Geographical indications outside the European regulation of PGIs, and the rule of free movement of goods: Lessons from cases judged by the Court of Justice of the European Communities

Christophe Charlier, Mai-Anh Ngo

Geographical indications outside the European Regulation on PGIs, and the rule of the free movement of goods: lessons from cases judged by the Court of Justice of the European Communities

Christophe Charlier* and Mai-Anh Ngo**

*Corresponding author.

GREDEG/CNRS and Université de Nice Sophia Antipolis,

250 rue Albert Einstein

06560 Valbonne

France

charlier@gredeg.cnrs.fr

Tel: 0033493954341

Fax: 0033493653798

**GREDEG/CNRS, 250 rue Albert Einstein, 06560 Valbonne, France. ngo@gredeg.cnrs.fr

The original publication is available at www.springerlink.com:

http://www.springerlink.com/content/v8uuv121wv537385/

Abstract Several recent cases judged by the Court of Justice of the European Communities (the Court) have raised interesting issues related to the possibility for operators of food chains to use national quality signs to indicate territory of origin, which are different from the regulatory European 'Protected Geographical Indications'. The various attempts by France (a list of quality signs), Germany ('Markenqualität aus deutschen Landen' sign) and Belgium ('Walloon' sign) have all been condemned as protectionist policies contradicting the free movement of goods in the European Market. These national quality signs can be seen as attempt to defend the viability of specific kinds of activities (involving small enterprises) in specific places (rural areas). These cases are a good illustration of the difficulties that a Member State of the European Communities (Member State) faces in trying to protect its traditional activities and/or rural areas in a way that is compatible with free markets. The paper analyses the recent court decisions underlining economic aspects such as information delivery and the cost of alternative protection mechanisms for these activities. We highlight in particular the collective trademarks and the kind of intellectual property right they form by the economic theory of clubs, and make some comparisons with protected geographical indications.

Keywords Geographical Indications . Intellectual property rights . Free movement of goods . European regulation

JEL Classifications K11 . K19

1 Introduction

Several recent cases judged by the Court of Justice of the European Communities (the Court) have raised interesting issues related to the possibility for Member States of the European Communities (Member States) to protect their various agricultural activities with the help of national quality signs to indicate territory of origin, as an alternative to the European labelling regulation . The European labels are known as Protected Geographical Indications (PGIs) and are a form of intellectual property (IP) rights protected by European Regulation 510/2006 (the European Regulation).[1] The various attempts made by France[2] (a list of broad quality signs such as 'Salaison d'Auvergne', 'Franche Comté', 'Savoie' etc.), Germany[3] ('Markenqualität aus deutschen Landen' sign) and Belgium[4] ('Walloon' sign), which relate to a class of products rather than one specific product, gave rise to the cases examined in this study. They were all condemned by the Court as protectionist policies contradicting the free movement of goods in the European Market.

These proposed national policies are aimed at providing information to consumers about product quality as well as defending the viability of specific kinds of activities (of small enterprises) in specific places (rural areas). Given the generality of the current proposed geographic labelling, it is fairly clear that protection of these activities was the motivation. Thus, these cases are a good illustration of the difficulties faced by governments trying to make the protection of certain traditional activities compatible with free markets.

[1] For a study on the expansion of PGIs see Barjolle and Sylvander (2002).

[2] C-6/02. Commission of the European Communities v French Republic. [2007] ECR I-164.

[3] ECJ Case C-325/00 Commission of the European Communities v Federal Republic of Germany. [2002] ECR I-9977.

[4]. ECJ C-255/03 Commission of the European Communities v Kingdom of Belgium [2007] ECR I-5567.

Interestingly, supporting development of the rural economy is a declared aim of the European Regulation: along with providing consumers with information on quality, in the preamble to the European Regulation mention is made of rural economies with particular attention to less-favoured areas - "the promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas."[5] This position is in line with the reform of the EU's Common Agricultural Policy which, as pointed out by Becker (2009), promotes rural development through improvement to food quality. The Court ruling condemning protective national policies, which clearly have the same aims, is therefore somewhat surprising and requires some explanation. At the same time, amassing various regulations, at different institutional levels, with identical objectives is questionable.

The aim of this paper is to present an analysis of these cases focusing on their legal and economic characteristics. Section II presents the cases and explores their legal aspects. The fact that the geographical names which would be protected under the proposed national policies cannot be considered as IP (contrary to PGIs) is underlined as a cornerstone of the Court's decisions. Economic analysis of the cases considers the two aims of the policies being considered: delivery of information to consumers on the one hand, and protection of a certain kind of agricultural activity on the other hand. The information that geographical names would provide to consumers, especially in the case of PGIs, has been thoroughly analysed in the economics literature (Auriol and Schilizzi (2003) and Marette and Crespi (2003)). But the idea of protection per se through the use of geographical labelling has not really been

[5] Council Regulation (EC) No 510/2006 of 20March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. Official Journal of the European Union, L 93/12, 31.3.2006. Point (2) of the preamble.

investigated although the fact that PGIs create non-tariff trade barriers (Charlier and Ngo 2007 and Josling 2006) generating benefit as well as costs for a country has been pushed forward (Anders and Caswell 2009, Evans and Blakeney 2006). The economic analysis of the cases developed in this article focuses on this protection per se aspect, interpreting the Court's decisions as a 'social choice' about admissible ways to protect activities (Section III). If PGIs are excluded for most of the products related to the cases analysed, and if the only protection of IP is acceptable, then other forms of IP will need to be found for these activities.[6] On this basis, Section III of the paper focuses on collective trademarks mentioning geographical indications. This form of IP is compared with that provided by PGIs and the results are used in Section IV to outline some of the implications for society of shifting protective labelling from a system of national policies to a collective trademark regime. The relation established in this paper between the IP rights of PGIs and public goods on the one hand, and between the IP rights of collective trademarks and club goods on the other hand, highlights a different aspect to the Court's decision than only the interest in maintaining the free movement of goods.

2 Presentation of the cases

The cases in this study have some common characteristics. First the parties are the same, in that the applicant is the Commission of the EC and the defendant is an EC Member State (France, Germany or Belgium). Second, the issue being judged is the same: national legal protection afforded by names or regional labels that explicitly (Salaisons d'Auvergne, Savoie,

[6] This can be seen as a branding strategy choice. See Argawal and Barone (2005).

Franche Comté, Walloon label of quality…) include a geographical indication. Third, the judgement is the same. In every case, the national legal protection being applied for was found to violate the provisions of Article 28 EC stipulating that "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". Finally, the Court, in every case, refused to consider that the different national legal protections might come under Article 30 EC,[7] which lists possible exceptions to Article 28 EC including "the protection of industrial and commercial property". This is the crux of the matter.

PGIs are recognized as IP rights by the World Trade Organization (WTO) TRIPS – Trade Related Aspects of Intellectual Property Rights - agreement. The Court, however, did not acknowledge the status of industrial and commercial property in relation to the names and regional labels being proposed, since they were not registered as PGIs under European Regulation 2081/92[8] on the protection of geographical indications (GIs). Furthermore, because these names and regional labels refer to classes of products rather than to single products, the Court deemed that they could not, in any case, be considered PGIs within the European framework.

[7] Article 30 states that "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

[8] Now European Regulation 510/2006.

What lesson can we draw from these cases? In the cases we analyse no harm in the form of economic or financial loss was directly at stake. The national legal protections being requested were attacked by the European Commission as such, because of their potential to discriminate on the grounds of nationality. The same reasoning and judgement was applied by the Court, which used the arguments of the European legal standard of free movement of goods between Member States, and only registered GIs could be considered as exceptions. Outside the European regulatory framework on GIs, any national legal protection that mentions the geographic origin of a product or of a class of products will always be considered as interfering with the free movement of goods between Member States. In order to be considered an exception to the free movement of goods, a national legal protection in the form of a quality sign mentioning a geographic origin has to be in keeping with the European regulatory framework of regulation 2081/92, that is, it has to protect IP represented by a registered PGI. This position may seem odd. It can be seen as being in contradiction with the attempt of the European Union (EU) to promote the protection of GIs at the international level. In this context, the EU is generally considered a strong supporter of PGIs.[9] However, national legal protection for geographical origin labelling outside the European legal framework is a prime example of a threat of discrimination in favour of a country's own products.[10] The argument that it provides information for consumers (see section IV) is of secondary importance. In requiring that national protection afforded by geographic origin labelling complies with the European regulation on GI protection the Court is arguing from

[9] See Charlier and Ngo(2007), Evans and Blakeney (2006) and Josling (2006).

[10] At the international level the European Commission strongly supports its model of protection of geographical indications. Charlier and Ngo (2007) showed how the European wish of unilateral harmonization of the international systems of protection of geographical indications on the European model contradicts National Treatment and has produced the international dispute over GIs arbitrated by the WTO.

the point of view that it is IP rights, rather than quality *per se,* that is the subject of legal protection.

In order to comment on the substantive aspects of the Court's decisions, this reference to registered PGIs needs to be explored further. A PGI in European Regulation is the inclusion of the name of a region in the labelling of an agricultural product or a foodstuff that meets all of three requirements (Article 2.1 of the European Regulation): (i) the product originates from that region; (ii) the product possesses "a specific quality, reputation or other characteristics attributable to that geographical origin"; (iii) the "production and/or processing and/or preparation" of the product take place in that region. To be eligible for a PGI, an agricultural product or foodstuff must comply with a product specification form (Article 4 of the European Regulation). This document has also to identify the authorities or bodies that should verify compliance with the product specification. In addition to its definition there are two other features that are important and highlight the 'nature' of the IP right of a PGI. First, only groups (any association of producers or processors working with the same agricultural product or foodstuff, irrespective of its legal form or composition) are entitled to apply for registration (Article 5.1 of the European Regulation). Second, a name registered under the European Regulation may be used by any operator marketing an agricultural product or food stuff conforming to the corresponding specification (Article 8.1 of the European Regulation).

These two characteristics allow us to draw a parallel between the definition of the nature of the IP right of a PGI implicitly used by the European regulator, and public goods theory. The first characteristic shows that the IP of a PGI is 'non rivalrous'. If the agricultural good corresponding to a PGI is individually exploited, the IP of a PGI concerns a group of producers. The second characteristic shows that the IP of a PGI is 'non excludable'. As soon

as an operator conforms to the product specification of a PGI, he can use this PGI without being able to prevent another operator whose products conform to the product specification from also using it. As a consequence, in a given area the number of operators marketing an agricultural product or foodstuff corresponding to a PGI cannot be limited. This clearly shows that the property rights represented by a PGI cannot be appropriated by an operator even if he is the only one marketing the corresponding product. These two properties (non-rivalry and non-excludability) of the IP of a PGI attributable to Articles 5.1 and 8.1 of the European Regulation show that in the spirit of the European regulator the IP right of a PGI is a public good.[11] This interpretation, furthermore, is perfectly in line with the idea expressed in the European Regulation (in its Article 2) according to which the quality of the agricultural product or foodstuff is essentially (or exclusively) due to its geographical origin, that is, to human and natural factors historically constructed by a society, inherited and therefore escaping the strict operator ability condition. An operator marketing a PGI benefits from the pre-existing reputation of the PGI, and cannot be considered its creator. The difference with a privately owned trademark (i.e. with a privately owned IP right) is here very clear. The reputation of a trademark is constructed and maintained by its owner. In line with this, a trademark owner can lose his property right if he ceases to exploit his trademark or if he ceases to defend it. A PGI, however, 'never dies': a PGI may be discontinued for many years if a product stops being produced but will be revived as soon as an operator starts to produce a good that conforms to the product specification for that PGI. This property of permanence underlines the independence of the IP right of a PGI, from the operators' actions.

[11] Langinier and Babcock (2008) have suggested that PGIs can be seen as 'club goods'. For that, they consider that producers are free to decide the size of the club representing a PGI. This idea is however in contradiction with the non-excludability property underlined here.

The main consequence for our analysis of the Court's judgements of this interpretation of the nature of the IP rights of PGIs which underlines their public good dimension is straightforward. In awarding costs to the different Member States involved in these cases, the Court explicitly stated that the names and regional labels being judged were not IP rights, unlike the case of PGIs. If operators want to seek IP within a different format, other possibilities can be explored such as individually owned or collective trademarks. However, whatever form is considered, the dimension of a public good will not be reached. The properties of 'non-rivalry' and 'non-excludability' are assigned to PGIs by the European Regulation and are not the consequences of material properties, as is the case with a conventional public good. It is the consequence of the expression of an implicit social choice that gives these properties to the intellectual protection bestowed by PGIs. This choice supports the intangible properties of PGIs, of inheritance and timelessness.

These remarks raise a series of questions. Should we limit a specific legal protection related to origin labelling, for IP that can be considered as public goods? What are the consequences (both private and social) of using trademarks to afford legal protection of IP rights through some form of geographic labelling? Would this option be 'economically' feasible? Could collective trademarks be considered as having a public good dimension? If not, what are the consequences? We try to answer these questions and examine any consequences in the next two sections.

3 Collective trademarks and PGIs

A brief history of the agricultural products that were protected under national legal protection schemes shows that some are now protected by PGIs and some are protected under quality signs such as the French 'Label Rouge'.[12] These protections are not at issue for all the products to which they relate. Some regional labels have turned into collective trademarks.[13] In order to get a complete picture of the consequences of the Court ruling we need to consider the possibility to protect a geographic name with a collective trademark.

A trademark can be owned by an individual or by a legal entity representing a group of operators. The latter occurs when a specific agricultural product is produced by several small operators for whom the financial burden of owning a trademark on their own would be too great. Operating as a group eases for example the advertising costs involved in building and maintaining trademark reputation. However, it does imply some coordination costs. We focus on this form of protection since it is a good illustration of the context that has likely created the need for the national legal protections condemned by the Court in the cases described in this paper. The trademarks owned by legal entities are known as 'marques collectives de certification' in France and 'collective trademarks' within the Office for Harmonization in the Internal Market (OHIM) at European level.[14] In this paper, we do not distinguish between types and refer to them as 'collective trademarks' throughout.

[12] Saucisson sec d'Auvergne was protected under the regional label "Auvergne" and was awarded the French quality sign 'Label Rouge'.

[13] This is the case for example for the label 'Savoie', http://www.marque-savoie.com/ (visited 10 November 2008). The trademark 'Ardennes de France' is another example, http://www.ardennes-de-france.com/association/ardennes-de-france.html (visited 10 November 2008).

[14] Ibele (2009) and Schuβler (2009) compares PGIs with certification and collective marks found in the US Trademark Act.

Collective trademarks and PGIs have several common points. First, both are IP rights. Second, a collective trademark such as the French 'marque collective de certification'[15] is defined in terms of the origin of the product, and this is the case for other types of collective trademarks. Third, as in the case of a PGI, only a group is entitled to register a collective trademark, and product specification, which is an important aspect of PGIs in the European Regulation, is also imperative for a collective trademark, and is now called 'rule' in the collective trademark scheme. Finally, the idea that an operator can use the relevant collective trademark as soon as he complies with the requirements of the 'rule' also applies to certain forms of collective trademarks.[16]

A collective trademark, therefore, implies non-rivalry and non-excludability. Can we therefore assume a public good dimension in the IP rights bestowed by a collective trademark as in the case of a PGI? The answer is no. To become a PGI, a GI has to apply for registration. The European Commission in evaluating whether to accept or reject the application considers two things. The first is a series of points (Article 5.3 of the European Regulation) relating to the legitimacy of GI in reference to the particular product: e.g. the definition of the product, the definition of the geographical area, the link between the product and the geographical environment and, "where appropriate, the specific elements of the product description or production method justifying the link". The second (Article 7 of the European Regulation) involves examining the objections (if any) to the proposed registration (e.g., a conflict with a generic name or an existing trademark, etc.), the admissibility of these objections, and, where necessary, taking decisions on these aspects. The application procedure in the case of trademarks (and therefore "collective trademarks") is less cumbersome under national

[15] 'Cochon de Bretagne' is an example.

[16] This is true for 'marques collectives de certification' in particular.

regulations or the OHIM directives at European level. Qualification for a collective trademark is based on certain general attributes (novelty of the trademark, product with individual characteristics, a denomination that is not contrary to public policy, etc.) and the guidelines in the OHIM concerning its proceedings focus on objections (the trademark shall be justifiable in the preceding sense and not conflict with existing trademarks) rather than on the authenticity of the geographical indication *per se*. Thus, demonstrating the existence of a link between quality of the good and the natural and human environment of its origin is not compulsory within the 'rule' document of a collective trademark, which allows greater latitude to applicants for collective trademarks.

This greater latitude can be exploited by a group of producers in order to obtain a rule for a collective trademark that is more restrictive than the product specification in a PGI. A group of producers can limit access by other producers by including constraints relating to the production area and production technique, all of which will contribute to increasing profits. This clearly shows that the IP of a collective trademark is 'congestible', and does not have the dimensions of a pure public good where, ideally, such congestion cannot appear. In other words, the IP of a trademark encompasses some characteristics that are halfway between a purely public good (non-rival and non-excludable) and a purely private good (rival and excludable) to obtain a club good attributes (non rival, non excludable and congestible). What are the consequences for the cases under scrutiny? We deal with these below.

4 Analysis of the cases

The key words in the Court's decisions were the same: preservation of the 'free movement of goods' between Member States. Does this guarantee the maximum wellbeing of society? We consider this question looking first at informational problems and, second, with the help of the relationship established between the IP of a PGI and a public good on the one hand, and the IP of collective trademarks and club goods on the other hand.

4.1 Provision for the free movement of goods, competition and information

The rule bestowing free movement of goods between Member States has normative roots. It is seen as a necessary condition for competition in markets. From that perspective, the Court's decisions clearly consider the national legal protections afforded by names and regional labels in these cases as policies implying or favouring withdrawn attitudes by domestic consumers towards national products. Favouring this kind of behaviour with a national policy is seen as equivalent to an implicit entry barrier and is banned. However, names and regional labels can also be quality signs which give information to consumers in the context of asymmetric information. A number of theoretical results point to the utility of public intervention in such contexts, since without such signalling, the market for high quality goods could collapse. The case of 'credence goods',[17] that is goods for which consumers cannot determine the quality - either before or after purchase, is particularly sensitive. Geographical origin is typically a credence attribute. Signalling this origin to consumers where demand for this attribute exists, is thus essential. The information provided transforms a credence good into a 'search good', that is, a good where consumers can check the quality before they purchase. Without

[17] See Nelson (1970).

signalling, the variety of goods available on the market would diminish, decreasing the wellbeing of society.

Signalling of credence attributes, however, is something of a puzzle (Auriol and Schilizzi 2003). Because these attributes can never be experienced by consumers, signalling through price or producer's reputation is not very effective. Certification of credence attributes provides a way to transmit missing information to consumers. As a consequence, this is an important aspect of the national legal protections provided by the names and regional labels in the cases analysed. In making certification available, these national policies can be seen as organizing information delivery and would therefore be useful from a wellbeing maximization perspective. At the same time, however, such policies simultaneously protect producers from competition giving them a market power that increases their surplus, but generating fewer exchanges than the optimum. As a result, the legal protection of geographical origin would be justified if the net effect on society is positive, which is something that has to be evaluated, case-by-case, as shown in the economics literature.

In order to characterize this situation, Marette and Crespi (2003) consider a case where producers of high quality goods (with high quality understood as a credence attribute) bear higher cost of production than producers of low quality goods, but can certificate the high quality and create a cartel, which has the power to reduce the quantities available in the market so as to increase price. Controlling the quantities of high quality goods supplied to the market creates incentives for producers to differentiate their production with high quality goods. Certification allows consumers to choose the quality they want, and therefore increases their surplus. In cases where the certification cost is high, Marette and Crespi show that, if the product differentiation allowed by quality certification is sufficiently high, the positive effects

of certification are bigger than the negative one of increased market power for producers. This idea that a sufficiently high product differentiation is necessary to make national protective policies and quality certification welfare improving, was also found by Zago and Pick (2004). Zago and Pick also show that in a situation characterized by a high fixed certification cost and a large difference between the marginal costs of a high quality product and a low quality product, protecting geographical indications can reduce the wellbeing of society. In a different setting, Moschini and al. (2008) consider the case of a competitive market for a GI-certified good. In that context they show that the need for certification involving fixed costs creates increasing returns to scale at the industry level, so that the competitive equilibrium cannot be Pareto efficient. Under-provision of the GI-certified good appears as a consequence. Furthermore, since in that competitive setting the producers have no market power, they do not take advantage of the GI protection, whereas consumers do.

These results in the economics literature on GI protections can be used to qualify the reference to free movement of goods used in the analysed Court decisions. They show effectively that protecting GIs can be defended even when it has an effect on competition in the market, since GIs furnish valuable information to consumers. The results of Moschini and al. (2008) go further. Maintaining the hypothesis of competitive market and pointing out that the fixed certification cost creates a distortion to the first best equilibrium, the authors show that the protection of GI as a form of intellectual property alone is not sufficient to ensure an optimal provision of GI-certified goods. A government aiming at restoring the Pareto efficiency should therefore consider additional form of support to GIs. These results underline the need for protection and permit to understand why, as soon as the national quality signs under scrutiny have been condemned by the Court, other forms of protection have been sought after. Compared to this, the conclusions of the analysis considering imperfect

competition form a contrast. They stress that protection of GIs should not be considered automatic and evaluations needs to be made case by case, taking account especially of certification cost, degree of differentiation between quality levels and differences in marginal costs of production. The specificity of a large part of the agricultural products initially protected by the disallowed national policies was not strong, the labelling referring to classes of products rather single products. In our view, therefore, for many products, an analysis of information provided by such labelling would support the Court's decisions.

4.2 The IP right of a collective trademark as a club good

The producers whose national protection was disallowed by the Court, could gain protection for their products under the trademark scheme as outlined in Section III. Collective trademarks are of particular interest here. They can include the geographical origin of the product and they constitute a way of sharing out the cost of managing a brand image. This latter is especially significant for small businesses. The feasibility of this strategy and whether, compared to the protection provided by a national regulation, this strategy has an effect on the wellbeing of society are questions that need to be addressed. Finding the answers to these questions would enable a better appreciation of the consequences of the Court decisions. We consider first the latitude offered to operators in the elaboration of the 'rule' of a collective trademark and second the cost of the protection mode.

As described in section III, one of the main consequences of resorting to a collective trademark rather than a PGI for protection of activities, is the latitude given to operators in setting the rules defining a collective trademark. Groups of producers are allowed to enforce

restrictive dispositions in order to limit access by other producers in order to increase their profits. Not only can there be limitations imposed on the legitimate production area, but also only certain techniques may be considered eligible. There are consequences from these practices. Lence et al. (2007) for instance compare the different legal forms of production organization allowing the supply of high quality products to be controlled (in order to make them more profitable for producers). These include limiting the cultivated surface area, or implementing restrictions on the production process, or a combination of both. Lence et al. (2007) show that these various modes of organization of supply impact differently on the total surplus for society. A regulation that would favour restrictions on the production process without any other form of limitation could provide incentives for producers to choose production techniques that were more restrictive than necessary, to obtain high quality goods. This situation would impose an unnecessary social cost as a consequence. In considering only the free movement of goods in order to rule against the national protection of names and regional labels ignores these kinds of effects. However, if producers seek protection under a collective trademark these effects could be significant. Another way to consider the Court's ruling therefore would be to make reference to collective trademarks as an alternative mode of protection for the particular activities and look at the costs of this protection.

The organization of the supply of goods that have a common specificity (here names or regional labels), but are produced by different operators implies costs. These costs are different from the operating costs borne by individual operators. They concern specifically the coordination required among producers and the costs involved in promoting a trademark: product specification establishment, maintaining brand reputation, etc. These 'collective trademark costs' are shared by the producers and should be regarded as the costs of creating the value of the IP right of the trademark. The theory of club goods initiated by Buchanan

(1965) shows that comparing the costs per person in a club with the benefits per person, enables the optimal size of the club to be determined.[18]

Under the disallowed national protections or under a PGI regime these cost of coordination are small compared to what they could be within a collective trademark scheme: the denominations can easily be defended, the regulatory labels act as quality signs whereas a collective trademark requires that its 'rule' be specified, its brand image established and defended, etc.). Banning the legal national protections by names and regional labels creates a negative external shock on the activities involved. If collective trademarks are chosen as the alternative mode of protection, the operators' coordination framework has to be reinvented and its cost supported. The increase in coordination costs affects the optimal size of the producers' club. However, the effect is not systematic and depends on the shape of the cost function. This is illustrated in figure 1.

[18] See Glazer et al. (1997) and Sandler and Tschirhart (1980) for a survey.

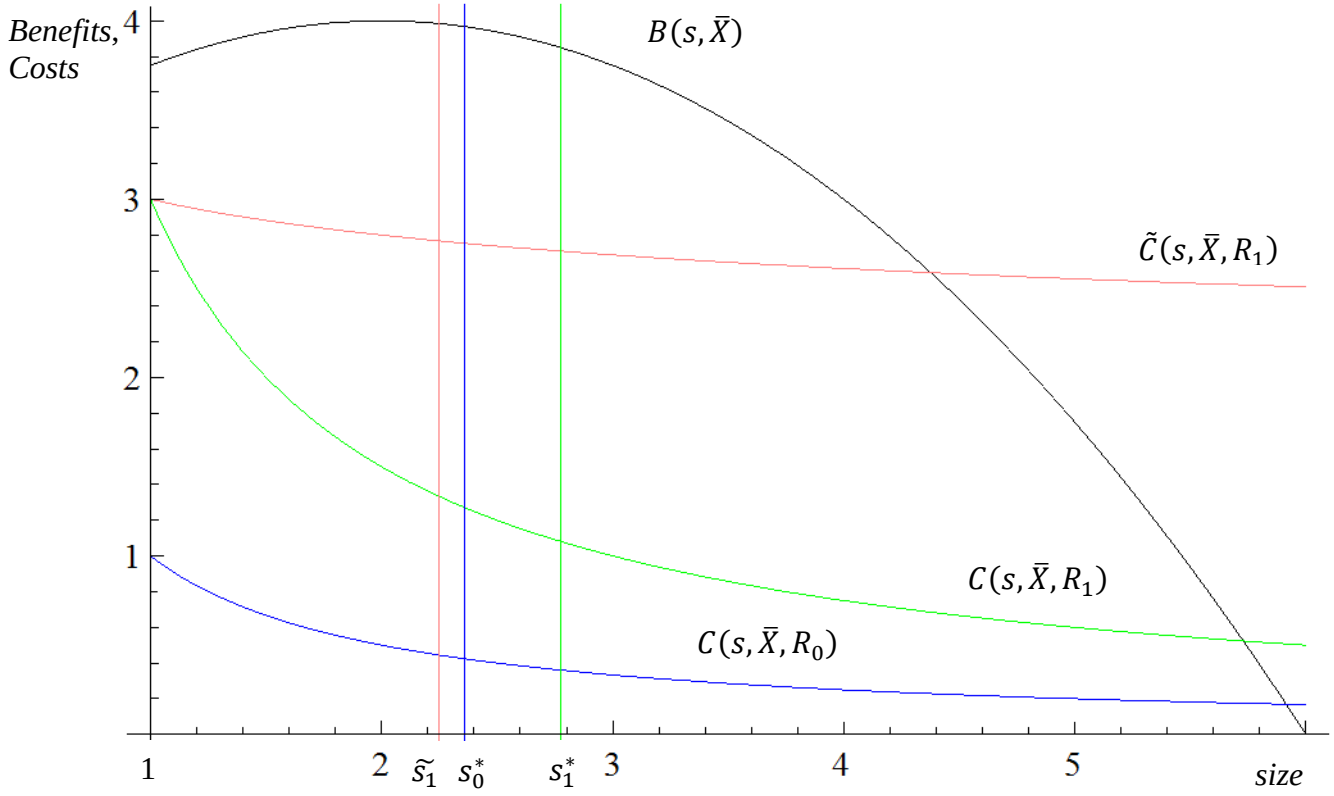

FIGURE 1[19]

In this figure, $B(s,\overline{X})$ is the benefit per person of the producers' club membership for a given level $\overline{X}$ of reputation created/defended for their collective trademark. This benefit first increases with the size *s* of the group and then decreases. The decrease is due to congestion, whereas the increase can be explained by positive externalities: for a given level of reputation of a collective trademark the increase in the number of producers in the group reinforces the presence of the trademark in the market so that the benefit per person increases (until

[19] Derived from J. M. Buchanan (1965). The curves are representing the following functions:

$B(s,\overline{X})=-\frac{1}{4}s^2+s+3$, $C(s,\overline{X},R_0)=\frac{1}{s}$, $C(s,\overline{X},R_1)=\frac{3}{s}$ and $\tilde{C}(s,\overline{X},R_1)=\frac{3}{s^{0,1}}$ and the three different optimal sizes are calculated with these functions : $\tilde{s}=2{,}24$, $s_0^*=2{,}36$ and $s_1^*=2{,}78$.

congestion occurs). The curves $C(s,\overline{X},R_0)$ and $C(s,\overline{X},R_1)$ and $\tilde{C}(s,\overline{X},R_1)$ stand for the cost of the club per person, for a given reputation of the collective trademark $\overline{X}$, under different protective regimes R_0 and R_1. The optimal size for the producer group is calculated maximizing the difference between benefit and cost.[20] The curve $C(s,\overline{X},R_0)$ represents the cost per person under the condemned national protection for regional names and labels. With this cost the optimal size is s_0^*. The curves $C(s,\overline{X},R_1)$ and $\tilde{C}(s,\overline{X},R_1)$ represents the cost of the club per person under a collective trademark for two different scenarios.

Both scenarios consider that exchanging the initial national protection for protection by a collective trademark raises the cost per person. In the first scenario, the new cost function $C(s,\overline{X},R_1)$ compared with the benefit function $B(s,\overline{X})$ implies an increase in the optimal size of the producers club (from s_0^* to s_1^*). This increase in the club's size allows the higher costs to be shared among a larger number of producers. In the second scenario, the new cost function $\tilde{C}(s,\overline{X},R_1)$ and the benefit function $B(s,\overline{X})$ implies a decrease in the optimal size of the producers' club (from s_0^* to $\tilde{s}_1^*$). This decrease in the club size moderates the increased costs of coordination. The relevance of these scenarios has to be evaluated case by case because they imply completely different social difficulties.

If the optimal size of the producers club increases following a shift in protection mode, as in the first scenario, it is important to ensure that a sufficient number of producers exists. Obtaining an optimum number in remote rural areas that probably were the target of the disallowed national legal protections might be difficult. Situations could arise in which a club

[20] This optimal size is obtained where the derivatives of the benefit and cost functions are equal.

cannot emerge because of an insufficient number of producers to cope with a significant increase in costs.

If, as in the second scenario, the optimal size of the producers club decreases following the shift in the protection mode, fewer producers will be protected. The unprotected ones may disappear or be in less favourable positions. As a consequence, the protected producers will have stronger market power. In that case, a decrease in the quantity of the good produced would therefore affect the wellbeing of the society.

These effects of the Court's decision on both the number of producers protected and on the quantity of high quality goods supplied, highlight other aspects of the problem than the mere free movement of good. No systematic conclusions can be drawn; a case by case approach is the only possible approach to assessing their existence and magnitude.

5 Conclusion

The relation established in this paper between the IP rights of PGIs and public goods on the one hand, and between the IP rights of collective trademarks and club goods on the other hand, has some implications for the rulings made by the Court on several cases concerning legal national protection afforded to geographical names and labels that do not comply with the European Regulation on PGIs. Some of the results from this analysis uphold the Court's decisions; others provide reasons for different judgements. For example, stressing the implicit dimension of public good in the IP rights of a PGI adds emphasis to the Court's reasoning

considering that PGIs should be considered as an exception to the rule of free movement of goods. However, when we consider the rulings of the Court in terms of their potential effects on the well-being of society, we can show that the capacity of the condemned national legal protection to provide information to consumers should not be ignored and should be evaluated case by case. From this point of view, we would argue that the effects of choosing alternative protection modes, such as collective trademarks, in the wake of the Court's decisions should also be considered.

Evaluation of the capacity of national legal protection for geographical names and labels to provide information highlights the issue of product differentiation. The generality of the names and labels at stake in the cases considered and the fact that they address classes of products rather than individual goods would suggest that an examination of the information provided by the names and labels would add force to the Court's rulings. The consideration of alternative protection modes, such as collective trademarks, is far more delicate. First, such consideration highlights the motives of protection of rural economies, in many cases constituted of small producers without the capacity to efficiently develop individual trademarks in order to signal the quality of their products. Protecting such rural economies was probably the real aim of the original national policies. Second, such consideration draws attention to collective trademarks making reference to geographical origin, as substitutes for PGIs. The property of a club good given to this form of IP in this article underlines the importance of the congestion phenomenon. An optimal size for the producer group protected under a collective trademark can be determined in order to manage congestion and coordination cost. The optimal size of the producer group can be different from the number of producers initially protected under the disallowed national policies. The question of the

feasibility of such a producer group and the impact on the quantities produced should thus be addressed.

An analysis that would focus on maximizing society's well-being would therefore give weight to the amount of information provided to consumers, the latitude allowed to producers to limit their production and the feasibility of a producers club. Case-by-case studies would be necessary and the results would most probably be different in each case. The invariability of the approach chosen by the Court along the different cases and the correspondence in its conclusions underline the primacy given by the Court to the free movement of goods over any other criteria.

References

Anders, S., and Caswell, J. A., (2009), "The benefits and costs of proliferation of geographical labelling for developing countries", The Estey Centre Journal of International Law and Trade Policy, 10(1), pp. 77-93.

Auriol, E., and Schilizzi, S. G. M., (2003), "Quality signaling through certification. Theory and an application to agricultural seed markets", IDEI Working Paper No. 165.

Argawal, S., and Barone, J., (2005), "Emerging issues for geographical indications branding strategies", MATRIC Research Paper, 05-MRP9 January 2005, Iowa State University.

Barjolle, D., and Sylvander, B., (2002), "Some factors of success for "Origin labelled product" in agro-food supply chains in Europe: Market, internal resources and institutions", Économie et Société, 25, pp. 1441-1461.

Becker, T., (2009), "European food quality policy: The importance of geographical indications, organic certification and food quality assurance schemes in European

countries", *The Estey Centre Journal of International Law and Trade Policy*, 10(1), pp. 111-130.

Buchanan, J. M., (1965), "An economic theory of clubs', Economica, 32, pp. 1-14.

Charlier, C. and Ngo, M. H. (2007), "An analysis of the European Communities: Protection of trademarks and geographical indications for agricultural products and foodstuffs dispute", Journal of World Intellectual Property, 10(3/4), pp. 171-186.

Evans, G.E., and Blakeney, M., (2002), "The protection of geographical indications after Doha: Quo vadis?", Journal of International Economic Law, 9(3), pp. 575-614.

Glazer, A., Niskanen, E., and Scotchmer, S., (1997), "On the uses of club theory: Preface to the club theory symposium", Journal of Public Economics, 65, pp. 3-7.

Ibele, E. W., (2009), "The nature and function of Geographical Indications in Law", *The Estey Centre Journal of International Law and Trade Policy*, 10(1), pp. 36-49.

Josling, T., (2006), "The war on *terroir*: Geographical indications as a transatlantic trade conflict", Journal of Agricultural Economics, 57(3), pp. 337-363.

Langinier, C., and Babcock, B. A., (2008), "Agricultural production clubs: Viability and welfare implications", Journal of Agricultural & Food Industrial Organization, 6, Article 10, http://www.bepress.com/jafio/vol6/iss1/art10.

Lence, S. H., Marette, S., Dermot, J. H., and Foster, W., (2007), "Collective marketing arrangements for geographically differentiated agricultural products: Welfare impacts and policy implications", American Journal of Agricultural Economics, 89, pp. 947-963.

Marette, S., and Crespi, J. M., (2003), "Can quality certification lead to stable cartels?", Review of Industrial Organization, 23, pp. 43-64.

Moschini, J., Menaplace, L., and Pick, D., (2008), “Geographical indications and the competitive provision of quality in the agricultural markets”, American Journal of Agricultural Economics, 90(3), pp. 794-812.

Nelson, P., (1970), “Information and consumer behaviour”, Journal of Political Economy, 78, pp. 311-329.

Sandler, T., and Tschirhart, J. T., (1980), “The economic theory of clubs: An evaluative survey”, Journal of Economic Literature, XVIII, pp. 1481-1521.

Schuβler, L., (2009), “Protecting ‘single-origin coffee’ within the global coffee market: the role of geographical indications and trademarks”, *The Estey Centre Journal of International Law and Trade Policy*, 10(1), pp. 149-185.

Zago, A. M., and Pick, D., (2004), “Labelling policies in food market: Private incentives, public intervention, and welfare effects”, Journal of Agricultural and Resources Economics, 29, pp. 150-165.