Regulation 510/2006/EC on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2006 O.J. L 93/12.

³ Enacted by Council Regulation 2081/92/EEC on certificates of specific character for agricultural products and foodstuffs, 1992 O.J. L 208/9, subsequently repealed and replaced by Council Regulation 509/06/EC on agricultural products and foodstuffs as traditional specialities guaranteed, 2006 O.J. L 93/1.

⁴ Enacted by Regulation 1151/12/EU of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs, O.J. 2012 L343/1.

PDO and PGI concern products characterised by a defining bond to a particular *milieu géographique* and bearing a geographical trade name. These quality schemes have enjoyed some success and have received noteworthy scholarly attention;⁵ moreover, they have lain at the heart of EU and international disputes.⁶

The TSG quality scheme aims to provide a protection regime for traditional food products of specific character. Unlike its siblings, it has attracted little interest from agricultural producers and has been largely ignored by academics; equally it has received limited judicial attention.⁷

The OQT scheme establishes a second-tier of quality systems, regulating the employment of horizontal, value-adding terms with a European dimension which express characteristics or attributes shared by one or more categories of agricultural products, such as ‘mountain product.’

The EU has recently enacted Regulation 1151/12,⁸ which aims to rationalise the regulatory framework governing its quality schemes and to further protect and promote quality of agricultural products. With regard to the TSG, this legislative measure largely replicates the pre-existing legal architecture yet also introduces significant procedural and substantive law changes. These developments provide an inviting opportunity to reflect on whether the new legislation elevates the TSG scheme above its past shortcomings and sets a trajectory towards a brighter future.

This paper thus aims to first determine the systematic collocation of the TSG within the EU legal framework for food nomenclature; second, to revisit this scheme under the previous legislation, conducting a legal exegesis of the relevant norms and considering the ways in which they have been interpreted and applied; third, to identify the reasons for the limited success of the TSG in the past; and, fourth, to chart the reforms introduced by Regulation 1151/12 and to explore the extent to which they address pre-existing difficulties.

II The EU Legal Framework for Food Nomenclature

Historically, the norms governing EU food nomenclature stem from multiple sources: some derive from Treaty provisions; others are contained in food-specific EU secondary legislation; still others emerge from case law. An analysis of the TSG limited to an examination of the specific regulations which govern it would thus only engender a partial understanding of this scheme. Accordingly, a preliminary

⁵ For a comprehensive bibliography, see D. Gangjee, *Relocating the Law of Geographical Indications* (CUP, 2012).

⁶ For a historical overview, see V. Mantrov, ‘Protection Norms of Indications of Geographical Origin in the Applicable Regulations: Recent Changes and the Necessity for Further Unification’, (2012) 43 *International Review of Intellectual Property and Competition Law* 174.

⁷ The notable exceptions are D. Holland and H. Pope, *EU Food Law and Policy* (Kluwer, 2004), at 127–129; C. MacMaolain, *EU Food Law* (Hart, 2007), at 117–119; L. Bently and B. Sherman, *Intellectual Property Law* (CUP, 3rd edn, 2008), at 981–1001; C. Seville, *EU Intellectual Property Law and Policy* (Edward Elgar, 2009), at 305–309. An empirical study was conducted by L. Joyet and M. Delobel, ‘Protection des produits traditionnels rhônalpins par la Spécialité Traditionnelle Garantie’ (2006) [http://rhone-alpes.synagri.com/synagri/pj.nsf/46b50bbadf2cf901c1256c2f0041b9a7/28c531179ca0f020bc1257227003bb074/\\$FILE/Document%20de%20synth%C3%A8se%20STG.pdf](http://rhone-alpes.synagri.com/synagri/pj.nsf/46b50bbadf2cf901c1256c2f0041b9a7/28c531179ca0f020bc1257227003bb074/$FILE/Document%20de%20synth%C3%A8se%20STG.pdf). The only judicial dispute involving a TSG was Trade Mark Registry Decision O-316-09, *Axle Associates Ltd v Gloucestershire Old Spots Pig Breeders’ Club* [2010] ETMR 12.

⁸ See n 4 *supra*.

historical reconnaissance is helpful in identifying the general principles that inform this area of EU law, and in the acquisition of a systematic perspective.

The first two decades of Community foodstuff legislation were characterised by an uncompromising pursuit of the common market objective. Both positive and negative harmonisation approaches were utilised to overcome national ‘technical barriers’ to the free movement of foods.⁹ Stemming from Article 100 EC (Article 115 TFEU), positive integration yielded an array¹⁰ of horizontal¹¹ and vertical¹² directives regulating food production, distribution and nomenclature. Based on a teleological interpretation of Article 30 EC (Article 34 TFEU) and the strict construal of Article 36 EC (Article 36 TFEU), negative harmonisation led to the casting aside of Member State compositional rules¹³ and the curtailing of national regulatory schemes for indications of geographical origin (IGO).¹⁴

Towards the end of the 1980s, however, several Member States expressed dissatisfaction with Community foodstuff legislation and demanded stronger legal protection for their typical products, in line with pre-existing national legislation.¹⁵ Concurrently, it was increasingly felt that the common market for agricultural products, though perfectible, had largely been achieved. As a result, the policy aims of Community foodstuff legislation were reconsidered, shifting towards new objectives such as quality, consumer protection and support to small agricultural producers.¹⁶ At first,

⁹ For a detailed analysis, see A. Dashwood, ‘Hastening Slowly: The Communities’ Path towards Harmonization’, in H. Wallace, W. Wallace and C. Webb (eds), *Policy-Making in the European Community* (Wiley, 1977), at 277–281.

¹⁰ A General Programme for the adoption of several directives concerning food products was enacted by Council Resolution of 28 May 1969, drawing up a programme for the elimination of technical barriers to trade in foodstuffs, 1969 O.J. C 76/1. See A. Dashwood, n 9 *supra*, at 281–284.

¹¹ Horizontal directives addressed transversal issues relevant to all foods. Among these, the most significant was Council Directive 79/112/EEC relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, 1979 O.J. L 33/1.

¹² Vertical directives established ‘compositional rules’ for specific foods and are often referred to as Community ‘recipe laws’. For an in-depth analysis of these directives, see O. Brouwer, ‘Community Protection of Geographical Indications and Specific Character as a Means of Enhancing Foodstuff Quality’, (1991) 28 *Common Market Law Review* 615.

¹³ The doctrine of mutual recognition established in Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paved the way for several cases challenging the compatibility of Member States’ ‘compositional rules’ with Community law. See Case C-788/79, *Italy v Herbert Gilli and Paul Andres* [1980] ECR 2071; Case C-27/80, *Anton Adriaan Fietje v Arrondissementsrechtbank Assen—Netherlands* [1980] ECR 3839; Case C-261/81, *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961.

¹⁴ See Case C-12/74, *Commission of the European Communities v the Federal Republic of Germany* [1975] ECR 181. Throughout this paper, the term ‘indications of geographical origin’ is used as a neutral common denominator, adopting the terminology employed by the World Trade Organization Secretariat in its ‘Review under Article 24.2’ IP/C/W/253/Rev.1.

¹⁵ In 1988, France sent a memorandum to the Commission criticising the Community foodstuff legislation; this was shortly followed by supporting documents from Germany, Belgium, Luxembourg, the Netherlands and Italy. Notably, in 1989, the UK sent a memorandum expressing support for the existing Community policy. See O. Brouwer, n 12 *supra*, at 615.

¹⁶ This is explicitly expressed in several documents, eg Commission communication transmitted to the Council and to the European Parliament, *The future of rural society*, COM (88) 501 final, as well as Communication of the Commission to the Council, *The Development and Future of the CAP*, Reflections Paper, COM(91)100. This recalibration took place in diverse areas of EU law; for instance, at around the same time, Community competition law shifted from the ‘single market objective’ to ‘consumer welfare’ and ‘efficient allocation of resources’; see P. Akman, ‘Searching for the Long-Lost Soul of Article 82’, (2009) 29 *Oxford Journal of Legal Studies* 267.

the change of course was slight, with the Court of Justice of the European Union (CJEU) accepting the lawfulness of national compositional rules under a narrow set of circumstances;¹⁷ the veer, however, became evident with the enactment of Regulations 2081/92 and 2082/92.¹⁸

Regulation 2081/92 introduced the PDO and PGI as two distinct supranational quality schemes regulating geographical trade descriptions for foods. Both institutes allowed for the registration of the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product originating therein. To qualify for a PDO, the food had to be produced, processed and prepared in the geographical area referenced in the designation of origin, and its quality or characteristics had to be essentially or exclusively due to its *milieu géographique*. By contrast, less onerous requisites were established for the PGI, merely requiring that either the production, processing or preparation take place in the locale to which the product name referred and that either a specific quality, reputation or other characteristic of the food was attributable to its geographical source. Thus, both the PDO and PGI certified the existence of a link between a food and its place of origin, yet the two differed with regard to the intensity of such a bond.¹⁹

Regulation 2082/92 established the certificate of specific character (CSC), which allowed for the registration of names of foods deemed to be traditional and of specific character. The CSC was a novelty conceived by the European legislature, as pre-existing Member State legislation did not contemplate distinct regulatory devices protecting specific character and tradition.²⁰

In 2006, Regulations 2081/92 and 2082/92 were repealed and replaced by Regulations 510/2006 and 509/2006, respectively.²¹ The former did not radically reform the PDO and PGI schemes;²² by contrast, Regulation 509/2006 introduced several amendments to the CSC, as symbolised by the name change to ‘traditional specialities guaranteed.’

The body of rules governing EU quality schemes was reformed again by Regulation 1151/12.²³ This legislative measure aimed to consolidate and perfect the PDO, PGI and TSG, the latter again being subject to the most significant reforms. Concurrently, the new legislation further expanded the framework of EU quality schemes, introducing the OQT scheme.

The EU legal framework for food nomenclature is structurally and historically informed by the principles governing the free movement of goods. The PDO, PGI and TSG schemes were initially introduced as exceptions designed to safeguard interests deemed worthy of special protection, which would otherwise have been neglected in pursuit of the internal market objective. Over the past two decades, however, the

¹⁷ See Case C-298/87, *Smanor SA* [1988] ECR 4489; Case C-286/88, *Ministere Public v Deserbais* [1988] ECR 4907. This was followed by a European Commission interpretative communication on the names under which foodstuffs are sold O.J. 1991, C270/2.

¹⁸ See n 2–3 *supra*.

¹⁹ See N. Olzsak, *Droit des appellations d'origine et indications de provenance* (Tec&Doc, 2001), at 393–448.

²⁰ Though limited to cheese, an international protection regime bearing some similarities to the TSG was established by the *Convention internationale sur l'emploi des appellations d'origine et dénominations de fromages*, signed in Stresa in 1951.

²¹ See n 2–3 *supra*.

²² For an in-depth analysis, see V. Mantrov, n 6 *supra*.

²³ See n 4 *supra*.

prominence of these legal institutes has increased as they have become cardinal to the aims of the Common Agricultural Policy (CAP).

III Traditional Specialities Guaranteed under Regulation 509/06

The following analysis will first consider Regulation 509/06 and, subsequently, Regulation 1151/12. Acquiring a crisp picture of the legal framework governing the TSG prior to its most recent reform will allow for an easier understanding of the underlying rationale of the new legislation, and highlight the changes that it seeks to introduce.

A *The Relationship between Regulations 2082/92 and 509/06*

Despite rechristening the CSC scheme 'TSG,' Regulation 509/06 did not radically reform Regulation 2082/92, but rather built upon its foundations, seeking to perfect the scheme by clarifying several of its most significant areas.²⁴

Thus, this paper will primarily utilise Regulation 509/06 as its point of reference in determining the law of the TSG as it was prior to the enactment of Regulation 1151/12. Nevertheless, Regulation 2082/92 will be considered where to do so sheds light on the evolutionary trajectory of this quality scheme.

B *Recitals*

While the recitals of Regulation 509/06 did not elucidate the reasons and objectives underlying the TSG scheme,²⁵ those which accompanied Regulation 2082/92 offered a wealth of information.

Regulation 2082/92 was informed by two bases of reasoning. First, the recitals emphasised the importance of product diversification and the need to support 'the rural economy in less favoured or remote areas' by 'improving income of farmers.'²⁶ Second, the recitals recognised a need to buttress consumer protection in the internal market by sating increasing demand for 'greater emphasis on quality and information as regards to the nature, method of production and processing of foodstuffs';²⁷ accordingly, consumers should be provided with 'clear and succinct information regarding the specific characteristics of foodstuffs' to facilitate informed choices.²⁸

Based on these tenets, the recitals of Regulation 2082/92 postulated that the objective of the legislation was the introduction of a voluntary scheme enabling producers to effectively communicate the 'quality' and 'specific character' of their products. This instrument would help them to extract value from the 'distinguishing features' of their foodstuffs, concurrently increasing consumer awareness of these products and their unique characteristics.²⁹

²⁴ In 1999, the European Commission submitted a report to the European Parliament and the Council on the application of Reg. 2082/92, COM(1999) 374 final, highlighting several shortcomings of the CSC and suggesting solutions.

²⁵ Recitals (2)–(4), Regulation 509/06 are notable exceptions.

²⁶ Recitals, Regulation 2082/92; this is reaffirmed in recital (2), Regulation 509/06.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

C Registration, Amendments and Cancellation

Under Regulation 509/06, a TSG was granted upon registration on a specialised Union register.³⁰ This process was divided into two phases.

The first took place at a national level. TSG applications could only be submitted by a 'group'³¹ and had to be addressed to the designated authorities of the Member State in which said group was established. Applicants had to provide a 'product specification' containing all the relevant information about the candidate food product;³² Member States had a duty to 'scrutinise each application by appropriate means,³³ ensuring compliance with both substantive and formal requirements. National authorities were also required to establish a specific objection procedure open to any person 'having a legitimate interest and established or resident on its territory.'³⁴ Applications satisfying the statutory requirements were forwarded to the Commission.³⁵

The second phase took place at the European level. The Commission scrutinised the application anew, conducting its own assessment on grounds of both merit and form.³⁶ Subsequently, if the Commission deemed it admissible, the application would be transmitted to all Member States and published in the Official Journal.³⁷ Member States, third countries and persons with a legitimate interest had six months during which to oppose registration; objections were only admissible if they concerned the absence of one or more of the substantive requisites for protection.³⁸ States lodged oppositions with the Commission directly;³⁹ persons, by contrast, did so through their Member State. If the application was unopposed, the Commission proceeded with registration. If oppositions were raised, the Member States involved would be invited to engage in consultations;⁴⁰ if this conciliatory attempt failed, the Commission would decide whether to admit the application, following the procedure established in Article 18(2) of Regulation 509/06.⁴¹

A TSG could be amended at the request of a Member State on behalf of a group established in its territory, provided that 'a legitimate economic interest'

³⁰ See Art 3, Reg 509/06.

³¹ Defined in Art 2, Reg 509/06.

³² See Art 6(2), Reg 509/06. The formalities and level of detail required for the product specification were established in Commission Regulation 1216/07/EC laying down detailed rules for the implementation of Council Regulation (EC) no. 509/2006, 2007 O.J. L 275/3. This regulation repealed and replaced Commission Regulation 1848/93/EEC laying down detailed rules for the application of Council Regulation (EEC) no. 2082/92, 1993 O.J. L 168/35.

³³ See Art 7(5), Reg 509/06.

³⁴ *ibid.*

³⁵ Regulation 509/06 did not establish a harmonised appeal procedure against decisions at Member State level; the matter was left to national administrative laws. See the comments of A.G. Jacobs in *Carl Kühne v Jütro Konservenfabrik*, 2001 ECR I-9517, at 50, 77.

³⁶ European Institutions were not awarded such powers under Regulation 2082/92.

³⁷ See Art 8, Reg 509/06.

³⁸ See Art 9(3)(a)-(b), Reg 509/06.

³⁹ See Art 9(2), Reg 509/06.

⁴⁰ See Art 9(5), Reg 509/06. Though the provision uses the term 'interested parties', Art 8, Reg 1216/07 specified that these consultations exclusively involved Member States.

⁴¹ See Articles 5, 7, Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. L184/23. In this procedure the Commission was assisted by the Scientific Committee for designations of origin, Geographical Indications and certificates of specific character (established by Commission Decision 93/53/EEC, 1993 O.J. L13/16).

could be demonstrated.⁴² The procedure to be followed mirrored that for registration.

Under Regulation 509/06, a registered TSG could only be cancelled if the Commission took the view 'that compliance with the conditions of the specification is no longer ensured.'⁴³ Notably, it was not possible to bring an action to have a TSG declared void for pre-existing or supervened breach of the statutory requisites for protection.

D Subject Matter and Requisites for Protection

The subject matter of the TSG was limited to the agricultural products and foodstuffs listed in Annex II of the EC Treaty and in the Annex to Regulation 509/06.⁴⁴

The requisites for registration of a TSG fell into two broad categories, the first concerning the nature of the product and the second the trade name designating it.

a) Product Requisites

The candidate food product had to satisfy two requirements to be TSG eligible: it had to be (1) of specific character⁴⁵ and (2) traditional.

1. Article 2 of Regulation 509/06 contained a quadripartite definition of 'specific character.'⁴⁶ The first part expounded the intension of this concept, describing it as 'the characteristic or set of characteristics which distinguishes an agricultural product or a foodstuff clearly from other similar products or foodstuffs of the same category.' The second part focused on the notion of 'characteristic bestowing specific character,' providing examples: 'the characteristic or set of characteristics . . . may relate to the product's intrinsic features such as its physical, chemical, microbiological or organoleptic features, or to the product's production method or to specific conditions that pertain during its production.' The third limb offered a negative definition, excluding 'presentation' as a possible characteristic bestowing specific character. The fourth part returned to the characteristics bestowing specific character, adding that they were not restricted to 'qualitative or quantitative composition or to a mode of production laid down in Union or national legislation, in standards set by standardisation bodies or in voluntary standards; however, this rule shall not apply where the said legislation or standard has been established in order to define the specificity of a product.'

The notion of 'characteristic' was the cornerstone of this tortuous definition. Regrettably, Article 2(2) provided only a brief exemplificative list, rounded up by a circular reference to the specific conditions that 'pertain during its production.'⁴⁷ Thus, it was unclear whether elements such as the reputation of a product, or the

⁴² See Art 11(1), Reg 509/06.

⁴³ See Art 10, Reg 509/06. By contrast, under Art 10, Reg 2082/92, a cancellation request could also be submitted by a Member State.

⁴⁴ See Art 1, Reg 509/06.

⁴⁵ Although Regulation 509/06 did not explicitly qualify 'specific character' as a product requirement, this was indisputable. First, Articles 2, 4(1), 7(2)(d) and 9(3)(a) implied that products had to be of specific character to qualify for a TSG. Second, recital (2), Articles 3(3), 4 and Annex III, Regulation 1216/07 expressly identified specific character as a requirement.

⁴⁶ This definition closely mirrored that in Art 2(1), Reg 2082/92, despite the recitals of Regulation 509/06 explicitly mentioning the need to simplify the notion of 'specific character.'

⁴⁷ The term 'pertain' in English is not particularly helpful; the French text employs the much clearer 'prévalent.'

idiosyncrasies of the producers (such as their origin or training) would qualify as characteristics bestowing specific character. Similarly, it was unclear whether the exclusion concerning ‘presentation’ was limited to ancillary elements such as packaging, or whether it extended to aesthetic features such as colour and shape. This definition also neglected to establish parameters by which to ascertain whether a feature ‘clearly’ distinguished a product from others in its same category; there was no indication as to whether this differential should be measured objectively, from a consumer perspective or by employing a combination of these two approaches. Notably, the possibility that a product could lose its specific character in due course was not contemplated, implying that the product only needed to satisfy this requirement at the time of registration. The cumulative effect of these shortcomings rendered the notion of ‘specific character’ under Regulation 509/06 riddled with uncertainty.⁴⁸

2. The second product requisite concerned tradition: to qualify for a TSG, a food had to ‘be produced using traditional raw materials or be characterised by a traditional composition or a mode of production and/or processing reflecting a traditional type of production and/or processing.’⁴⁹ Rectifying an omission of the previous legislation, Regulation 509/06 defined ‘traditional’ as ‘proven usage on the Community market for a time period showing transmission between generations; this time period should be the one generally ascribed to one human generation, at least 25 years.’⁵⁰

This definition, however, was not exhaustive and raised concerns as to its compatibility with international law. First, in common parlance, ‘tradition’ designates ‘the action of transmitting . . . from one to another, from generation to generation . . . statements, beliefs, rules, customs, or the like.’⁵¹ While Regulation 509/06 set a time frame, it failed to quantify the minimum number of persons who had to be privy to the information in order for it to qualify as a tradition; thus, the question of how widespread a recipe need be in order to be eligible for a TSG remained unanswered.⁵² Second, the geographical delimitation of ‘tradition’ to proven usage in the ‘Community market’ sat uncomfortably with WTO rules.⁵³ This requirement was evidently more onerous for products originating outside of the Union; thus it was arguable that this notion of ‘tradition’ discriminated against non-EU producers, denying them national treatment, in violation of Article 3(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵⁴ Crucially, this issue hinged on whether the TSG could be classified as intellectual property.⁵⁵

b) Name Requisites

Under Regulation 509/06, the second set of TSG requisites for protection concerned the product name submitted for registration. Article 4(2) stated that two distinct

⁴⁸ For a discussion of how the ‘specific character’ requirement was addressed in TSG applications, see *infra* Part IV.C.a).

⁴⁹ Art 4, Reg 509/06.

⁵⁰ Art 2(1), Reg 509/06. Surprisingly, Regulation 2082/92 neglected to define this term.

⁵¹ OED Online, ‘traditional, adj. and n.’ (OUP, March 2012).

⁵² For a discussion of how the ‘tradition’ requirement was addressed in TSG applications, see *infra* Part IV.C.b).

⁵³ See *infra* Part VI.D.a).

⁵⁴ Art 3(1), TRIPS agreement establishes that ‘each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.’

⁵⁵ See *infra* Part VIII.C.

categories of denominations could be registered, establishing different requirements for each one. A TSG name had to either '(1) be specific in itself' or '(2) express the specific character of the agricultural product or foodstuff.'⁵⁶

With regard to the first category, Article 4(3) established that a name had to be 'traditional and comply with national provisions or be established by custom' to be 'specific in itself.' Thus, save for the unqualified distinction between 'traditional' and 'established by custom,' this provision was fairly linear.

The second category, 'names expressing the specific character of the product,' presented greater difficulties. Regulation 509/06 did not provide a positive definition of this notion, merely establishing that registration of a name expressing specific character is inadmissible if '(1) it refers only to claims of a general nature used for a set of agricultural products or foodstuffs, or to those provided for by particular Community legislation' or '(2) it is misleading.'⁵⁷ Thus the uncertainties plaguing the definition of specific character as a product requirement inevitably spilled over to this category of registrable names.⁵⁸

Notably, the rules governing the names which could be registered under Regulation 509/06 had two significant corollaries: first, the registration of generic food names was not precluded; second, *a fortiori*, if a registered name were to become generic following registration, the TSG would not become void.

E Scope of Protection: The TSG Nomenclature Rule

Under Regulation 509/06, the protection regime for TSG registered names was established in Articles 12–13 and 17.

Article 12(2) regulated the use of the indication 'traditional speciality guaranteed' and the associated TSG symbol,⁵⁹ establishing that 'where reference is made to a traditional speciality guaranteed on the labelling of an agricultural product or foodstuff produced within the Community, the registered name accompanied either by the Community symbol or the indication "traditional speciality guaranteed" shall appear thereon.'

Crucially, Article 13 set out two distinct and alternative protection regimes for registered TSG product names.

The first (hereinafter Tier 1) was detailed in Article 13(1), establishing that 'from the date of publication' a registered name 'may continue to be used on the labelling of products not corresponding to the registered specification, but the indication "traditional speciality guaranteed," the abbreviation "TSG" or the associated Community symbol may not be indicated thereon.' Thus, Tier 1 awarded an exclusive right over a specific combination of signs: the registered product name, accompanied by the TSG indication and/or symbol. Two elements stood out: first, protection commenced from the moment of publication, leaving applicants unprotected throughout the

⁵⁶ Art 4(2), Reg 509/06.

⁵⁷ Art 4(3), Reg 509/06.

⁵⁸ For a discussion of the application of the rules governing registrable names under Regulation 509/06, see *infra* Part IV.C.c).

⁵⁹ Established by Commission Regulation 2515/94/EC amending Regulation (EEC) no. 1848/93 laying down detailed rules for the application of Council Regulation (EEC) no. 2082/92, 1994 O.J. L 275/1.

application process,⁶⁰ rather than retroacting to the time of submission; second, the registered product name remained freely available to all producers when used on its own.

The second protection regime for TSG registered denominations (hereinafter Tier 2) was detailed in Article 13(2), under which ‘the name, even where unaccompanied by the indication “traditional speciality guaranteed,” the abbreviation “TSG” or the associated Community symbol, may no longer be used on the labelling of similar agricultural products or foodstuffs not satisfying the registered specification,’ provided that: ‘the group so requested in its application for registration and the procedure provided for in Article 9 does not show that the name is used in a lawful, renowned and economically significant manner for similar agricultural products or foodstuffs.’ Thus, following publication, Tier 2 awarded an exclusive right covering the use of the registered food name, regardless of its association with the TSG indication and symbol. This expanded protection was contingent on three circumstances: the absence of a (1) lawful, (2) renowned and (3) economically significant use of that particular name for a similar product. Unfortunately, the elegance and simplicity of this phraseology was purchased at the expense of clarity, as the exact purview of the three aforementioned cumulative circumstances was not defined, and no guidance was provided to assist in determining whether products were ‘similar.’

The core nomenclature rules contained in Articles 12 and 13 were further bolstered by Article 17, stating that Member States had to prevent (1) ‘any misuse or misleading use of the term “traditional speciality guaranteed,” the abbreviation “TSG” and the associated Community symbol’;⁶¹ (2) ‘any imitation of names registered and reserved under article 13(2)’;⁶² (3) ‘any practice liable to mislead the public’ with regard to ‘registered names,’ including ‘practices suggesting that the agricultural product or foodstuff is a traditional speciality guaranteed recognised by the Community’; and (4) ensure that ‘sales descriptions used at national level do not give rise to confusion with names registered and reserved pursuant to Article 13(2).’⁶³ Article 17 expanded the scope of protection of both protection tiers established in Article 13; however, it acted as a multiplier rather than an addition, further widening the chasm between Article 13(1) and 13(2). Elements (2) and (4) in particular had a markedly broader purview in cases in which the object of protection was a food name under Tier 2 rather than an elaborate combination of signs including the TSG indication and/or symbol under Tier 1.

Thus, Regulation 509/06 established a two-tiered protection system with significant differences in access and scope. Tier 1 offered a narrow yet more attainable protection. Tier 2 awarded a broader exclusive right, yet was subject to more onerous requirements. Notably, despite these differences, both tiers shared the same protection standard: prevention of deception and consumer confusion, as evidenced in no uncertain terms by the reference to practices ‘liable to mislead the consumer.’⁶⁴

⁶⁰ See Trade Mark Registry Decision O-316-09, *Axle Associates Ltd v Gloucestershire Old Spots Pig Breeders' Club* [2010] ETMR 12, at 21.

⁶¹ Art 17(1), Reg 509/06.

⁶² *ibid.*

⁶³ Art 17(3), Reg 509/06.

⁶⁴ Art 17(2), Reg 509/06.

F Interactions between the TSG and the PDO, PGI and Other Intellectual Property (IP) Rights

Regulation 509/06 did not establish an exhaustive body of rules to regulate possible tensions and overlaps between the TSG and other national or Union-protected trade signs. Nevertheless, there were a few norms scattered throughout, addressing some of these potential issues.

Article 5(1) established a general rule for the resolution of conflicts between a TSG and other rights, providing that ‘this Regulation shall apply without prejudice to Community rules or those of the Member States governing intellectual property and in particular those concerning geographical indications and trademarks.’⁶⁵ The TSG was therefore expressly collocated in subordination to other national or Union intellectual property (IP) rights. The wording of this provision also raised questions as to whether a TSG constituted an ‘earlier right’ on the basis of which a trade mark registration could be opposed.⁶⁶

With regard to registrable names, Article 4(1) established that ‘the use of geographic terms shall be authorised in a name without prejudice to Article 5(1).’⁶⁷ Thus, in accordance with Article 5(1), a TSG name comprising a geographic sign was admissible only if it did not infringe a trade mark, PDO or PGI.⁶⁸

Article 4(2) added that a TSG could not be awarded to a product ‘the specific character of which is due to its provenance or geographic origin,’ thus separating the domain of the TSG from that of the PDO and PGI, and preventing registration of a food product under multiple quality schemes.

G Official Controls

Regulation 509/06 explicitly recognised the importance of subjecting TSG products to a system of impartial and objective controls.⁶⁹ Member States were under an obligation to designate competent authorities responsible for verifying that TSG labelled products complied with their registered specification. A preliminary assessment had to take place prior to the product being placed on the market, and further controls could be conducted thereafter to verify continued compliance.⁷⁰

IV Application of the CSC/TSG Rules Prior to Regulation 1151/12

The exegesis of Regulation 509/06 provides but a partial understanding of the state of the TSG scheme at the time of the enactment of Regulation 1151/12; a complete

⁶⁵ See recital (13), Regulation 509/06. This rule is in stark contrast with that in Art 14, Reg 510/06 for PDO and PGI denominations; for an extensive analysis see D. Gangjee, n 5 *supra*, at 255–265.

⁶⁶ See Council Regulation 40/94/EC on the Community Trade Marks, 1994 O.J. L11/1, Art 52(1)(c). The same rule is also established in Art 4(4)(c), Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks, 2008 O.J. L 299/25.

⁶⁷ In a similar vein, Art 5(2) provided that ‘a plant variety or breed of animal may form part of the name of a traditional speciality guaranteed, provided that it is not misleading as regards the nature of the product.’

⁶⁸ An exhaustive analysis of the scope of protection of trade marks, PDO and PGI falls outside of the scope of this work. Nevertheless, as an example, a TSG name comprising a trademarked geographic sign would be admissible, provided that it was used descriptively for the traditional food product. See *infra* Part V.A.b).

⁶⁹ See recitals (9), (15), Regulation 509/06.

⁷⁰ See Articles 14–16, Reg 509/06.

picture requires that attention be devoted to the application of this body of rules. The aim is not to compile an exhaustive empirical study,⁷¹ but rather to highlight crucial quantitative data and analyse the approach adopted by both applicants and the Commission in construing the relevant provisions.

A TSG Applications and Time Length of the Registration Process

A combined total of 59 CSC/TSG applications have been submitted since the creation of this scheme in 1992; 38 were successful. Under Regulation 2082/92, 28 CSC applications were submitted to the Commission; 14 were successful. Following the adoption of Regulation 509/06, 31 TSG applications were lodged, 13 of which were successful; moreover, 11 applications which had been submitted under Regulation 2082/92 were subsequently approved under Regulation 509/06; at the time of the enactment of Regulation 1151/12, there were 21 applications pending. The number of applications and TSG awarded per year has increased following the adoption of Regulation 506/06, yet continues to be unimpressive.⁷²

It is difficult to calculate the total duration of the application process from submission to national authorities to the final EU registration, as precise data are only available for the European phase of the process.⁷³ Nevertheless, in the past, the latter alone has taken a minimum of one year and a maximum of six. Historically, registration has been a strikingly lengthy process; this fact is of particular significance when one considers that under Regulation 509/06, protection of TSG registered names commenced only after publication.

B Protection Tiers

Of the 38 existing TSGs, 26 received protection under Tier 1; only 12 obtained Tier 2 protection. Four applications for protection under Tier 2 were instead granted Tier 1 protection due to opposition.

The vast majority of applicants have not chosen to pursue the higher protection tier, despite its broader scope. An explanation may lie in the onerous requirements established in Article 13(2). By their very nature, TSG-eligible products have been produced for many years, by multiple subjects and, potentially, in different geographical areas, likely leading to fragmentation in the recipe and mode of production. In this context, it might be difficult to reach an agreement on an 'authentic' recipe and mode of production of such products to which all applicant producers will commit to adhere. This hypothesis is also indirectly supported by the fact that several of the successful Tier 2 TSG applications concerned foods the recipe and production process of which had previously been standardised by national laws, thus eliminating fragmentation.⁷⁴

⁷¹ For further data, see L. Joyet and M. Delobel, n 7 *supra*.

⁷² The data presented reflects the contents of the EU Database of Origin & Registration (DOOR) as of 3.1.2013.

⁷³ DOOR details the timeline of past and present TSG applications submitted to the Commission. By contrast, not all Member States record and publicise this information.

⁷⁴ Notable examples are *Leche certificada de granja*, 1997 O.J. C 21/15; *Falukorv*, 2001 O.J. C 78/18; *Boerenkaas* 2005 O.J. C 316/16; *Spišské párký*, 2010 O.J. C 95/34; *Liptovská saláma*, 2010 O.J. C 103/15.

C Requisites for Protection

The analysis of CSC/TSG applications⁷⁵ provides a wealth of information with which to evaluate the approach adopted by both applicants and the Commission towards the interpretation of the provisions governing specific character, tradition and registrable names under Regulation 509/06.

a) Specific Character

The analysis of the definition of 'specific character' in Regulation 509/06 identified two areas of penumbra: first, the lacunose notion of 'characteristic bestowing specific character'; and second, the dearth of statutory guidance on how to measure whether such features 'clearly' distinguish the candidate product from others in its category.⁷⁶

Applicants took advantage of the absence of a precise definition of 'characteristic granting specific character' by adducing a bewildering variety of features to substantiate their submissions. For classificatory purposes, a general distinction can be made between objective and subjective features. The former predominantly related to ingredients, raw materials and method of production. Notably, the amount of detail and information provided varied substantially: some applications precisely dictated the source and quantity of each ingredient;⁷⁷ others did not even contain a precise and exhaustive recipe.⁷⁸ Similarly, some meticulously illustrated the production process,⁷⁹ while others merely offered a rough sketch.⁸⁰ Moreover, the shape and colour of the product were often cited as features bestowing specific character;⁸¹ the Commission never challenged this convention, adopting a narrow interpretation of the exclusion in Article 2(2).⁸² A few applications also mentioned objective features which, *prima facie*, appeared to fall outside the definition of specific character, such as the fact that milk employed for the product originated from animals owned by the cheese maker⁸³ or that cake was cut 'by hand' and 'diagonally'.⁸⁴

Subjective characteristics such as 'taste,' 'aroma' and 'softness' were also adduced in a large number of applications.⁸⁵ The Commission never opposed these, suggesting that such features were indeed capable of granting specific character. Nevertheless, this stance inevitably raised the question of how elements such as 'the characteristic taste of onion and mustard,'⁸⁶ the 'uniform white or slightly yellowish

⁷⁵ In this paragraph, CSC and TSG applications are considered as a unitary body. Divergences due to differences in the underlying regulations will be highlighted when appropriate.

⁷⁶ See *supra* Part III.D.a).

⁷⁷ eg Mozzarella, 1996 O.J. C 246/9; Falukorv, n 74 *supra*; Pizza Napoletana, 2008 O.J. C 40/17; Špekačky, 2010 O.J. C 94/18.

⁷⁸ eg Panellets 2001 O.J. C 5/3; Kalukko, 2001 O.J. C 235/04; Karjalanpiirakka, 2002 O.J. C 102/14.

⁷⁹ eg Mozzarella, n 77 *supra*; Dwójniak, 2007 O.J. (C 268) 22 (EC).

⁸⁰ eg Jamón serrano, 1998 O.J. C 371/4; Vieille Kriek, Vieille Kriek-Lambic, Vieille Framboise-Lambic, Vieux Fruit-Lambic, 1997 O.J. C 21/5.

⁸¹ eg Leche certificada de granja, *supra* n 74; Hushållsost, 2003 O.J. C 110/18; Idrijski žlikrofi, 2009 O.J. C104/11.

⁸² See *supra* Part III.D.a).

⁸³ eg Boerenkaas, n 74 *supra*.

⁸⁴ eg Belokranjska pogača, 2009 O.J. C 137/19.

⁸⁵ eg Traditional farmfresh turkey, 1998 O.J. C 405/9; Olej Rydzowy, 2008 O.J. C 244/27; Skilandis, 2010 O.J. C 106/27.

⁸⁶ eg Olej Rydzowy, n 85 *supra*.

colour⁸⁷ or ‘gamey flavour’⁸⁸ could be objectively measured, recorded and verified for compliance.

With regard to the second element of uncertainty concerning the notion of specific character, CSC/TSG applications historically presented very little information to substantiate the claim that the submitted foodstuff was ‘clearly’ distinguishable from others in its category. In the absence of precise legislative specifications, applicants typically described the specific characteristics of the candidate foodstuff, yet neglected to illustrate the extent to which these elements differentiated the product from others in its category, or whether consumers perceived such diversity; the element of comparison was either entirely absent or extremely vague. The Commission never resisted this practice, which suggests that a clear differentiation was assumed *ipso facto* from the objective characteristics of the foodstuff and did not have to be rigorously evidenced by applicants.

b) Tradition

Regulation 2082/92 did not contain a definition of the adjective ‘traditional.’⁸⁹ Most CSC applications provided historical evidence for the existence of the product in the past and of its trade name;⁹⁰ nevertheless, with few exceptions,⁹¹ very little information was offered to support the claim that the raw materials of the product or its method of production had been preserved and transmitted unaltered among a group of people over a period of time.

Regulation 509/06 introduced a structured definition of ‘tradition.’⁹² This reform yielded an improvement in the information provided, with several applications adducing precise evidence to indicate that the materials, composition or method of production had been consistently used for at least 25 years in the common market.⁹³ Nevertheless, several submissions have continued to offer little more than a brief history of the product and its trade denomination.⁹⁴

c) Registrable Names

Under Regulation 2082/92,⁹⁵ applicants were not required to specify under which of the two available categories their proposed name fell, nor how it satisfied the relevant requisites for registration.⁹⁶ Despite this, in most instances, assessing whether the proposed name was ‘specific in itself’ (eg Falukorv) or ‘expressing the specific character’ (eg Traditional farmfresh turkey) was not problematic. Some of the submitted names, however, were evidently descriptive and contained claims of general nature (eg Boerenkaas, Jamón serrano). In principle, these denominations should have been treated as specific in themselves, and thus requiring supporting evidence that they

⁸⁷ eg Leche certificada de granja, n 74 *supra*.

⁸⁸ eg Traditional farmfresh turkey, n 85 *supra*.

⁸⁹ See *supra* Part III.D.a)-b).

⁹⁰ eg Jamón serrano, n 80 *supra*. Mozzarella, n 79 *supra*.

⁹¹ eg Boerenkaas, n 74 *supra*; Leche certificada de granja, n 74 *supra*.

⁹² See *supra* Part III.D.a).

⁹³ eg Olej Rydzowoy, n 85 *supra*; Kabanosy, 2009 O.J., C 156/27.

⁹⁴ eg Pierekaczewnik, 2008 O.J., 2008, C 269/11; Traditionally Farmed Gloucestershire Old Spots Pork, 20009 O.J., C 238/8.

⁹⁵ For the rules governing the application of Regulation 2082/92, see n 32 *supra*.

⁹⁶ See *supra* Part III.D.b).

were ‘traditional’ or ‘established by custom’;⁹⁷ surprisingly, no information was ever provided in this respect, raising questions as to the reasons for their successful registration.

Regulation 509/06 amended the rules governing TSG application formalities,⁹⁸ requiring applicants to explicitly indicate whether the submitted name was ‘specific in itself’ or expressed ‘the specific character’ of the product, and to provide supporting evidence.⁹⁹ This reform brought a degree of clarity and transparency, yet the information adduced by applicants to support their submissions continued to be less-than-exhaustive in numerous cases. Moreover, descriptive names referring to general claims continued to be accepted for registration, despite little evidence to substantiate their ‘traditional character.’¹⁰⁰

D The Approach Adopted by Applicants and the Commission

This empirical analysis has revealed that, under the previous regulations, applicants have generally treated TSG requisites for protection in a cavalier fashion. The amount and quality of information provided has undeniably improved significantly over time, particularly with regard to tradition and registrable names; nevertheless, even in the recent past, numerous submissions neglected to precisely address all of the statutory requisites for protection. In this context, despite the general EU rule that exceptions to the tenet of free movement of goods should be narrowly interpreted,¹⁰¹ the Commission has persistently turned a Nelsonian eye to these shortcomings. Perhaps this conduct was motivated by a benign inclination towards the growth of this troubled scheme; nevertheless, the adoption of a less-than-rigorous approach to the scrutiny of applications inevitably undermined the credibility of the TSG and generated uncertainty.

V The Weaknesses of the TSG Scheme under Regulation 509/06

The total number of CSC/TSG applications filed since the inception of the scheme has been low, particularly when compared to those for the PDO and PGI.¹⁰² Theoretically, this limited success could be attributed to multiple factors: (1) scarcity of subject matter, (2) insufficient understanding and awareness or (3) lack of interest.

1. Scarcity of subject matter can be confidently excluded, as Member States have a bountiful gastronomic tradition rich in products which are potentially TSG-eligible.
2. Inadequate understanding on the part of both producers and consumers is equally unconvincing. Perhaps it was a plausible explanation during the years

⁹⁷ See *supra* Part III.D.b).

⁹⁸ See n 32 *supra*.

⁹⁹ *ibid*.

¹⁰⁰ As exemplified by two recently-granted TSGs: Kiełbasa jałowcowa (juniper sausage), 2009 O.J., C 158/24 and Kiełbasa myśliwska (hunter’s sausage), 2009 O.J., C 160/12.

¹⁰¹ For a comprehensive analysis see P. Oliver (ed), *Oliver on Free Movement of Goods in the European Union*, (Hart Publishing, 2010), at 215–311.

¹⁰² PDO and PGI total 680 and 692 applications, respectively.

immediately following the creation of the scheme,¹⁰³ as its novel and unfamiliar nature was likely unclear to potential applicants.¹⁰⁴ Nevertheless, over the past two decades, abundant information about the TSG has been disseminated, yet its success has not seen a significant increase.

3. By way of exclusion, the limited desirability for potential applicants appears to be the primary factor underlying the low number of TSG applications, and thus warrants further consideration.

A The TSG Was an Unpalatable Proposition for Agricultural Producers

Under Regulation 509/06, the TSG quality scheme was structured as an exchange. A group of producers of a traditional product of specific character was required to codify a recipe, make it public through the product specification document and invest time and resources in the registration process. In return, provided all requisites were satisfied, they were awarded a collective exclusive right to use specific signs to differentiate their products on the market and thus extract value. Crucially, however, three fundamental flaws rendered the TSG an unpalatable proposition for producers.

a) The Implications of the Rules Governing Those Who Can Exploit a TSG and Its Place of Production

The first flaw stemmed from the rules governing those who can exploit a TSG and its place of production. Under Regulation 509/06, a name registered as a TSG could be employed by any operator marketing a product conforming to the corresponding specification, regardless of their geographical location. Thus, potential TSG applicants were confronted with the invidious prospect of drawing an unlimited number of competitors to their market and facilitating the delocalisation of their coveted recipe. Producers of a traditional food always face the risk of larger players from more developed areas entering their market; however, the registration of a TSG heightened the risk of such an unwelcome advent and magnified its negative impact, providing a publicly available recipe for newcomers to replicate and an EU trade sign acting as a lowest common denominator. Similarly, if a new producer were to attempt to label its product as 'traditional' for marketing purposes, it would likely be in breach of national legislations for consumer protection and unfair competition; by contrast, following the registration of a TSG, newcomers in compliance with the product specification could lawfully market their products as traditional.

A TSG might have been an enticing option in instances in which a product was already being produced by a large number of manufacturers employing different recipes yet all labelling it 'traditional.' In such circumstances, a group of producers could have pursued a TSG as a defensive strategy: registration would have codified

¹⁰³ See European Commission report, n 24 *supra*; more recently, see the Commission impact assessment report, SEC(2009)670, Addendum C, 4 and the Commission staff working paper impact assessment on traditional specialities guaranteed, SEC(2011)1525, 8.

¹⁰⁴ PDO and PGI were easier to understand as they largely replicated the structure of pre-existing national regulatory schemes; for the legal lineage of these quality schemes, see D. Gangjee, 'Melton Mowbray and the GI Pie in the Sky: Exploring Cartographies of Protection', (2006) 3 *Intellectual Property Quarterly* 291.

the 'authentic' recipe, forcing market participants to either conform to the registered specification or cease labelling their product as traditional. Critically, the economic significance and likelihood of this scenario were marginal at best.

b) A Problematic Scope of Protection

The second flaw hindering the TSG lay in its protection regime.

First, the two-tier protection structure was complex and potentially confusing. Regulation 509/06 did not outline the rationale for this legal architecture, while the Commission scantily described it as the 'compromise' that allowed for the scheme to be established.¹⁰⁵

Second, neither protection tier made for a compelling proposition. The scope of protection awarded by Tier 1 could hardly be considered a valuable reward for disclosing a traditional recipe and for accepting the risk of increased competition and delocalisation. By contrast, Tier 2 offered strong protection, yet was extremely difficult to attain, as a single producer already employing the name put forth for registration could thwart the application by raising an opposition.

Third, under Regulation 509/06, registered names were only protected against confusion.¹⁰⁶ By contrast, PDO and PGI are protected against any direct or indirect commercial use in respect of comparable products, 'misuse, imitation or evocation,' and any other practice liable to mislead consumers 'as to the provenance, origin, nature or essential qualities of the product.'¹⁰⁷ Similarly, EU trade marks are protected against confusion¹⁰⁸ and, if renowned, against dilution, unjust enrichment and tarnishment.¹⁰⁹ That the EU legislature only attributed a distinctive function to the TSG scheme implies that tradition and specific character were not deemed worthy of the higher standard of protection awarded to the interests underlying PDO, PGI and trademarks. This hypothesis is consistent with Article 5(1), which places the TSG in a position of subordination in case of conflict with trade marks, PDO and PGI.¹¹⁰

This problematic protection regime likely caused producers considering the pursuit of EU trade signs to bolster their traditional products to look first to other institutes and only consider the TSG as a residual option. Moreover, the appeal of other protection instruments was further enhanced by the enactment of Regulation 510/06, which introduced the registration of 'traditional . . . non-geographical'¹¹¹

¹⁰⁵ See European Commission report, n 24 *supra*, at 24.

¹⁰⁶ Under Art 17(1), Reg 509/06, the locution 'traditional speciality guaranteed' and the related symbol were protected against any 'misuse' and 'misleading use'; this broader protection, however, was not extended to TSG registered names, which were only protected against confusion, under Art 17(2).

¹⁰⁷ See Art 13, Reg 510/06. For a detailed analysis of the scope of protection of PDO and PGI see D. Gangjee, n 5 *supra*. Specifically on 'misuse' and 'imitation', see R. Knaak, 'Case Law of the European Court of Justice on the protection of Geographical Indications? And Designations of Origin Pursuant to the EC Regulation no. 2081/92', (2001) 32 *International Review of Intellectual Property and Competition Law* 375, 382; on 'evocation,' see Case C-87/97, *Cambozola* [1999] ECR I-1301 and the opinion of A.G. Jacobs.

¹⁰⁸ See Art 4(1), Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks, 1989 O.J. L40/1; Art 8(1), Reg 40/94; Case C-251/95, *SABEL BV v Puma AG, Rudolf Dassler Sport* [1997] ECR I-6191.

¹⁰⁹ See Art 4(3) Dir 89/104; Art 8(5) Reg 40/94; Case C-252/07, *Intel Corporation Inc. v CPM United Kingdom Ltd* [2008] ECR I-0000.

¹¹⁰ See *supra* Part III.F.

¹¹¹ See Art 2(2), Reg 510/06.

food names under the PGI scheme, provided that a link to the relevant *milieu* could be proven.¹¹²

c) *Nebulous Definitions and Protection Requisites*

The third flaw of the TSG stemmed from the legal uncertainty vitiating several of its cardinal provisions. Under Regulation 509/06, the rules governing the product requisites for protection lacked precision, as epitomised by the convoluted and vague definition of ‘specific character.’ Equally, insufficient guidance was provided regarding the types of names which could be registered. All these uncertainties were further magnified by the excessive length of the TSG registration process.

Against this statutory backdrop, the Commission adopted a markedly permissive interpretation approach to product requirements and registrable names. On one hand, this acted as a counterbalance to the lack of clarity and likely alleviated applicants’ fears of rejection; on the other, however, it cast an even greater shade of arbitrariness over the entire TSG quality scheme without resolving the underlying issues.

VI The TSG Reform: Regulation 1151/12

In 2008, the EU opened a consultation towards the reform of the CAP and its food quality schemes.¹¹³ The lack of success of the TSG was acknowledged, and three alternatives were proposed: abolishing the scheme,¹¹⁴ reforming it or replacing it with a specific protection regime for the locution ‘traditional product.’¹¹⁵ Throughout the consultations, agricultural producers and Member State representatives expressed support for the TSG;¹¹⁶ thus it was concluded that the scheme should be retained, yet reformed.¹¹⁷

In 2010, the Commission presented a regulation proposal on agricultural product quality schemes,¹¹⁸ and following the ordinary legislative procedure, this text emerged from its chrysalis as Regulation 1151/12.

Regulation 1151/12 repeals and replaces Regulations 509/06 and 510/06. Crucially, the Commission has been granted ample powers to adopt both implementing and delegated acts to finalise and qualify several cardinal elements of the new legislation;¹¹⁹ the reformed legislative framework for EU quality schemes will not be

¹¹² This was also noted in the Commission impact assessment report, n 103 *supra*, at 20.

¹¹³ European Commission, Green Paper on agricultural product quality: product standards, farming requirements and quality schemes, COM(2008) 641 final, 5. See also, DG Agriculture, Background paper to the green paper on agricultural product quality, 2008.

¹¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on agricultural product quality policy, COM(2009) 234 final, at 4.5.

¹¹⁵ Opinion of the Committee of the Regions on the quality of agricultural products O.J. 2010, C 175/15, at 25–26.

¹¹⁶ European Commission, Directorate-General for Agriculture and Rural Development, Conclusions from the Consultation on Agricultural Product Quality, 2009, at 3.11.

¹¹⁷ Council Conclusions on the Communication from the Commission on Agricultural Product Quality Policy, 16 June 2009, at 15.

¹¹⁸ European Commission, Proposal for a Regulation of the European Parliament and of the Council on agricultural product quality schemes, COM(2010) 733 final.

¹¹⁹ The powers granted to the Commission far exceed those under previous regulations governing quality schemes.

complete until such measures are enacted.¹²⁰ Thus, while the following analysis cannot be considered conclusive, it will seek to identify the structural reforms to the TSG scheme introduced by the new legislation and offer a preliminary assessment of the extent to which they address previous shortcomings.

A Recitals

The recitals of Regulation 1151/12 mirror its overall structure:¹²¹ there is a core of recitals relevant to all quality schemes, complemented by further recitals addressing each quality scheme individually.

Echoing previous legislation, the general recitals restate the objectives and rationale underpinning EU quality policy,¹²² stressing the importance of agriculture, product diversity, consumer demand for quality, supporting disadvantaged rural areas and providing producers with the means to differentiate their products and secure fair rewards.¹²³ Subsequently, the recitals remark that greater coherence and consistency would benefit this area of the law;¹²⁴ accordingly, having observed that the PDO, PGI and TSG share certain common objectives and provisions,¹²⁵ they suggest that the norms governing these institutes should be amalgamated into a single legal framework to achieve increased clarity, transparency and efficiency.¹²⁶ The recitals also highlight the importance of cultivating and reinforcing consumer trust by ensuring effective verifications and controls.¹²⁷

The recitals specifically addressing the TSG commence by restating that the aim of this scheme is to enable producers of traditional products to communicate the characterising attributes of their products.¹²⁸ However, they also acknowledge that this scheme has struggled to garner success in the past and thus posit that current provisions should be ‘improved, clarified and sharpened’ to render the scheme more ‘understandable, operational and attractive.’¹²⁹ Accordingly, the recitals provide an outline of the substantive law changes which ought to be introduced to this effect. First, they suggest that Tier 1 protection should be discontinued, as this option has ‘not been understood by stakeholders’ and because protection of traditional products without reservation of their names ‘can be better achieved at Member State or regional level.’¹³⁰ Second, they propose that the ‘criteria and conditions for registration of a name’ should be adapted, devoting particular attention to the notion of tradition.¹³¹

¹²⁰ Art 56, Reg 1151/12 lists all the provisions which will be completed by delegated acts. For the impact of implementing regulations on the TSG legal framework under the previous legislation see *supra* Part IV.C.

¹²¹ See *infra* Para V.B.

¹²² Throughout this paper, the locution ‘EU quality policy’ is used, adopting the terminology employed by the Commission in its Communication on agricultural product quality policy, see n 114 *supra*.

¹²³ Recitals (1)–(6), Regulation 1152/12.

¹²⁴ Recitals (9), Regulation 1152/12.

¹²⁵ Recitals (10), Regulation 1152/12.

¹²⁶ Recitals (13)–(14), Regulation 1152/12.

¹²⁷ Recitals (46)–(50), Regulation 1151/12.

¹²⁸ See recital (34), and also Art 17, Reg 1152/12.

¹²⁹ *ibid*.

¹³⁰ Recital (35), Regulation 1151/12.

¹³¹ Recital (36), Regulation 1151/12.

B Reform of the Legislative Structure for EU Quality Schemes

Regulation 1151/12 introduces a new structure for the legal framework governing EU quality schemes.

Title I (general provisions), Title V (common provisions) and Title VI (procedural and final provisions) of the new legislation are common to all EU quality schemes, establishing a normative backbone which comprises, *inter alia*, the rules governing controls, registrations, amendments, cancellations and definitions. By contrast, Title II, Title III, and Title IV contain the provisions specific to PDO and PGI, TSG and OQT, respectively.

This new legislative architecture consolidates and streamlines the legal framework for EU quality schemes. Nevertheless, the danger of establishing a common rule set for multiple institutes lies in the possibility that some of these provisions may not be well suited to a particular quality scheme, and may produce unintended consequences.

C Registration, Amendments and Cancellation

Under Regulation 1151/12, the rules governing registration, amendments and cancellation are contained in Title V, Articles 48–54, and are common to the PDO, PGI and TSG.

The new provisions do not mark a significant departure from the structure and substance of the rules established by Regulation 509/06; nevertheless, there are a few notable changes. First, applications can be submitted not only by groups but also by a single natural or legal person, provided that ‘the person concerned is the only producer willing to submit an application.’¹³² Second, the national registration phase is regulated in greater detail;¹³³ notably, Member States are explicitly required to establish an appeal procedure.¹³⁴ Third, the time limits imposed at each step of the European registration phase have been tightened, with emphasis placed on timely execution.¹³⁵ Fourth, in dealing with applications, oppositions, amendments and cancellations, the Commission is now assisted by the Agricultural Product Quality Policy Committee and is required to follow the procedures established in Regulation 182/2011.¹³⁶ Fifth, natural or legal persons with a legitimate interest may now submit a request for the cancellation of a TSG to the Commission.¹³⁷ In addition to lack of compliance with the conditions of the specification, the new legislation has added a second cause for cancellation ‘where no product is placed on the market under the traditional speciality guaranteed [...] for at least seven years.’¹³⁸

¹³² Art 49(1)(a), Reg 1151/12.

¹³³ For example, specifying the need to grant electronic access to the relevant documents, highlighting the issues raised by joint-Member States applications; see Articles 49(3), (7), Reg 1151/12.

¹³⁴ Art 49(4), Reg 1151/12. See n 35 *supra*.

¹³⁵ Art 50(1)–(4), 51(1), Reg 1151/12.

¹³⁶ Art 57, Reg 1151/12. See Regulation 182/2011/EU of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, 2011 O.J. L55/13.

¹³⁷ See *supra* Part III.C.

¹³⁸ Art 54(1)(b), Reg 1151/12.

D Subject Matter and Requisites for Protection

Regulation 1151/12 appears to have curtailed the TSG subject matter slightly, as the relevant Annex does not mention certain product categories previously included in the legislation.¹³⁹

Requisites for protection continue to be divided into product and name requirements, yet their substance has been reformed.

a) Product Requisites

Consistently with previous legislation, a product must be (1) of specific character¹⁴⁰ and (2) traditional to qualify for a TSG. Regulation 1152/12, however, has significantly amended the substance of these requisites.

1. Article 3 of Regulation 1151/12 defines 'specific character' as 'the characteristic production attributes which distinguish a product clearly from other similar products of the same category.' This definition is more concise and linear than the quadripartite behemoth present in Regulation 509/06,¹⁴¹ yet it still contains flaws. First, the notion of 'production attribute' is not satisfactorily expounded. *Prima facie*, a literal interpretation would suggest that packaging and reputation cannot bestow specific character. By contrast, it is entirely unclear whether the concept of a 'production attribute' is limited to objective elements of the production process, or whether it also comprises intrinsic product features, environmental factors or the peculiar traits of the individuals involved. Second, analogously to previous legislation, Regulation 1151/12 neglects to provide guidance on the means of ascertaining whether a characteristic 'clearly' distinguishes a product from others in its same category.
2. Despite its slightly different wording, the substance of the product requirement concerning tradition established in Article 18 of Regulation 1151/12 does not differ from that in Regulation 509/06; thus, either the raw materials, production method or processing of the candidate food must be 'traditional.' The new legislation, however, slightly modifies the definition of 'traditional,' establishing that it means 'proven usage on the domestic market for a period that allows transmission between generations; this period is to be at least 30 years.'¹⁴² Notably, the time frame has been extended, and the relevant locus has been changed from 'Community' to 'domestic' market; the latter amendment is particularly welcome, as it places producers based inside and outside the EU on equal footing, soothing potential concerns of incompatibility with TRIPS.¹⁴³

¹³⁹ Compared to Regulation 509/06, soups, broths, ice creams, prepared condiment sauces and sorbets are no longer mentioned. Nevertheless, the exact remit of the TSG subject matter will hinge on the construction of the categories listed in Annex I.

¹⁴⁰ In similar fashion to Regulation 509/06, 'specific character' is not explicitly framed as a product requirement under Regulation 1151/12; nevertheless, a combined analysis of Articles 18(2)(b), 19(1)(b), 26(1) leaves little doubt that products must be of specific character to qualify for a TSG. In line with the past, this matter will be definitively settled by the implementing regulations specifying mandatory elements for a TSG application, as per Art 18(5), Reg 1151/12. See n 45 *supra*.

¹⁴¹ Nevertheless, the definition of 'specific character' in Regulation 1151/12 appears largely inspired by the first two parts of that in Regulation 509/06. See *supra* Part III.D.a).

¹⁴² Art 3(3), Reg 1151/12.

¹⁴³ See *supra* Part III.D.a).

Regrettably, however, Regulation 1151/12 does not address the issue of the minimum number of individuals who must be privy to a recipe for it to be considered ‘traditional.’

Thus, the new legislation simplifies the notion of ‘specific character,’ yet fails to provide sufficient clarity; the new definition is unlikely to discourage applicants from continuing to adduce a vast array of characteristics to substantiate their claims of specific character. By contrast, the definition of ‘traditional’ has been effectively amended, resolving almost all past concerns; nevertheless, providing robust evidence that the production method has remained unaltered becomes even more burdensome than previously due to the expanded time frame.

b) Name Requisites

Article 18(2) of Regulation 1151/12 establishes that for a name to be registrable for a TSG product it must ‘(a) have been traditionally used to refer to the specific product; or (b) identify the traditional character or specific character of the product.’

As in previous legislation, there are two distinct categories of admissible names. The first is moulded on Articles 4(2)(a)–4(3) of Regulation 509/06,¹⁴⁴ yet employs simpler and clearer language. Similarly, the second category closely replicates that established in Articles 4(2)(b)–4(3) of Regulation 509/06, allowing for the registration of names that ‘identify the traditional character or specific character of the product’;¹⁴⁵ the only meaningful novelty is that names expressing the ‘traditional character’ of the product are also admissible for registration. Regrettably, however, this second category continues to suffer from the uncertainties surrounding the notion of ‘specific character.’¹⁴⁶

E Scope of the Protection: The TSG Nomenclature Rule

Regulation 1151/12 significantly reforms the TSG protection regime; amendments are contained in both the rules specifically regulating the TSG scheme (Title III) and in the common provisions (Title V).

a) Title III Reforms

Regulation 1151/12 radically overhauls the two-tier system which characterised the previous TSG legislation. Under the new legislation, registration of a TSG always awards an exclusive right over the submitted product name.¹⁴⁷ Mirroring the previous Tier 2 protection, Regulation 1151/12 specifies that registration of a name is inadmissible if an opposition shows that there is (1) lawful, (2) renowned and (3) economically significant use of the name for ‘similar agricultural products or foodstuffs.’¹⁴⁸ Regrettably, inheriting a pre-existing flaw, the new legislation does not provide precise guidance concerning the construction and appraisal of these grounds for opposition. Nevertheless, there is room for observation. First, the three grounds for opposition are cumulative. Second, element (1) is a legal concept, while (2) and (3) are matters of

¹⁴⁴ See *supra* Part III.D.b).

¹⁴⁵ Art 18(2), Reg 1151/12.

¹⁴⁶ See *supra* Part III.D.b).

¹⁴⁷ Art 24, Reg 1151/12.

¹⁴⁸ Art 21(1)(b), Reg 1151/12.

fact. Consequently, (1) will be the object of a structured and relatively certain legal analysis, whereas (2) and (3) will require an empirical assessment, the metrics of which will have to be determined on a case-by-case basis; inevitably, the adoption of a permissive or a restrictive construction approach will significantly impact these evaluations. Third, Regulation 1151/12 does not provide guidance in determining whether products are ‘similar.’ This omission is problematic and will likely require judicial clarification. Nevertheless, a suitable solution might be to analogically extend to the TSG the judicial doctrines developed for community trademarks (CTM) infringements and relative grounds for refusal,¹⁴⁹ as in both instances, the similarity test aims to prevent consumer confusion.¹⁵⁰

The significance of the inadequate definition of the aforementioned conditions is amplified by Article 18(3) of Regulation 1151/12; under this provision, if an opposition to a TSG registration shows that the submitted name ‘is also used in another Member State or in a third country, in order to distinguish comparable products or products that share an identical or similar name, the decision on registration [. . .] may provide that the name of the traditional speciality guaranteed is to be accompanied by the claim “made following the tradition of” immediately followed by the name of a country or a region thereof.’ Thus, by way of exception, this provision provides applicants with a viable path in the event that their submission encounters a valid opposition;¹⁵¹ however, the protected trade denomination will comprise the name of the product accompanied by a specification of the geographic origin of the traditional recipe. Looking beyond the easily remediable deficiency of Article 18(3) in relation to traditional products unrelated to a locale,¹⁵² the protection regime established by this provision bears a notable resemblance to that of the previous Tier 1, as it awards an exclusive right over a combination of trade signs, without precluding the use of the product name when employed on its own. Consequently, despite the intention expressed in the recitals, the new legislation still contains a bifurcation in the protection regime awarded to TSG products.

Regulation 1151/12 also broadens the scope of the exclusive right awarded by the TSG scheme. Under Article 24, ‘registered names shall be protected against any misuse, imitation or evocation, or against any other practice liable to mislead the consumer.’ Thus, in contrast to previous legislation, registered names are protected not only against confusion and imitation but also against ‘misuse’ and ‘evocation.’ Though definitions of these terms are not provided, it is likely that the doctrines developed by the CJEU for PDO and PGI will be extended to the TSG by way of analogy.¹⁵³

b) Title V Reforms

The scope of protection of the TSG is also affected by norms found among the common provisions in Title V. Article 41 of Regulation 1151/12 establishes that ‘this

¹⁴⁹ See Case C-39/97, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*, formerly Pathé Communications Corporation [1998] ECR I-5507, at 28.

¹⁵⁰ See Art 17(1), Reg 509/06 and Articles 8, 9, Council Regulation 207/2009/EC on the Community trade mark, 2009 O.J. L 78/1.

¹⁵¹ The application of Art 18(3), Reg 1151/12 will likely be clarified in greater detail in the implementing and delegated measures.

¹⁵² Though this issue is likely to be addressed by the implementing and delegated measures, Art 26(1), Reg 1151/12 already includes a solution to this issue. See *infra* Part VI.H.

¹⁵³ See R. Knaak, n 107 *supra*.

Regulation shall not affect the use of terms that are generic in the Union, even if the generic term is part of a name that is protected under a quality scheme.’ Diverging from previous legislation, this provision precludes enforcing the exclusive right awarded by the TSG scheme against products bearing a generic denomination.¹⁵⁴ Thus, registration of a generic name or its inclusion in a TSG continues to be admissible under Regulation 1152/12,¹⁵⁵ yet the only residual benefit for right holders will be the ability to differentiate their product by labelling it with the TSG indication and symbol.

Article 42 contains an analogous rule, for names of plant varieties and animal breeds, establishing that ‘this Regulation shall not prevent the placing on the market of products the labelling of which includes a name or term protected or reserved under a quality scheme described in . . . Title III . . . that contains or comprises the name of a plant variety or animal breed.’¹⁵⁶

The potential implications of Articles 41–42 are not easy to predict, yet should not be underestimated. A cursory glance at past TSG registrations reveals that numerous protected denominations either include plant or animal names, or give rise to questions concerning their generic nature.

F Interactions between the TSG and the PDO, PGI and Other IP Rights

Article 43 of Regulation 1151/12 reproduces Article 5(1) of Regulation 509/06 almost verbatim, confirming the subordination of the TSG to the PDO, PGI and other IP rights. Unfortunately, it also leaves unresolved the doubts concerning whether a TSG constitutes an opposable ‘earlier right.’¹⁵⁷

Notably, contrary to Regulation 509/06,¹⁵⁸ TSG and PDO, PGI requisites for protection are not mutually exclusive under Regulation 1151/12. Thus, in principle, there is no impediment preventing a product with a link to a particular locale from being recognised as being of ‘specific character’ and ‘traditional,’ as defined in the new legislation.

G Official Controls

Under Regulation 1151/12, the rules governing controls are contained in Title V, Articles 35–40 and are common to the PDO, PGI and TSG.

Member States are required to designate impartial and objective national authorities responsible for carrying out official controls, involving two distinct activities ‘(1) verification that a product complies with the corresponding product specification; and (2) monitoring of the use of registered names to describe products placed on the market . . . in conformity with Article 24.’¹⁵⁹

¹⁵⁴ The notion of ‘generic terms’ is defined in Art 3(6), Reg 1151/12. For the rules governing the assessment of whether a name is generic see Art 41(2), Reg 1151/12.

¹⁵⁵ Consistently with Regulation 509/06, see *supra* Part III.D.b).

¹⁵⁶ However, the provision further mandates that the following conditions must be met: ‘a) the product in question comprises or is derived from the variety or breed indicated; b) consumers are not misled; c) the usage of the name of the variety or breed name constitutes fair competition; d) the usage does not exploit the reputation of the protected term.’

¹⁵⁷ See *supra* Part III.F.

¹⁵⁸ *ibid.*

¹⁵⁹ Art 35(3), Reg 1151/12.

The former is consistent with previous legislation, and the relevant provisions closely mirror those in Regulation 509/06.¹⁶⁰ The second category of controls, however, constitutes a significant reform, as Member States are now under an obligation to ensure that registered TSG names are not infringed.¹⁶¹

A further novelty mandates that Member States submit plans and reports of their control activities to the EU on a yearly basis.¹⁶²

H Transitional Provisions

The significant reforms to the TSG scheme inevitably shape the transitional rules contained in Regulation 1151/12.

Under Article 25(1), TSGs registered under the previous Tier 2 protection will ‘be automatically entered in the register referred to in Article 22 of this Regulation.’ By contrast, those registered under Tier 1 may only continue to be used pursuant to the provisions in Regulation 509/06 until 4 January 2023.

Article 26 establishes a ‘simplified procedure’ to salvage TSGs previously registered under Tier 1 beyond 2023. A new application needs to be submitted and must pass muster at both national and European level, satisfying the conditions set by the new legislation. In this ambit, Article 26(1) establishes a rule closely matching that in Article 18(3), providing that if an opposition shows that the name submitted for registration is ‘used in reference to comparable products or products that share an identical or similar name, the name may be complemented by a term identifying its traditional or specific character.’¹⁶³

This simplified procedure will likely provide useful indications as to the precise differences between Regulation 509/06 and Regulation 1151/12, as past TSG products will have to be considered anew through the lenses of the new legislation. It will be interesting to monitor how many TSG Tier 1 right holders will elect to apply to renew their certification. Similarly, it remains to be seen whether the reformed TSG requisites for protection will result in the rejection of any resubmission and, if so, on which grounds.

VII The Effects of Regulation 1151/12 on the Previous Weaknesses of the TSG Scheme

The extent to which Regulation 1151/12 has addressed the three fundamental flaws which previously rendered the TSG scheme unpalatable to producers is questionable. While certain issues have been resolved, others persist.

A The Rules Governing Those Who Can Exploit a TSG and Its Place of Production Remain Unchanged

The rules governing those who can exploit a TSG and its place of production have been left untouched by Regulation 1151/12. Both the recitals and the enacting terms explicitly restate that any producer conforming to the relevant product specification is

¹⁶⁰ Art 37, Reg 1151/12.

¹⁶¹ Art 38, Reg 1151/12.

¹⁶² Art 40, Reg 1151/12.

¹⁶³ The difference between the rules in Articles 18(3) and 26(1) is worthy of note.

allowed to market his product under the registered TSG denomination, regardless of location and personal traits.¹⁶⁴ Accordingly, as under Regulation 509/06, producers considering registering a product as a TSG will continue to face the undesirable prospect of attracting an unlimited number of competitors and delocalising their traditional recipe. This issue thus remains unresolved.

B The New Protection Regime

Regulation 1151/12 explicitly set out to improve the pre-existing TSG protection regime; its results, however, are mixed.

First, in principle, the elimination of the two-tier protection system is a welcome reform, as it simplifies the TSG and brings it in line with the other EU quality schemes. Nevertheless, the regime established by the new legislation is less than perfect. The rules contained in Regulation 1151/12 closely reproduce those which governed Tier 2 in the previous legislation; thus, if past practice is to be seen as indicative, obtaining a TSG will be extremely challenging due to the relative ease with which registration of a name can be opposed. Concurrently, though presumably intended as a path to evade opposition, the option provided by Article 18(3) is unlikely to appeal to producers, as it merely awards an exclusive right over a feeble trade sign.¹⁶⁵

Second, the expansion of the scope of the right granted by the TSG to also protect against the 'imitation' and 'evocation' of registered names will present interested producers with a welcome change. Notably, however, this regime is still not as broad as that awarded to PDO and PGI.¹⁶⁶

While the reforms introduced by Regulation 1151/12 are ameliorative of the previous legislation, it is by no means certain that the new protection regime will yield significant changes in the general attitude of producers towards the TSG. In this context, it continues to be extremely likely that parties seeking to protect their products under EU quality schemes will first consider other options. Notably, under Regulation 1151/12, this dynamic might be exacerbated even further, as the new protection requisites for the PGI scheme require a looser link between place and product than that previously necessary under Regulation 510/06.¹⁶⁷

C Definitions and Protection Requisites Continue to Present Challenges

Despite notable improvements, Regulation 1152/12 is not entirely successful in dispelling all the legal uncertainties vitiating the TSG scheme.

The rules governing protection requirements and registrable names have been clarified and refined. Equally, applicants will welcome the rules enacted to shorten the duration of the registration process. Nevertheless, the notion of 'specific character' continues to be shrouded in a veil of uncertainty. Similarly, Regulation 1151/12 fails to provide sorely needed guidance to assess the grounds of opposition concerning

¹⁶⁴ See recital (39) and Art 23, Reg 1151/12.

¹⁶⁵ See *supra* Part VI.E.a).

¹⁶⁶ See *supra* Part V.b).

¹⁶⁷ For a detailed discussion, see G. Evans, 'The Simplification of European Legislation for the Protection of Geographical Indications: The Proposed Regulation on Agricultural Product Quality Schemes', (2012) 34 *European Intellectual Property Review* 770.

'lawful, renowned and economically significant' previous use of a name submitted for registration.

As under Regulation 509/06, significant uncertainty hinders several crucial elements of the TSG scheme; thus, the approach adopted towards these lacunae is crucial. In the past, the Commission compensated for legislative obscurity by construing TSG protection requirements generously and showing lenience in accepting imperfect applications. This approach, however, now appears to be irreconcilable with the declared objective of increasing the credibility of EU quality schemes in the eyes of consumers through the rigorous application of the relevant provisions and the imposition of stringent controls.

D Registration of the Same Product under Multiple Quality Schemes: A Silver Lining?

Although it fails to dismiss the pre-existing weaknesses of the TSG in an entirely convincing manner, the new legislative framework might contain one reform capable of turning the fortunes of this scheme.

Regulation 1152/12 does not expressly or implicitly preclude the registration of the same product under multiple EU quality schemes. It is unclear whether this is an intended change, as there is no mention of this matter in the recitals or in the preparatory works.

If one were to hypothesise that registration under more than one quality scheme were admissible, producers who have already registered their product under either the PDO or PGI scheme might consider additionally obtaining a TSG worthwhile. Admittedly, this course of action would not provide stronger protection, as that awarded by PDO and PGI is broader. However, from a communication and marketing perspective, it would allow producers to further differentiate their product in the marketplace, expressing that it is characterised by both a link to a *milieu* and a traditional method of production or recipe.

Nevertheless, one quibble may be noted against the concurrent registration of a product under multiple EU quality schemes. As previously mentioned, both the recitals and the enacting terms of Regulation 1151/12 state that names registered as a TSG may be used by any operator marketing a product that conforms to the corresponding specification.¹⁶⁸ The combined effect of the PDO or PGI and TSG schemes would effectively negate this rule, as producers unrelated to the geographic area associated with the relevant PDO or PGI would be precluded from using a TSG registered denomination.

It is to be hoped that the Commission will definitively resolve the critical question of whether EU quality schemes are mutually exclusive in the forthcoming implementing and delegated acts, as this issue carries significant implications.

VIII The Legal Function and Nature of the TSG

The comparative analysis of the past and present legislation governing the TSG scheme conducted thus far provides a secure foothold from which to present observations on the legal function and nature of this institute.

¹⁶⁸ See *supra* Part VII.A.

A *The Essence of the TSG*

The TSG is a singular regulatory scheme, at the heart of which lie three elements.

First, the TSG is a registered right. Registration is the constitutive moment of protection; moreover, such publicity is integral to this institute, as it allows for ready access to the information contained in the product specification, to the advantage of both consumers and producers.

Second, this quality scheme awards a collective exclusive right to use specific trade signs. This right is accessible to all producers willing to conform to a relevant product specification: it cannot be appropriated by a single person nor can it be assigned or licensed. This is the syllogistic conclusion flowing from the premise that traditional foods are the fruit of the labour of multiple individuals over a period of time.

Third, the TSG is informed by a particular dualism between private and public law.¹⁶⁹ The former is expressed in the rules and principles regulating those who may obtain and exploit a TSG and the associated exclusive right. The public law soul of this institute is manifested in the permeating control attributed to both Member States and EU institutions over several crucial elements of the TSG. Applications, objections and amendments are always subject to preliminary approval on grounds of both form and merit by the relevant Member State(s).¹⁷⁰ This influence persists even after a TSG has been granted, as compliance with the registered specification is monitored either by public authorities or by private entities under Member State supervision.¹⁷¹ Crucially, following the enactment of Regulation 1151/12, the protection of these distinctive trade signs is regulated as a matter of public interest, as Member States are under an obligation to police the use of TSG names and must take action to enforce them.¹⁷² Finally, though not strictly a point of law, both Member States and EU institutions actively promote all quality schemes, TSG included.¹⁷³

B *The Legal Function of the TSG and Its Relation to the Objectives of the EU Quality Policy*

The legal function of the TSG is to certify that a particular agricultural product objectively possesses specific characteristics which differentiate it from all others in its category, and that its raw materials, composition or method of production have been consistent for a minimum of 30 years. Thus, TSG food denominations are registered trade signs with a distinctive function.

This quality scheme is conducive to the creation of Union food standards based on tradition and specific character, and open to all producers willing to abide by them; it establishes a legal instrument to preserve Member States' gastronomic heritage and

¹⁶⁹ For similar considerations in relation to IGOs, see A.F. Ribeiro de Almeida, 'Key Differences between Trade Marks and Geographical Indications', (2009) 31 *European Intellectual Property Review* 410; D. Marie-Vivien, 'The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India', (2010) 11 *Journal of World Intellectual Property* 121.

¹⁷⁰ See *supra* Part VI.C.

¹⁷¹ See *supra* Part VI.G.

¹⁷² *ibid.*

¹⁷³ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe, COM(2012) 148 final.

foster European food champions. In this respect, *mutatis mutandis*, the TSG bears a not-so-distant resemblance to Community recipe laws.¹⁷⁴

While the TSG seems attuned to some of the objectives pursued by EU quality policy, it seems misaligned to others.

On one hand, this quality scheme realises two of the declared aims of the relevant legislation: it provides producers with an instrument with which to communicate product information to the public and concurrently increases the amount of information available to consumers. However, even assuming that the target market recognises and appreciates the meaning of the TSG food names and indications,¹⁷⁵ the scheme does not provide a wealth of information. A TSG merely certifies that a food is traditional, has specific features recognised by the EU, and is monitored for compliance; consumers are not made aware of the characteristics which grant the product its specific character or constitute its traditional elements.

On the other hand, there appears to be an asynchrony between the TSG and several of the objectives underlying the EU quality policy.

First, the rules governing those eligible to apply for and exploit a TSG are at odds with the aim of favouring small-scale producers.¹⁷⁶ On the contrary, the identity and features of the production source of the foodstuff in question are entirely immaterial to the registration of a TSG. There are neither restrictions nor incentives based on the identity of the applicants; equally, the only requirement for exploitation of a TSG is that the product bearing the protected signs be compliant with the registered specifications. Therefore, even in a hypothetical scenario in which the group registering a TSG comprises only small-scale producers, this would be a legally insignificant factual element, subject to change at any time. No legal safeguards prevent large food conglomerates from flocking to a commercially successful TSG and pricing out incumbent small producers.

Second, the provisions concerning the place of production of a TSG product are irreconcilable with the declared intention of favouring the rural economy in remote or less-favoured areas. The area of origin and place of production of the product are wholly irrelevant in the registration and exploitation of a TSG. Accordingly, a protected product can be simultaneously produced at separate locations, and there are no prohibitions against a change in production site. Thus, rather than favouring underdeveloped agricultural areas, it is all but inevitable that competition will lead to the delocalisation of the production of TSG products to more economically developed regions. Moreover, these rules allow for a TSG product bearing a name including a geographic term (eg Traditionally Farmed Gloucestershire Old Spots Pork) to be produced anywhere in the world, an antinomy likely to raise consumer confusion concerns.

Third, the TSG scheme does not promote agricultural diversity. It codifies traditional recipes, makes them publicly accessible to all producers and thus incentivises

¹⁷⁴ See n 12 *supra*.

¹⁷⁵ On consumer perception of quality labels, see G.A. Akerlof, 'The Market for Lemons: Quality, Uncertainty, and the Market Mechanism', (1970) 84 *The Quarterly Journal of Economics* 488; M.V. Thakor and A. Lavack, 'Effect of Perceived Brand Origin Associations on Consumer Perceptions of Quality', (2003) 12 *Journal of Product & Brand Management* 394.

¹⁷⁶ Regulations 509/06 and 1151/12 mention 'improving income of farmers' without explicitly specifying small-scale producers; see *supra* Parts II.B, V.A. Nevertheless, this policy objective is clearly expressed in several Commission documents detailing the aims of the CAP; see n 114, 115, 116 *supra*. See M. Cardwell, *The European Model of Agriculture* (OUP, 2004) 24–30, 74–82 for a historical analysis of this issue.

their adoption. Such an instrument inevitably favours consolidation, attracting producers to TSG recipes rather than encouraging them to pursue diversification and innovation.

C The Legal Nature of the TSG and Its Classification as Intellectual Property

Establishing whether the TSG scheme can be classified as intellectual property is not a scholastic exercise. On the contrary, this point of law carries significant implications: first, it dictates whether this institute falls within the general rules and principles applicable to intellectual property rights in the EU legal order; second, it determines whether the TSG scheme must comply with the provisions of TRIPS and other international intellectual property agreements.

In the past, the Commission has held that, unlike the PDO and PGI, the TSG is not an intellectual property right, as its purpose was to 'lay down a [traditional] method of production' open to any producer.¹⁷⁷ Though little substantiation was provided, it appears that the Commission based this distinction on the marked difference between the legal function of the PDO and PGI and the TSG.¹⁷⁸

More recently, it has been submitted that 'the TSG designation cannot, in any meaningful sense, be viewed as an intellectual property right,' as it is not included among the list of intellectual property rights in the Paris Convention or TRIPS.¹⁷⁹

Neither thesis is entirely convincing, as both appear to misconstrue the rationale underlying the classification of IGOs as intellectual property.

First, commentators concur that the lists provided in Article 1 of the Paris Convention, Article 1(2) TRIPS, Article 2(viii) of the convention establishing the World Intellectual Property Organization and others are exemplificative and exhaustive. Indeed, a historical analysis of international sources reveals that intellectual property is an open category the subject matter of which has been expanding over the course of the centuries. Thus, the fact that traditional food denominations are not mentioned in the aforementioned international agreements is not decisive with regard to the classification of the TSG as intellectual property.

Second, the prevailing view is that IGOs have historically¹⁸⁰ been classified as intellectual property rights by virtue of their legal architecture and not because of

¹⁷⁷ See European Commission report, n 24 *supra*, at 15. Regulation 1151/12 appears to embrace this classification, as the provisions regulating the PDO and the PGI contain references to intellectual property (eg Art 4), while those governing the TSG do not.

¹⁷⁸ See *supra* Part II.

¹⁷⁹ See J. Mellor *et al.*, *Kerly's Law of Trade Marks and Trade Names*, (Sweet & Maxwell, 15th edn, 2013, first supplement), para.11-005, n 20.

¹⁸⁰ For a detailed account, see S.P. Ladas, *Patents, Trademarks and Related Rights, National and International Protection* (Harvard University Press, 1975), Vol.III, at 1572–1575; J. Audier, 'Pour une qualification juridique internationale de l'appellation d'origine' (2008) *Bulletin O.I.V.* 85. In the EU legal framework, Art 4(b), Reg 1151/12 explicitly qualifies PDO and PGI as intellectual property; this is also the case in Council Regulation 1383/2003/EC concerning customs actions against goods suspected of infringing certain intellectual property rights, 2003 O.J. L 196/7. Coextensively, the CJEU has repeatedly held that the PDO and PGI are intellectual property rights; see Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* [2003] ECR I-5121 at 64; Case C-3/91, *Exportur SA v LOR SA* [1992] ECR I-5529 at 28.

their legal function.¹⁸¹ The rationale for classifying IGOs as intellectual property is that they share a common core with the archetypical intellectual property rights (trademarks, in particular), as they award an exclusive right over an immaterial good¹⁸² (a trade sign).

The TSG scheme awards a collective exclusive right to use a registered trade sign; in this respect, its legal architecture is fundamentally identical to that of the PDO and PGI. Indeed, the commonalities of these institutes are now explicitly recognised by Regulation 1151/12.¹⁸³ Thus, provided that the aforementioned thesis is accepted as the basis for the classification of IGOs as intellectual property, there is no reason why the TSG scheme should not be equally considered a form of intellectual property by way of analogy. Differences in subject matter and legal function are immaterial in the ambit of this classification, as evidenced by a comparison between copyright, trade marks, patents and design rights.

IX Concluding Remarks

European gastronomic tradition is a valuable cultural and economic resource, the preservation and valorisation of which can yield benefits for producers, consumers and remote rural areas. The EU elected to introduce the TSG to foster and support these interests; disappointingly, over the past two decades, the scheme has been unable to achieve its ambitious aims.

This paper has documented the limited success of the TSG scheme in the past, suggesting that this was primarily due to three structural flaws which rendered it an unpalatable proposition for producers: thorny rules governing those who can exploit a TSG and its place of production, a problematic scope of protection and unclear norms.

Recently, the EU has enacted Regulation 1151/12 reforming this area of the law. The legislative structure of the framework governing quality schemes has been re-engineered, and the TSG scheme has been subject to significant amendments. The new legislation attempts to address the weaknesses previously fettering this institute, yet the results are mixed.

¹⁸¹ The legal categorisation of IGOs has been the object of a limited yet sophisticated body of scholarship. The prevailing view classifies these institutes as intellectual property: see M. Plaisant and F. Jacq, *Traité des noms et appellations d'origine*, (Librairie Arthur Rousseau, 1921), at 40–54; J.-M. Auby and R. Plaisant, *Le droit des appellations d'origine, l'appellation d'origine Cognac* (LiTec, 1974), at 67–76; J. Audier, 'De la nature juridique de l'appellation d'origine' (1993) *Bulletin O.I.V.* 21; M.C. Piatti, 'L'appellation d'origine (essai de qualification)' (1999) *Revue trimestrielle de droit commercial* 567; N. Olzsak, n 19 *supra*, at 240–263; L. Bently and B. Sherman, n 7 *supra*, at 975–976; J. Audier, 'Passé, présent et avenir des appel vers la globalisation?' (2008) *Bulletin O.I.V.* 417, 425–427; A.F. Ribeiro de Almeida, n 74 *supra*, at 406–411. However, this thesis is opposed by several commentators: S. Visse-Causse, *L'appellation d'origine: valorisation du terroir* (A.D.E.F., 2005), at 207–208; S. Stern, 'Are GIs IP?', (2007) 29 *European Intellectual Property Review* 39; A. Jokuti, 'Where is the What if the What is in Why? A Rough Guide to the Maze of Geographical Indications', (2009) 31 *European Intellectual Property Review* 118, 122–123; C. Le Goffic, *La protections des indications géographiques* (Litec, 2010), at 233–263.

¹⁸² For the original formulation of the *Immaterialgüterrechte* category, see J. Kohler, *Das Autorrecht: eine zivilistische Abhandlung* (Fischer, 1880); for an analysis of its evolution see A. Troller, *Immaterialgüterrecht* (Helbing & Lichtenhahn, 1983).

¹⁸³ See *supra* Part VI.A.

The protection regime of the TSG has been simplified, and the scope of the exclusive right granted upon registration has been expanded to further entice potential applicants; concurrently, the rules governing several cardinal elements of the scheme have been recast to increase clarity and simplicity. Though these ameliorations are welcome, several concerns remain. The new protection regime still contains an unwelcome bifurcation the exact contours of which are hazy, the definition of 'specific character' is not exhaustive, grounds for opposition to registration of a name are not sufficiently precise, and the issue of whether products can be registered under both the PDO or PGI and the TSG appears unsettled. It is to be hoped that the Commission will bring clarity to these issues with its implementing and delegated acts. The possible implications of the amendments to the requisites of protection of the PGI also present cause for concern.

Above all, Regulation 1152/12 does not appear to achieve harmony between incentives provided to encourage incumbent producers of traditional foods to apply for a TSG and the rules which allow newcomers to exploit registered names. Such lack of equilibrium is cause for significant disquiet, as it places the success of the entire TSG scheme in jeopardy.

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