

European Union Three Anniversaries Polish Perspective

Edited by
Elżbieta Czarny
Paweł Folfas



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SGH WARSAW SCHOOL OF ECONOMICS

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**This project is funded by National Science Centre of Poland on the basis of the decision
Nr DEC-2013/11/B/HS4/02126.**

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First Edition

ISBN 978-83-8030-141-2

SGH Publishing House
162 Niepodległości Ave., 02-554 Warsaw, Poland
www.wydawnictwo.sgh.waw.pl
e-mail: wydawnictwo@sgh.waw.pl

Cover design and production

Monika Trypuz

Cover photo

©iStockphoto.com/DariuszPa

DTP

DM Quadro

Print and binding

QUICK-DRUK s.c.

e-mail: quick@druk.pdi.pl

Order 22/II/17

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Preface

Elżbieta Czarny, Paweł Folfas

The book summarizes a multidimensional study of the benefits and costs of three processes connected with European integration. The time caesura has been determined by three anniversaries: unification of Germany (1990–2014 – the 25th anniversary), creation of the Eurozone (1999–2013; 15 years) and accession of 10 states to the European Union, including Poland (as well as Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Malta, Slovakia, Slovenia and Hungary; May 2004–April 2014; 10 years). We analyse the genesis, course and effects of these processes. We focus on economic and political aspects determined by the legal timeframe; however, at the same time we do not omit the social aspects of these processes. We perceive them from Poland's perspective, enlarged by a regional dimension. Thus, we examine Poland's role and rank with reference to the above mentioned processes and their impact on Poland.

The EU enlargement in 2004 was unique and spectacular. During the European Council Meeting (EU Summit) in Copenhagen in December 2002 representatives of the current and acceding member states noticed a great moment for Europe. During the summit, accession negotiations between the EU and Poland, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia and Slovenia were conducted. The representatives declared their aim as *One Europe*. This idea was directly linked with an idea of one European currency. In 1999, the concepts of European currency became a reality. The introduction of such a currency was possible also due to the earlier unification of the two German states and Germany's commitment to replace the *Deutsche Mark* by a single European currency (the euro). Before launching the euro, the *Deutsche Mark* used to play an important role as an international currency with the reputation of one of the

world's most stable currencies. A deeper integration in the framework of (west) European political and economic structures seems to be a necessary condition for the unification of the two German states. Thus, these three processes: unification of Germany, creation of the Eurozone and – the biggest in history and the most difficult – EU enlargement in 2004 appear to be the milestones along the route to *One Europe* (Europe without frontiers). However, this concept is still under way, and this book contains the analysis of the role of these processes in building *One Europe*.

The prevalent part of the empirical study embraces the decade beginning with Poland's accession to the EU. We believe that the period 2004–2014 is long enough to reveal the direction and size of the changes. The study embracing a longer period of time enables, in turn, the analysis of phenomena occurring after the unification of Germany, during ongoing monetary integration and preparation of 10 states for the accession. Especially, huge changes have been expected in economies of the states that were implementing the systemic transformation. Not only were they making a transition “from plan to market” in national economies and establishing new political, social and economic institutions, but they were also opening to international cooperation, which required substantial adjustments. Carrying out the changes enabled them to accede to the EU, gathering democratic states with a high level of development.

Although the analysis concerns anniversaries and should be finished in 2014, we sometimes exceed this timeframe also considering 2015, that is, the last year for which statistical data were available while conducting the study.

The unique characteristics of this book is the fact that the authors have presented outcomes of the study of a wide range of variables and indicators concerning the main forms of cooperation and economic activity of Poland and the remaining new member states, especially including states, which together with Poland became the EU members (i.e., New Member States, NMS), as well as subregions of regional integration of the EU.

We dedicate a lot of space to Germany within 25 years, which, in 2014, passed since its unification. The designated rank reflects a fundamental significance of the unification of Germany for European and world's security, as well as deepening and extending European integration. The unification of Germany embodying the end of the Cold War (the ultimate elimination of the effects of WWII in Europe), enabled – from our point of view – enlargement of the (west) European security community by the states of Central and Eastern Europe, and later Southern Europe. The unification made (unified, not divided) Germany Poland's neighbour,

which contributed to the rapid growth of reciprocal trade and capital ties. This process was reinforced by changes in Polish economy resulting from the preparation for Poland's membership in the EU. In a new architecture of the European and world's security, Poland's participation in international organizations – economic (OECD, WTO), political (the Council of Europe) and defense (NATO) ones became possible, which opened Poland's way to EU membership. Participation in these organizations enhanced Poland's position in politics and the world's economy. At any time, Poland's strategic partner was, except for the U.S., unified Germany. It was also Poland's dominating economic partner. Incorporating Poland and Germany into economic and political structures of the EU and NATO made both states safer. Poland gained the position of a strong and effective member of the Alliance, which strengthens its external security towards the countries that do not belong to the EU and NATO. (Western) Germany, in turn, ceased to be a border state of the Schengen Area.

Outcomes of the studies presented in this book confirm the fact that the economic crisis revealed advantages of leaving Poland outside the Eurozone. Depreciation of the PLN contributed to an increase in competitiveness of Polish goods. However, in accordance with our analysis, it is not necessarily a good scenario for the future. Together with progressing integration, the increasing transaction cost of remaining outside the Eurozone can urge Poland to participate in it. The Eurozone's members, though, bear lower transaction costs of cooperation. Simultaneously, substantial differences among the Eurozone's members impede functioning of the euro and weaken its international position.

Undoubtedly, the Eurozone's existence and the fact that numerous member states remain outside it differentiate the EU members. The existence of different levels of integration is important and unfavorable for Poland and the whole EU. Regarding the benefits from the common currency, the ties among the Eurozone's members (at least some of them) are tightening. At the same time, similar integration processes do not occur among the Eurozone's members and the remaining EU states, as well as the EU states outside the Eurozone. It poses a threat of long-lasting divergence within the EU.

The book consists of nine chapters. They all are interconnected, even if the first three chapters are more general than the following ones. The first three chapters are interdisciplinary and go far beyond economics concerning political, social, legal and econometric issues.

The following six chapters are monothematic in their nature as they raise various aspects of international trade. The reader will find there a general analysis of the position of trade in Poland and other EU member states' current account balances (CAB), as well as Poland's trade with partners from the EU and the rest of the world. More detailed problems are tackled in the further chapters, e.g. the question of the real nationality of goods exported from Poland is answered. Moreover, there is discussed Poland's intra-industry trade seen as the most modern type of international trade nowadays.

The three general chapters are organized as following: in Chapter 1 Elżbieta Czarny and Jerzy Menkes connect changes in the nature and membership of the EU with economic and political developments in Europe and all over the world. In this context, of special importance is German unification seen as a trigger for deepening of European integration, creation of the Eurozone and the biggest EU enlargement in 2004. Chapter 2 written by Paweł Folfas consists of an analysis of absolute income (*GDP per capita*) beta-convergence among regions in the new EU member states before and during the global economic crisis that started in autumn 2008. The Author presents the results for the years 2000–2008 and 2008–2011; the analysed period starts just after the creation of the Eurozone and finishes after the last global economic crisis. In this chapter the Author also scrutinizes the power of spatial dependencies between regions of the NMS. It is important for evaluating Poland's position among the post-communist states, which underwent a systemic transformation process and adjusted to the EU membership. Additionally, this chapter contains a study on convergence and spatial relationships between German NUTS 3 level regions in the context of the unification of Germany. It allows to answer the question about the reality of creation of one economy from two totally different economic and political parts constituting two German states before the unification. This study covers the period 1992–2012 because of the lack of availability of further data. Chapter 3 by Andżelika Kuźnar presents the EU as a creator of international standards of the protection of intellectual property rights in the case of geographical indications (GI). It gives a broad perspective while comparing the EU–GI system with the U.S. and multilateral approaches. Economic, cultural and political reasons for the disagreement between the EU and U.S. on the desired level of GI-labelled goods protection are here discussed as well.

The following six chapters are devoted to the problems of international trade in Poland and other EU member states. This part of the book starts with two relatively general analyses followed by the discussion of more detailed issues. In

Chapter 4 Michał Paliński and Katarzyna Śledziwska analyse changes in the structure of the Eurozone's current account balance (CAB), as well as those of the block of extra Eurozone's states and individual EU member states in 2005–2014. This analysis is limited to ten years of Poland and other NMS' membership in the EU. This chapter also contains a study on determinants of the CAB, thus, presenting from the broader perspective international trade of the analysed groups of the EU member states. In Chapter 5 Elżbieta Czarny and Katarzyna Śledziwska describe Poland's foreign trade after ten years of the EU membership. The Authors focus on changes in the material and geographical structure of this trade in the years 2004–2013. The subject of Chapter 6 by Elżbieta Czarny and Katarzyna Śledziwska concerns NMS' intra-industry trade with the groups of their partners from the EU. These groups refer to the EU members constituting the Eurozone and those staying outside it. In Chapter 7 Elżbieta Czarny and Katarzyna Śledziwska consider determinants of intra-industry trade of the new EU member states. In Chapter 8 Kristóf Gyódi and Katarzyna Śledziwska discuss an impact of the Schengen Area on the economic cooperation of four Visegrad states (V4) being as well NMS (the Czech Republic, Hungary, Poland and Slovakia). Finally, in Chapter 9 Elżbieta Czarny and Katarzyna Śledziwska analyse to what extent Polish export is from Poland. The Authors examine the material structure of Poland's export of goods to the EU, as well as to the U.S. on different levels of aggregation. After indicating goods (on the disaggregation level HS6) dominating in Poland's export to the EU and to the U.S., the Authors analyse their producers' profile answering the question about their motivation to be active in Polish economy and the nationality of capital that they employ. The chapters are supplemented with final remarks made by Elżbieta Czarny and Paweł Folfas.

The book has been written as a summary of the studies conducted within the frame of the project OPUS financed by the National Science Centre of Poland entitled "Three anniversaries: unification of Germany, creation of the Eurozone and transition of EU15 into EU25 – the Polish perspective" based on the decision No DEC-2013/11/B/HS4/02126. All authors of the chapters, except for Michał Paliński (the co-author of Chapter 4) and Kristóf Gyódi (the co-author of Chapter 8), are participants of this research project.

Chapter 3

European Union as the creator of international standards of protection of intellectual property rights – the case of geographical indications

Andżelika Kuźnar

Introduction

The European Union creates legal standards that apply on the territory of its member states. These standards are established through various legal regimes concerned with the creation of European law. The member states participate in the “decision-making” process. Countries outside the EU, but belonging to the European Economic Area participate in the process through “decision-shaping”. The EU seeks to extend these standards to non-EU states by, among others, concluding international agreements or by co-creating standards in the framework of international organizations. These standards are implemented by the European Union and its member states.

One of the areas in which the EU is interested in increasing the level of international protection are intellectual property rights (IPR) in general, and geographical indications (GIs), in particular. The EU has created some common rules obligatory for its member states. It also undertakes efforts to increase the level of international protection of IPR at the WTO level and in its bilateral relations. This is not an easy task.

The negotiations of the *Transatlantic Trade and Investment Partnership* (TTIP) have resulted in a return to the debate on the desired method and the most appropriate

level of protection of geographical indications. Despite justified rationales for GI protection, controversies have been raised among countries with respect to the nature and scope of the protection. They are reflected in the various legal approaches to GI protection, represented on the one hand by the *sui generis* model and, on the other, by existing intellectual property and unfair competition laws. The first approach is used in the EU and the second one in the U.S.

The level of GI protection in the EU is higher than in the United States and guaranteed by an agreement called TRIPS. The EU's policy on GI affects both its member states and third countries because the EU greatly influenced the final shape of TRIPS, which is binding on all WTO members. The U.S., even though not very enthusiastic about the European proposals, agreed to the TRIPS provisions regarding GIs and amended its domestic trademark law accordingly. But differences remain and these have been highlighted during the TTIP negotiations.

Surprisingly (considering the present approaches to protection), it seems that the United States and the European Union share quite a similar history of protecting local products. At the same time, there are cultural and ideological differences between them that make multilateral (TRIPS/WTO) and bilateral (TTIP¹) talks harder resolve in a mutually satisfactory agreement.

The goal of this chapter is to find out, why the EU's position is so firm in negotiations concerning GIs and whether there is scope for compromise between the European Union and the United States in this area in the TTIP agreement. The roots of the different approaches in the EU and U.S. are presented as background to the current provisions related to GI internationally.

The chapter is divided into six sections with an introduction and conclusion. In the first section, the historical roots of GI provision in the EU are presented by describing the French system of protection. The second section explains the meaning of GIs and the economic rationale that justifies their legal protection. This section is followed by an analysis of the economic significance of GIs in the EU. Then, the provisions related to GIs in European law are analysed. The next section is devoted to the pertinent regulations in the U.S. legislation. The last section presents the European and American systems compared to the provisions on GI in TRIPS. The conclusion summarises the sources of the different approaches of the EU and U.S. to the negotiations on GI and indicate whether there is scope for compromise.

¹ TTIP will not be a typical bilateral agreement. It is going to be a mixed agreement, with the U.S., as one party and the EU and its member states, as the other party.

1. Historical roots of protection of geographical indications

The history of protecting geographical indications as we now know them in Europe goes back to 19th century's France. Given the reputation of this country for its cuisine, it is not surprising that the model of protection developed there was widely adopted across Europe later on. That these regulations appeared only in the 19th century has several reasons, the importance of which decreased with the start of the industrial revolution: 1) difficulties with transportation over long distances, 2) lack of preservative technologies facilitating international trade in food products, 3) high costs of imitation relative to the costs of traded products. Overcoming these difficulties resulted in an increased need for protection of genuine products and their names. Additionally, some internal factors affected the wine industry in France in the late 19th century and eventually led to protection through geographical indications. At that time, the industry faced crises including the pest *phylloxera*, which destroyed vineyards, then the increased production of local wines of lower quality (for example, with the addition of sugar for faster fermentation), and finally, a surge in imports from newly established Algerian vineyards.

The wine merchants of the Midi region organised a wine revolt in 1907 to which the government responded with the system *Appellation d'Origine* (AO, designated origin), based on the notion of *terroir*. This French term does not have a direct translation to English. The Merriam-Webster Online Dictionary defines it as “the combination of factors including soil, climate, and sunlight that gives wine grapes their distinctive character” [Merriam-Webster Dictionary 2017]. This system privileged physical geography – it was based on the assumption that the quality of a product can be guaranteed and fraud prevented by ensuring that it originated from the place indicated on the label. According to this system, not only could wine names not be used legally outside of some limited areas, but also administrative agencies were set up to provide definitions of each appellation. The system was difficult to administer (there were continuous disputes about the appellation definitions and boundaries of regions) and the regulations were faulty (as they did not associate granting a GI protection with high quality).

The problem of fraud in terms of quality remained unaddressed until 6 May 1919, when a new law was enacted. The most important change was that the protection depended, to some extent, on quality – producers had to prove that their methods were tightly connected to the local territory and traditional methods

of production. The review process included numerous limits on registration, the possibility of losing registered appellations, and controls on the availability of legal protection (for example, French soft cheese – camembert – was refused geographical protection²) [Melkonian 2005]. However, judges were not competent enough to specify anything other than geographical criteria for an appellation, which was a serious disadvantage of the system. Other problems included economic, political and scientific difficulties with delineating distinctive regions and varying quality of products originating from the same (often large) area. There was an increasing need for the appreciation of human factors and production techniques on the end result [Geiger 2015].

Eventually on 30 July 1935, a new regime, the *Appellation d'Origine Contrôlée* (AOC, controlled the designation of origin), was created, with a permanent official body³ recognising geographical boundaries as well as production specifications (both technological and cultural components⁴) [Gangjee 2012]. Nowadays, the range of products qualifying for protection include agricultural, forestry and seafood products and foods (e.g., wines, cheeses, olives, honey, beef, poultry, mussels, etc.).

The notion of *terroir* is nowadays the most important and most fundamental rationale for all regulations and protection for GI. The understanding of products based on *terroir* has changed, and also now includes the human element. It can be defined as: “local and traditional food products or produce with a unique and identifiable character based upon specific historical, cultural or technical components. The definition includes the accumulation and transmission of *savoir-faire*” (i.e., know-how) [Gangjee 2012].

This historical perspective shows the evolution of understanding of how to guarantee and certify the quality of products based on conditions depending only on climate and *terroir* to alternative measures that take into account collectively generated know-how. Its importance also derives from the fact that EU regulations are to a large extent inspired by the French example. Also, some signs of the use of the French experience can be found in early U.S. food regulations.

Americans have a relatively long tradition of protecting locally made products. The first developments of food regulations in the United States in the late 19th

² There is, however, a geographical indication protecting *Camembert de Normandie* – see: Agriculture and Rural Development, DOOR [2017].

³ *Comité National des Appellations d'Origine* (CNAO), renamed in 1947 to the *Institut National des Appellations d'Origine* (INAO), which operates today.

⁴ These two components are still present in GI nowadays.

century resulted from not only health concerns, but also commercial issues. The pressure from cheaper competitors (benefitting from the development of railways) who were undercutting prices, and therefore the profits of local farmers resulted (like in France) in requests for protection against fraudulent foods. Protecting local business from unfair competition was, therefore, an important driving force of early legislation at the federal level in the Pure Food and Drug Act of 1906. It was enacted to prevent misbranding and adulteration of foods, drugs, medicines and liquors. False labelling was prohibited, but food manufacturers were not obliged to add any labelling indicating geographical origin. So, although it was designed to protect geographical indications (as we term them nowadays), it was not fully comprehensive and could not play this role too well. But it proves that as early as in France and using similar methods, the United States had implemented provisions intended to protect products dependent on local natural conditions. Such protection would result in the recognition of products as distinctive, and thus higher prices could be charged.

2. Definition of geographical indications and goals of their protection

Geographical indications can be defined as signs (names) used on products that underline a specific geographical origin and point out the qualities, reputation or other characteristics essentially due to origin. GI can (but does 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 a 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 there (see, for example, the WIPO [2017] definition or WTO definition in Article 22 of TRIPS [2017]).

The place of origin may be used as a quality signal, reducing the asymmetry of information, and resources of the region (such as production techniques, species, landscape, culture, etc.) may be captured as quality attributes that increase the value of GI-labelled products⁵ [Pacciani et al. 2001].

⁵ The economic rationale for protection of the earliest types of trademark also derived from the indication of the geographical origin of goods through the use of distinctive signs.

General reasons for GI protection are universal worldwide, but there are some objectives specific for the EU. The universal reasons for GI protection are producer protection and consumer protection.

Because origin-labelled products can acquire commercial value, and therefore be exposed to the risk of misuse or counterfeiting, legitimate producers are exposed to financial loss. For some producers, associating certain products with qualities or a tradition sourced from a particular geographical place has become a strategic tool for differentiation and an opportunity to move away from commodity markets (with prices declining over time) into more lucrative niche markets. Thanks to GI protection, they can benefit from the creation of collective monopolies⁶ and achieve economic rent⁷ [WIPO 2009b]. Without any legal protection, GI would be just a public good that anybody could use and would carry a reputation as a free rider. So, as a producer protection tool, GI prevents the misappropriation of benefits and free-riding on reputation.

Consumers' growing awareness of the quality of products (food in particular) observed in recent decades has resulted in increasing demand for products associated with certain places or methods of production. At the same time, consumers may be confused as to the origin or quality of a product because of market distortions based on the asymmetry of information between sellers and buyers. The latter adopt various strategies to protect themselves against unfair behaviour of producers, who sell lower-quality products at the price of higher-quality goods. One of these strategies is a willingness to pay a premium for reputation. In response, producers adopt strategies for creating such a reputation, which involves a period of initial investment in reputation. Premium prices, at which high-quality products are sold, represent return on that investment [Shapiro 1983, pp. 659–679]. In order to successfully use reputation as a means of overcoming market failure, it should be protected or “institutionalised”, for example, through geographical indications (or trademarks) that signal a certain level of quality [WIPO 2009b]. GI gives a guarantee to consumers that the product is authentic, made according

⁶ Producers within the geographical region who comply with the code of practice are granted monopolistic rights against producers outside the region, similar to those of trademark owners. However, for producers located in the specific region, GIs retain “club good” characteristics with excludability of benefits and non-rivalry in benefits to GI rights-holders [Benavente 2013].

⁷ According to Chever et al. [2012], in 2011, the price for EU27 GI products was on average 2.23 times higher than non-GI products. The premium rate for wines was estimated at 2.75, for spirits at 2.57 and for agricultural products and food at 1.55.

to a producer specification, controlled by an independent certifying body, and most significantly, owes its specific characteristics to production in the particular area. So, as a consumer protection tool, GI addresses information asymmetries and quality [WIPO 2009b].

Another dimension of GI protection (besides producer and consumer protection) is the potential influence on rural livelihoods and rural development [Pacciani et al. 2001]. It is very clearly visible in European policies. Thanks to such protection, rural communities can extract rents based on the interaction between geographical conditions and local know-how. The positive economic aspects of GI that influence the development of rural areas may include job creation, limitation of rural exodus, a stable source of income derived from usage of indigenous knowledge that can be preserved, conservation of biodiversity and cultural landscapes, preservation of natural resources, more investments, potential increase in tourism to the region (wine routes, cheese museums, etc.).

Apart from these three basic objectives pursued through GI protection, i.e., producer protection, consumer protection and rural development⁸, there are also cultural or ideological bases of protection. For many people living in certain regions and provinces, production of traditional products is a value in itself. Protection of GI is a necessary condition for the preservation of traditional agriculture and ways of life in these regions. Without such protection, these people would not have enough motivation to make – sometimes enormous – efforts to undertake production using traditional methods. This argument is particularly important due to the ongoing process of harmonization of European law resulting in a continuous loss of identification. It is reflected, among other places, in the preamble to the EU [2012] Regulation No. 1151/2012, which reads: “The quality and diversity of the Union’s agricultural, fisheries and aquaculture production is one of its important strengths, giving a competitive advantage to the Union’s producers and making a major contribution to its living cultural and gastronomic heritage. This is due to the skills and determination of Union farmers and producers who have kept traditions alive while taking into account the developments of new production methods and material”⁹.

⁸ All these arguments can be found in the preamble of EU Regulation No. 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

⁹ The European vision of the economy is linked to feedback on the vision of society. See: Preamble to The Treaty on The Functioning of The European Union: “DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”; Article 3.2 “It

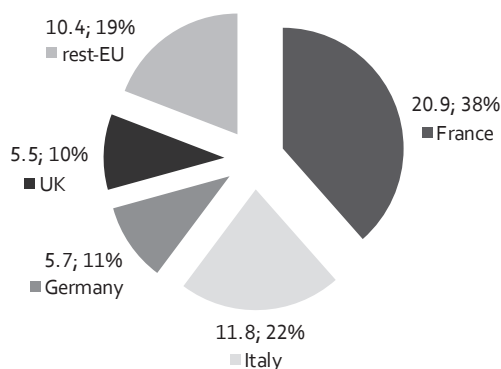
3. The economic significance of GIs in the European Union

The protection of GIs is reflected in the economic significance of GI-labelled products. This analysis is possible only for the EU, mainly because the U.S. uses a different system of GI protection.

The available data for the EU indicate that the worldwide sales value of GI agricultural products, foodstuffs, wines and spirits registered in the EU was estimated in 2010 at 54.3 billion EUR, which was 5.7% of the total food and drink sector in the EU27. The EU total exports of GIs were 11.5 billion EUR, i.e., 15% of all extra-EU trade for food and beverages. Of the GIs sales value, 19% was exported to extra-EU markets. The United States was the largest non-EU importer of EU GI products, with 3.4 billion EUR in imports, which accounted for 30% of total U.S. imports of food and beverages from the EU [Chever et al. 2012]. According to the Database of Origin & Registration (DOOR), there were 1,256 registered GI agricultural and foodstuff products in the EU in 2015, among which 1,237 registrations originated in the EU member states.

Do these numbers mean that GI protection is equally important for all EU countries? The picture is slightly different if we look at more specific data. Just a few EU member states account for most registrations, sales and exports of GI-labelled goods. For example, just three countries – Italy, France and Spain – collectively accounted for 55% of registrations in the DOOR database of GI agricultural and foodstuff products in the EU in 2015. Only four states, namely France, Italy, Germany and the United Kingdom were responsible for around 80% of GI sales value in 2010 (Figure 1). France was the leader with sales of 20.9 billion EUR (75% for wines, 15% for agricultural products and foodstuffs, and 10% for spirits) while second was Italy with sales of 11.8 billion EUR (51% for agricultural products and foodstuffs, 48% for wines and 1% for spirits). The next two were Germany (5.7 billion EUR) and the United Kingdom (5.5 billion EUR). The following countries in terms of sales by value were Spain, Portugal, Greece, Austria, Ireland, Hungary and Poland.

shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.” [Consolidated Versions of The Treaty on European Union and The Treaty on The Functioning of The European Union, 2017].

Figure 1. GI-leading EU member states, sales by value, billions EUR and %, 2010

Source: Chever et al. [2012].

Exports were concentrated in three countries – France, United Kingdom and Italy – which together accounted for 86% of total extra – EU sales of GI products. What is more, exports originated in a very small number of designations: Champagne and Cognac in France; Scotch Whisky in the UK; Grana Padano and Parmigiano Reggiano in Italy [Chever et al. 2012].

The data shown before concerning the commercial value of GIs indicate that the economic significance of GIs is larger for specific EU countries than for the EU as a whole. What is more, very often these are regions within certain countries that are particularly interested in and famous for protecting geographical indications. But these few regions and countries were very successful in bringing the issue of GI to the international level. Common standards for GI protection were created within the EU. It has been an issue in multilateral trade negotiations (TRIPS/WTO) and a stumbling block in many trade agreements with non-EU countries, both with developed countries (e.g., CETA¹⁰, TTIP) and developing ones (e.g., The Economic Partnership Agreement, EPA, with the Southern African Development Community EPA group¹¹).

¹⁰ After long negotiations, within the Comprehensive Economic and Trade Agreement (CETA) framework Canada has agreed to protect over 140 European geographical indications, with the partial exception of 21 names that conflicted with names already in use in Canada [European Commission, CETA 2017].

¹¹ The EPA includes a bilateral protocol between the EU and South Africa on the protection of geographical indications and on trade in wines and spirits. The EU will protect names such as: Rooibos, the infusion from South Africa, and numerous wine names. In return, South Africa will protect more than 250 EU names spread over the categories of food, wines and spirits [European Commission, SADC 2017].

4. Provisions on geographical indications in the European Union

In 1992, the European Union adopted a regulation [EEC 1992] on the protection of geographical indications and designations of origin for agricultural products and foodstuffs that became the first legal instrument to cover all agricultural products¹² (including beer, but not wines and spirits, for which specific regulations apply¹³). It was replaced in 2006 [EC 2006a] and more recently in 2012 by Regulation No. 1151/2012 [EU 2012]. The link between quality and geographical origin was maintained, contributing to the development of the European quality policy, responding to the consumers' increasing attachment to the quality of foodstuffs.

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)¹⁴. In both cases, products must originate in the region, specific place or country whose name they bear (this linkage indicates

¹² There is not a specific geographical indication system at the EU level for non-agricultural products.

¹³ The first regulations protecting wine names at the EU level appeared in the 1970s and required member states to identify and protect GIs and notify the European Commission (and thereby protect them). There were two instruments of protection: the QWPSR (quality wine produced in a specified region) and GI, geographical indication. For spirit drinks, a list of protected names in the EU was established as a result of legislation in 1989. In the wine protection reform adopted by the EU in 2008 [EC 2008a], a register of designations of origin and geographical indications protected in the EU in the wine sector was established and is available online (the E-Bacchus database). For spirit drinks [EC 2008b], the system is still centred on a list of names in an annex to the spirit drinks regulation, which serves as the register (E-Spirit drinks database). The two instruments of protection of wines have been replaced by the PDO and PGI systems respectively. For spirits, there is one instrument, geographical indication.

¹⁴ A parallel scheme of protection is provided for products that are not geographically but methodologically distinct (a product must have features that distinguish it from other products belonging to the same category). This is the Traditional Specialities Guaranteed (TSG) scheme, which also highlights the traditional character of products. It is available for goods that are produced using traditional materials or are characterized by a traditional composition or way of processing (as in the case of mozzarella cheese). These provisions are now under the EU new Quality Schemes Regulation, which in 2012 simplified the regime for several quality schemes by putting them under one single legal instrument. Previous regulations on agricultural products and foodstuffs as TSGs [EC 2006a] and on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [EC 2006b] have been repealed and replaced by Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs [EU 2012]. See the "DOOR-database" for information regarding registered and applied for PDOs, PGIs and TSGs, available at <http://ec.europa.eu/agriculture/quality/door/list.html>.

similarity with the concept of *terroir*). Stricter additional conditions must be met by products to qualify for PDO rather than PGI (making PDO *de facto* a subset of PGI), i.e.:

- protected designations of origin – for products closely associated with an 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 milk of the local sheep, and to the mould *penicillium roqueforti* existing in nearby caves);
- 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 (does not need to be essential or exclusive as with PDO, so, for example, it could just be the reputation of the product 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 can 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) [European Commission 2017a].

Across the EU, consumer appreciation of the difference between PDO and PGI is not great (on average 8% in EU, but in Greece over 50%, and in Italy, 16%), but some producers in certain member states strongly support the difference (mainly those whose names are registered as PDOs), considering this fact to be a factor distinguishing a product on the marketplace.

Once a GI (whether 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 are prohibited, i.e.:

- a) direct or indirect commercial use of a registered name on products not covered by the registration;
- b) 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;

- c) false or misleading indication as to the provenance, origin, nature or essential qualities of the product;
- d) other practice liable to mislead the consumer as to the true origin of the product.

Similar to the French practice, the EU does not allow for registrations of generic names as geographical indications. However, protected indications will never become generic in the EU (as might happen to trademarks, if its owner does not assert his rights). They also do not require any renewal procedures, as is the case with trademarks.

According to the European regulations, if GI is already registered, a trademark cannot be registered in the same class of product. However, if a prior trademark enjoys a reputation, is renowned and long used, in order to avoid misleading consumers as to the true identity of the product, the GI cannot be registered. There are also cases where trademarks and GIs can coexist (a conflicting trademark can be used if it was applied for, registered or used in good faith before the date of protection of GI in the country of origin).

Similar rules apply for the protection of indications related to wines, and are contained in Regulation (EC) No. 479/2008 on the common organisation of the market in wine [EC 2008a].

5. Comparison of provisions regarding geographical protection in the United States and the European Union

Methods of protecting geographical indications differ in the U.S. and EU. The theoretical foundations of U.S. intellectual property rights (including trademarks) are utilitarian. It basically means that giving the creators and inventors exclusive and transferrable rights to their works creates incentives to invest in them as their efforts may bring them economic benefits.

Contrary to the solutions in the EU, protection of GI nowadays in the United States is mainly based on trademark regime and unfair competition law, in which geographical indications are not considered a separate, independent intellectual property right. The last is the feature of *sui generis* legislation, providing protection of GI in the EU. In that legal regime, GI is considered so unique in its characteristics that it cannot be treated as part of a wider concept. Moreover, trademark regulations are not recognised in Europe as a useful tool for protecting GI, as trademark laws are transferable and GI rights are not (which conforms to the concept of *terroir*,

i.e., something that cannot be relocated¹⁵). Another difference between the two systems is that the public law approach is used in the EU and private law approach in the U.S. According to the first approach, the public authorities in the EU are responsible for GI protection (enacting legislation, organisation of inspection system, official recognition of GI, enforcing protection)¹⁶, while in the U.S. the protection is primarily based on the private actions of associations of producers themselves¹⁷ and which are also responsible for defending their rights in the case of a violation of their IPR. Also, the issue of adhering to quality requirements is irrelevant to the U.S. Patent and Trademark Office (USPTO), where trademarks are registered.

The USPTO holds the view that GIs serve the same functions as trademarks, which are source-identifiers, guarantees of quality and valuable business interests, and therefore there are not separate laws to protect them.

Protection of GI was first incorporated into U.S. law by the Lanham Act in 1946. It is applicable to all goods (agricultural and/or industrial) and services. Traditionally geographical names were excluded from protection under trademark law (which has been justified by the need to enable using 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, since then used as the main method for protection of GI in the U.S.

The term “certification mark” is defined as a mark used by a person other than its owner to certify geographic origin or certain standards met (e.g., quality or other characteristics of the good/service) or work performed by member of a union. The owner of the certification mark does not use it (because he does not produce the goods), but controls use of the mark by others who apply it to 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 a specific (geographical) certification mark. Moreover, the owner cannot deny anyone from using it as long as the characteristics that the mark certifies are maintained. So, certification marks are not exclusive but must be available to all [Monten 2005]. In this respect, they are similar to the French *Appellation d’Origine* or just the European understanding of geographical indications according to which the right to label a product with GI is open to all qualifying producers within a defined region. It is

¹⁵ This feature is also reflected in the tradition of using the term “appellation of origin” in parallel with GI in *sui generis* systems of protection.

¹⁶ It is called *ex officio* protection, from the Latin meaning “from the office”.

¹⁷ It is called *ex parte* protection, from the Latin meaning “from (by or for) one party”.

a big difference when compared to regular trademarks, which grant monopolistic IP rights to a single owner.

Contrary to the European solutions, certification marks are not controlled by any governmental bodies, but still they are perceived by consumers as symbols of quality certified by issuing entities. Willingness of American specialty producers of food to benefit from such consumer recognition resulted in a series of protections for local products¹⁸, especially after the EU's regulations in 1992 gave new privileges to European foodstuff producers.

As in European regulations, generic names cannot be protected under trademark law in the U.S., either. There are many debates between the EU and U.S. about whether a certain GI is generic or not. Examples of GI-protected products in the EU include feta (white cheese produced in a traditional way in particular areas of Greece), parmesan (which is an English name for *Parmigiano-Reggiano*, a cheese made according to a specific recipe and production methods only within specific provinces of Italy¹⁹), gorgonzola (veined Italian blue cheese, produced for centuries in Gorgonzola, Milan, today mainly produced in the northern Italian regions), Black Forest ham (an English name for *Schwarzwälder Schinken*, produced in the Black Forest region of Germany), Chablis²⁰, Champagne and many others. At the same time, these names are not protected in the U.S. because they lost their distinguishing nature. As a result, they are regarded as generic names there²¹. The geographical name passed into current use and is used as a designate of the whole product category. That means that feta may be produced in Wisconsin, parmesan can be made by Kraft²² and you can buy California Champagne²³, just to give

¹⁸ Some examples include Idaho potatoes, Florida oranges, Virginia ham.

¹⁹ There are, however, producers that do not protect the name of the origin of the product. For example, apart from the protected designation of origin registered in Italy, *mozzarella di bufala campana* (made from the milk of the domestic Italian water buffalo), the name mozzarella is also used. It received a Traditional Speciality Guaranteed certificate, which allows for using any type of milk in the production process as long as a traditional recipe is used.

²⁰ To be exact, Chablis is a region where the strain of chardonnay is grown. All Chablis is made 100% from the Chardonnay grape.

²¹ Some names indicating geographical origin in Europe became generic in the EU as well and include camembert, gouda, cheddar and brie. Any producer of cheese of such kind may use these names freely.

²² Kraft Foods, which has produced parmesan cheese in the U.S. since 1945, is no longer allowed to sell its product in the EU under this name and uses *Pamessello* instead. The EU aims to prohibit Kraft sales of Parmesan cheese in the U.S. as well.

²³ There are many producers of sparkling wine in Europe using the "Champagne method" of fermentation in the bottle process. They use different names for their "champagnes". For example, in Spain, it is Cava, in Germany it is Sekt, in Italy, Prosecco.

a few examples. This possibility in the EU is considered unacceptable by European producers of GI-protected products.

There are separate rules concerning generic names in the U.S. referring to all goods and to wines and spirits. As a general rule applying to all goods, only marks that are distinctive can be protected. Therefore GI (but also trademarks) that became generic cannot be afforded protection – they no longer refer to a unique region and lack distinctiveness. Therefore, producers from any place can use such names freely. This is the case for many European producers on the American marketplace, especially since the U.S. relatively often deems GI generic or semi-generic. In such a case, many products protected in the EU are not afforded protection in the U.S.

Geographical indications in wines and spirits are protected by the Alcohol and Tobacco Tax and Trade Bureau (TTB). In general, there is a higher level of protection for names of wines and spirits than for other goods. GIs for wines fall into one of three categories: generic, semi-generic or non-generic. Generic terms are defined as “designation of a class or type of wine”²⁴ and can be used on labels freely (so they do not enjoy protection at all). Semi-generic names are defined in the same way, but they still have some potential to distinguish a specific origin, such as champagne. They can be used to designate wines of an origin other than that indicated by such name only, if the label also indicates the true appellation of origin. In other words, producers may label their wine, for example, Californian Champagne. The allowance of such semi-generic terms in the U.S. is the most problematic for many European producers of wine²⁵. Non-generic names are those that truly indicate the specific origin of a product²⁶ [TTB 2017]. They cannot be used by producers from outside the area specified by the indication, even if the true origin of the product is stated. This is a level of protection comparable to PDOs and PGIs in the EU.

Another type of trademark 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 marks “used by the members of a cooperative, an association, or other collective group or organization” [TMEP 2015]. The commercial use

²⁴ For example: Vermouth, Sake.

²⁵ According to the EU–U.S. Agreement on wines of [2006], the U.S. will limit the use of 17 semi-generic names on the U.S. market: Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Porto, Retsina, Rhine, Sauterne, Sherry and Tokay [U.S./EC Wine 2006].

²⁶ Some examples include: Bordeaux Blanc, Bordeaux Rouge, Graves, Medoc, Liebfraumilch. A more extensive list can be found at: TTB, Subpart C – Foreign Nongeneric Names of Geographic Significance [ECFR 2017].

of collective marks in the U.S. is limited to members of the group. This feature differentiates them from certification marks, which, on the contrary, are open to anyone who complies with the standards defined by the holder of the mark. That implies that stronger registration rules apply to certification marks (as goods must meet specific requirements). Another difference between these two types of marks is that collective marks designate the source of the product in relation to a certain group of producers and not in geographical terms. Therefore, they do not put the emphasis on the origin of production and, in turn, on the quality of reputation linked to that place.

Finally, GI can be protected as a regular trademark. It is possible to register a geographical term as a trademark only if the name does not mislead consumers and has acquired a “secondary meaning” or “distinctiveness”. The primary meaning to consumers is the geographic place while the secondary meaning is the manufacturing source (brand name), which no longer describes only the geographical source (for example, Philadelphia cream cheese). Trademarks identify a good or service as originating from a particular company and give it monopoly rights. They are transferable rights, and can be assigned or licensed to anyone anywhere in the world.

6. How the EU and U.S.’ GI provisions relate to TRIPS/WTO

Despite the differences in the legal systems between the EU and U.S. regarding the protection of GI as outlined above, they had to compromise when negotiating the World Trade Organisation Agreement on Trade – Related Aspects of Intellectual Property Rights (WTO/TRIPS). Despite strong initial U.S. objections to including GIs at all in the scope of TRIPS, it was mainly EU negotiators who were successful in convincing the U.S. representatives that TRIPS should also refer to GI as separate intellectual property rights. On the other hand, the EU had to agree to a multilateral level of protection that is lower than in the EU. It also had to give up requests for establishing an international GI register for wines and spirits.

First of all, TRIPS provides a definition of GI (Article 22). The definition and its explanation is presented in Table 1.

Table 1. Definition of geographical indications in TRIPS

GI are ...	Comments for agricultural, fisheries, and foodstuff products
...indications	names of places compound names other names and non-geographical names are possible logo, graphic or visual representation
...which identify a good ...	the indication must be understood by the consumer to describe a specific product
...as originating...	the indication must show the consumer that the product has a particular origin
...in the territory of a country or region or locality	in a geographical place
...where a given	
... quality of the good	specific chemical composition (sugar level, acidity, ingredients), physical attributes (size, shape, colour, texture, appearance...), microbiological, organoleptic, etc.
...or reputation of the good	the public knows of the specific product originating in that place (agronomic literature, newspapers, books, consumer survey...)
...or other characteristics of the good	other characteristics possible, such as traditional or indigenous knowledge
...is essentially attributable to its origin.	the quality or reputation must be due to its origin. There is a link between the product and its original place of production. The "essentially attributable" link can be due to environmental factors and/or the traditions or skills or know-how of the local/indigenous population. The link to origin must be demonstrated or justified.

Source: European Commission [2017b], emphasis added.

Different levels of protection are possible depending on the category of products (which are all goods, whether agricultural, natural or manufactured). According to 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 usage could potentially mislead consumers as to the origin of the goods, or if it constitutes unfair competition. This level of protection is quite low compared to the EU's standards. In fact, this provision is easy to circumvent by using so-called *corrective labels*, that is, terms that indicate that the good carrying the specific GI actually does not have the geographical origin represented by the GI. Corrective labels could contain words such as "style", "type" and "imitation". That means that for example Grana Padano – style cheese, produced in the U.S. is fully legitimate labelling, according to TRIPS.

A higher level of protection is established in Article 23 for wines and spirits. GI identifying wines and spirits not originating in the place indicated by the

geographical indication is prohibited even if the public would not be 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 the GI *Liebfraumilch type wine made in the U.S.* This absolute protection of GI for wines and spirits corresponds to the EU's level of protection of GI granted to all products (within the scope of the EU-level regulations).

Article 23 also regulates homonymous GIs, but only with regard to wines and not to spirits. If there are two indications from different geographical regions but identically named and produce similar products (such as Rioja, produced in Argentina and Spain), protection can be granted to both indications. It must be ensured, however, that consumers are not misled.

TRIPS also regulates the relationships between GIs and trademarks. For all goods, trademarks that conflict with GI should be invalidated or registration refused, if the use of such trademarks could mislead consumers as to the true place of origin (Article 22.3). In relation to wines and spirits, this condition does not have to be met (Article 23.2) (the public does not have to be misled in order to have a remedy applied). There is a 5-year time limit during which proceeding must be initiated should the conflicting trademark be invalidated (Article 24.7). These provisions in general favour 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]:

1. generic names – there is no obligation to protect GI, if the term has become generic; each country is free to decide, which terms it considers to be generic; that is why American generic names of European foods and semi-generic names of wines comply with the TRIPS regulations;
2. prior good faith trademark rights – this is a *grandfather clause* according to which a prior trademark identical or similar to a GI in question takes precedence over a later GI; this is why Italian producers of Parma ham cannot use that GI in Canada (and the term “N.I ham” is used instead) because a trademark on that name was registered some 30 years ago²⁷;

²⁷ CETA would eliminate this problem, as *Prosciutto di Parma* along with four more EU GI names conflicting with prior Canadian trademarks would coexist with existing trademarks [European Commission, CETA 2017].

3. continued and similar use of geographical indications for wines and spirits—under certain circumstances it may be allowed to use GI to identify wines or spirits registered in another country; for example, “Chablis” is a generic name for white wine in the U.S. and it still can be used, even though it is also a GI in France.

Each WTO member state is free to determine how to implement the TRIPS provision. They are also free to implement more extensive protection, such as in the EU. The U.S. has amended the Lanham Act to comply with the minimum standards of TRIPS, but the EU claims that disparities remain [Monten 2005].

Taking into account the different provisions related to wines, spirits and all other goods, a conclusion can be drawn that producers of different categories of goods in WTO member states are treated unequally. Inconsistencies in the level of protection among WTO members also exist, as has been presented in the case of the EU favouring greater protection and the U.S. opposing such an approach. These controversies remain and should be gradually removed, as Article 24 calls for future negotiations aimed at increasing the protection of all GI to the level now afforded to wines and spirits. The EU (and some other WTO members) has made proposals on extending the protection for wines and spirits to all products (to dispose of the disparity of the current system), to establish a global GI registry (to make the system more predictable and to prevent current non-abused GI being usurped in the future) and to introduce a clawback clause (to declare certain EU GI names used in other countries to be generic or registered as trademarks²⁸) [IP/03/1178 2017]. The United States (and other major food exporters, such as Canada and Australia) strongly opposes the EU proposal, claiming that it goes too far in protecting goods against competition. So far, the discussions on this subject have not found a solution satisfactory for both sides²⁹. It is highly improbable there will be compromise on a universal level because GIs are part of intellectual property rights and opening negotiations in this area would start very problematic talks with developing countries.

²⁸ In 2003, the EU has identified a list of 41 such names and requested that they become protected as recognized GI. They are listed in the Annex to IP/03/1178 [2017].

²⁹ See more: TRIPS [2017].

Conclusion

Despite some commonalities in the historical roots between the American and European systems of GI protection, the current regulations differ a lot. Whilst the U.S. claims that private trademark law is good enough to prevent consumer confusion and protect the interests of producers of genuine products, the EU's international policy on GIs aims to increase the level of GI protection. It also assumes some superiority of GIs over trademarks. The EU ideas threaten the interests of U.S. producers of goods labelled with names considered generic in the U.S., but awarded GI protection in the EU. Another American group of producers concerned about the EU's proposals are the successors of immigrants from Europe, who centuries ago started their businesses in the U.S. using the culture, traditions and native names from Europe (for example, many U.S. winemakers³⁰, cheese and meat producers³¹). Arguments have also been raised that consumers might be more confused, if certain products would have to be re-named than they might be under the current system.

In response, the EU response is that for many European food producers a labelled name is closely associated with tradition, specific agricultural techniques, a way of life and, obviously, the quality of a product. Therefore, it is not possible to produce the same quality Champagne or Parmesan in the U.S. or anywhere outside the designated region in France or Italy. It should be emphasized that European policy in the area of GI – and wider, in European agricultural policy – supports producers (farmers)³². The EU also underlines that trademarks do not provide the necessary relationship between the product and the territory, which is the essence of GI. Moreover, trademarks are exclusive individual rights that can be sold and delocalised. In contrast to trademarks, GI is accessible to any producer of the region concerned and cannot be transferred to anybody else.

Clearly, GI is a source of disagreement between the EU and U.S. and other WTO member states. It has been recently revealed in TTIP negotiations where

³⁰ It is quite a paradox that after the grape crisis in France (phylloxera), which resulted in the destruction of most vineyards, wine grape stock was grafted for phylloxera – resistant purposes using American rootstock (because the American species are resistant to it).

³¹ Pastrami is often perceived as a symbol of Italian food. The reality is, it is an American product, and the most famous (model) pastrami is sold in Katz's Delicatessen (in New York).

³² That does not mean that the U.S. does not support agricultural producers, but it uses other instruments than the EU.

GI has become one of the crucial topics in the area of IPR, and the issue has still not been resolved. The negotiations revealed not so much economic, but more cultural and political reasons for the lack of compromise. First of all, the attitudes of partners in agricultural production differ. High importance is attributed to traditional methods of production and way of life in some regions of France, Italy, Greece, etc., on the one hand, and to innovative and technologically advanced methods of production in the U.S., on the other hand. Second, both the EU and U.S. negotiators and policymakers are not used to accepting demands from other parties. Third, the level of tension is increased by media reports and non-governmental organizations seeking to affect public opinion in the EU about the adverse effects of TTIP (for example, the possibility of accepting genetically modified crops and meat in the EU in exchange for a U.S. commitment to stronger GI protection³³).

That makes reaching compromise more difficult. Were the differences based on economics alone, a mutually acceptable solution could be based on the exchange of reciprocal (economic) benefits. However, the example of the CETA agreement shows that compromise is possible and some patterns of cooperation between the EU and an advanced economy (from a similar cultural circle as the U.S.) already exists and can be followed.

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