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EU *sui generis* GIs for Agricultural Products and Foodstuffs: The Case for a Single Quality Scheme

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1. Introduction

1.1 Background: the EU *sui generis* GI system and the protection of agricultural products and foodstuffs

Indications of Geographical Origin (IGOs) are names that inform the public that a product originates from a specific place, suggesting the existence of a connection between a good and a given area. For instance, names like ‘Scotch Whisky’; ‘Bordeaux Wine’ or ‘Parma Ham’ trigger in the mind of consumers the idea that said goods originate from Scotland, Bordeaux and Parma, respectively. At the same time, IGOs generate a specific expectation of quality. If we buy a bottle of ‘Champagne’, we expect to taste the best sparkling wine in the world, that only the environment of the Champagne region and the unique know-how of Champagne winemakers can ensure.¹

IGOs can be protected in different ways. For instance, producers’ associations can register Collective Marks. Unfair Competition Law, or the common law tort of Passing Off, are also relevant, as they protect the consumers against practices capable of misleading the consumers as to the origin of a good, among the other things.²

The European Union (EU), instead, is the champion of the *sui generis* approach to protection. This means that IGOs are protected as such, not through Trade Mark Law or other means adapted to that end, but through a specific Intellectual Property Right (IPR), and are granted an *ad hoc* level of protection. Particularly, the EU Geographical Indications (GIs) system provides *sui generis* protection to four kinds of products, each one falling under the scope of a different Regulation. These are: (1) spirits,³ (2) wines,⁴ (3) aromatised wines and,⁵

¹ For a broad introduction to the concept of Geographical Indication, see WIPO, ‘What is a Geographical Indication?’ (*Geographical Indications*) <https://www.wipo.int/geo_indications/en/>. For a commentary on the EU *sui generis* GI regime, see Michael Blakeney, *The Protection of Geographical Indications: Law and Practice* (Second edition, Edward Elgar 2019).

² For a description of the key technical differences between an approach based on *sui generis* GIs and one based on Trade Marks, see Giovanni Belletti and Andrea Marescotti, ‘Evaluating Geographical Indications’ (FAO and Department of Economics and Management, University of Florence 2021) 91-92. On the topic of IGO protection through Unfair Competition Law, see Kimberlee Weatherall, ‘Does the Unfair Competition Approach to Geographical Indications of Origin Have a Future?’ in Irene Calboli and Jane C Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (1st edn, Cambridge University Press 2020).

³ Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages [2019] OJ L130, 1.

⁴ Regulation (EU) 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products [2013] OJ L347, 671.

⁵ The rules on the definition, description, presentation and labelling of Aromatised Wines are provided by Regulation 151/2014. However, art 16a of Regulation 1151/2012 is the set of rules applicable to the GI protection of this class of products. This stipulates that the names entered in the register shall receive PGI protection. See, Regulation (EU) No

lastly, (4) agricultural products and foodstuffs (agri-food), which constitute the focus of the present contribution.⁶

This system is currently undergoing a deep process of reform. In particular, the reform will combine the abovementioned regulations into a single set of rules. This will introduce general principles applicable to all classes, plus individual Chapters which will regulate the specificities of each of them. Overall, the reform pursues a number of objectives, such as clarifying and streamlining the existing legal framework and contributing to making the EU food system more sustainable, in line with the ‘Farm to Fork Strategy’ and the EU Green Deal.⁷ In addition, on 18 October 2023, the EU institutions approved the new Regulation 2023/2411 that, for the first time, extends GI protection to ‘craft and industrial products’, thus closing a discussion started in 2011.⁸ Among the several significant innovations introduced by this set of rules, the application process stands out as particularly noteworthy. Indeed, since the implementation of the EU *sui generis* GI regime, the EU Commission, specifically the Directorate-General for Agriculture and Rural Development (DG AGRI), has been the authority responsible for reviewing applications, which can only be submitted by national competent authorities following a positive outcome in a national examination phase. Conversely, in the case of crafts and industrial products, the competent authority will be the European Union Intellectual Property Office (EUIPO), which, for the first time, will be regularly involved in the process for the registration of GIs. Moreover, producers' groups residing in Member States that have obtained specific authorization will be able to submit their applications directly to the EUIPO, without having to submit to their national competent authority first.⁹ EU Law features two GI Quality Schemes, the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI).¹⁰ These operate on the market as origin labels, i.e. labels that certify the geographical origin of a product. This sets them apart both from standard trade marks, whose primary function is the indication of commercial origin, as well as from the broad family of ‘quality labels’, that, generally speaking, focus on *how* a good was made but not on *where*.¹¹

251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation and labelling of aromatized wine products [2014] OJ L84, 14.

⁶ 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. For a focus on EU agri-food GIs, see Andrea Zappalaglio, ‘Sui Generis, Bureaucratic and Based on Origin: A Snapshot of the Nature of EU Geographical Indications’ in Anselm Kamperman-Sanders and Anke Moerland (eds), *IP as a Complex Adaptive System: its Role in the Innovation Society* (Edward Elgar Publishing 2021).

⁷ For the full legislative process, see Legislative Observatory – European Parliament, ‘Geographical Indications for wine, spirits drinks and agricultural products’ (2022/0089(COD)) <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0089\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0089(COD)&l=en)>.

For the role that *sui generis* GIs play in the context of the EU Green Deal, see European Commission, ‘Farm to Fork Strategy: For a Fair, Healthy and Environmentally-Friendly Food System’ (2020).

⁸ Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products’ [2023] OJEU L. For the recount of the discussions that preceded the adoption of this new set of rules, see Andrea Zappalaglio, Flavia Guerrieri and Suelen Carls, ‘Sui Generis Geographical Indications for the Protection of Non-Agricultural Products in the EU: Can the Quality Schemes Fulfil the Task?’ (2020) 51 IIC 31, 32-35.

⁹ See, Regulation 2023/2411, Chapters 2 and 3.

¹⁰ These are not the only Quality Schemes that compose the EU Quality Policy. For instance, Regulation 1151/2012 includes additional minor schemes such as the Traditional Specialities Guaranteed (TSGs) as well as the ‘Mountain Product’ and the ‘Products of the EU Outermost Regions’ labels. For an overview of the EU Quality Policy, see European Commission, ‘Geographical indications and quality schemes explained’ (*Agriculture and Rural Development*) <https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en>.

¹¹ Take the example of the ‘Fair Trade’ mark. It informs the consumers that the product is produced in a specific way, e.g. respecting the rights of the workers, providing a fair treatment to all the relevant stakeholders and so on. However, it is not an origin label, because it does not establish a link between a product and a specific place. 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).

The structure of the EU *sui generis* GI system is not particularly homogeneous, however. In fact, the PDO is included in the Regulations on wines and agri-food products that, therefore, are characterised by a dual system composed of both Quality Schemes. Instead, the other sets of rules on the protection of spirits, aromatised wines and crafts feature only the 'Geographical Indication' (GI) that essentially overlaps with the PGI.

Today, and until the EU Institution approve the new Regulation mentioned earlier, GIs for agricultural products and foodstuffs fall under the scope of Regulation 1151/2012. At art 5, this provides the following definition of PDO and PGI:

'designation of origin' is a name, which may be a traditionally used name, which identifies a product:

- (a) originating in a specific place, region or, in exceptional cases, 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.

'geographical indication' is a name, including a traditionally used 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 takes place in the defined geographical area.

These rules feature the two key components that characterise every origin label: (1) the 'origin link', provided under letter b of both paragraphs; (2) the 'locality requirement', which appears under letter c. The first is the core of every *sui generis* GI system. In fact, it is the element that defines the nature of the link between the product and its place of origin and stipulates how its existence must be proved. The second, instead, establishes how much of the product must be made in the designated area to be validly registered as a PDO or PGI.

The abovementioned definitions highlight the key differences between the two GI Quality Schemes. In particular, PDO features a narrow origin link that requires evidence of an essential or exclusive link between a good and the environmental and human specificities of its area of origin. In GI literature, this combination of elements that establishes such a strong connection is often indicated by the French term *terroir*. The PDO's locality requirement is also very restrictive, since all the steps of the production must take place in the designated area. In contrast, PGI rules set forth a flexible origin link consisting of three main linking factors: 'quality, reputation and other characteristic'. These will be analysed in due course.¹² Furthermore, the locality requirement is less demanding than that of the PDO, as it requires only one production step to take place in the area.¹³ However, it is of paramount importance to highlight that, despite their differences, the two Quality Schemes grant their beneficiaries the same level of protection.¹⁴

¹² See, Section 3.

¹³ The production process is defined as every step of the production from the sourcing of the raw materials until the final product, excluding optional steps such as slicing and grating. See, 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>.

¹⁴ EU GIs enjoy a very high level of protection that makes them probably the better protected IPR. See, Regulation 1151/2012, art 13(1). The contribution returns to this point at text to n 65. For a critique of the level of protection granted to GIs in the EU legal frame, see Andrea Zappalaglio, 'EU Geographical Indications and the Protection of Producers and Their Investments' in Enrico Bonadio and Patrick Goold (eds), *The Cambridge Handbook of Investment-Driven Intellectual Property* (CUP 2023).

1.2 Objectives, methodology and importance of the contribution

EU *sui generis* GIs for agricultural products and foodstuffs have been characterised by the presence of both the PDO and the PGI quality scheme since they were introduced more than 30 years ago by Regulation 2081/1992.¹⁵

Although ‘simplification’ has been the keyword that has guided the ongoing reform process,¹⁶ the EU institutions have never been put into question the dual structure of this system. By contrast, the EU Commission has recently claimed that ‘[h]aving two logos, different in colour but similar in design, helps to distinguish the PDO definition that comprises a stronger link to the terroir¹⁷. The same institution states that in the drafting process of the proposed new Regulation on spirits, wines, and agri-food GIs, the idea of introducing one EU symbol for all PDO/PGI/GI products, instead of the existing two, was discarded at an early stage of the work.¹⁸

For the first time in the academic literature on GI Law, this article presents an original perspective that challenges this narrative. Specifically, it is proposed that the EU *sui generis* GI regime can be restructured into a single-label system based solely on PGI, similar to the existing systems for spirits, aromatised wines, and crafts and industrial products. This argument is based on six points, each one explored in a separate Section:

1. The dual PDO/PGI structure of the EU agri-food GI regime is the result of historical contingencies, rather than cogent structural or systemic reasons. The justifications for the coexistence of PDO and PGI at the outset of the system are no longer present (Section 2).
2. The functioning of the origin link reveals that the differences between PDO and PGI are blurred, and PGI can provide adequate protection to PDO goods, while also including products that are not rooted in *terroir* (Section 3).
3. The analysis of the locality requirement demonstrates that the less demanding rules characterising PGI do not result in a weaker connection between the product and its place of origin (Section 4).
4. Discontinuing the PDO Quality Scheme will have little to no impact on the marketplace because consumers are generally unaware of the meaning of the origin labels (Section 5).
5. Registration trends show that the PDO quality scheme was used between 1992 and 1996 as a bridge between the previous national systems and the unitary EU *sui generis* GI regime. After this transition phase, the PGI became the predominant Quality Scheme. Therefore, the adoption of a one-label system would merely align with these trends (Section 6).
6. The proposed reform does not breach any international obligation assumed by the EU (Section 7).

This article also provides some concrete suggestions on how the proposed system should be implemented in practice. However, it is stated from the outset that this work does not intend to recommend the transformation of existing PDOs into PGIs, unless their users so desire. PDOs which are already on the register could merely be grandfathered into the proposed one-label system. In fact, the latter is not intended to rewrite the past of EU agri-food GIs but rather to introduce a simpler regime that aligns with current trends and the likely future functionality of the system.

¹⁵ Council Regulation (EEC) 2081/1992 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] L208/1, art 2(2)(b). This was the first set of rules to introduce a unitary EU frame for the *sui generis* protection of GIs.

¹⁶ The goals of the reform are listed in its Explanatory Memorandum, see European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on European Union geographical indications for wine, spirit drinks and agricultural products, and quality schemes for agricultural products’ COM(2022) 134 final/2, 1-3.

¹⁷ European Commission, ‘Commission Staff Working Document: Impact Assessment Report’ (2022) SWD(2022) 135 final, 33.

¹⁸ *Ibid*, 32.

This innovative argument is supported by employing a mixed methodology that combines the results of the most comprehensive historical research on the origins and characteristics of EU agri-food GIs with the findings of the most recent empirical investigations into their practical functioning. In particular,

1. the work of Gangjee is an essential reference point for any archival research on this topic¹⁹;
2. the author of this paper has contributed to the two most extensive quantitative analyses on the functioning of the EU *sui generis* GI regime, focusing in particular on the contents of the specifications and Single Documents of the products registered between 1996 and the end of 2019²⁰; finally,
3. the work will present novel, previously unpublished findings that will enhance and update the abovementioned scholarship. In particular, the article has analysed the Single Documents of the 98 PGIs registered by EU producers between 1 January 2020 and 1 October 2023,²¹ i.e. the period not covered by the previous studies. The contents of the Single Documents have been investigated to determine (a) the linking factors on which each PGI is based, i.e. quality, reputation or both; (b) whether the products must be entirely produced in the designated area or the producers are free to complete some production steps outside of it.²² Additionally, the paper will provide a statistical analysis of the registration trends to illustrate when and to what extent PGIs have become the predominant Quality Scheme for the protection of EU agri-food products.²³

This research aims to make a significant contribution to the existing body of literature on EU *sui generis* GIs. Firstly, it presents an innovative proposal for restructuring and simplifying this system in line with the results of the most recent archival and empirical research. Secondly, it challenges traditional views held by EU institutions regarding the relationship between PDO and PGI and demonstrates that the decision of the EU Commission not to discuss the simplification of this system during the ongoing reform process represents a missed opportunity. Thirdly, it supports its argument through the presentation of new empirical findings, thus expanding and updating the existing research.

All data, figures, and references are valid and up-to-date as of 2 October 2023.

¹⁹ Dev Gangjee, *Relocating the Law of Geographical Indications* (CUP 2012). See also, the contributions collected in Dev Gangjee (ed), *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar Pub 2016) and Andrea Zappalaglio, *The Transformation of EU Geographical Indications Law: The Present, Past, and Future of the Origin Link* (Routledge 2021) Chapters 1 and 2.

²⁰ Andrea Zappalaglio and others, 'Overall Assessment of the EU Law of Geographical Indications for Agricultural Products and Foodstuffs' (Max Planck Institute for Innovation and Competition 2021); Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) Chapter 4.

²¹ The Single Document is a standardised document, the template of which is provided by the European Commission, that is used to transpose national specifications into a common EU format. The use of the Single Documents rather than the full specifications is justified for two reasons: first, the Single Documents are the outcome of the two phases – national and European – that compose the application process for a EU GI and, unlike the specifications, are translated into all the languages of the EU Member States; second, the EU guidelines themselves specify that 'the Single Document is sufficient in itself'. Hence, it faithfully presents the elements upon which the registration is based. See, European Commission, 'Guide to Applicants: How to Compile the Single Document' (n 13) 1.

²² The research has ascertained the character of the linking factors through the evidence presented in the texts, rather than relying solely on the formal assertions of the producers. For example, if the producers claim that their products are based on a 'qualitative' link, but the document also includes information on the 'reputation' of the good, by mentioning elements such as the awards won by the product, the national notoriety etc... the analysis has considered both factors as present in the Single Document.

²³ All the documents and raw data used to conduct this empirical analysis were extracted from the EU database of registered GIs, see European Commission, 'eAmbrosia - the EU Geographical Indications Register' <<https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/>>.

2. The dual PDO/PGI system for the protection of agri-food product exists for mere historical contingences

The history of the EU *sui generis* GI system demonstrates that there is no compelling practical or technical reason for agri-food GIs to be protected by two separate Quality Schemes. In fact, PDO and PGI evolved separately, at different times and for different reasons. Then, the EU system merely juxtaposed them primarily for political and opportunity-related reasons rather than as part of an effort to create an effective and coherent unitary system.

The present section demonstrates this point by outlining (2.1) the origins of PDO; (2.2) the origins of PGI and (2.3.) how historical contingencies led to their juxtaposition with the introduction of EU *sui generis* GIs for the protection of agricultural products in 1992.

2.1 The origins of PDO: the French experience and the Appellation of Origin model

PDO is the EU incarnation of the French *Appellation d'Origine*, i.e. the Appellation of Origin (AO).²⁴ This was introduced in 1919 to protect French wine producers against the marketing of adulterated or counterfeited wine and other widespread fraudulent practices. Among the other things, this legislation gave the judiciary the power to determine the areas where a product could lawfully be made and marketed under a given name according to 'local, loyal and constant uses'. This marked the beginning of a process that culminated in 1935 with the introduction of a special kind of AO called *Appellation d'Origine Contrôlée* (AOC). As the name suggests, this introduced an *ad hoc* control body, the *Institut National de l'Origine et de la Qualité* (INAO), which is still in charge of monitoring the production of origin goods in France.²⁵ Moreover, it determines, in cooperation with the producers' associations, all the requirements for the production of a given wine, such as the area of production, the admissible kinds of grapes and their process of cultivation, the correct method of distillation and so on. The concept of *terroir* has always played an essential role in this process. As mentioned earlier, this term, almost impossible to translate into English, stands for the environmental and human characteristics of a place that determine the specificities of a given product.²⁶

Gradually, the protection of AO/AOC in France started to be extended to other products, such as cheese, olive oil, and meat. At the same time, the interest in various European and non-European civil law jurisdictions began to rise, whereas common-law countries remained sceptical. The increased support to the AO model led to the adoption of the Lisbon Agreement (1958).²⁷ This introduced AO into the international legal framework, together with an international union, the Lisbon System, for its registration and protection.

This treaty provides the current international definition of AO. In line with the French tradition, this is also based on the concept of *terroir*. This clearly emerges from its art 2(1):

... "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.

²⁴ A complete recount of the history of the French AO system would exceed the scope of the present work. For an in-depth analysis see Gangjee, *Relocating the Law of Geographical Indications* (n 19) Chapter 3; Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) Chapter 1.

²⁵ 'National Institute of Origin and Quality'. Before 1947 it was known as *Comité National des Appellations d'Origine* (National Committee of the Appellations of Origin).

²⁶ The literature on *terroir* is incredibly vast. For an analysis of this concept and a literature review, see Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) 40-48.

²⁷ Lisbon Agreement for the protection of Appellations of Origin and their International Registration (as amended on 28 September 1978). For more information, see the dedicated page on WIPO's website, here: <<https://www.wipo.int/treaties/en/registration/lisbon/>>; Gangjee (n 19) Chapter 3.

This provision anticipates the current definition of PDO for agri-food products. It was initially introduced by Regulation 2081/1992 under art 2(2)(a), which corresponds to art 5(1)(b) Regulation 1151/2012, which was analysed in the introduction.²⁸

Finally, the AO paradigm, similar to today's EU sui generis GI Law, applies the standard of 'absolute protection'. That is, the registered names are protected as such, even against uses that cause no confusion or consumers' deception in the market. Indeed, art 3 reads:

Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as 'kind', 'type', 'make', 'imitation', or the like.

2.2 The origins of PGI: Unfair Competition Law and the role of Germany

After the Lisbon Agreement came into force, the absolute, registration-based AO paradigm was introduced in various European jurisdictions.²⁹ Indeed, 7 of the 11 original signatory members to the Lisbon Agreement are currently EU Member States.³⁰ However, a number of European countries preferred to protect IGOs through Trade Mark Law and, especially, Unfair Competition Law, or Passing Off in Common Law jurisdictions.

It is known that Unfair Competition Law protects consumers against various dishonest practices, including misleading allegations as to the quality or other characteristics of the goods, including their geographical origin.³¹ Contrary to AO, the protection granted by Unfair Competition Law:

1. Is relative, not absolute: IGOs are protected on the basis of a case-by-case approach against practices that create confusion or can concretely mislead consumers.
2. Is not heavily bureaucratic: it does not require any form of registration or centralised public authority.
3. Is significantly broader and more flexible than AO, as it extends protection to Indications of Source. These consist of indications that directly communicate origin, like expressions such as 'made in...', 'product of' etc..., but also encompass 'indirect' indications which fall outside the scope of AO rules. For instance, the misleading use of the image of the Eiffel Tower can deceive consumers into believing that a given product originates from France.³²

Hence, in its basic form, Unfair Competition Law preserves truth telling on the marketplace by ensuring that the communicative strength of a given IGO is not used to mislead consumers.

From the 1950s, certain countries, Germany in particular, began to enhance the protection of IGOs by emphasising the significance of the reputation attached to a product's origin. This reinforced model, known as the Qualified Indication of Source, provided consumers with added protection in cases where the characteristics of a product did not align with their expectations based on the reputation of the good's name,

²⁸ Interestingly, although AO was originally introduced for the protection of wine, the EU introduced the PDO Quality Scheme for Wines only in 2008.

²⁹ In the wine sector, a relevant example is the Italian *Denominazione di Origine Controllata* (DOC) and the *Denominazione d'Origine Controllata e Garantita* (DOCG), both introduced for the first time in 1963.

³⁰ Specifically, these are: France, Greece, Hungary, Italy, Portugal, Romania and Spain. Bulgaria is not a signatory member but accessed in 1975.

³¹ See, Paris Convention for the Protection of Industrial Property (28 September 1978), art 10bis.

³² For more information on the concept of Indication of Source and its differences from GI, see WIPO, 'Frequently Asked Questions: Geographical Indications'

<[%https://www.wipo.int/geo_indications/en/faq_geographicalindications.html#:~:text=Indications%20of%20source%20only%20require,...">%2C%20etc..](https://www.wipo.int/geo_indications/en/faq_geographicalindications.html#:~:text=Indications%20of%20source%20only%20require,...)>. For an extensive analysis, see Gangjee (n 19) Chapter 2.

even if the origin of the product was properly displayed.³³ For example, in 1970, the German Supreme Court ruled that whisky produced in Scotland could not be marketed as 'Scotch Whisky' if it did not meet the mandated quality standards for the original product.³⁴

Therefore, the Qualified Indication of Source, although substantively different from AO, represents a strengthened version of the standard protection provided to Indication of Source under Unfair Competition Law. Due to its emphasis posed on the 'reputation' of a good, and the expectations that come with it, it can be identified as the historical predecessor of the protection based on 'reputation' that characterises PGI.³⁵

2.3 The emergence of the dual PDO/PGI system: the political compromise and the influence of the Uruguay Round

Discussions on the unitary EU *sui generis* GI frame began in the late 1980s. In that period, the scenario was still extremely split. At that time, the EC was composed of 12 countries, 6 of which had adopted the AO model³⁶ and six which applied Trade Mark Law and Unfair Competition Law. These were Denmark, Germany, Ireland, Luxemburg, the Netherlands, and the U.K..

The participation of the EU – or European Community (EC), as it then was - in the Uruguay Round (1986-1994), which led to the establishment of the World Trade Organisation (WTO) and of the TRIPS Agreement,³⁷ constituted a crucial opportunity for the Member States to negotiate with the EU/EC institutions the structure of a mutually acceptable unitary *sui generis* GI regime. It is not by chance that the first definition of GI presented during the Uruguay Round was submitted by the EU/EC. This shares important similarities with the current definition of PGI, which can also be considered, therefore, the result of a joint 'European' effort.³⁸

Eventually, Regulation 2081/1992, approved in 1992 during the height of the Uruguay Round, adopted an elementary solution to reconcile the legal traditions of the EU Member States. This solution involved the juxtaposition of two paradigms that already existed: PDO, which reflects the French and Southern European tradition and closely resembles the AO paradigm embodied in the Lisbon Agreement, and PGI, which is based on the definition of GI that the Member States had agreed upon during the TRIPS negotiations. This definition includes a link based on "reputation," which is reminiscent of the German Qualified Indication of Source model and was deemed acceptable by countries that had not previously adopted a *sui generis* approach to GI protection.³⁹

Eventually, this strategy left traces in Recital 10 of the abovementioned Regulation that reads:

... existing practices make it appropriate to define two different types of geographical description, namely protected geographical indications and protected designation of origin.

³³ Hilke Kickler, 'Die Geschichte Des Schutzes Geographischer Herkunftsangaben in Deutschland Vom Zweiten Deutschen Kaiserreich Bis Zum Markengesetz 1995' (Universität Bayreuth 2012). For a discussion on the Qualified Indication of Source in English, see Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) 83-85. This approach to IS protection is not limited to Germany. For the case of Switzerland, for instance, see, IGE/IPI, 'Indications of Source' (IGE/IPI) <<https://www.ige.ch/en/protecting-your-ip/indications-of-source/faq.html>>.

³⁴ 'Scotch Whisky (Case Note)' (1970) IIC 402.

³⁵ Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) 84-85; Gangjee (n 19) 224-229.

³⁶ Belgium, France, Greece, Italy, Portugal and Spain.

³⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994).

³⁸ European Community, 'Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights' (Negotiating Group on Trade-Related Aspects of Intellectual Property Rights 1988) Multilateral trade negotiations Uruguay Round Restricted MTN.GNG/NG11/W/26.

³⁹ A detailed discussion on the circumstances that led to the introduction of Regulation 2081/1992 would exceed the scope of the present article. For an in-depth analysis and a complete review of the available archival sources, see Gangjee (n 19) 225-231 and Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) 111-127.

This provision is noteworthy, as it provides insight into the context that influenced the formation of the unitary *EU sui generis* GI regime. It also raises a fundamental question, however. The ‘existing practices’ that necessitated the introduction of the dual PDO/PGI system for agricultural and food products are still current today? The subsequent sections will demonstrate that the answer to this query is in the negative.

3. The origin link in practice: overlaps between PDO and PGI and why the latter absorbs the former

As outlined in the Introduction, the origin link is the fundamental aspect of a *sui generis* GI regime, as it determines the nature of the connection necessary between a product and its place of origin for it to be recognised as a GI in the EU. Specifically, a PDO can only be registered for a product ‘whose quality or characteristics are exclusively or essentially attributable to a specific geographical environment with its inherent natural and human factors’, i.e. linked to the unique *terroir* of the designated area. Conversely, a PGI can be registered if ‘a given quality, reputation or characteristic [of the product] is essentially attributable to its geographical origin’.

This Section focuses on the PGI origin link, with a particular emphasis on the concepts of ‘quality’ (qualitative link) and ‘reputation’ (reputational link).⁴⁰ The work will define these two linking factors and analyse their use in practice to demonstrate that specifications that show their connection to their area of origin based on either (3.1) the qualitative link or (3.2) the combination of quality and reputation would also satisfy the PDO origin link. As a result, the distinction between PDO and PGI is not always clear-cut in practice, and the latter has, to some extent, absorbed the former while also providing flexible protection to goods that feature a mere reputational link with their area of origin. Finally, (3.3) the Section will briefly address the issue of PGIs solely based on reputation.

3.1 The *Terroir* link (PDO) and the Qualitative link (PGI) are functionally equivalent

The previous Section showed that the PDO constituted the way to introduce the concept of *terroir*, emerged in France and subsequently embodied in the Lisbon Agreement, in the *EU sui generis* GI regime. However, a key point often overlooked by GI literature and EU institutions is that the qualitative link, that characterises PGI together with the reputational one, plays in the practice an identical function.

In fact, PGI rules stipulate that a connection between a product and a given area exists if the ‘qualities’ of the former are essentially attributable to the latter. In this context, ‘qualities’ is synonymous with ‘specificities’.⁴¹ Therefore, just as with PDO, a PGI specification based solely on ‘quality’ must demonstrate that the distinctive attributes of the product, i.e. its qualities or specificities, are due to the unique characteristics of its area of production. Consequently, the two linking factors appear to be equivalent in terms of the type of evidence that must be provided.

To illustrate this point, consider the following two examples, taken from the section of a recently registered EU GI's Single Document that describes the link between the product and its place of origin. Can you determine whether the product in each example is a PDO or a PGI?

⁴⁰ ‘Other characteristic’ is a broad clause that adds flexibility and breadth to the provision. However, its meaning and functioning have never been clarified by the theory and practice of EU GIs.

⁴¹ The origin link and its evidence are under-researched topics in English scientific literature. For an essential reading to approach this matter, in French, 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, Institutiona, and Co-ordination Aspects* (Actes et Communications, 2000) 163.

Example 1

Corsica has a Mediterranean climate, characterised by hot, dry summers and mild, wet winters. The island is buffeted by two dominant winds: the nocturnal *a tramuntana* brings cool nights, and the diurnal *u maestrale* makes the days dry.

The local soil and climate combine to create ideal conditions for forest growth. Corsica is therefore a region of forests, with broadleaved trees – chestnut, oak and beech in particular – particularly rife across the entire island ... Cork oak can mainly be found in the centre and south of the island, making up around 15 % of its forests. An area of more than 200 000 hectares is covered with maquis shrubland, often growing up to 5 or 6 metres high and forming a ‘forest’ in itself...

The conditions of island life have led the Corsican people to develop ways of making charcuterie that are tailored to the local climate and forest resources...

Making ‘Saucisson sec de l’Île de Beauté’ / ‘Salciccia de l’Île de Beauté’ is one of the oldest pork preservation traditions and is practised throughout Corsica...

Example 2

The organoleptic characteristics of ‘Châtaigne des Cévennes’ are ... attributable to the Mediterranean climate. The hot, dry summers enable the build-up of sweet and aromatic compounds in the chestnuts. The rain pattern in the Cévennes, which gets heavier from mid-August onwards, favours the enlargement of the husk and the kernels, thus defining the size...

In the autumn, the differences in temperature mean that the chestnuts ripen fully between September and December, depending on the varieties and where they are planted (altitude). The land management and farming practices in the Cévennes result in healthy groves that produce chestnuts of good size, with the nutritional quality and characteristic sweetness for which they are recognised.

Different fruit conservation techniques have also been used for the chestnuts... These ... led to the development of a specific building: the ‘clède’, a typical feature of the landscape and an example of the know-how of the local population in drying out the fruit... Thanks to the skill in constructing the ‘clèdes’ ... the local traditions have been consolidated and enhanced, making it possible for the original sweet taste and smooth texture to be preserved in the dried chestnuts over time.

Although the two excerpts look very similar, the first, ‘Saucisson sec de l’Île de Beauté’⁴², is a PGI whereas the second, ‘Châtaigne des Cévennes’⁴³ is a PDO.

While similar examples could be presented to illustrate this point,⁴⁴ doing so would make the current analysis unnecessarily lengthy as they would not alter its conclusions. The origin link of PGIs based on ‘quality’ are indistinguishable from that required for PDOs, as the evidence that the applicants must provide to support their case is essentially identical.

3.2 PGI specifications commonly include both the qualitative and the reputational link

Evidence of qualitative link is not a mandatory requirement for the registration of a PGI because the link can be based only on the reputation of the good. In this case, applicants must state the reasons why a specific product is associated with the designated area.⁴⁵ In practice, this requirement is usually met in two non-exclusive ways: (1) by providing evidence of the historical, cultural, and social link between the product and the place (‘historical reputation’); (2) by demonstrating that the market recognises the specific character of

⁴² ‘Saucisson sec de l’Île de Beauté / Salsiccia de l’Île de Beauté PGI’ [2021] C417/32, [5].

⁴³ ‘Châtaigne des Cévennes PDO’ [2022] C347/7.

⁴⁴ These are some examples selected from recently registered PGIs, ‘Aceite de Ibiza / Oli d’Eivissa PGI’ [2020] C211/28; ‘Rucola della Piana del Sele PGI’ [2020] C254/17; ‘Fertőd vidéki sárgarépa PGI’ [2021] C283/12; ‘Olio di Roma PGI’ [2021] C112/12; ‘Derecske Alme PGI’ [2022] C115/18;

⁴⁵ European Commission, ‘Guide to Applicants: How to Compile the Single Document’ (n 13) [5].

the origin product ('market reputation'). This can be proved by attaching application materials such as press articles, awards, information on fairs and other events, menus of famous restaurants, and so on.⁴⁶

One could argue that the adoption of a one-label system may result in the proliferation of applications based solely on the reputational link, thus leading to the weakening of the connection between GI goods and their areas of production, all the more since the two Quality Schemes provide the same level of protection. Indeed, reputation could be considered an easier way to gain IP protection, as it does not require an in-depth analysis of the relationship between the physical/environmental specificities of the area of production and those of the product.

However, a recent study of the Max Planck Institute for Innovation and Competition (MPI) shows that these concerns are unfounded. This work, among other things, analysed the contents of all EU agri-food GIs registered from 1996 – when the first products were added to the register – until 2019. The objective of the evaluation was to identify and categorise the total number of PDOs and PGIs registered based on the evidence of a qualitative link, reputational link, or a combination of both.⁴⁷ The results are presented in Table 1.

Table 1. PDOs and PGOs based on quality, reputation or on both linking factors (1996-2019)

Kind of link	PDO	PGI
Quality	44.46%	13.75%
Quality and Reputation	55.54%	58.21%
Reputation	0%	27.37%

Source: Max Planck Institute for Innovation and Competition

It can be observed that the majority of agri-food PGIs are based on a combination of both qualitative and reputational links, with approximately 60% utilising this combination. Additionally, 13% of them are based solely on the qualitative link, while 27% are based solely on the reputational element. These findings demonstrate that the fact that in the EU *sui generis* GI system, producers can base their PGI applications exclusively on reputation has not weakened the origin link, but has rather led to the combination of more linking factors. These results also serve as a reminder that obtaining a PGI in the EU is a demanding task that requires producers to provide detailed and diverse evidence to support their applications.⁴⁸

Furthermore, it is not surprising that the majority of registered PDOs also include both links, as this Quality Scheme requires evidence of both natural and human factors. In many cases, evidence of the latter is provided through the recount of the history of the product, similar to the case of PGIs. As a result, PGIs that combine qualitative and reputational elements replicate *de facto* the *terroir* origin link that characterises PDOs.

The registration trends of the last three years confirm these conclusions. Table 2, featuring previously unpublished data,⁴⁹ demonstrates that during the period 1 January 2020 - 1 October 2023, with the only exception of 2022, the majority of PGIs registered by EU producers featured either the qualitative link alone, or combined with the reputational one. Particularly, over this 45 months-period, in almost the 63% of cases EU PGI specifications has included evidence of qualitative link, combined or not with reputation.

⁴⁶ Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 19) 87-97; Chapter 4.

⁴⁷ Andrea Zappalaglio and others (n 20) 28.

⁴⁸ For instance, German authorities often require a proof of *terroir* so rigorous that PDOs are very difficult to register, thus resulting in strongly supported PGI. See, Zappalaglio, *The Transformation of EU Geographical Indications Law* (n 18) 145.

⁴⁹ For information on the applied methodology, see text to n 20.

Table 2. EU PGIs based on quality, reputation or on both linking factors (1 January 2020 – 1 October 2023)

Registration year	Quality		Quality and Reputation		Reputation	
	Ratio	%	Ratio	%	Ratio	%
2020	3/21	14.2%	10/21	47.6%	8/21	38%
2021	10/26	38.4%	11/26	42.3%	5/26	19.2%
2022	1/21	4.7%	8/21	38%	12/21	57.1%
2023	10/33	33.3%	10/33	33.3%	10/33	33.3%

Source: original elaboration of Single Documents' contents retrieved from eAmbrosia database

3.3. The 'reputational link' should not be considered weak only because it does not include elements of *terroir*

The last scenario to consider prior to conclude this empirical assessment is that of PGIs based exclusively on 'reputation'. Indeed, this linking factor has often been considered weaker than, and somewhat inferior to, the evidence of *terroir*. For instance, in 2001, the UK House of Lords, as per Lord Hoffmann, held that for a PGI '... the causal link between the place of origin and the quality of the product may be a matter of reputation rather than a verifiable fact'.⁵⁰

This prejudice against the reputational link is not completely unjustified. Indeed, this paper recommends that an EU GI system for the protection of agri-food products based solely on the PGI Quality Scheme should, as a general rule, require producers to provide evidence of both quality and reputation whenever possible. However, it is important to note that the strength of this linking factor cannot be determined in the abstract, but on the basis of the evidence that is practically provided in every specific case. In fact, the reputation of a product, that connects it to a specific place, can indeed be a verifiable fact. For instance, market reputation can be proved through elements such as consumers surveys, the analysis of the market, the awards and prizes won by the good and so on. Instead, historical reputation can be based on archival sources, documents, and other evidence capable of demonstrating that a product belongs to a given area.⁵¹ Therefore, the 'reputational link' can effectively operate in the case of products that, because of their nature, do not feature an intuitive link to the soil as long as rigorous evidence is provided.

In conclusion, this section has shown that the overlaps in the functioning of the origin link that characterises PDOs and PGIs makes the distinction between these two Quality Schemes less clearcut. Particularly, PGIs that base their origin link on 'quality', both alone or in combination with 'reputation', can provide adequate protection also to PDO goods, while also encompassing products that, because of their nature, can base the link only on 'reputation'. However, this is not sufficient to claim that the two origin labels are simply interchangeable. The analysis of the locality requirement is also necessary to provide a clear picture of the interrelations between PDO and PGI. This is discussed in the next Section.

4. The locality requirement: PGIs are not less locally-based than PDOs

The 'locality requirement' is the rule that establishes how much of the product must be produced in the designated area to be granted GI protection. In particular, PDO requires that all production steps, including

⁵⁰ *Consorzio del Prosciutto di Parma v Asda Stores Limited and Others* [2001] UKHL 7, [8].

⁵¹ The topic of what constitutes acceptable evidence of historical link has been especially debated in the French literature. See, Laurence Bérard and Philippe Marchenay, 'Prouver l'Origine' in Laurence Bérard and Philippe Marchenay (eds), *Les produits de terroir: entre cultures et règlements* (CNRS Editions (Open Edition) 2004); Dominique Barjolle, Stéphane Boisseaux and Martine Dufour, 'Le Lien Au Terroir: Bilan Des Travaux de Recherche' (Institut d'économie rurale 1998). For a contribution written in English, see Laurence Bérard and Philippe Marchenay, 'From Localised Products to Geographical Indications: Awareness and Action' (Centre national de la recherche scientifique 2008).

the sourcing of raw materials, take place in the designated area.⁵² Instead, PGI is more flexible and requires only one step of the production process to take place in the area.⁵³

These differences raise a natural objection to the thesis supported by this article: PGI cannot replace PDO, because the latter protects products that feature a stronger link to their area of production. However, empirical evidence refutes this point on two main grounds. (4.1) Firstly, like PDOs, the large majority of PGI products are entirely produced in the designated area, and (4.2), secondly, PDOs are also often produced in large areas, even larger than those where PGIs are made.

4.1 The majority of agri-food PGI products is entirely produced in the designated area

The flexible nature of the PGI locality requirement does not result in products with a weaker connection to their areas of origin. The research conducted by MPI reveals that the majority of PGI products are in fact made entirely in the designated area.⁵⁴ These counterintuitive findings are shown in Table 3.

Table 3. PGI agri-food goods produced entirely in the designated area (1996-2019)

Product Class	Overall registered PGI	% whole production in the area
Class 1.1 (Fresh meat)	127	46.46%
Class 1.2 (Meat products)	139	35.97%
Class 1.3 (Cheeses)	47	68.09%
Class 1.4 (Other products of animal origin)	12	83.33%
Class 1.5 (Oils and fats)	18	77.78%
Class 1.6 (Fruit, vegetables and cereals fresh or processed)	225	79.11%
Class 1.7 (Fresh fish, molluscs, and crustaceans and products derived therefrom)	36	58.33%
Class 1.8 (Other products of Annex I of the Treaty ⁵⁵)	28	82.14%

Source: Max Planck Institute for Innovation and Competition

It can be observed that the proportion of goods in the PGI category that are completely manufactured within the designated area is 66.4%, according to the data. This confirms that the differences between the standards of the two schemes are not as clear-cut as the rules suggest. For example, Table 3 shows that goods such as fruits and vegetables, which fall under class 1.6, are usually registered as PGIs. This is indeed surprising

⁵² This is not an absolute rule, however, as Regulation 1151/2012 provides some exceptions, see art 5(3).

⁵³ 'Production process' is defined as every step of the production from the sourcing of the raw materials until the completion of the end product. See, European Commission, 'Guide to Applicants: How to Compile the Single Document' (n 13) [3.4].

⁵⁴ Zappalaglio and others (n 20) 23. This research took into consideration the products registered under classes 1.1 to 1.8, representing the 88% of EU agri-food GIs.

⁵⁵ This includes tea, spices and vinegar.

considering that the strong link to a specific place, which characterises this kind of goods, would instinctively associate them with PDO.

Similarly, the analysis of the locality requirement in the Single Documents of EU PGIs registered between 1 January 2020 and 1 October 2023 shows that this trend is still present and more pronounced. As shown in Table 4, during this period, 79.4% of EU PGIs registered by producers must be manufactured entirely in the designated area, according to their Single Documents.

Table 4. EU PGI products entirely produced in the designated area (2020 – 1 October 2023)

Registration year	Ratio	%
2020	17/21	80.9%
2021	18/26	69.2%
2022	17/21	80.9%
2023	26/30	86.6%

Source: original elaboration of Single Documents' contents retrieved from eAmbrosia database

4.2 The areas of production of PDO goods are larger than those of PGI products

PDO is usually described as the Quality Scheme that protects goods characterised by the strongest link to their area of production.⁵⁶ However, it would be wrong to portray PDO products as the result of the efforts of small communities that operate exclusively in a tiny, well-delimited and highly romanticised geographical area. Indeed, the available empirical research proves the opposite. Indeed, on average, the production areas of PGI agri-food products are equivalent to, if not smaller than those of PDOs.⁵⁷ These findings are summarised in Table 5.

Table 5. Size of the geographical area of production per quality scheme (1996-2019)

Size of area of production	PDO (%)	PGI (%)
1 – 100 km ²	7,02%	10,68%
101 – 500 km ²	15,44%	17,49%
501 -1000 km ²	12,48%	11,48%
> 1000 km ²	64,90%	59,55%

Source: Max Planck Institute for Innovation and Competition

It can be observed that, on average, almost 65% of registered PDOs can be produced in an area larger than 1000 km², against 59,55% of PGIs.

It would be excessive to conclude, on the basis of these figures, that PGIs are significantly more locally-based than PDOs. Indeed, it is crucial to emphasise that the analysis in this and the previous subsections does not intend to diminish the relevance of the differences in the intensity of the locality requirement in determining the nature and functioning of each GI Quality Scheme. In fact, this remains the key difference between the two, from a practical standpoint. However, the analysis above confirms that, also under this aspect, the distinction between PDO and PGI is less clear-cut than is commonly believed. In reality, a PGI based solely on quality and entirely produced within a designated area is functionally identical to a PDO. Therefore, while differences do exist between PGI and PDO, there is no reason why the latter, due to its broader and more flexible nature, could not incorporate the former. More importantly there is no indication that this would lead to the eradication of the 'Appellation of Origin' paradigm, traditionally represented in the EU context by PDO, as also PGI can embody it.

⁵⁶ European Commission, 'Geographical indications and quality schemes explained' (n 10).

⁵⁷ Zappalaglio and others (n 20) 20-21.

If the results of this empirical analysis have not sufficiently alleviated the potential doubts arising from the varying intensity of the locality requirement stipulated by PDO and PGI regulations, corrective measures may be implemented. For instance, the one-label system proposed by the present paper could combine the origin link of PGI, i.e. 'quality, reputation and other characteristic', with the strict locality requirement that characterises PDO. However, such a provision would need to be tempered by the inclusion of some exceptions to (1) allow protection for processed products that frequently utilize raw materials of diverse origin and (2) ensure that restrictions on the sourcing of raw materials do not create unjustified barriers to the single market, as such restrictions are prohibited by EU law.⁵⁸

5. Consumers are generally not aware of the differences between PDO and PGI

The preceding sections have shown that the historical and practical aspects of EU agri-food GIs do not present any obstacles that cannot be overcome in transitioning from the current dual PDO/PGI system to a single PGI label system. However, it may be argued that PDO should not be subsumed under PGI because it represents niche and higher-end products.

The analysis of the market of GI products, however, demonstrates that this concern is overestimated. In fact, surveys show that, not only the consumers do not attach a specific extra value to PDO, but also that the difference between the latter and PGI is often obscure. In this regard, a recent report of the European Commission observes:

... public awareness of EU quality logos is relatively low: 20% for the PGI logo ... [and] 14% for the PDO logo ... In addition, 20% of those surveyed were not familiar with any of the logos. Furthermore, final consumers may confuse the different labels: 40% did not see a difference between PDO and PGI ... Based on the consumer survey in the context of the evaluation support study of GI/TSG, consumers who are aware of the GI ... schemes tend to understand the following key features: ... respectively 51% and 57% associate PDOs and PGIs with a "link to a geographical area". However, consumers do not fully understand their meaning...⁵⁹

Indeed, the results of a recent public consultation conducted by the EU show that 96% of the stakeholders that responded to the survey expressed the opinion that one of the key challenges that EU GIs are facing today is the 'necessity to increase consumer awareness of the GI logos'. The author acknowledges the fact that the same document reports that only 38% of respondents considered that simplifying the PDO/PGI system with a single label would contribute to solving the problem.⁶⁰ However, it is important to understand that these numbers must be read in context to be correctly interpreted. For example, 76% of the respondents claimed that GI logos are ineffective because their meaning does not come across.⁶¹ This clarifies why stakeholders are sceptical that simplifying the system would solve their issues. Indeed, simplification would not constitute a solution if the logos are not effectively promoted. Nevertheless, it is intuitive that, considering especially the difficulties faced by consumers to understand the meaning of two GI Quality Schemes, a single label would be easier to promote, thus contributing to meet the needs of EU producers.

⁵⁸ This point is explicitly addressed by the applicants' guide itself. See, European Commission, 'Guide to Applicants: How to Compile the Single Document' (n 13) [3.4].

⁵⁹ European Commission, 'Evaluation of Geographical Indications and Traditional Specialities Guaranteed Protected in the EU' (2021) SWD(2021) 428 final, 36.

⁶⁰ European Commission, 'Factual Summary of the Public Consultation on the Revision of the EU Geographical Indications (GIs) Systems in Agricultural Products and Foodstuffs, Wines and Spirit Drinks' Ref. Ares(2021)3900103, 3; 8.

⁶¹ Ibid, 4-5.

6. The role of PDO in the history of the PGI-dominated EU GI frame: a bridge between the pre-unitary and the unitary regime

A last objection to the proposal put forth in this article could be based on the history of the EU's *sui generis* regime for the protection of agri-food products. PDOs have been a part of this system since its inception. Is it truly appropriate to discontinue them now, after more than 30 years of existence?

This contribution suggests that, while the historical importance of this Quality Scheme remains relevant, its role may have become somewhat limited in recent times. The statistical analysis of registration trends indicates that PDO has, in fact, played a crucial role in the history of EU *sui generis* GIs, serving as a bridge for the translation of IGOs already protected at the national level before 1992 into the unitary EU system. However, after this transition, EU agri-food GIs have become significantly PGI-based. Therefore, the simplification of the regime would essentially be an acknowledgement of the current state of the art.

Particularly, in order to ensure a smooth transition from the different national systems to the unitary *sui generis* EU GI regime, Regulation 2081/1992, under art 17, featured the 'Simplified Procedure'. This consisted in a special fast track that allowed the registration of IGOs, legally protected or established by use at the national level and specifically communicated by the Member States to the European Commission within six months from the entry into force of the Regulation. The key peculiarity of this procedure was that the other Member States could not object to these special applications, as long as they complied with the general rules for the granting of a GI.

PDO was the primary driving force behind this process. Of the 699 PDOs currently registered, 275 (39.3%) joined the register through art 17 Regulation 2081/1992.⁶² In contrast, only 166 PGI applications out of 958 (17.3%) followed this same track. It is worth noting that many EU Member States registered a significant portion of their PDOs through the Simplified Procedure in the early days of the EU's *sui generis* GI regime. This is true even for some of the leading EU countries in terms of GI registrations. Table 6 provides some original data showing that France registered in this way 42.7% of its PDOs; Portugal and Greece even 72.4% and 73.4% respectively.

Table 6. PDOs registered through the Simplified Procedure (Regulation 2081/1992, art 17) by five selected EU Member States

EU Member	PDOs Registered via Simplified Procedure (%)
Greece	73.4%
France	42.7%
Italy	39.6%
Portugal	72.4%

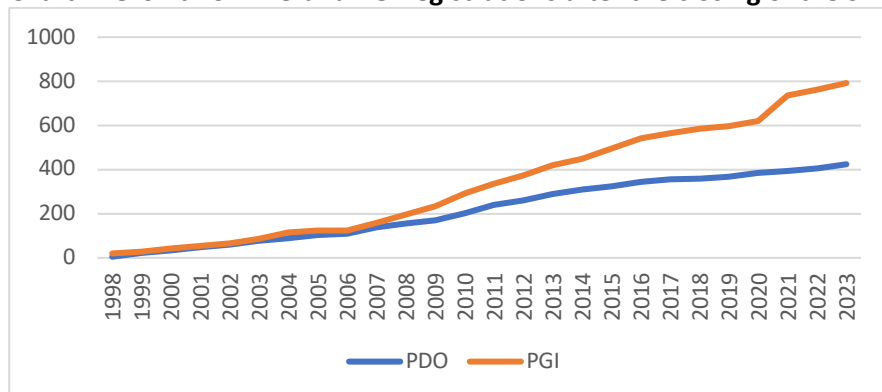
Source: original elaboration of Single Documents' contents retrieved from eAmbrosia database

When the Simplified Procedure became unavailable, PGI rose as the main Quality Scheme. To date, 792 PGIs have been registered through the standard registration process against 424 PDOs. This is due to two main reasons: (a) the flexible nature of PGIs gives more options to the applicants while granting the same level of protection as PDO; (b) PGI has become the standard way to provide protection to non-EU products. In fact, excluding UK GIs, that have all been registered when this country was a Member State, out of 134 non-EU products, 113 are protected by PGI whereas only 21 by PDO.

Hence, the choices of the producers, as well as the approach to the protection of non-EU GIs have shaped a system that, although featuring two Quality Schemes, for at least the last fifteen years has been characterised for the most part by one of them: the PGI. Chart 1 provides a visual demonstration of this point.

⁶² Zappalaglio and others (n 20) 17.

Chart 1. Growth of PDO and PGI registrations after the closing of the Simplified Procedure



Source: original elaboration of Single Documents' contents retrieved from eAmbrosia database

These figures are not meant to show that PDOs for agri-food products have disappeared or that are useless and this article does not intend to suggest that this is the case. However, they demonstrate that a relevant share of registered PDOs, sometimes representing the majority of all the PDOs registered by a Member State, has played a very specific function in a very specific point in time: the transition between the 'old' pre-unitary national systems and the new EU *sui generis* regime. This phase is now over and PGI is firmly the Quality Scheme preferred by applicants. It is therefore unfortunate that the EU institutions have not taken the ongoing reform process as an opportunity to give due consideration to the possibility that agri-food products, just like spirits, aromatised wines and, most recently, crafts and industrial products, can be protected by PGI alone, resulting in a streamlining of the system.

Of course, as already mentioned in the Introduction, this does not require to compulsorily turn existing PDOs into PGIs. In fact, a much better solution would be to grandfather existing PDOs into the new one-label system while leaving the future evolution of the regime to GI/PGI alone, thus following a trend that is already in place. The author is aware that this course of action would not result in an immediate simplification of the system, as PDOs would remain on the register and available on the market. However, the solution presented in this article is the most respectful of the rights of users, particularly those who are currently benefiting from PDO protection and do not wish to be forced to switch to PGI, all the more considering that such a coercive measure could be in conflict with the constitutional principles of several EU Member States. Additionally, data shows that, over the past five years, approximately 60 new PDOs/PGIs have been registered annually, including non-EU ones. Even if the number of applications were to decrease, the number of registered PGIs in the proposed one-label system would still nearly double that of existing PDOs within ten years, resulting in a clear simplification of the system in a relatively short period of time.

7. A one-label system would be compliant with the international obligations of the EU

Before turning to conclusions, the present contribution will clarify that a one-label system for the protection of agri-food GIs would be perfectly compliant with the EU obligations under the TRIPS Agreement and the Geneva Act of the Lisbon Agreement.

GIs are regulated under arts 22-24 of the TRIPS Agreement.⁶³ These provisions are purposively very broad and relatively undemanding to accommodate the different and often contradictory requests presented by the negotiating parties during the Uruguay Round.⁶⁴ Therefore, an EU one-label system for the protection of agri-food GIs would not only be compliant with, but also largely exceed, the TRIPS standards for the following

⁶³ For a general analysis of the provisions of the TRIPS on GIs, see Carlos Maria Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary* (2nd ed, Oxford University Press 2020) 208-239.

⁶⁴ For an overview of the difficulties encountered by the negotiating parties to find an agreement on GIs during the Uruguay Round, see Adrian Otten, 'The TRIPS Negotiations: An Overview' in Jayashree Watal and Antony Taubman (eds), *The Making of Trips Insights from the Uruguay Round Negotiations* (World Trade Organization 2015).

reasons. First of all, this international treaty does not include the concept of AO and, as mentioned earlier,⁶⁵ the definition of 'GI' set forth under art 22(1) was originally proposed by the EU and it is similar to that of PGI. Secondly, the standard level of protection mandated by TRIPS is low, being based on broad unfair competition standards, essentially aimed at preventing any misleading or dishonest use of the protected name.⁶⁶ Instead, the protection that EU *sui generis* GIs grant to agri-food products is very high, mixing absolute protection standards with broad unfair competition elements. Particularly, Regulation 1151/2012 protects GIs against:

- (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits, weakens or dilutes the reputation of the protected name, including when those products are used as an ingredient;
- (b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar, including when those products are used as an ingredient;
- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the consumer as to the true origin of the product.⁶⁷

Finally, the TRIPS does not require WTO Member States to introduce a register for GIs. Indeed, although art 23(4) calls for the establishment of a multilateral system of notification and registration, this has never been implemented. By contrast, the EU has established a functioning GI register, thus exceeding the requirements set forth in the TRIPS Agreement.

Therefore, a one-label system based on PGI would be absolutely compliant with the mandatory minimum standards set forth by the TRIPS Agreement.

With regard to the international provisions on AOs, the discussion is more articulated. In 2015, WIPO adopted the Geneva Act of the Lisbon Agreement ('Geneva Act').⁶⁸ This Treaty does not supersede the Lisbon Agreement, but rather expands the Lisbon System by introducing the 'GI' model as defined by the TRIPS Agreement as an alternative to AO.⁶⁹ On 26 November 2019, the European Union joined the Geneva Act, which entered into force shortly after, on 26 February 2020. However, this Treaty does not obligate its Member States to implement a dual AO/GI system. In fact, it merely stipulates a specific level of protection without specifying the means for its implementation.⁷⁰ Particularly, art 10 reads:

[Form of Legal Protection] Each Contracting Party shall be free to choose the type of legislation under which it establishes the protection stipulated in this Act, provided that such legislation meets the substantive requirements of this Act.

⁶⁵ Section 2.3.

⁶⁶ TRIPS Agreement, art 22(2). A more demanding standard, based on the absolute protection granted to AOs is provided under art 23(1). This, however, applies only to Wines and Spirits, not agricultural products.

⁶⁷ Regulation 1151/2012, art 13. For a complete analysis of this provision and of the related case law, see Blakeney (n 1) 126-133.

⁶⁸ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulation Under the Geneva Act of the Lisbon Agreement (20 May 2015).

⁶⁹ For a deeper assessment of this Treaty, see Matthijs Geuze, 'Protecting Geographical-Origin-Brands Abroad: The Geneva Act of the Lisbon Agreement' in William van Caenegem and Jen Cleary (eds), *The importance of place: Geographical Indications as a Tool for Local and Regional Development* (Springer 2017); Anna Micara, 'The Geneva Act of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration: An Assessment of a Controversial Agreement' (2016) 47 IIC 673.

⁷⁰ WIPO, 'Main Provisions and Benefits of the Geneva Act of the Lisbon Agreement (2015)' (2018) 5.

The level of protection mandated by the Geneva Act reminds the text of art 13 Regulation 1151/2012 presented above.⁷¹ Therefore, an EU agri-food GI system based on just one label would be perfectly compliant with this international treaty.

Conclusions

The article has presented the argument that the EU *sui generis* GI regime for the protection of agricultural products and foodstuffs can be reformed and simplified. Specifically, it has been suggested that the current system, which includes two GI Quality Schemes, PDO and PGI, could be transformed into a one-origin label system based solely on PGI, similar to what is already in place for spirits, aromatised wines and crafts. The author has supported this proposal by drawing on the history of the EU regime, as well as previously unpublished quantitative analyses, also providing suggestions for the practical implementation of the proposed system. Particularly, the contribution has been organised around six fundamental statements to discuss the argument from all the relevant perspectives, drawing the following conclusions.

First, the work has determined that the coexistence of PDO and PGI in the EU agri-food GI system is due to historical contingencies that are no longer relevant, and therefore cannot justify the continued use of a dual system.

The analysis then focused on the practical functioning of the regime, with particular emphasis on the origin link and the locality requirement, i.e. the defining elements of every *sui generis* GI system. The study revealed that the differences between PDO and PGI have significantly blurred, and that PGI can provide adequate protection for PDO goods without compromising the intensity of the connection between the product and its place of origin.

Furthermore, the work focused on the market for GI products. It found that discontinuing the PDO Quality Scheme would not bring any disruption to the system, as the vast majority of consumers are not familiar with the meaning of GI labels and often cannot even recognise or distinguish them.

In addition, the research has stated that, although PDOs have been part of the EU agri-food GI system for more than 30-years, descriptive statistics show that this Quality Scheme has played an essential role at the beginning of the EU regime, particularly as a means to transpose the Indications of Geographical Origin already protected at the national level into the new unitary frame. After this transition phase, however, PGI has become the predominant Quality Scheme, due to its broader and more flexible nature. Therefore, the adoption of a one-label system would merely align with these trends, not to mention that PGIs are also the way through which the EU usually provides protection to non-EU GIs.

Finally, for the sake of completeness, the article has reviewed the relevant provisions of the TRIPS Agreement and of the Geneva Act of the Lisbon Agreement, coming to the conclusion that the proposed reform would not breach any obligation assumed by the EU under these treaties, since a one-label regime based on PGI would perfectly comply with both of them.

⁷¹ Cf Geneva Act, art 11.