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***Sui generis*, bureaucratic and based on origin: a snapshot of the nature of EU Geographical Indications**

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6.1. Introduction

This contribution will provide a picture of the nature of the EU *sui generis* GI regime. In particular, it will focus on the system for the protection of agricultural products and foodstuffs,¹ falling under the scope of Regulation 1151/2012.² This registration-based mechanism was introduced in 1992,³ as a way to harmonise the national practices of the single EU Member States in the field of protection of Indications of Geographical Origin (IGO).⁴ Since then, it has become an internationally influential model.

This system features two main quality schemes, the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI) and a residual one, the Traditional Speciality Guaranteed, which we will not cover here.⁵ Art 5(1) Regulation 1151/2012 defines PDO as follows:

(...) ‘designation of origin’ is a name which identifies a product:
(a) originating in a specific place, region or, in exceptional cases, a country;
(b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and
(c) the production steps of which all take place in the defined geographical area.

It is easy to recognise in this provision the paradigm of Appellation of Origin (AO) as defined by the Lisbon Agreement.⁶

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¹ The body of EU *sui generis* GI Law protects also wines, spirits and fortified wines, see: (i) Council Regulation (EC) No. 491/2009 of 25 May 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products; (ii) Regulation EU No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products; (iii) Regulation 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks deals with the use of geographical names for spirits.

For a complete overview, see Michael Blakeney, *The Protection of Geographical Indications: Law and Practice* (2nd edition, Edward Elgar 2019).

² Regulation (EU) 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L343/1 (Regulation 1151/2012). This replaced Regulation 510/2006 that, in turn, repealed Regulation 2081/1992.

³ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ L208/1.

⁴ See, *ibid* Recitals 6 and 7.

⁵ For more information of TSGs, see Andrea Tosato, ‘The Protection of Traditional Foods in the EU: Traditional Specialities Guaranteed’ (2013) 19 *European Law Journal* 545. See also, Andrea Zappalaglio, ‘The Puzzle of Reputation in EU Protected Geographical Indications: Can Traditional Specialities Guaranteed Provide a Solution?’ (2018) <<https://ssrn.com/abstract=3226011>>. Last accessed 10 February 2021.

⁶ ‘In this Agreement, “appellation of origin” means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’. Art 2(1) Lisbon

The PGI, instead, is a broader and more flexible quality scheme. It had a complex genesis that will be outlined in the next section. It accommodates both a qualitative link, which basically corresponds to the *terroir* link that characterises the PDO and the AO,⁷ and a reputational link that, as it will be explained below, recalls the legal tradition of the countries that based their mechanism of IGO protection on the need to ensure truth telling on the market place, rather than on *terroir*. Art 5(2) Regulation 1151/2012 defines them as follows:

- (...) ‘geographical indication’ is a name which identifies a product:
- (a) originating in a specific place, region or country;
 - (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and
 - (c) at least one of the production steps of which take place in the defined geographical area.

This contribution will discuss the main features of the EU *sui generis* GI model that characterise it and that set it apart from other approaches to IGO protection. In particular, the work will focus on three main points: (1) the *sui generis* nature of the regime; (2) its bureaucratic functioning; (3) the centrality of the concept of ‘origin’. These characteristics create a complex system, based on collective organisation and management, where producers define, among the other things, the rules for the production process, the boundaries of the area of production and the elements that link the good to a specific place.⁸ Furthermore, because of its nature, this peculiar model is not only meant to contribute to the preservation of the ‘living cultural and gastronomic heritage’ of a given region,⁹ but it has also been chosen to play a role in the new EU plan for an innovative, sustainable and inclusive growth, i.e. the ‘Green Deal’ and, specifically, in the ‘Farm to Fork Strategy’.¹⁰ More specifically, this Intellectual Property Right has been identified by the Commission as a tool to stimulate development in rural regions and to encourage practices that can, at the same time, preserve quality and encourage the introduction of environmental-friendly practices.¹¹ Indeed, some recent contributions have presented GIs as a system in continuous evolution that can be a driver of innovative practices. A particularly important role in this process is played by the amendments that, just like the application itself, are an expression of the collective management of the GI.¹²

Agreement for the Protection of Appellations of Origin and their International Registration (TRT/LISBON/001 (1958), amended for the last time on 28 September 1979). For more information, see WIPO, ‘Objectives and Main Features of the Lisbon Agreement’ (*WIPO*) <<http://www.wipo.int/lisbon/en/general/>>. Last accessed 10 February 2021.

⁷ See, Laurence Bérard and others, ‘Les Facteurs Historiques, Culturels, Économiques et Environnementaux Dans La Délimitation Des Zones IGP’ in Bertil Sylvander, Dominique Barjolle and Filippo Arfini (eds), *The socio-economics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional, and Co-ordination Aspects* (Actes et Communications, 2000) 164-165.

⁸ For more on this aspect, see Sophie Réviron and Jean-Marc Chappuis, ‘Geographical Indications: Collective Organization and Management’ in Elizabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (CABI 2011); Xiomara F Quiñones-Ruiz and others, ‘Why Early Collective Action Pays off: Evidence from Setting Protected Geographical Indications’ (2017) 32 *Renewable Agriculture and Food Systems* 179; Xiomara F Quinones-Ruiz and others, ‘Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications’ (2016) 57 *Land Use Policy* 103.

⁹ Regulation 1151/2012, Recital 1. The preamble of the Regulation presents all the policy goals of the system.

¹⁰ European Commission, ‘Farm to Fork Strategy: For a Fair, Healthy and Environmentally-Friendly Food System’ (2020) <https://ec.europa.eu/food/sites/food/files/safety/docs/f2f_action-plan_2020_strategy-info_en.pdf>. Last accessed 10 February 2021. See also, Flavia Guerrieri, ‘The Farm to Fork Strategy as an External Driver for Change: Possible Impacts on Nested GI Rule Systems’ [2021] *Journal of Intellectual Property Law & Practice*.

¹¹ European Commission, ‘Inception Impact Assessment (Geographical Indications)’ (2020) Ares(2020)7158775-27/11/2020 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12664-Food-drink-EU-geographical-indications-scheme-revision->>. Last accessed 10 February 2021.

¹² For more on the topic of ‘GI and Innovation’ with specific reference to the role of amendments, see Andrea Marescotti and others, ‘Are Protected Geographical Indications Evolving Due to Environmentally Related Justifications? An Analysis of Amendments in the Fruit and Vegetable Sector in the European Union’ (2020)

By applying a mixed historical, comparative and empirical approach, the present research analyses the roots, justification and importance of each of these elements. More specifically, it will focus on the strengths – and weaknesses – of bureaucratic *sui generis* registration-based regimes. Then, it will provide a map of the concepts of ‘origin link’ and ‘locality requirement’ and, on the basis of original data, some of which previously unpublished,¹³ will illustrate two trends that shed some light on the present nature as well as on the future of EU GIs. In particular, it will be shown that, first, as far as the origin link is concerned, the differences between PDO and PGI have blurred, at least to some extent; second, that the history of the product has become an essential element to prove the existence of a link between it and its place of origin, thus surpassing traditional linking factors such as the market reputation of the good.

Before diving deep into the analysis, however, it is expedient to describe the history of the EU *sui generis* GI system in order to understand how and why we have reached the present scenario. This will be done in the next section.

6.2. History

Before the introduction of the unitary EU *sui generis* GI regime in 1992, the systems of IGO protection adopted by European countries were significantly diverse. In particular, on the one hand, a group of countries championed by France and Italy, and other representatives of the European ‘South’, applied a registration-based *sui generis* system. Here, protection was granted at the conclusion of a bureaucratic procedure that ended with an administrative decision allowing for the registration of the product. The most famous models of this kind are the French *Appellation d’Origine Contrôlée* and its Italian equivalent, the *Denominazione di Origine Controllata*. Indeed, as anticipated above, the concept of AO, enshrined into the Lisbon Agreement at international level,¹⁴ is based on them. On the other hand, countries like Germany, the United Kingdom (U.K.), the Netherlands and others, prevalently from ‘Central/Northern’ Europe, did not protect IGOs through a *sui generis* mechanism. Rather, they resorted to the Law of Unfair Competition (or the Law of Passing Off in the U.K.)¹⁵ to protect ‘Indications of Source’ (IS). These are indications – explicitly mentioned in the Paris

12 Sustainability 3571; Xiomara Fernanda Quiñones Ruiz and others, ‘How Are Food Geographical Indications Evolving? – An Analysis of EU GI Amendments’ (2018) 120 *British Food Journal* 1876. See also, Maurizio Crupi, ‘Innovating Within Tradition: Are PDOs and PGIs Loosening Their Link to Origin?’ <<https://ecta.org/ECTA/documents/MaurizioCrupi1stStudentAwardwinner20202148.pdf>>. Last accessed 10 February 2021.

¹³ The work will present some of the findings of two separate analyses of the specifications of all the registered GIs. One was carried out by me alone and another, still unpublished, was conducted by the Max Planck Research Team on Geographical Indications, which I coordinate. I would like to thank the other members of the team: Dr Suelen Carls; Ms Flavia Guerrieri; Mr Alessandro Gocci as well as Prof Annette Kur and Dr Roland Knaak for their priceless advice.

For the analysis of other trends concerning EU GIs, see Andrea Zappalaglio, ‘The Why of Geographical Indications: The Transformation of the Link between the Product and Its Place of Origin in Europe’ (University of Oxford 2018) <<https://ora.ox.ac.uk/objects/uuid:d7124003-81b5-4d7b-8c27-eba29c8a3d24>>, Chapter 3. Last accessed 10 February 2021. See also, Andrea Zappalaglio, *The Transformation of EU Geographical Indications Law: the Present, Past and Future of the Origin Link* (Routledge 2021) Chapter 4.

The quantitative research has been carried out via the DOOR database, that is the former search utility for the specifications of registered agricultural products and foodstuffs. It has now been replaced by the eAmbrosia database (<https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/>). Last accessed 10 February 2021.

¹⁴ See fn 6.

¹⁵ For a discussion on this ‘North/South’ divide, see Dev Gangjee, *Relocating the Law of Geographical Indications* (CUP 2012) 115-123. For an overview of the IGO protection mechanisms in Germany, the Netherlands, the U.K., Sweden and others, see Herman Cohen Jehoram (ed), *Protection of Geographic Denominations of Goods and*

Convention¹⁶ - referring to a country, or to a place in that country, as being the origin of a product. Contrary to AOs, they do not imply any special quality or characteristics of the good on which they are used.¹⁷

These separate legal traditions led to two substantively different approaches, since the AO – quoting the Lisbon Agreement – protects the geographical names of products ‘the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.’ This one-to-one correspondence between the product and the physical characteristics of the place, also known as *terroir*-link,¹⁸ constitutes the basis for the legal protection. Unfair Competition Law, instead, is essentially aimed at preventing ‘any act contrary to honest practices in industrial or commercial matters’¹⁹. In this system, therefore, no registration or other bureaucratic procedure is needed because anyone who misleads the consumers as to the origin of the good, or makes a deceptive use of an IS, commits this tort. Moreover, this approach applies both to direct and indirect IGOs, the first being a geographical name and the second consisting in any symbol, image etc... that implicitly indicates a specific geographical origin, such as the Eiffel Tower for France or the Sphinx for Egypt.

These regimes based on Unfair Competition Law, however, are not concerned with codifying the substantive origin of the product and fixing its specific production method. Indeed, they operate on a formal level, ensuring that a product labelled as ‘made in Germany’ – for instance – effectively comes from there.²⁰ By contrast, in a *sui generis* regime such as AO, the registration occurs at the end of a process where a specification is drafted. This document provides, among other things: (a) the description of the specific area where the product can be lawfully made; (b) the method of production that must be followed and (c) the link between the product and its place of origin that, as said earlier, before 1992 was limited to *terroir*. Hence, this regime does not merely ensure the truthfulness of the indication of source. Rather, it strictly defines the origin product from a substantive perspective.²¹

These different perspectives on IGO protection led to some famous cases where the European Court of Justice (ECJ) accepted only the narrower AO approach and not the central-northern one. The most famous

Services (Sijthoff & Noordhoff 1980). See also, Zappalaglio, ‘The Why of Geographical Indications’ (n 13) Chapter 2.

¹⁶ The term “Indication of Source” is used in Articles 1(2) and 10 of the Paris Convention for the Protection of Industrial Property of 1883 (as amended on 28 September 1979, TRT/PARIS/001) <<https://wipolex.wipo.int/en/text/287556>>. Last accessed 10 February 2021. It is also used throughout the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 (as amended on 28 September 1979, TRT/MADRID-GP/001) <<https://wipolex.wipo.int/en/text/283529>>. Last accessed 10 February 2021.

¹⁷ WIPO, ‘Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization’ (2003) [4]. For more details on the nature and functioning of Indications of Source, see Gangjee *Relocating the Law of Geographical Indications* (n 15) Chapter 2.

¹⁸ *Terroir* is a complex – and sometimes criticized – concept that stands for the milieu created by the interaction between physical and human elements that characterize a specific geographical area, thus determining the distinctive attributes of the product. The literature on this issue is immense. See, among others, Laurence Bérard, ‘Terroir and the Sense of Place’ in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016); Laurence Bérard and Philippe Marchenay, *Les produits de terroir: entre cultures et règlements* (CNRS Editions (Open Edition) 2004); Laurence Bérard and Philippe Marchenay, ‘Lieux, Temps et Preuves: La Construction Sociale Des Produits de Terroir’ (1995) 24 *Terrain*. See also, Gangjee (n 15), 83-92 and Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 13) Chapter 1. For a critique of this concept, see Mark Allen Matthews, *Terroir and Other Myths of Winegrowing* (University of California Press 2015).

¹⁹ Paris Convention, art 10(2)bis.

²⁰ This is what Dev Gangjee defines ‘communicative logic’, see Gangjee (n 15) 116.

²¹ The contents of the specification and of the application file are set forth in Regulation 1151/2012 under arts 7 and 8 respectively.

decision in this regard is *Sekt*.²² Here, the ECJ ruled against the conduct of Germany that in its Wine Act 1971 (*Weingesetz*) restricted the terms '*Sekt*' (sparkling wine) and '*Weinbrand*' (brandy) to wines and spirits produced in a country in the whole of the territory of which German was an official language and the term '*Pradikatssekt*' (choice-*sekt*) to wine made from at least 60 per cent by home-grown grapes. The Commission considered such a provision to be a measure having an effect equivalent to a quantitative restriction, thus breaching art 30 of the Treaty Establishing the European Economic Community (EEC Treaty, currently art 34 TFEU).²³ The Federal Republic of Germany, by contrast, argued that these names deserved protection because, first, the drinks were prepared according to a traditional manufacturing method that distinguished them from all other similar products and, second, opinion polls demonstrated that German consumers considered the appellations '*Sekt*' and '*Weinbrand*' as referring to domestic products only. The ECJ rejected these arguments, however, by ruling that:

(...) the registered designations of origin and indirect indications of origin (...) always describe at the least a product coming from a specific geographical area. (...) These appellations only fulfil their specific purpose if the product which they describe does in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area. As regards indications of origin in particular, the geographical area of origin of a product must confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products.²⁴

This problematic scenario pushed the European Commission to, first, start a reform of the Common Agricultural Policy (CAP)²⁵ and, second, to introduce the abovementioned Regulation 2081/1992. The latter was amended twice²⁶ and a reform process is currently ongoing.²⁷

6.3. A *sui generis* regime for IGO protection

A *sui generis* regime is a system that protects IGOs as such through a specifically designed legal mechanism and not, for instance, via Trade Marks or Unfair Competition Law. Typical examples are the abovementioned French AOC and Italian DOC. Indeed, as anticipated above, in 1958 the former had an impact on the

²² Case 12-74 *Commission v Germany* [1975] ECR 181 (*Sekt*).

²³ The Treaty on the Functioning of the European Union [2012] OJEU C326/47 (TFUE). Moreover, since the measures in dispute were not indispensable in order to protect producers from unfair competition, and consumers from deception regarding the origin of the products, they were not justified under art 36 EEC (currently art 36 TFEU). This article, in fact, provides for an exception to the general principle of the prohibition of quantitative restrictions between Member States in different circumstances, including the need to protect industrial or commercial property, if the protection does not constitute an arbitrary discrimination or a disguised restriction of intra-communitarian trade.

²⁴ *Sekt* (n 22), para 7.

²⁵ For a recount of the history of the EU Common Agricultural Policy, see Zappalaglio, 'The Why of Geographical Indications' (n 13) 98-104. For more information on the present and future of the CAP, see European Commission, 'The Common Agricultural Policy at a Glance' (*European Commission*) <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en>. Last accessed 10 February 2021; European Commission, 'Future of the Common Agricultural Policy' <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap_en#documents>. Last accessed 10 February 2021.

²⁶ The first time with the introduction of Regulation 510/2006 and the second time by Regulation 1151/2012.

²⁷ On 1 June 2018 the European Commission kicked off the discussions on the reform of the EU GI regime by presenting the 'Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands' COM(2018) 394 final. Maybe a sentence on where we currently are?

international legal frame, providing the model for the AO, protected in the Lisbon System through the registration in an international register.²⁸

However, the 1995 Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs),²⁹ that is the international agreement that dictates the minimum standards of IP protection to which every WTO Member must conform, leaves the door open to different approaches. This Treaty deals with GIs under arts 22-24. In particular, the concept of 'Geographical Indication' (GI) is defined under art 22(1) TRIPs in these general terms:

Geographical indications are (...) indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

With regard to the protection of GIs, art 22(2) reads as follows:

(...) Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

This general clause is broad. Indeed, it simply requires a country to protect these geographical names from practices contrary to the duty of truth-telling on the marketplace and, thus, capable of misleading the consumers. The reference to art 10bis of the Paris Convention does nothing but reaffirming this principle. Furthermore, the TRIPs Agreement provides a specific rule, under art 23(1) to grant wines and spirits – only – a higher level of protection even in cases where no confusion or deception may arise. In particular, 'where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like'. The same article also requires WTO Members to engage in discussions aimed at establishing 'a multilateral system of notification and registration of geographical indications for wines'. It is unlikely that such system will ever be implemented, however.

With the minimum level of GI protection mandated by the TRIPs Agreement being quite low – except for the abovementioned protection for wines and spirits – it is not surprising that different countries satisfy this standard in various ways. The United States (US) notoriously reject the idea of a *sui generis* GI regime and protect IGOs through the trade mark system only, considering this approach less bureaucratic, less expensive and more business oriented.³⁰ Indeed, other common law countries apply the same approach.³¹ The EU,

²⁸ All registered AOs can be retrieved via the 'Lisbon Express' database. WIPO, 'Search Appellations of Origin (Lisbon Express)' (*Lisbon: the international system of appellation of origin*) <<http://www.wipo.int/ipdl/en/search/lisbon/search-struct.jsp>>. Last accessed 10 February 2021.

²⁹ WTO, 'Agreement on the Trade-Related Aspects of Intellectual Property Rights' <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf>. Last accessed 10 February 2021.

³⁰ United States Patents and Trademark Office, 'Geographical Indication Protection in the United States' (USPTO) <https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf>. Last accessed 10 February 2021. For a critical comparative analysis of the US and the EU system, see Caroline Le Goffic and Andrea Zappalaglio, 'The Role Played by the US Government in Protecting Geographical Indications' (2017) 98 World Development 35.

³¹ Such as Australia and New Zealand. See, Australian Government, 'Geographical Indications' (*IP Australia*) <<https://www.ipaustralia.gov.au/trade-marks/understanding-trade-marks/types-trade-marks/certification-trade-mark/geographical>>. Last accessed 10 February 2021. See also New Zealand Intellectual Property Office, 'Geographical Indications' <<https://www.iponz.govt.nz/about-ip/geographical-indications/>>. Last accessed 10 February 2021.

instead, as anticipated above, features a *sui generis* system that provides an enhanced protection not only to wines and spirits, as required by the TRIPs, but also to agricultural products and foodstuffs. This approach is contested by US scholars and analysts³² and led to controversies. The most famous is the *EC – Trademarks and Geographical Indications* case, decided on 15 March 2005. Here, among others, the US and Australia successfully argued before the WTO Dispute Settlement Body that the EU *sui generis* GI system was discriminatory against non-EU nationals, thus breaching the principle of National Treatment enshrined at art 3.1 TRIPs.³³

Despite these controversies, a growing number of countries is implementing a *sui generis* ‘EU-style’ approach. Just to make two notable examples, India introduced a GI Act in 1999 – came into force in 2003 – that provides a definition of GI very similar to that of the TRIPs Agreement.³⁴ Contextually, it has introduced a register that currently counts 361 entries, most of which consist in traditional handicrafts.³⁵ The People’s Republic of China (PRC), instead, has a peculiar dual system in place: a trade marks-based and a *sui generis* one, operated by the General Administration of Quality Supervision, Inspection and Quarantine (AQSI) and the Ministry of Agriculture (MOA). The latter system is inspired by the French and European tradition.³⁶

Therefore, the *sui generis* registration-based approach to IGO protection that characterises the EU GI system is a European creation that descends from the legal tradition of the ‘Southern’ countries, such as France and Italy, blended with that of countries such as Germany and the U.K. This approach sets the EU regime apart from the US and, generally speaking, from the traditional common law approach. This model has spread and has been adopted by countries such as India and the PRC. Another feature of the *sui generis* registration-based approach – we could consider it as a natural consequence of it – consists in its bureaucratic nature. This will be discussed in the next section.

³² Justin Hughes, ‘The Limited Promise of Geographical Indications for Farmers in Developing Countries’ in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the crossroads of trade development and culture* (Cambridge University Press 2017); Justin Hughes, ‘Champagne, Feta and Bourbon: The Spirited Debate About Geographical Indications’ (2006) 58 *Hastings Law Journal* 299; K. William Watson, ‘Reign of Terroir: How to Resist Europe’s Efforts to Control Common Food Names as Geographical Indications’ (Cato Institute 2016) Policy analysis no. 787 <<https://www.cato.org/publications/policy-analysis/reign-terroir-how-resist-europes-efforts-control-common-food-names>>. Last accessed 10 February 2021.

³³ Timothy E Josling, ‘The War on Terroir: A Transatlantic Trade Conflict’ (2006) 53 *Journal of Agricultural Economics* 337; WTO, ‘EC – Trademarks and Geographical Indications (Case Summary)’ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds290sum_e.pdf>. Last accessed 10 February 2021.

³⁴ Geographical Indications of goods (registration and protection) Act 1999, No. 48. The definition of GI is provided under art 2(e) that reads as follows: “‘geographical indication’, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin [...]’

³⁵ Intellectual Property India, ‘Geographical Indications Registry’ (*Geographical Indications*) <<http://ipindiaservices.gov.in/GirPublic/>>. Last accessed 10 February 2021.

³⁶ Haizheng Zhang, Didi Hu and Yanhui Li, ‘Protection of Geographical Indications under China’s Intellectual Property Legal Framework’ (2016) 17 *Australian Journal of Asian Law* 1, 2; Haiyan Zheng, ‘A Unique Type of Cocktail: Protection of Geographical Indications in China’ in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the crossroads of trade development and culture* (Cambridge University Press 2017) 388. Moreover, also the Russian Federation has recently reformed its *sui generis* GI Law explicitly taking the EU system as a model, see Andrea Zappalaglio and Evgeniia Mikheeva, ‘The New Russian Law of Geographical Indications: A Critical Assessment’ [2021] *Journal Of Intellectual Property Law and Practice*.

6.4. Bureaucratic nature and public involvement

The functioning of the EU *sui generis* GI regime is based on the involvement of public authorities, both national and European. In particular, Regulation 1151/2012 provides for a two-steps procedure – unusual in the international scenario – in which the application is examined by a national authority first³⁷ and then transmitted to the competent unit of the Directorate General for Agriculture and Rural Development of the EU Commission (DG AGRI).

This procedure has the advantage to leave the first part of the application process, which includes the structuring of the draft specification, to the authority closest to the applicant, rather than to the EU ones. Indeed, the former is arguably in the best position to assess the substantive validity and correctness of the application. It has some disadvantages, nevertheless. While some countries have a complete and articulated set of rules to govern the proceedings,³⁸ others, especially where the interest in GIs is low, dedicate only a limited number of provisions³⁹ or, sometimes, no provision at all, to the implementation of Regulation 1151/2012.⁴⁰ This creates some differences between the position of the applicants in a country rather than in another. Just to mention a few, a comparative analysis of the national practices shows, among others, that: (1) some countries require applicants to submit additional documents not specifically mentioned in Regulation 1151/2012⁴¹; (2) some sets of rules provide a detailed time schedule for the proceedings, thus making it possible to predict the average length of the process while others do not⁴²; and (3) some countries involve in the proceedings a large number of institutions and stakeholders, both public and private, national or local, while in other countries they are absent.⁴³

If the system was organised differently, such complex scenarios would not exist. For instance, in a jurisdiction where IGOs are protected through the Law of Unfair Competition or judge-made mechanisms such as the Law of Passing Off, no lengthy registration procedures involving one or more public institutions would be required. In an IGO protection system based on trade marks, no ad hoc formalities would apply apart from those necessary to register the – collective or certification – mark itself.

Why, then, has the EU opted for this system? The answer lies both in the history and in the theory of the registration-based *sui generis* GI regimes. Indeed, the concept of AO that, as already mentioned above, is the historical antecedent of the current EU GI rules, was introduced when it became evident that only a system that substantively identified the origin of a product could provide the adequate level of protection to the producers. In other words, a bottle of sparkling wine made in Germany but bottled and marketed in the Champagne region is not Champagne wine, because it does not substantially originate from that area, even if it is formally sourced from it. Hence, in a *sui generis* system like the EU one, just like AO, the GI is not an asset with a specific owner, rather it only has ‘users’ or ‘beneficiaries’. Unlike trade marks, the ambitious goal of *sui generis* GIs is becoming the portrait of a situation of fact, that is of the link between a product and a specific place.⁴⁴ Furthermore, a registration-based *sui generis* system has – at least in theory - the ambition

³⁷ This is generally the Ministry of Agriculture or the IP Office / Trademark Office. However, there are various cases of other/*sui generis* institutions in charge of the procedure, the most famous being the French *Institut National de l’Origine et de la Qualité* (INAO).

³⁸ For instance, Italy, France, Spain, Portugal, Greece and Romania.

³⁹ For instance, Ireland and Finland.

⁴⁰ For instance, Malta, Denmark or Sweden.

⁴¹ Among these demanding countries it is possible to mention, for instance, France and Italy.

⁴² For instance, the Italian ministry of Agriculture must comply with a detailed time-schedule while the German Trade Marks Office does not.

⁴³ For instance, Germany and Italy involve in the procedure a variety of stakeholders on various levels, such as local public authorities, consumer’s associations, research centres and so on.

⁴⁴ Louis Lorvellec, ‘You’ve Got to Fight for Your Right to Party: A Response to Professor Jim Chen’ (1996) 5 Minnesota Journal of Global Trade 65, 69; Elizabeth Barham, ‘“Translating Terroir” Revisited: The Global Challenge of French AOC Labeling’ in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016) 52-53.

to codify in a specification the ‘authentic’ method of production of the good, on which all the interested parties must agree and that the competent national authority must accept.⁴⁵ Next, in the EU regime, also the Commission must approve the application for registration that includes the draft specification, thus adding an additional level of scrutiny. Hence, EU *sui generis* GIs are an open-ended right from which – generally speaking – everyone respecting the specification can benefit. It is, therefore, a public authority that must mediate between the positions of the different producers and oversee the drafting of the specification.

Moreover, in the absence of a specific owner, the EU rules establish obligations and principles for a system of official controls that must be implemented by the Member States.⁴⁶ These cover both the production phase and the monitoring of the use of the protected name on the market. Member States are also called by EU Regulations to take appropriate measures, in particular administrative and judicial steps, to prevent or stop unlawful use of protected names. These are commonly – although unofficially – called *ex officio* protection measures.⁴⁷ This is significantly different from a system based on trade marks. For instance, a collective mark has a specific group of owners who, like in a club, can use the mark as long as they comply with the requirements fixed in the regulations concerning its use.⁴⁸ Moreover, they are entitled to decide how to proceed in case of infringement as the enforcement action is completely left to them.⁴⁹

Furthermore, the EU *sui generis* GI regime serves other goals, not directly related to trade, that require the intervention of a public bureaucratic system. In particular, the Preamble of Regulation 1151/2012 refers to the promotion of agricultural diversity and the fostering of rural development, under Recitals 1 and 4 respectively.⁵⁰ Such matters, which are also related to the general goals of the EU Common Agricultural Policy (CAP), cannot be discussed here, as they would exceed the scope of the present paper. Therefore, I refer the reader to the key literature on this point.⁵¹

6.5. The concept of origin: the origin link and the locality requirement

The last issue that must be discussed before completing this short analysis of the nature of EU GIs is the concept of ‘origin’. *Sui generis* GIs are ‘origin labels’, that is labels aimed at informing about the *where* a

⁴⁵ Lorvellec (n 44) 67-68.

⁴⁶ Regulation 1151/2012, Title V.

⁴⁷ A complete description of the functioning of the EU mechanism for the monitoring and enforcement of GIs would exceed the scope of the present contribution. For a deep analysis of this topic, see EUIPO, ‘Protection and Control of Geographical Indications for Agricultural Products in the EU Member States’ (2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/Enforcement_of_GIs/EUIPO_Geographical_Indications_full_report_en.pdf>. Last accessed 10 February 2021.

⁴⁸ World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2nd edn, WIPO 2004), [2.327].

⁴⁹ For a complete overview of the technical differences between Trade Marks and GIs, see FAO&SINER-GI, *Linking People, Places and Products: A Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications* (2nd edn, FAO 2010), 153-155; London Economics, ‘Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI): Final Report’ (European Commission 2008) 171.

⁵⁰ Blakeney (n 1) 69-74.

⁵¹ The literature on GIs and Rural Development is extremely wide. For some initial readings, see Dominique Barjolle, ‘Geographical Indications and Protected Designations of Origin: Intellectual Property Tools for Rural Development Objectives’ in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016); Giovanni Belletti and Andrea Marescotti, ‘Origin Products, Geographical Indications and Rural Development’ in Elizabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (CABI 2011); Sarah Bowen, ‘Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy’ (2010) 75 *Rural Sociology* 209.

product was made.⁵² Then, as we have already shown, these are based on a specification that, among other things, sets forth the production method that must be followed. This focus on origin is what sets GIs apart from the broad family of ‘quality labels’, i.e. labels that focus on *how* a product was made and not necessarily on where.⁵³ For instance, the famous ‘Fairtrade’ mark is a quality label that certifies that the products have been produced in compliance with specific ethical standards.⁵⁴ Hence, the purchasers of goods that bear this mark know that these are different from similar ones made without following the same criteria. This label, however, does not *per se* convey any information about the origin of the products.

The concept of origin is translated into EU GI Law as a mix of two factors of paramount importance: the origin link and the locality requirement. The origin link is a set of legal requirements that identify the elements whose presence must be proved in order to establish a connection between a product and a place. If, on the basis of these provisions, such connection is found to exist, the name that identifies the origin of the good, usually of a geographical location, can be registered.

Indeed, this element is so important that the definitions of various kinds of *sui generis* IGO protection systems almost coincide with the definition of the origin link itself.⁵⁵ For instance, a PDO is the name of a product ‘whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors’. In this case, therefore, it must be proved that the physical and human environment of a given area determine the main features of the good. The PGI quality scheme, instead, setting aside the generic reference to ‘other characteristics’ admits two main origin links: (1) quality and (2) reputation. The former can be defined as the distinctive attributes of the product that are due to its connection to a specific place.⁵⁶ Hence, it basically corresponds to the link required for PDOs,⁵⁷ which, as anticipated, is generally called *terroir* link. The latter, instead, consists in elements that do not attempt to establish a physical link between a product and its place of origin. Rather, they prove that the good is commonly associated with a given area.

In particular, the analysis of the specifications of all the products registered in the EU database makes it possible to identify two main – and non-alternative – components of this origin link which can be called ‘reputational link’.⁵⁸ These are (1) the market reputation and (2) the historical element.⁵⁹ The first is the traditional way of describing ‘reputation’ and descends directly from the approach of the Central and

⁵² Furthermore, the products protected by *sui generis* GIs are often defined as ‘origin products’, i.e. products significantly integrated with their area of origin, especially with its environment and/or local community. For a discussion on the concept of ‘origin product’, see Belletti and Marescotti (n 51).

⁵³ For instance, the famous ‘Fairtrade’ mark is a quality label that certifies that the products have been produced in compliance with specific ethical standards, thus emphasising the method of production rather than the origin. See, Elizabeth Barham, ‘“Translating Terroir” Revisited: The Global Challenge of French AOC Labeling’ in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016) 53-54. Elizabeth Barham, ‘Towards a Theory of Values-Based Labeling’ (2002) 19 *Agriculture and Human Values* 349, 352-354.

⁵⁴ Fair Trade International, ‘Fairtrade Standards’ (*Fair Trade International*) <<https://www.fairtrade.net/standards.html>>. Last accessed 10 February 2021.

⁵⁵ Andrea Zappalaglio, ‘The Debate between the European Parliament and the Commission on the Definition of Protected Designation of Origin: Why the Parliament Is Right’ (2019) 50 *IIC* 595. 596-597. This is true also with regard to the definition of GI in the TRIPs and of AO in the Lisbon Agreement. See, text to n 29 and fn 6.

⁵⁶ Laurence Bérard and others, ‘Les Facteurs Historiques, Culturels, Économiques et Environnementaux Dans La Délimitation Des Zones IGP’ in Bertil Sylvander, Dominique Barjolle and Filippo Arfini (eds), *The socio-economics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional, and Co-ordination Aspects* (Actes et Communications, 2000) 164-165.

⁵⁷ *ibid.*

⁵⁸ The data presented in the discussion below are the results of my personal research as well as of the quantitative analysis carried out by the Max Planck Research Team on Geographical Indications.

⁵⁹ See, Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 13).

Northern European countries before 1992.⁶⁰ According to this interpretation of the reputational link, a product is related to a specific area if consumers associate the product's characteristics with its geographical name; consider it different from others of the same kind; are willing to pay more for it etc... The market reputation is usually proved through elements such as consumer's surveys, the description of the awards won by the product and so on.

The historical element, instead, aims at linking the product's reputation to a place by showing that it is traditionally linked to an area because it belongs to its 'history' in the broad sense. It is important to clarify that this element does not generically consist in the 'past' of the good. Rather, it shows how the history of a product links its image, and that of its area of origin, to a specific place and not to another. This element can take different forms. It can consist solely in the recount of the historical facts related to the product and of its cultural history until the present days; it can be used to show how the production of the good traditionally shapes the society of the designated area and contributes to sustain local communities; in other instances, it is used to illustrate why specific production methods have been developed to determine the specificities of the product. Other examples could be made. A practical case is probably clearer:

The quality and reputation of "Kulmbacher Bier" goes back to a centuries-old brewing tradition. Long before the first documented monastic brewery of 1349 there was probably a so-called communal brewery where the burgers of Kulmbach in a fixed order were allowed to brew beer for their own needs and for small-scale trade (*history of the product*). That for example is how the EKV Brauerei was founded in 1872 from a Kulmbach communal brewery (*traditional socio-economic relevance of the product*). The old tradition is still nurtured today. About 400 Kulmbach citizens have come together in a cooperative to produce beer for the needs of their own pub. The population's diligence, business acumen and brewing skills based on rich experience contribute significantly to the importance of "Kulmbacher Bier" (*current socio-economic reality, linked to the history of the product and to the evolution of the know-how related to it*).⁶¹

This example is, indeed, useful as it also shows another recurring element that is the description of the 'current socio-economic reality'. This is a factor that often complements the two main linking factors, especially the historical element. Thus, it cannot be considered a fully independent category.

This categorisation allows to analyse some interesting trends concerning the nature of EU *sui generis* GIs today.⁶² In particular, two will be presented here. The first reveals that, on the one hand, elements that are

⁶⁰ Gangjee (n 15) 225-231.

⁶¹ 'Kulmbacher Bier' PGI (EN/06/97/50730400.W00 (DE) CCE, 1997), [f]. Italics added.

⁶² This is not the first attempt to provide a description of the structure of the reputational link, of course. Bérard and others authoritatively distinguish between the 'ancient reputation' (*réputation ancienne*) and the 'current reputation' (*réputation actuelle*). Next, they propose a hierarchy of six criteria, related both to 'quality' and to 'reputation', to delimit correctly the area where the prospective PGI product can be produced. In particular, the authors mention the 'current economic reality' (*réalité économique actuelle*), defined as the current location of the producers and the 'historical economic reality' (*réalité économique historique*) that allows the identification of historical areas of production. Moreover, the French INAO, in its 'Applicants' Guide', states that '[a] reputation is most usually composed of three elements: the history, the reputation in the past and the current reputation'. Then, it is explained that the first element '(...) demonstrate[s] that [the product] has a long history within the geographical area (...)'; the second regards the sections of the application '(...) pertaining to the determination of the geographical area of the method of elaboration' and, the third, consists in '(...) the modern situation of the industry, demonstrating its local and national economical importance'. This structure has been endorsed by Gangjee. See, Bérard and others (n 51) 166-170; INAO, 'Geographical Indication: Applicant's Guide' (2005) 18; Dev Gangjee, 'From Geography to History: Geographical Indications and the Reputational Link' in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture in the Asia-Pacific* (Cambridge University Press 2017) 54-55. Our personal categorisation, based on this literature review, has been presented in detail in Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 13).

used in PGIs to establish the reputational link are also found in PDO specifications, and at the same time, elements that prove a *terroir* link appear in PGI specifications, where a less demanding origin link, e.g. market reputation, would suffice.

In particular, according to searches, in more than the 70% of PDO specifications, there are elements that do not establish a *terroir* link but merely a reputational one. When this occurs, a recount of the history of the product is included in more than 90% of the cases.⁶³ Of course, it may be argued that since *terroir* consists both of a physical/environmental and of a human component, the historical element in PDOs represents nothing but the proof of the existence of a traditional technical know-how linked to the geographical area. However, in approximately 30% of the cases, the existence of an origin link in PDO specifications is proved by presenting elements related to the market reputation of the product. This suggests that the reputational link has indeed crossed the boundaries of PGI.⁶⁴ Conversely, as anticipated, the findings reveal that, in approximately 60% of all cases, elements that are typically associated with the *terroir*-link, such as the description of the influence that the climate has on the characteristics of the products and so on, are included in PGI specifications as well.⁶⁵

These findings are interesting as they show that the linking factors that exist under EU GI Law can actually be found in both quality schemes and that, therefore, as far as the origin link is concerned, the practical differences between PDO and PGI are indeed blurred. This suggests that the latter may gradually absorb the former due to its flexible nature that accommodates also the linking factors that characterise PDO. Indeed, the PGI is already the predominant quality scheme in the EU⁶⁶ and, over the last ten years, it has been preferred also by countries with a strong AO tradition, such as Italy and Portugal, as shown in Figure 6.1 and Figure 6.2.

< ADD HERE Figure 6.1: Growth of PDOs and PGIs in the period 2010-2019 in Italy >

< ADD HERE Figure 6.2: Growth of PDOs and PGIs in the period 1996-2019 in Portugal >

The second trend highlighted by the few figures mentioned earlier⁶⁷ concerns the success of the historical element, with all the nuances introduced before, as an origin link. This is interesting as it shows that the EU *sui generis* GI system, descending from regimes that, as shown above, were built either upon the *terroir*-link or a market-related logic,⁶⁸ may be shifting to another paradigm based on the history and the tradition that characterises the product.

Finally, turning to the 'locality requirement', it can be defined as the element that determines to what extent the product is made in the designated area. In particular, with regard to PDO, art 5(1)(c) provides that all the production steps must take place in the defined geographical area. However, art 5(3) admits some exceptions where the raw materials can be sourced from outside the area under some conditions.⁶⁹ As to PGIs, instead, art 5(2)(c) provides that it is enough that at least one step of the production process takes place in the area.

⁶³ Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 13) Section 4.6.

⁶⁴ This figure is sourced from the quantitative analysis carried out by the Max Planck Research Team on Geographical Indications, still unpublished.

⁶⁵ Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 13) Section 4.6.

⁶⁶ As of 25 February 2021, 660 PDOs and 792 PGIs appear on the eAmbrosia database.

⁶⁷ Text to n 61.

⁶⁸ See, Section 1.

⁶⁹ These are: (a) the production area of the raw materials is defined; (b) special conditions for the production of the raw materials exist; (c) there are control arrangements to ensure that the conditions referred to in point (b) are adhered to; and (d) the designations of origin in question were recognised as designations of origin in the country of origin before 1 May 2004.

It is important to remember that, according to the EU GI applicant's guidelines, the production process starts with the sourcing of the raw materials and ends with the completion of the product, excluding operations – some of which optional – such as packaging, cutting, slicing and grating.⁷⁰

With this background in mind, the analysis of the specifications of the registered EU GIs makes it possible to determine how 'local' PDOs and PGIs really are. In the case of PDOs, the research carried out by the Max Planck GI Research Team reveals that in 85% of the cases, all production steps take place in the designated area. Interestingly, this figure is high also in the case of PGIs, where it stands at approximately 58%, although it must be specified that many specifications state that the product is entirely made in the designated area, even when the raw materials are actually sourced elsewhere. In spite of this, these findings are important as they show that even if the rules allow PGIs to have a loose locality requirement, in practice also these products are often significantly related to their area of origin.

6.6. Conclusion

This contribution has drawn a sketch of the main attributes that characterise the EU *sui generis* GI regime, with a specific focus on the system for the protection of agricultural products and foodstuffs. In particular, it has elaborated upon three of its key characteristics: (1) its *sui generis* nature; (2) its bureaucratic functioning and (3) the central role played by the concept of origin.

This work has illustrated that the first two characteristics of the EU regime descend from the French approach and, in particular, from the *Appellation d'Origine Contrôlée* that was later adopted into the international frame by the Lisbon Agreement. Indeed, this IGO protection model was introduced to overcome the weaknesses of the systems of IGO protection, like the Indication of Source, based exclusively on the Unfair Competition paradigm that preserved the truth telling on the marketplace without, however, focusing specifically on the substantive features of the product. A *sui generis* system, instead, is specifically designed to protect the names of goods that are linked to a determined geographical area and that are produced following a method on which the producers' group has agreed. In this kind of regime, protection must be granted at the end of a bureaucratic process aimed at ensuring the substantive correctness of the specification. Furthermore, unlike trade marks, *sui generis* GIs do not have a specific owner but only 'users' or 'beneficiaries'. Hence, the intervention of the public authorities is needed to ensure the monitoring and the enforcement of the rights conferred. Then, this contribution has also observed that this model, despite being criticised by important players such as the US, has indeed been successful. For instance, a *sui generis* registration-based regime has been adopted by India and China, among the others.

Finally, and above all, the EU *sui generis* GI system – unlike trade marks – has the specific goal to protect 'origin'. This is done by providing specific origin links and locality requirements. The contribution has focused on these two essential elements by presenting empirical data, obtained through a quantitative analysis of the specifications of the registered products that reveal interesting trends concerning the present nature – and possibly the future – of the EU GIs. Two were specifically highlighted. First, as far as the origin link is concerned, it is possible to argue that, to some extent, the difference between the PDO and the PGI quality scheme has become blurred. Hence, it can be hypothesised that, in the future, the latter may partially absorb the former thanks to its broader and more flexible nature. Second, the history of the product has become an essential element to prove the existence of a link between a product and its place of origin. Indeed, this linking factor has become more important than others that have traditionally played a central role, such as the market reputation of the good.

⁷⁰ European Commission, 'Guide to Applicants: How to Compile the Single Document', [3.4] <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/food_safety_and_quality/documents/guide-to-applicants-of-single-document_en.pdf>. Last accessed 10 February 2021.