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## The European system of protection of geographical indications

An increasing number of trade agreements contains regulations on geographical indications (GIs). The European Union is one of the main proponents of including them in such agreements. It also aims to raise the protection to the level guaranteed in the EU. Transatlantic Trade and Investment Partnership (TTIP), under negotiation since July 2013, resulted in a return to the discussion of the desired scope and level of protection of GIs. The aim of the article is to assess whether the current level of GI protection in the EU and US is sufficient to secure the rights of GI holders and to indicate the roots of tensions in this area between the two parties. The research was carried out through the studies of literature and the critical analysis of the legal systems of the two parties of TTIP as compared to the multilateral system of GI protection guaranteed by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The results show that the European system gives the producers of GI much greater protection than other countries, including the US and other WTO members. As a result, the EU desires to raise the international standards to the EU levels. One of the reasons of stronger protection of GI holders' rights in the EU is the economic significance of the market for GI products. Other reasons include political, social and cultural differences – and these are especially difficult to overcome in the course of trade negotiations.

Keywords: intellectual property rights, geographical indications, trademarks, European Union, United States, TRIPS

JEL classification: F13, F14, F15, O34

### Europejski system ochrony oznaczeń geograficznych

Rosnąca liczba umów handlowych zawiera przepisy dotyczące oznaczeń geograficznych (GI). Unia Europejska jest jednym z głównych zwolenników włączania ich do takich umów. Dąży ona także do podniesienia ochrony do poziomu gwarantowanego w UE. Negocjowane od lipca 2013 r. Transatlantyczne Partnerstwo w dziedzinie Handlu i Inwestycji (TTIP) spowodowało powrót do dyskusji o pożądanym zakresie i poziomie ochrony oznaczeń geograficznych. Celem artykułu jest dokonanie oceny, czy obecny poziom ochrony GI w UE i USA jest wystarczający dla zabezpieczenia praw właścicieli GI, oraz wskazanie źródeł napięć w tym obszarze między obydwoma partnerami. Badanie przeprowadzono metodą studiów literaturowych oraz krytycznej analizy systemów prawnych obu stron TTIP na tle wielostronnego systemu ochrony gwarantowanego przez Porozumienia WTO w sprawie handlowych aspektów praw własności intelektualnej (TRIPS). Na podstawie wyników badania można stwierdzić, że producenci dóbr oznaczonych geograficznie mają większe prawa w UE niż w innych krajach, w tym w USA i innych państwach

członkowskich WTO. Wynika stąd dążenie UE do podniesienia standardów międzynarodowych do unijnych. Jednym z powodów silniejszej ochrony praw posiadaczy GI w UE jest znaczenie gospodarcze produktów GI. Inne powody to różnice polityczne, społeczne i kulturowe – a te są szczególnie trudne do pokonania w trakcie negocjacji handlowych.

Słowa kluczowe: prawa własności intelektualnej, oznaczenia geograficzne, znaki towarowe, Unia Europejska, Stany Zjednoczone, TRIPS

Klasyfikacja JEL: F13, F14, F15, O34

## Introduction

The European Union is an active player on the international arena in terms of creating standards to be obeyed by different countries. However, if it is not too difficult to impose certain rules on its member states, it is much more complicated in relations with other countries, especially of a comparable level of development.

One of the areas in which the EU has vital interests in creating common rules are geographical indications (GIs). The EU's policy on GI protection affects legislations in both the member states and third countries, as proved by the provisions contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – greatly influenced by the EU negotiators – and by the increasing number of trade agreements containing regulations on GIs (this area has been incorporated into free trade agreements with Canada, South Korea, Singapore, Colombia and Peru, and other countries<sup>1</sup>).

Reaching the EU's goal of increasing the protection of GIs has proved to be difficult, especially within the WTO framework and in current negotiations with the United States (Transatlantic Trade and Investment Partnership, TTIP<sup>2</sup>). European GI producers have been pushing for better protection of GIs due to the importance of the GI sector in the European economy, and the abuse of the EU's GIs in third countries. These arguments are relatively easy to express and constitute a justified reason for the protection of all intellectual property rights [Maskus, 2000, pp. 27–85]. Moreover, the economic rationales of protection are common for all countries (especially within the same level of development), which means that there should be a possibility of creating a base of mutually satisfactory solutions. But apart from economic rationales, there are also reasons specific to individual countries. In the case of the EU, they relate to preserving the European food culture. However, the link between intellectual property rights and culture is harder to find and prove [Agdomar, 2007]. The cultural and ideological differences ex-

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<sup>1</sup> See the list of EU bilateral agreements that contain important levels of protection for geographical indications [EC, 2013].

<sup>2</sup> TTIP will not be a typical bilateral agreement. It is going to be a mixed agreement, with the US as one party, and the EU and its member states as the other party.

plain to a large extent the reasons of the schism between the European Union and the United States in this area despite similar economic goals of protection. These reasons are rarely expressed directly, but they are reflected in different legal instruments used for protection.

The aim of the article is to assess whether the current level of GI protection in the EU and US is sufficient to secure the rights of GI holders and to indicate the roots of tensions in this area between the two parties. The research was carried out through the studies of literature and the critical analysis of legal systems of the two parties of TTIP as compared to the multilateral system of GI protection guaranteed by TRIPS.

The first section of the article explains the economic rationale that justifies legal protection of GIs. The second section analyses the provisions relating to GIs in the European and American legal systems. The last section presents these systems in comparison to the provisions on GIs in TRIPS. Conclusions summarise the results of the research and contain some recommendations regarding the possibility of reaching a compromise acceptable by both the EU and US.

## 1. Economic rationale for protection of geographical indications

Geographical indications can be defined as signs (names) used on products that underline a specific geographical origin and point out qualities, reputation or other characteristics essentially due to that origin. GIs can (but do not have to) refer directly or indirectly to the name of the place where the product comes from (e.g. Parma ham), though it is sufficient that they refer to the characteristics essentially attributable to the geographical origin of product (e.g. Feta cheese). In both cases, however, the qualities or other characteristics (such as reputation) must derive from the geographical place of production and a sign can function as a GI only if it identifies a product as originating in the territory of a particular country, region, or locality (see, for example, the WIPO's definition [WIPO] or the WTO definition in Article 22 of TRIPS [WTO, 1994]).

There are three basic objectives pursued through GI protection, i.e., producer protection, consumer protection and rural development<sup>3</sup>. As a producer protection tool, GIs prevent the misappropriation of benefits and free-riding on reputation. As a consumer protection tool, GIs address information asymmetries and quality [WIPO, 2009]. The positive economic aspects of GIs that influence development of rural areas are based on the opportunity of rural communities to extract

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<sup>3</sup> All these arguments can be found in the preamble of the EU Regulation No. 1151/2012 [EU, 2012].

rents based on the interaction between geographical conditions and local know-how.

The market for GI products is significant, especially in the EU. In 2010 (latest available data), the worldwide sales value of GI products registered in the EU-27 was estimated at EUR 54.3 billion. Of these, total sales of wines accounted for 56% (EUR 30.4 billion), agricultural products and foodstuffs for 29% (EUR 15.8 billion), spirit drinks for 15% (EUR 8.1 billion) and aromatised wines for 0.1% (EUR 31.3 million) (see Figure 1).

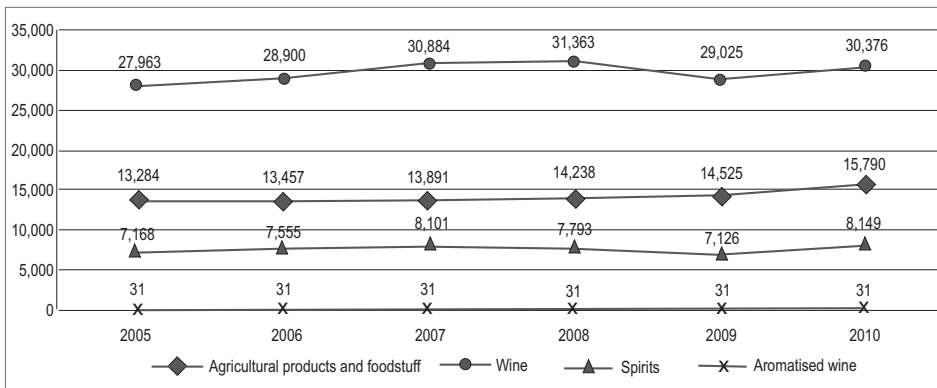


Figure 1. Value of GIs in the EU by scheme (EUR million)

Source: [EC, 2012].

GIs represented 5.7% of the total food and drink sector in the EU-27. France was the leading country, with sales value of EUR 20.9 billion (with 75% share for wines, 15% for agricultural products and foodstuffs and 10% for spirits), the second was Italy with sales of GIs accounting for EUR 11.8 billion (51% for agricultural products and foodstuffs, 48% for wines and 1% for spirits). The two next were Germany (EUR 5.7 billion) and the United Kingdom (EUR 5.5 billion). The following countries in terms of sales value were Spain, Portugal, Greece, Austria, Ireland, Hungary and Poland [Chever et al., 2012].

Despite the economic rationales for GI protection, there are controversies among countries with respect to the nature and the scope of the protection. They are reflected in different legal approaches to GI protection, represented by the *sui generis* model on the one hand, and existing intellectual property and unfair competition laws on the other. The first approach is used in the EU, whereas the second one in the US.

## 2. Provisions on geographical indications in the European Union and the United States

In 1992, the European Union adopted regulation [EEC, 1992] on the protection of geographical indications and designations of origin for agricultural products and foodstuffs<sup>4</sup>. It was replaced in 2006 [EC, 2006] and, more recently, in 2012 by Regulation No. 1151/2012 [EU, 2012].

Under this regulation, two categories of protected names for agricultural products and foodstuffs are recognized: protected designations of origin (PDO) and protected geographical indications (PGI)<sup>5</sup>. In both cases products have to originate in the region, specific place or country whose name they bear<sup>6</sup>. Stricter additional conditions must be met by products to qualify for PDO than for PGI [EC, 2004] (making PDO *de facto* a subset of PGI), i.e.:

- protected designations of origin: for products closely associated with the area whose name they bear; the quality or characteristics of the product must be essentially or exclusively due to the particular geographical environment of the place of origin; the whole production and processing and preparation of the final product must take place in a given geographical area using recognised know-how (for example cheese Roquefort which owes its characteristic blue veins and strong, salty taste to the milk of local sheep and to the mould *penicillium roqueforti* existing in the caves nearby);
- protected geographical indications: for products attached to the region whose name they bear; the link between quality and/or reputation and/or other characteristics of the product and the place of origin may be more flexible (it does not need to be essential or exclusive as in the case of PDO; for example, it could just be reputation of the product due to its geographical origin and not the actual characteristics of the product that is the determining factor for registration); it is sufficient that at least one of the stages of production, processing or preparation be ‘attributable’ to the geographical region where it originates (for example, the specification of rogal świętomarciński, a croissant coated with icing and sprinkled with chopped nuts, demonstrates its reputation and association with Poznań and the entire region [EU, 2008]).

Across the EU, consumer appreciation of the difference between PDO and PGI is not great (on average 8% in the EU, yet over 50% in Greece, and 16% in Italy), but some producers (mainly those whose names are registered as PDOs) in

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<sup>4</sup> There is no specific geographical indication system at the EU-level for non-agricultural products.

<sup>5</sup> See the DOOR database of PDOs and PGIs for information regarding the names that are registered and have been applied for [EC, 2016].

<sup>6</sup> The European system of GI protection originates from the French tradition of such protection.

certain member states strongly highlight that difference, considering it as a factor distinguishing their product on the market [Fay, 2009].

Once a GI (whether it be PDO or PGI) is registered at the EU-level, it enjoys protection under the provisions of Article 13 of Regulation No. 1151/2012 [EU, 2012]. In short, this article prescribes that certain actions be prohibited, i.e.:

- direct or indirect commercial use of a registered name on products not covered by the registration,
- 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,
- false or misleading indication as to the provenance, origin, nature or essential qualities of the product,
- other practice liable to mislead the consumer as to the true origin of the product.

The EU does not allow for registrations of generic names as geographical indications. When a name of the product has lost its distinguishing nature, the geographical name passes into current use and is used as a designate of the product category. However, protected indications will never become generic in the EU (as might happen in the case of trademarks if their owner does not assert his rights). They also do not require any renewal procedures, as is the case of trademarks.

According to the EU regulations, if there is already a GI registered, the same name cannot be registered as a trademark if the products belong to the same class. Similarly, if a prior trademark enjoys reputation, is renowned and long used, in order to avoid misleading consumers as to the true identity of the product, the same name cannot be registered as a GI. Nevertheless, there are certain cases in which the same product names can coexist as both trademarks and GIs (a conflicting trademark can be used if it was applied for, registered or used in good faith before the name became protected as a GI in the country of origin). Similar rules apply for the protection of indications relating to wines and are contained in Regulation (EC) No. 479/2008 on the common organisation of the market in wine.

Contrary to solutions in the EU, the protection of GIs in the United States is mainly based on trademark regime and unfair competition law, in which geographical indications are not considered as a separate, independent intellectual property right (see Table 1 for a summary of differences between the two legal systems).

The protection of GIs was first incorporated into the US law by the Lanham Act in 1946, amended in response to the adoption of TRIPS and to ensure consistency with its provisions [USPTO, 2016]. Traditionally, geographical names were excluded from protection under trademark law (which is justified by providing the ability to use the names by all producers in a given territory and not their owners only), but the Lanham Act changed this rule and introduced certification and collective marks, now used widely as a method for the protection of GIs in the US.

Table 1. Differences between the EU and US systems of GI protection

Feature	European Union	United States
relation of GI to intellectual property protection	separate form of intellectual property: <i>sui generis</i> legislation	no specific laws for the protection of GIs: – trademark regime and unfair competition law – geographical signs which acquired a 'secondary meaning' – certification marks – collective marks
enforcement of the rights	public law approach: public authorities responsible for GI protection and defence	private law approach: protection primarily based on private actions of associations of producers
the main aim	to certify and protect authentic designation must certify the origin of the product	to certify quality may certify the origin of the product
coverage	agricultural products and foodstuff, wines and spirits – protected designations of origin (PDO) – protected geographical indications (PGI)	all products
duration and cost of protection	not limited in time – no need to renew the registration registration free of charge	protection must be renewed periodically relatively high cost of registration
transferability	GI rights are not transferable	trademark laws are transferable

Source: Own elaboration.

The term 'certification mark' is defined as a mark used by a person other than its owner to certify geographic origin or certain standards (e.g. quality or other characteristics of the good/service) or that the work was performed by members of a union.

The owner of the certification mark controls the use of the mark by others who apply it to their goods or services to indicate to consumers that the standards set forth by the certifier are met. That means that various producers in the relevant region are allowed to use the same specific (geographic) certification mark. Moreover, the owner cannot deny anyone the right to use it as long as the characteristics certified by the mark are maintained. Therefore, certification marks are not exclusive but must be available to all [Monten, 2005]. Contrary to the European solutions, certification marks are not controlled by any governmental bodies<sup>7</sup>.

<sup>7</sup> Which is a feature of a private law approach, represented by the US system.

As in the European regulations, generic names cannot be protected under trademark law in the US. There are many debates between the EU and the US regarding whether GIs are to be considered generic or not.

GIs (as well as trademarks) that became generic cannot be afforded protection – as they no longer refer to a unique region, they lack distinctiveness. Therefore, producers from any place can use such names freely. Such is the case of many European producers on the American market, especially since the US relatively often deems GIs generic or semi-generic (in the case of wines and spirits). In such case, many products protected in the EU are not worth protection in the US (for example parmesan, bologna ham, feta, gorgonzola, champagne). In general, the US provides a higher level of protection for names of wines and spirits than other goods (as required by TRIPS), but it is still lower than in the EU.

Another type of trademarks that may refer to a geographical name to indicate the specific qualities of goods are collective marks. According to the Lanham Act, they are defined as trademarks ‘used by the members of a cooperative, an association, or other collective group or organization’ [USPTO, 2015]. A commercial use of collective marks in the US is limited to the members of a particular group.

Despite the differences between the two legal systems outlined above, the author agrees with the USPTO statement that geographical indications can be viewed as a subset of trademarks, as they serve the same functions. Like trademarks, they are source-identifiers, guarantees of quality and valuable business interests [Hajdukiewicz, 2015].

### 3. TRIPS provisions on geographical indications

When negotiating TRIPS, the EU and the US had to compromise on geographical indications. TRIPS is the most important and first widely accepted multilateral agreement for the protection of GIs. Because of strong initial objections of the US representatives in terms of even including GIs into the scope of TRIPS, it was mainly the EU’s negotiators success to convince them that the agreement should consider GIs as separate intellectual property rights. On the other hand, the EU had to agree to the multilateral level of protection lower than in the EU. It also had to give up the requests of establishing an international register of GIs for wines and spirits.

According to TRIPS Article 22, all GIs are granted a minimum standard of protection, which means that producers not located in the designated region are prohibited to use a given GI if such a usage could potentially mislead consumers as to the origin of the goods or constitutes unfair competition. This level of protection is quite low if compared to the EU’s standards. The use of terms such as ‘style’, ‘type’



and 'imitation' is allowed, which means that 'Grana Padano-style cheese, produced in the USA', for instance, is an example of fully legitimate labelling according to TRIPS.

A higher level of protection is established in Article 23 for wines and spirits. GIs identifying wines and spirits not originating in the place indicated by their geographical indication are prohibited even if the public is not misled, there is no unfair competition and the true origin of the good is indicated or the GI is accompanied by corrective labels; that is why TRIPS would prevent the use of, for example, the GI 'Liebfraumilch-type wine made in the USA'. This absolute protection of GIs for wines and spirits corresponds with the EU's level of protection of GIs granted to all products (within the scope of the EU-level regulations).

TRIPS also regulates relationships between GIs and trademarks. In general, it favours GIs over trademarks; there are, however, limitations and exceptions to these general provisions regulated in Article 24 that weaken the position of GIs. These exceptions are based on the following rationales [Flodgren, 2010]:

- generic names: there is no obligation to protect a GI if the term has become generic and each country is free to decide which terms it considers as generic,
- prior good faith trademark rights: this is a grandfather clause according to which a prior trademark identical or similar to the GI in question takes precedence over a later GI,
- continued and similar use of geographical indications for wines and spirits: under certain circumstances it may be allowed to use a GI identifying wines or spirits registered in another country.

Taking into account the different provisions relating to wines, spirits and all other goods, a conclusion can be drawn that producers of different categories of goods are treated unequally. Inconsistencies in the level of protection among the WTO members also exist, as it has been presented in the case of the EU favouring greater protection, and the US opposing such an approach. These controversies remain unsettled and should be gradually solved, as Article 24 calls for future negotiations aiming at increasing the protection of all GIs to the level now afforded to wines and spirits. So far, discussions on this subject were unsuccessful.

## Conclusions

The results of the research revealed that the EU offers its producers a higher level of protection of geographical indications than it is granted in the United States and on the basis of multilateral regulations (TRIPS). The EU pushes to significantly extend the TRIPS protection and strives to include provisions on GIs in bilateral trade agreements. This task is not easy on multilateral level, since differ-

ent countries follow different models of protection that, in their opinion, best suit the needs of their economies. The first approach (represented by the EU) provides GI protection through extensive *sui generis* legislation and is more specifically tied to geographical terms. The second approach (followed by the US) does not consider GIs a separate branch of intellectual property and their protection is based on already existing legal framework (trademark and unfair competition laws). These differences translate into the level of protection granted to GIs, which is relatively stronger in the first approach.

Both approaches are based on similar economic grounds, but they are not enough to reach an international consensus as far as the higher level of protection is concerned, as there is a different ideological and cultural attitude to IP protection in general, and to GIs specifically, on both sides of the Atlantic. GIs are protected in the US by a system that is based primarily on the reasoning of economic efficiency [Waggoner, 2007], while the EU also raises issues such as protection of agricultural techniques and traditions, unique craftsmanship and gastronomic and cultural heritage (see Recitals 1, 2 and 4 of Regulation No. 1151/2012 [EU, 2012]) – and these are especially difficult to discuss in the course of trade negotiations.

GIs are one of the most controversial issues in the current EU trade negotiations with the United States (see a more extensive analysis of the negotiations on GIs as intellectual property rights in TTIP in: [Kučnar, 2016, p. 83–100]). There is a need of further work and intensification of efforts of both partners to understand their positions and find an acceptable consensus. The EU has perceived TTIP as a remedy to the problem of using many EU-registered GIs as generic names in the US (which as such do not receive protection there). The United States is consistently opposing the idea of granting common food names GI protection.

The EU's failure in the negotiations on the WTO level resulted in the willingness to sign trade agreements that would be more effective in protecting the interests of European producers of GI-labelled goods. The US has also contained provisions regarding trademarks in their bilateral trade agreements. These agreements reveal the possible outer limits of negotiations and exchange of concessions between the EU and US<sup>8</sup>, but there is also a need to increase efforts to find a way to re-open negotiations on GIs with the WTO.

A solution will probably finally be found (after all, it is hard to believe that the entire TTIP agreement would be abandoned for the sake of a number of cheese and wine producers in France or Italy), especially that the US is not really opposing GI protection as such and has incorporated an effective system of (geographic) certification marks.

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<sup>8</sup> A limited space of this article does not allow for a more extensive analysis of this aspect.

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