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Consumer protection and safeguards: proper information on the geographical origin of ingredients. The case of olive oils¹

1. Background

Our society's economic and cultural development and the development of markets has led the public to engage in the environmental issues and to seek foods of quality that also have certain particular characteristics. It is thus not enough for the food we eat to be merely a generic produce. The plentiful information on the market and our easy access to it today, have brought about a collective awareness in consumers who are willing, through higher retail prices, to reward economic operators able to supply us foods with high standards of quality achieved, for example, by farming methods that respect the environment, workers' rights, traditional techniques or age-old customs of regions where particular production processes are employed.

This is the reality of markets that has not gone unnoticed by EU and regional legislators. See, for example, recital 1 of Regulation (EU) No 1151/2012 of

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the European Parliament and of the Council, stating that “Citizens and consumers in the Union increasingly demand quality as well as traditional products. They are also concerned to maintain the diversity of the agricultural production in the Union. This generates a demand for agricultural products or foodstuffs with identifiable specific characteristics, in particular those linked to their geographical origin.”²

In these circumstances it is understandable that in the EU and also at the national and regional level a plethora of standards should have emerged, with different perspectives and differing purposes, to regulate this significant area, creating a range of distinctive signs that ensure market visibility to goods produced in ways that respect the values mentioned above.³ Examples would be the use of protected geographical names, labels for organic produce, details of carbon or water footprints, etc. Here we should also mention the public initiatives to be found in almost any part of our country aimed at identifying, highlighting and promoting local foodstuffs or those with short supply chains and with characteristics normally rooted in a particular territory. Such is the case, for example, of the *Degusta Jaén* or *Sabor a Málaga* schemes promoted by the corresponding provincial councils.

It has thus been this shift in consumer preference towards such particular types of products along with the corresponding market response by economic operators that has displaced the competitive melee to this arena, requiring regulators to focus on it too. Given that consumer choices generally hinge upon such product variables, it follows that competition between producers should also revolve around them, and accordingly should centre on food quality with a view to gaining the public’s favour. Likewise, governments must be vigilant to prevent less scrupulous operators from taking advantage of information asymmetries on the market in such a way as to harm the interests of all those concerned (consumers and competitors).

² This was expressed more succinctly but no less explicitly by recital 3 of the repealed Regulation (EU) No 510/2006 of Council Regulation (EU) No 510/2006, stating that “A constantly increasing number of consumers attach greater importance to the quality of foodstuffs in their diet rather than to quantity.”

³ See V. Di Cataldo (*Denominazioni e indicazioni geografiche tra registrazione comunitaria e protezione nazionale. Made in, IGP e DOP*, “Annali Italiani del Diritto D’Autore della Cultura e dello Spettacolo (AIDA)” 2016, Vol. XXI, pp. 31 ff.) who asserts that “regole nazionali di tutela delle denominazioni e indicazioni geografiche non sono affatto incompatibili con l’architettura comunitaria. Possono convivere perfettamente con essa, così come convivono con essa tutti gli altri titoli nazionali di proprietà industriale” (“national rules on the protection of geographical designations and indications are not incompatible with the EU framework. They can coexist with it perfectly, almost as do all other national industrial property titles”) (p. 46).

Thus if we look closely at any market in foodstuffs and in particular at the olive oil market, we see how competition based on product quality takes the form of continual references on labelling to geographical product origin, for such references are seen as meaningful signs of or pointers to the actual quality of what traders offer.⁴ Given their ability to communicate diverse information in the course of trade which ordinarily appeals to consumers, geographical indications in the promotion of a company's offering reduce the effort for the public in getting to know and remembering products, and also save the company advertising time and expense with the use of such elements in their presentation to convey a message about what its products or services are like.⁵

In order to sort out all the competing interests at play in this tendency in trade and to resolve its inherent tensions, EU legislators have sought to regulate it on the agri-food market by imposing on economic operators a duty to provide material information liable to help consumers behave rationally and efficiently. There is plainly a complex framework of rules intended to offset the information asymmetry on the market with the mandatory disclosure of appropriate, sufficient, clear and accurate details of products on offer. Yet, although the regulatory framework is profuse, the fact is that the measures implemented are, as we see it, inefficient, as there remain spheres in which there is a patent imbalance of information and where opportunistic behaviour can be seen in less scrupulous operators. Perhaps an example of this is the event addressed here: an indication of the geographical origin of a primary ingredient, and in particular of olive oils, in the presentation of a composite product.

2. Indications of geographical origin on the labelling of bottled olive oils

2.1. Overview of the European technical standards on olive oils

The olive oil market does not escape the business trends referred to above and is certainly not immune to these interesting and complex tensions. For as this is the plant oil most widely recognised and appreciated by consumers for its virtues and the health benefits linked to its consumption, it is unsurprising that here too (and indeed often) we find the trade practice

⁴ C. Fernández-Nóvoa, *Fundamentos de derecho de marcas*, Madrid 1984, pp. 23 ff. in relation to expressive trademarks; idem, *Tratado de Derecho de Marcas*, Madrid 2004, pp. 191 ff.

⁵ C. Fernández-Nóvoa, *Fundamentos de derecho...*, pp. 23 ff. regarding expressive brands; idem, *Tratado de Derecho...*, pp. 191 ff.; J.A. Gómez Segade, *La protección constitucional de la marca y de las denominaciones de origen*, "ADI" 1981, Vol. 7, p. 312.

of including a reference on labelling to the geographical origin of packaged products or their ingredients, primary or otherwise, which, moreover, has resulted in not just a few conflicts, firstly between economic operators, as the rules of fair competition have been stretched, and secondly between operators and consumers, as this practice involves a chance to take advantage of the information asymmetry on the market and to mislead consumers as to the product's actual origin and the associated properties, and thirdly between operators and the authorities in the field of agriculture. Many such practices result in penalty proceedings being brought for regulatory infringements.

So in order to avoid advantage being taken of information asymmetries and to properly reconcile the interests underlying the trade practice at issue here, since the late nineties the European Commission has taken an interest in specifically regulating this aspect of the olive oil market by enacting provisions devoted to it when standards have been issued for the sector. Indeed, the Commission has given particular attention to the marketing of olive oils and has adopted special provisions for this market in two general legislative acts. Thus the first legislation adopted by the Commission was its Regulation (EC) No 2815/98 concerning marketing standards for olive oil,⁶ which, despite its title, chiefly concerned the designation of origin of olive oils, establishing a provisional and optional European system in the field. "Optional" in that it allowed operators freedom to use the indications provided for designations of origin of olive oils on the labels attached to packaging; "provisional" in that its period of validity was limited. Indeed, it was initially due to expire at 31 December 2001, though its life was later extended to 30 June 2002 and finally to 31 October of that year. At this point it was superseded by the second legislative act we wish to mention here.

As to this second Community instrument, just before the end of the first extension of the optional system adopted by Regulation 2815/1998, the Commission enacted its Regulation (EC) No 1019/2002 on marketing standards for olive oil.⁷ With a broader scope than that of the previous standards as a result of also including provisions on trade in packaged oil, these rules have endured to the present, albeit in updated and codified form. Specifically this

⁶ Commission Regulation (EC) No 2815/98 of 22 December 1998 concerning marketing standards for olive oil, OJ L 349/56 of 24 December 1998.

⁷ This body of laws has undergone many amendments since it came into effect and its contents appear in the following acts of the Commission: Regulations (EC) No 164/2002 (OJ L 300, 5 November), No 1176/2003 (OJ L 164, 2 July), No 406/2004 (OJ L 67, 5 March), No 1750/2004 (OJ L 312, 9 October), No 1044/2006 (OJ L 187, 8 July), No 632/2008 (OJ L 173, 3 July), No 1183/2008 (OJ L 319, 29 November), No 182/2009 (OJ L 63, 7 March) and No 596/2010 (OJ L 173, 8 July). Some of these provisions had to be complemented with legislative contributions by Member States, as occurred in the Spanish case with Royal Decree No 1431/2003.

latter instrument was asserted to be justified by three defining circumstances of the olive oil market, namely the organoleptic and nutritional qualities of this oil, its high production costs, and its high sale price. See in this regard the Regulation's recital 1, stating that "Olive oil has certain properties, in particular organoleptic and nutritional properties, which, taking into account its production costs, allow it access to a relatively high-price market compared with most other vegetable fats. In view of this market situation, new marketing standards should be laid down..."

Yet much as this act was entitled Regulation on marketing standards for olive oil, we should note that its actual scope was more limited, as it concerned neither all oils coming into that category nor all ways of marketing them. This conclusion follows from a systematic reading of its Article 1 alongside the Annex to Council Regulation No 136/66/EEC on the establishment of a common organisation of the market in oils and fats.⁸ So while Article 1 of Regulation (CE) No 1019/2002 delimited its scope, providing "specific standards for retail-stage marketing of the olive oils and olive-pomace oils referred to in points 1(a) and (b), 3 and 6 of the Annex to Regulation No 136/66/EEC," the Annex of reference sets out the various names and definitions of olive oils and olive-pomace oils.⁹ A systematic reading of the two precepts leads us to this conclusion, for as the objective scope of the vertical standard adopted was delimited, the effects of these vertical rules were restricted to the retail-stage marketing of three categories of oil, namely extra virgin olive oil, virgin olive oil, olive oil – containing solely refined olive oils and virgin olive oils – (hereinafter "olive oil") and olive-pomace oil. Consequently their scope excludes not only retail sales of other expressly prohibited categories of olive oil (inedible virgin olive oils known as *lampante* due to having been traditionally used as fuel in lamps) but also bulk sales between wholesalers (manufacturers, bottlers or distributors) of any type of oil extracted from olives.

With the enactment in 2007 of a new Single CMO Regulation laying down new specific provisions for olive oils and the series of amendments to the marketing standards adopted in 2002, the Commission saw fit to codify these vertical rules "in the interests," it expressly acknowledged, "of clarity and rationality"¹⁰ with the adoption of Implementing Regulation (EU)

⁸ Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats, OJ 172 of 20 September 1966.

⁹ The content of this Annex to Regulation No 136/66/EEC was included in Part VIII of Annex VII of Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (OJ L 347/671 of 20 December 2013), currently in force.

¹⁰ Recital 1 of Implementing Regulation (EU) No 29/2012.

No 29/2012, i.e. the instrument now in force and subject of our analysis. And after determining the scope of these vertical rules as well as how olive oils are to be presented to final consumers and the names under which they may be sold, along with the information to be included for each marketable type of oil, in Articles 4 and 4b the Commission sets out to regulate how geographical origin should be designated for this prized plant oil, as we will discuss below.

2.2. European provisions regarding the geographical origin of olive oils

After describing the scope of these vertical rules as well as how olive oils are to be presented to final consumers and the names under which they may be sold, along with the information to be included for each marketable type of oil, in Articles 4 and 4b the Commission sets out to regulate how geographical origin should be designated for this prized plant oil. A careful reading of these articles warrants a series of critical remarks, as set out below.¹¹

So we should note, firstly, that these provisions have a scope restricted to virgin edible olive oils, as only these, after extraction by mechanical means, conserve physico-chemical and organoleptic characteristics linked to their geographical origin. As to the other categories of edible oils (olive oil and olive-pomace oil), the second point in paragraph 1 simply prohibits the inclusion of geographical information, stating bluntly that such oils “shall not bear any designation of origin on the labelling.” This prohibition is founded on the manufacturing process of these derivative olive oils, including, as is well known, a phase of chemical refining. Hence, as the Commission states in recital 5 of Implementing Regulation (EU) No 29/2012, the inclusion of geographical particulars on the labelling of these two types of oil would be liable to mislead consumers, as it might lead them to believe that these oils have particular physico-chemical and organoleptic characteristics deriving from their origin.¹²

¹¹ The various versions of the provision have been critically appraised by Á. Martínez Gutiérrez, *Sobre las marcas geográficas en el ámbito oleícola. Un apunte crítico*, “ADI” 2011, Vol. 31, pp. 225 ff.; idem, *La designación del origen geográfico en el comercio comunitario de los aceites de oliva. Restricciones especiales impuestas a las marcas*, in: G. Jiménez Sánchez, A. Díaz Moreno (eds.), *Estudios de Derecho del comercio internacional. Homenaje a Juan Manuel Gómez Porrúa*, Madrid 2013, pp. 427 ff.; M. Minelli, *Olive oil*, in: L. Costato, F. Albisinni (eds.), *European Food Law*, Padova 2012, pp. 435 ff.

¹² On this particular point the definitions and penalties provided in Italian law are illuminating, originating from the proposal by the Ispettorato Centrale della Tutela della Qualità

Secondly, we should note the ill-conceived passage in the subparagraph defining designation of origin, stating that this shall be taken to mean “reference to a geographical area on the packaging or the label attached to the packaging.” This is poorly expressed, for various reasons. On one hand, because it omits any reference to the link that should exist between the geographic name on the label and the packaged oils. We may recall in this regard that the horizontal standard defines place of provenance as “any place where a food is indicated to come from that is not the ‘country of origin’ as determined in accordance with [the provisions of the Customs Code]” (Art. 2(2)(g) of Regulation (EU) No 1169/2011). So a reference to a geographic name on a label does not suffice. What is required is an express indication to attribute this provenance to the particular product. And on the other hand, the vertical rule may be faulted in that, in the labelling of foods, as defined in Article 2(2)(j) of Regulation (EC) No 1169/2011, various geographic names may appear without having the function of indicating the geographical provenance of the packaged product. Consider, for example, the postal address of the economic operator responsible for a given product, or the website URL at which it may be bought online. Indeed, Article 2(2)(g) of Regulation (EC) No 1169/2011 defines this labelling indication negatively, stating that “the name, trade name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food.”¹³

e la Repressione Frodi dei prodotti agroalimentari (Central Inspectorate for Quality Safeguards and Fraud Suppression) attached to the Farming, Food and Forestry Ministry. The rule, entitled *Designazione dell'origine* (Designation of Origin), appears in Article 4(2) of Decree No 103 of 23 May 2016 laying down provisions governing penalties for contravening Regulation (EU) No 29/2012 on marketing standards for olive oil and Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (Italian Official Journal No 139 of 16 June 2016), providing that “salvo che il fatto costituisca reato, chiunque, in violazione dell’articolo 4, paragrafo 1, secondo comma, del regolamento (UE) n. 29/2012, utilizza nell’etichetta dell’«olio di oliva – composto da oli di oliva raffinati e da oli di oliva vergini» e dell’«olio di sansa di oliva» e nei documenti commerciali di detti oli, sia preimballati che allo stato sfuso, nonché nella loro presentazione e pubblicità, la designazione dell’origine, anche riportando segni, figure o altro che possono evocare un’origine geografica è soggetto alla sanzione amministrativa pecuniaria del pagamento di una somma da euro 3.500 a euro 18.000” (unless the conduct constitutes an offence, anyone who, in breach of Article 4(1)(2) of Regulation (EU) No 29/2012, uses a designation of origin, including through signs, figures or other references liable to evoke geographical origin, on the labelling of “olive oil composed of refined olive oils and virgin olive oils” and “olive-residue oil” or in the marketing documents for such oils, whether packaged or in bulk, or in their presentation and advertising, shall be liable for an administrative penalty with a fine of €3,500 to €18,000).

¹³ And recital 29 excludes “indications related to the name or address of the food business operator” from the scope of the criteria provided as the basis for specifying a food’s geographical origin.

Thirdly, we should also note the limiting nature of this mandatory system for designating the origin of olive oils, as the various forms of expression are established restrictively. This may be inferred from the adverb “only” included in the first line of paragraph 2, in “Designations of origin referred to in paragraph 1 shall only consist of ...” Thus, far from giving economic operators freedom to decide upon how this mandatory information should be expressed on their labels, the standards offer a set of indications and allow operators merely to select from a list of possibilities the option best describing the provenance of the product actually packaged and marketed.

Specifically, a glance at the various events provided for in the standard shows as many as six ways or forms of designating the origin of edible extra virgin olive oils for retail-stage marketing. Thus in the case of an oil originating from a Member State or a third country, the standard provides that the designation of origin shall consist of a reference to the Member State or to the Union or to the third country. In the case of a blend of olive oils originating from one or more Member States and from a third country, as well as the compulsory indication that this is a blend of oils, the designation of origin is to refer, as appropriate, to the Union in the first case, or to the EU and/or non-EU origin of the oils blended in the second. In the case of olive oils covered by a protected geographic name, the designation of origin is required to be as specified in the particular quality scheme, as provided in the relevant EU Regulation.

Fourthly, given the way that the rule is drafted, we should note that these different formulas for designating the origin of marketable virgin olive oils allow for a degree of accumulation. It is conceivable, provided that the principle of truthfulness is observed, that these indications might appear together on the label of any given oil. We may imagine, for example, combining the name of a Member State, a reference to the European Union, and the name of a protected quality mark. For as a protected geographic name is one of these forms of designating the origin of an olive oil, nothing prevents that name from being accompanied by a reference to the country where the protected area is located, and to the European Union, in the case of Member States. This possibility is expressly acknowledged in Article 12(4) of Regulation (EU) No 1151/2012, in a subparagraph deriving from wine standards, stating that “In addition, the following may also appear on the labelling: [...] text, graphics or symbols referring to the Member State and/or region in which that geographical area of origin is located.”

Fifthly, it is interesting to note that the rules provided in this vertical standard concerning geographical origin also derive from the specificity of the variables on which the designation of origin of virgin olive oils rests, on

laying down provisions concerning the specific geographical link with the product thereby distinguished. So, with an implicit reference to the quality mark standards for determining the geographical linkage of olive oils where their designation of origin involves a protected name, the Commission specifically addresses the variables underpinning this link where the designation of origin involves a reference to a Member State or to the EU. Specifically, the standard at hand requires that the designation of origin should be based on the combined presence of two factual circumstances, namely that the olives should have been grown or harvested and the mill where the oil was extracted should be located in that State or on EU territory respectively.

These are two original variables rooted solely in geography and that depart from the existing rules on quality marks for foodstuffs, as well as from the rules of industrial law, in that geographical origin is not required to have effects on the physico-chemical and organoleptic characteristics of the products distinguished.¹⁴ For in this regard, rather than explicitly requiring such effects, the Commission implicitly assumes that they exist on stating in recital 7 of Regulation (EC) No 1019/2002 that “it should be borne in mind that not only the olives used but also the extraction techniques and practices influence the quality and taste of the oil.”

Hence, if the bond between the two variables is sundered, this circumstance must be clearly stated. This is required by the last point of Article 4(5) of the Regulation, which states that “If the olives have been harvested in a Member State or third country other than that in which the mill where the oil was extracted from the olives is situated, the designation of origin shall contain the following wording: ‘(extra) virgin olive oil obtained in (the Community or the name of the Member State concerned) from olives harvested in (the Community or the name of the Member State or country concerned).’”

Sixthly, and even though information of a distinctly geographical nature may be included, liable to make indications qualify as designations of origin

¹⁴ F. Albinini (*Strumentario di Diritto Alimentare Europeo*, Torino 2015, pp. 299–300) asserts that “L’adozione di questa nuova formula, la designazione d’origine, ha introdotto così nell’acquis communautaire, anche per l’olio di oliva come già in precedenza per la carne bovina, una disciplina di origine da area vasta, che trova la sua ragion d’essere non nelle regole della proprietà industriale e nella logica individuale della singola impresa titolare del marchio, ma in un disegno collettivo, che valorizza l’identità geografica dei prodotti agro-alimentari, in un modo innovativo rispetto alle regole in tema di DOP e di IGP...” (the adoption of this new formula, i.e. designation of origin, has introduced into the EU Acquis, both for olive oil and earlier for beef, wide-area origin rules arising not from industrial property rules and the individual logic of single-firm trade marks but from a collective initiative attaching value to the geographical identity of foodstuffs in a novel way as regards the standards for PDOs and PGIs...).

as defined in the last subparagraph of paragraph 1, paragraph 3 goes on to deny this legal consideration to “names of brands or firms” requested at certain dates, in principle allowing these to elude the obligation to abide by the legal system provided for the designation of origin of olive oils.¹⁵

Seventhly and finally, we should recall that the latest regulatory change affecting this aspect of the marketing of olive oils is to be found in Commission Implementing Regulation (EU) No 1335/2013. Its aim, according to its recital 2, is that “Producers, traders and consumers should be provided with marketing standards for olive oils which guarantee product quality and combat fraud effectively.” And with this aim, the changes made, as concerns us here, have involved the insertion of Article 4b, which provides for the grouping together and homogeneity of the text for the twin reference on the label to the product’s trade name and geographical origin. The purpose is to prevent the reference to the geographical origin of olive oils from going unnoticed by the public, and so to make the market more transparent on this point and thereby to encourage competition on it in marketing.

3. Indication of the geographical origin of olive oils used as primary ingredients

3.1. The issue arising

Implementing Regulation (EU) No 29/2012 devotes special provisions to the designation of geographical origin of olive oils packaged for retail-stage marketing to final consumers or to collective establishments as described therein. In these cases the nature and identity of oils remain intact and these are directly packed in recipients of variable sizes, duly sealed and labelled, on which reference must be made, along with other particulars, to geographical origin. In Spain, this standard presentation has been extended to the hospitality sector (known as HORECA), so that the olive oils made available to consumers in such establishments must not only bear all of this information but also be commercially packaged in sealed containers not liable to be directly or immediately reused by the establishment. In this case the consumer’s experience evidently involves having direct contact with olive oils and the ability to savour their physico-chemical and organoleptic properties either directly or in seasonings of dishes, so that, given that these outlets

¹⁵ On this provision see Á. Martínez Gutiérrez, *Pretendida prohibición de registro o limitación de uso de marcas geográficas en el ámbito oleícola. Una discusión abierta*, “ADI” 2015, Vol. 35, pp. 151 ff.

have considerable influence on consumers, proper labelling is a significant source of consumer information and education in the field.

Alongside this direct consumption we find other uses in which olive oils tend to lose their characteristic nature on being used as ingredients. Examples would be the famed mayonnaises or the many dressings made with olive oils for seasoning other foods such as fish, meats or salads, sometimes including herbs (thyme, rosemary, fennel), bulbs (garlic), fungi (truffles) or vegetable condiments (paprika). As olive oils are part of the composite product's make-up, the public still consumes them, albeit in a more or less processed form. So, in theory it might seem irrelevant to inform the market of the geographical origin of the plant oil used in its preparation, on the packaging of the compound product.

Yet, the reality is otherwise and, as mentioned, the commercial irrelevance of such details is more apparent than real. Because in these cases there is an interest observable in economic operators to point out not so much the place where the composite product was actually made, as the geographical origin of its ingredients and raw materials, so as to infuse the product with their qualities, properties and reputation. For the scarce benefit for the composite product's image to be derived from the site of its industrial manufacture, contrasts with the decisive impact on image of the use of ingredients recognised to have a renowned geographical provenance, and so firms are interested in holding up the latter to the detriment of the site of the facilities where the foodstuff was processed, paving the way for conflicts between economic operators as well as for abuses of information asymmetry with a view to misleading consumers. And as a food may be made in a given place according to a traditional recipe from another place, or by combining ingredients of sundry geographical origins, identifying the geographic origin of the resulting composite foodstuff is a complex task. Here it is not inconceivable that the operator making the composite foodstuff may be tempted to define its geographic origin by applying disparate and contestable criteria, such as the provenance of the primary ingredient, whether protected by a quality mark or not, or the origin of the traditional recipe used in its preparation.

These are situations which our legislators have indeed sought to address with various provisions in horizontal standards, some of which already appeared in the previous harmonisation standard. A first provision traditionally contained in European regulations is that of Articles 9(1)(i) and 26(2) of Regulation (EU) No 1169/2011, of which a systematic interpretation qualifies the mandatory nature of the inclusion of geographical provenance on labelling, requiring it solely and exclusively "where failure to indicate this might mislead the consumer as to the true country of origin or place of prov-

enance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance.”

But the new Regulation has also introduced a twin novelty consisting not just of a distinction between the “country of origin” and “place of provenance” of foodstuffs but also of rules for specifying these two indications. Thus, as to the distinction, EU legislators seek to differentiate them preliminarily on providing a conceptual definition in Article (2)(2)(g) according to which the “place of provenance” is “any place where a food is indicated to come from, and that is not the ‘country of origin.’” As to the rules for specifying the two indications, we may note that, unlike in the previous rules, harmonised parameters are provided as a basis for both indications. Thus whereas the “country of origin” is determined, under Article 2(3) of the Regulation, in line with the provisions on preferential origin in the Community Customs Code, the “place of provenance” is determined in accordance with the comitology process, which is also based on harmonised criteria.

Now, having devoted part of our paper to the issues arising from the use of products covered by protected geographical indications as ingredients,¹⁶ we believe it is worth focusing on this occasion on another event of special significance for olive oils, in which not a few conflictual situations may arise when the geographical origin of composite products containing such oils is to be indicated. So we will now discuss the use of olive oils as primary ingredients of a composite food whose regulation at EU level, dating from 2018, came into full force during the lockdown imposed due to the COVID-19 pandemic in 2020.

3.2. Analysis of the new EU Regulation enacted in the field. A critical assessment

Setting out from the optional rule provided horizontally on references to the geographical origin of foods, Article 26(3) of the horizontal standard provided special rules for the situation at hand, though their efficacy is made subject to subsequent implementing acts adopted by the Commission. Specifically the provision states that, where there is an interest in indicating the country of origin or place of provenance of the composite food and this is not the same as that of its primary ingredient, an indication must be includ-

¹⁶ Á. Martínez Gutiérrez, *Protección de las DOP/IGP e Información al consumidor en la Unión Europea: conflicto abierto*, “ADI” 2019, Vol. 39, pp. 149 ff.

ed either of the “country of origin or place of provenance of the primary ingredient in question,” or, alternatively, an indication as to “the country of origin or place of provenance of the primary ingredient shall be indicated as being different to that of the food,” respectively.

As these special rules were made subject to the adoption of subsequent implementing acts, the Commission had to readdress them in Implementing Regulation (EU) 2018/775 laying down provisions for the implementation of Article 26(3) of Regulation (EU) No 1169/2011 as regards the rules for indicating the country of origin or place of provenance of a food’s primary ingredient, which came into effect on 1 April 2020. This is a legislative act grounded on the wish to enable consumers in these particular cases “to make better informed choices” (recital 10), and to this end it sets out to complement consumer information on the food’s country of origin or place of provenance with specific rules on the geographical origin of its primary ingredients, which must, the Commission says, be “easily visible and clearly legible and where appropriate indelible” (recital 14).

On the basis of the special rule provided in Article 26(3) of Regulation (EU) No 1169/2011 for events in which the origin of the primary ingredient is not the same as that of the composite product, Article 2 of Implementing Regulation (EU) 2018/775 regulates how or according to which rule the geographical origin of the primary ingredient is to be identified and indicated and also sets out the exact wording of the statement to be included on the composite product as an alternative. Let us look at this more closely.

As regards the indication of the origin of the primary ingredient, the Commission offers as many as six different possibilities so that economic operators may opt for the one best suited to the particular circumstances of the product marketed. Specifically the regulation provides all the following:

“The country of origin or the place of provenance of a primary ingredient which is not the same as the given country of origin or the given place of provenance of the food shall be given:

- (a) with reference to one of the following geographical areas:
 - (i) ‘EU,’ ‘non-EU’ or ‘EU and non-EU;’ or
 - (ii) Region, or any other geographical area either within several Member States or within third countries, if defined as such under public international law or well understood by normally informed average consumers; or
 - (iii) FAO fishing area, or sea or freshwater body if defined as such under international law or well understood by normally informed average consumers; or
 - (iv) Member State(s) or third country(ies); or

- (v) Region, or any other geographical area within a Member State or within a third country, which is well understood by normally informed average consumers; or
- (vi) The country of origin or place of provenance in accordance with specific Union provisions applicable for the primary ingredient(s) as such.”

A close reading of the above article and its application to the sphere of olive oils of interest here warrants two critical remarks. On the one hand, we believe that letter (vi) is ill-conceived in that it gives economic operators the option to determine the country of origin or place of provenance “in accordance with specific Union provisions applicable for the primary ingredient(s) as such.” Recital 12 expands on this optionality, stating that “Where a primary ingredient is a food subject to specific Union provisions on the indication of the country of origin or the place of provenance, these provisions could be alternatively used for the purposes of Article 26(3)(a) of Regulation (EU) No 1169/2011.”

Both points may be faulted in that where there are vertical EU rules applicable to the primary ingredient, as is in the case of olive oils, these will necessarily have to be abided by in indications of geographical origin, including where such oils are used as primary ingredients, so a referral to these provisions cannot be optional, left up to each operator. Note here that the recital quoted above says that “these provisions could be alternatively used ...” – a regrettable phrase, we feel, as regards olive oils, as it provides a way of evading the special rules where oils are used as primary ingredients. As an example, we may recall the different legal arrangements in this regard for marketable non-virgin olive oils, when these are packaged directly or appear as primary ingredients of other foods. For whereas in the former case, as we have seen, a designation of geographical origin is not possible, in the latter, with optional application of the vertical rules, nothing seems to prevent operators from using any of the geographical indications provided in Article 2(a) of Implementing Regulation (EU) 2018/775, such as a reference to the EU or a Member State. The same may be said as regards the adoption and use of geographical brands describing the origin of a primary ingredient, with consequences in the sphere of marketable virgin olive oils that are problematic.

Consequently, if the primary ingredient is subject to vertical legal rules, as is the case of olive oils, these must evidently apply to determining how its geographical origin is to be expressed. Such is the view taken by the Commission Notice on the application of the provisions of Article 26(3) of

Regulation (EU) No 1169/2011 (2020/C32/01),¹⁷ stating in relation to the interaction between this implementing act and EU legislation on organic foods that “the provisions of the Regulation on organic foods are to be considered as *lex specialis* and prevail over Article 26(3) of the Regulation. Consequently, whenever the EU organic logo is used, Article 26(3) of the Regulation does not apply.”

Moreover, as a second critical remark, we believe this menu of options to be used for indicating the geographical origin of a primary ingredient is incomplete, omitting a situation common in trade practice and involving some thorny issues. We are referring to the use as a food’s primary ingredient of a product covered by a place-based quality mark. It is odd that the list should omit any express reference to this event, in line with the negative delimitation of its scope contained in Article 1(2): “This Regulation shall not apply to geographical indications protected under Regulation (EU) No 1151/2012, Regulation (EU) No 1308/2013, Regulation (EC) No 110/2008 or Regulation (EU) No 251/2014 or protected pursuant to international agreements [...] pending the adoption of specific rules concerning the application of Article 26(3) to such indications.”

So although we might seek to subsume this point interpretively into letters (v) and (vi) of Article 2, referring respectively to the “Region, or any other geographical area within a Member State or within a third country, which is well understood by normally informed average consumers;” or to the “country of origin or place of provenance in accordance with specific Union provisions applicable for the primary ingredient(s) as such;” the fact is that the provisions of the Commission’s new implementing act do not properly resolve the underlying tension, and so a reference on the food’s labelling to the region or geographical area of the protected primary ingredient could come into conflict with the quality mark’s circle of legitimate users and thereby considerably harm the protected name. Thus, given that they fall quite outside the objective scope of Implementing Regulation (EU) 2018/775, we believe that the reconciliation of the competing interests in this event, pending the adoption of subsequent implementing acts as announced, is to be found in a Communication of the Commission adopted in 2010 with the title Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients.¹⁸

¹⁷ Commission Notice on the application of the provisions of Article 26(3) of Regulation (EU) No 1169/2011 (2020/C32/01), OJ C 32/1 of 31 January 2020.

¹⁸ Commission Communication 2010/C 341/03, OJ C 341 of 16 December 2010.

As to the alternative statement to a geographical indication to be included on the labelling of a composite product for a primary ingredient that has a different provenance, the Commission has opted to indicate the sequence to be used, which must run literally as follows: “(name of the primary ingredient) do/does not originate from (the country of origin or the place of provenance of the food)’ or any similar wording likely to have the same meaning for the consumer.”

Finally, the Commission sets out to regulate how this information is to be presented on the labelling of a composite product, stipulating that the font size shall not be smaller than the general size required under Article 13(2) of Regulation (EU) No 1169/2011, and Article 3(2) and (3) of the Implementing Regulation provide that the information on the ingredient’s geographical origin “shall appear in the same field of vision as the indication of the country of origin or place of provenance of the food.” Moreover, if this indication is given in writing, the characters used for indicating the provenance of the primary ingredient must necessarily have a minimum font size, as paragraph 2 of Article 13 states that the size to be used will be one “which has an x-height of at least 75% of the x-height of the indication of the country of origin or place of provenance of the food.”

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CONSUMER PROTECTION AND SAFEGUARDS: PROPER INFORMATION ON THE GEOGRAPHICAL ORIGIN OF INGREDIENTS. THE CASE OF OLIVE OILS

Summary

Since the nineties of the previous century, qualified geographic names have been covered by a harmonised EU-wide protection system whose main feature is the recognition of exclusive rights. Such rights are generally parallel to those deriving from the registration of a brand. Accordingly, they are not solely protected by the measures provided in the rules on unfair competition but also by a EU protection system based on granting the group of traders that had sought and obtained recognition of the protected designation of origin or geographical indication a monopoly over the use of a given geographic name and the possibility to seek remedy against any unlawful use of it. In this sense, the information provided generally benefits the market as well as merchants and consumers.

Keywords: qualified geographic names, consumer protection, consumer safeguards, olive oils

TUTELA E SALVAGUARDIA DEL CONSUMATORE: UNA CORRETTA INFORMAZIONE SULLA PROVENIENZA GEOGRAFICA DEGLI INGREDIENTI. IL CASO DELL'OLIO D'OLIVA

Riassunto

Fin dagli anni novanta del secolo scorso, le indicazioni geografiche qualificate sono incluse in un sistema di protezione armonizzato a livello di UE, la cui caratteristica principale è il riconoscimento dei diritti esclusivi. Tali diritti sono generalmente equivalenti (analoghi) alla registrazione di un marchio. Pertanto, esse sono tutelate non solo dalle misure previste dalla disciplina sulla concorrenza sleale, ma anche da un sistema di tutela comunitario che concede a un raggruppamento di operatori economici, che avevano chiesto e ottenuto la denominazione di origine protetta o l'indicazione geografica protetta, un monopolio per una determinata indicazione geografica e la possibilità di porre rimedio a qualsiasi uso illecito della stessa. In questo senso, le informazioni fornite vanno generalmente a vantaggio del mercato, dei commercianti e dei consumatori.

Parole chiave: indicazioni geografiche qualificate, tutela del consumatore, salvaguardia del consumatore, olio d'oliva