Article

Protection of Agricultural Food GI figures in cases of the use of the protected product as ingredients in other compound products. Analysis of new legislative developments.

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KEYWORDS:

Information, consumer, labeling, PDO, PGI.

ABSTRACT:

Regulation (EU) 2024/1143 introduces regulatory changes that raise concerns about poor legislative technique and a lack of balance of interests at stake. The regulation conflicts with two important rights in the agri-food market: the right of consumers and users to information, and the exclusive right to the protected name granted to legitimate users of PDO/PGIs. The regulation appears to liberalize the use of the protected name by allowing operators other than the Regulatory Board to include it in the list of ingredients of a composite product to satisfy consumers' right to information, which could, however, strain the group's exclusive rights. It is necessary to coordinate all the interests involved to find a solution that seeks to satisfy all, as the European Commission's 2010 communication on the matter attempted to do and as is now regulated—not without errors—by Article 27 of the current Regulation. It is therefore imperative to find a solution that balances the rights and interests at stake.

PALABRAS CLAVES:

Información, consumidor, etiquetado, DOP, IGP.

RESUMEN:

El Reglamento (UE) 2024/1143 introduce cambios normativos que suscitan preocupación por la deficiente técnica legislativa y la falta de equilibrio de los intereses en juego. El reglamento pone en conflicto dos importantes derechos en el mercado agroalimentario: el derecho a la información de los consumidores y usuarios, y el derecho exclusivo sobre el nombre protegido concedido a los usuarios legítimos de DOP/IGP. El reglamento parece liberalizar el uso del nombre protegido, al permitir que operadores distintos del Consejo Regulador puedan incluirlo en la lista de ingredientes de un producto compuesto para satisfacer el derecho a la información de los consumidores, lo que podría tensionar, sin embargo, los derechos exclusivos del grupo. Es necesario coordinar todos los intereses presentes para encontrar una respuesta que trate de satisfacer todos aquéllos, tal y como trató de hacerlo la comunicación de la Comisión Europea de 2010 sobre la materia y lo regula ahora -no sin errores- el artículo 27 del Reglamento vigente. Es obligado, pues, encontrar una solución que equilibre los derechos e intereses en juego.

MOTS CLES :

Informations, consommateur, étiquetage, AOP, IGP.

RESUME :

Le règlement (UE) 2024/1143 introduit des changements réglementaires qui suscitent des inquiétudes en raison de la médiocrité technique législative et du déséquilibre des intérêts en jeu. Le règlement met en conflit deux droits importants sur le marché agroalimentaire: le droit à l'information des consommateurs et des utilisateurs, et le droit exclusif sur le nom protégé accordé aux utilisateurs légitimes des AOP/IGP. Le règlement semble libéraliser l'utilisation du nom protégé, en permettant à des opérateurs autres que le conseil régulateur de l'inclure dans la liste des ingrédients d'un produit composé afin de satisfaire le droit à l'information des consommateurs, ce qui pourrait toutefois mettre à mal les droits exclusifs du groupe. Il est nécessaire de coordonner tous les intérêts en présence afin de trouver une réponse qui satisfasse tout le monde, comme l'a tenté de le faire la communication de la Commission européenne de 2010 sur le sujet et comme le réglemente désormais, non sans erreurs, l'article 27 du règlement en vigueur. Il est donc impératif de trouver une solution qui équilibre les droits et les intérêts en jeu.

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1 INTRODUCTION

Constituting another form of economic exploitation, the use of agri-food products covered by a protected designation of origin (PDO) or protected geographical indication (PGI) as ingredients in other compounds raises a number of questions from a strictly legal point of view which, judging by the limited existing literature, may have gone unnoticed by scientific doctrine (MINELLI, 2014, p. 43 et seq.; MARTINEZ GUTIERREZ, 2020/21, p. 285). One of these questions concerns the use of the protected name on the labelling of a product made from a raw material covered by a quality designation. The mere decision to include it on the label raises a difficult conflict of interest, as it pits consumer protection through the necessary provision of information aimed at overcoming the information asymmetry that exists in a competitive market on the one hand, with the protection of quality labels linked to the territory, which is based on a prohibition on their use in economic transactions by third parties outside the circle of legitimate users, on the other. From a legal point of view, this conflict stems from a regulatory antinomy that cannot be correctly resolved by applying the traditional criteria used to resolve conflicts of law.

Furthermore, the combination of information asymmetry in the liberal market and consumer disinterest in agri-food products also creates an environment conducive to the proliferation of opportunistic behaviour by economic operators seeking to distort the communication channel between supply and demand in order to gain a competitive advantage over others. Under the guise of providing consumers with comprehensive information about the ingredients of the composite product, dishonest behaviour may be concealed that could lead to situations of confusion, undue exploitation of the reputation of others or the risk of error regarding certain aspects of the product. In this regard, consider how the inclusion of a protected product in the composition of another food product of a different type and the reflection of this circumstance in the labelling of the final product offered on the market can be a significant breeding ground for damaging the specific concept of quality, either because it is intended to confuse consumers about the identity of the true protected product, or because the resulting product is associated with the reputation and prestige of the former, or because the intention is to give this final product a special characteristic derived from the select ingredient used.

It is therefore understandable that, for years, there has been concern in the European Union about regulating this scenario, which is detrimental to quality labels, and coordinating the underlying interests in the aforementioned case. Reflecting this concern, the Commission approved a Communication entitled '*Guidelines on the labelling of food products using protected designations of origin (PDOs) and protected geographical indications (PGIs) as ingredients'* ([1]), which offers a series of guidelines for coordinating all the interests affected in the aforementioned conflict of interests.

Similarly, and on the occasion of the regulatory reform on quality schemes carried out through Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, the European legislator, with the aim, as stated in Recital 32, of *'...ensuring a high level of protection and to align that protection with that which....'*, introduced ex novo an express prohibition on the use of quality designations as ingredients contained in points (a) and (b) of the first paragraph of article 13 of the now repealed Regulation (EU) No 1151/2012, but also recognised a certain binding value in the aforementioned Communication and the voluntary rules contained therein when it stated in Recital 32 of Regulation (EU) No 1151/2012 that *'...When protected designations of origin or protected geographical indications are used as ingredients,*

([1]) Commission Communication 2010/C 341/03 (DOUE C 341, 16 December 2010).

the Commission Communication…', which was ratified by legal basis nº. 45 of the Judgment of the Court of Justice of 20 December 2017, case C-393/16 'Champagner Sorbet'.

Finally, European legislators have paid particular attention to this conflict of interest in the new Regulation 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographical indications for wines, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products ([2]), whose regulatory provisions are analysed in this paper.

2 ON THE CONFLICT OF RULES AND THE INADEQUACY OF CLASSICAL CRITERIA FOR ITS RESOLUTION

As we have pointed out above, conflictive situations involving quality figures seem to be covered by consumer protection regulations and, in particular, in Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, which requires the inclusion of a list of ingredients used in the manufacture of the final product among the mandatory information on the label. The conflict of regulations in this scenario is therefore clear. Note how, while the regulation on consumer information seems to allow the inclusion of the quality label in the list of ingredients used in the manufacture of a food product, the regulation on quality schemes does just the opposite, prohibiting its inclusion on the grounds that it is detrimental to the underlying interests of the quality labels. Both regulatory instruments offer contradictory solutions to the underlying conflict of interest. The horizontal regulation on food information to consumers seems to give priority to the public's right to know the composition of food products and, consequently, to consumer protection itself, while the special regulation on quality labels would override this right in order to give priority to quality labels, placing all the legal, economic and social interests underlying their protection in a prominent position.

Furthermore, the traditional criteria for resolving this conflict of rules do not seem to offer acceptable solutions. Indeed, as they occupy the same regulatory hierarchy in Community law (both regulatory instruments are Regulations of the European Parliament and of the Council), the solution should come from the classic criteria relating to temporality and specificity, which, as we shall see, is not conclusive in this matter either. Thus, the application of the temporal criterion that states 'lex posterior derogat priori' would favour the priority of the underlying interests of protected geographical designations and, consequently, the refusal to provide information to consumers if this implies damage to the quality figures. The same solution is reached by applying the criterion of specificity, which states 'lex specialis derogat legi generalis'.

However, as we have already argued elsewhere (MARTINEZ GUTIERREZ, 2018/19, p. 149), the proposed solution to the conflict of rules represents a breach not only of a guiding principle of social and economic policy that is so legally relevant that it enjoys constitutional relevance (article 51.2 of the Constitution), but also of the proper functioning of the internal market, by depriving economic traffic of fundamental information that has been considered mandatory to communicate to the public. In this regard, it should be recalled that article 1.1 of Regulation (EU) No 1169/2011 states that one of its objectives is to '…assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market…'. Furthermore, it should not be overlooked that the food information provided to consumers is a way, as we have said, of protecting their interests and tends '…Food information law shall aim to achieve in the Union the free

([2]) Official Gazette L of 23 April 2024. It came into force twenty days after its publication (13 May 2024).

movement of legally produced and marketed food taking into account, where appropriate, the need to protect the legitimate interests of producers and to promote the production of quality products' (article 3.2).

Furthermore, from a practical perspective, the absolute protection of quality labels resulting from resolving the aforementioned regulatory conflict through traditional dispute resolution criteria is paradoxical in itself and counterproductive for them in any case. This is because, on the one hand, products protected by a designation of origin or geographical indication would be deprived of an important commercial outlet, namely, being used as raw materials for other processed products; and on the other hand, as a result of being used as ingredients in these products, relevant and accurate information would be omitted from the market, with a negative impact on the goodwill of the quality designation.

Therefore, we believe that the resolution of the regulatory conflict must be based on a weighing and coordination of all the interests at stake, which would require the introduction of certain limits on the protection conferred on quality labels, but without, of course, going so far as to s

We believe that the resolution of the regulatory conflict must be based on a weighing and coordination of all the interests at stake, which would require introducing certain limits on the protection conferred on quality figures, but without, of course, leaving them unprotected. In this regard, trademark regulations offer some provisions to regulate cases that bear a certain similarity to the one we are dealing with at the moment. Indeed, if we recall the content of article 14 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, we can see how the strict exclusive right granted to the trade mark proprietor is limited in certain cases. In particular, under the heading 'Limitation of the effects of a European Union trade mark', the legislator stipulates in the first paragraph of the aforementioned provision that 'A European Union trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade: ´…c) the EU trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of that trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts'.

However, this limitation on trademark rights is not unconditional. On the contrary, the second paragraph of the same article restricts this possibility of lawful use of another's trademark to the satisfaction of a condition, the verification of which in practice must be examined on a case-by-case basis. It is therefore a question of the use of another's trademark by a third party interested in using it in the labelling or advertising of its own products or services being carried out 'in accordance with honest industrial or commercial matterss'. Within this limit, the use of another's trademark will be lawful and any possible exploitation of another's reputation and notoriety that can be verified will be considered acceptable in all cases. The same will occur when the adoption of another's trademark exceeds this limit and goes beyond the bounds of what is permissible.

3 NEW REGULATION. CRITICAL APPROACH

3.1 NEW REGULATORY FRAMEWORK

On the occasion of the latest reform of the European legal regime for agri-food quality labels, implemented by Regulation 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographical indications for wines, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products, the European legislator has paid particular attention to this conflict of interest, which it has justified as follows:

> *In light of commercial practices and Union case-law, clarity is required on the use of a geographical indication in the sale name of a processed product of which the product designated by the geographical indication is an ingredient. It should be ensured that such use is made in accordance with fair commercial practices and does not weaken, dilute or is not detrimental to the reputation of the product bearing the geographical indication. To that end, conditions for the qualities attributed by the geographical indication as ingredient to the processed food should be added. Moreover, the producers of prepacked food should notify the recognised producer group, where such a group exists, before starting to use the geographical indication in the name of the prepacked food. Such approach is in line with the objectives of strengthening the protection of the geographical indications and enhancing the role of the recognised producer groups. With a view to the attainment of those objectives, Member States should be able to maintain or introduce additional national procedural rules applicable to internal situations where the producer of prepacked food and the recognised producer group are established on the territory of that Member State, in line with the Treaties and the case-law, and without hampering the free movement of goods and the freedom of establishment. Furthermore, respecting the principle of contractual freedom, the recognised producer group and the producer of prepacked food may conclude an agreement between them about specific technical and visual elements of the presentation of the geographical indication of the ingredient in the name of the prepacked food. (cdo. 36)*

In accordance with this approach, the legislator has devoted a specific provision to regulating the factual situation addressed in this paper, which is analysed below. In particular, article 27 provides as follows:

> *1. Without prejudice to Article 26 and Article 37(7) of this Regulation and to Articles 7 and 17 of Regulation (EU) No 1169/2011, the geographical indication designating a product used as an ingredient in a processed product may be used in the name of that processed product, or in its labelling, or in its advertising material where: (a) the processed product does not contain any other product comparable to the ingredient designated by the geographical indication; (b) the ingredient designated by the geographical indication is used in sufficient quantities to confer an essential characteristic on the processed product concerned; and (c) the percentage of the ingredient designated by the geographical indication in the processed product is indicated in the label.*
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> *2. In addition, producers of a prepacked food, as defined in Article 2(2), point (e), of Regulation (EU) No 1169/2011, containing as an ingredient a product designated by a geographical indication, who want to use that geographical indication in the name of that prepacked food, including in advertising material, shall give a prior written notification to the recognised producer group where such a group exists for that geographical indication. Those producers shall include in that notification the information that demonstrates that the conditions listed in paragraph 1 of this Article are complied with and shall act accordingly. The recognised producer group shall acknowledge receipt of that notification in writing within four months. The producer of prepacked food may start using the geographical indication in the name of the prepacked food following the receipt of that acknowledgment or after the expiry of that time period, whichever occurs first. The recognised producer group may attach to that acknowledgement non-binding information on the use of the geographical indication concerned. Member States may provide, in line with the Treaties, for additional procedural rules concerning the producers of prepacked food established on their territory.*
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> *3. Without prejudice to paragraph 1, the recognised producer group and the producer of prepacked food may conclude a contractual agreement about the specific technical and visual aspects of how the geographical indication of the ingredient is presented in the name of the prepacked food in labelling, elsewhere than in the list of ingredients, or in advertising material.*
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> *4. This Article shall not apply to spirit drinks. 5. The Commission is empowered to adopt delegated acts in accordance with Article 87 supplementing this Regulation by laying down additional rules on the use of comparable products as ingredients and the criteria of conferring essential characteristics on the processed products referred to in paragraph 1 of this Article.*

Although a quick reading of the provision leads us to applaud the inclusion of this new regulation, a more careful analysis of it clouds this positive assessment, as we will see, since there are areas where quality labels have been left unprotected, thus frustrating the purpose of this new regime, which was, as we recall, to 'strengthen the protection' of these labels.

3.2 DELIMITATION OF THE EXCLUSIVE RIGHTS GRANTED TO QUALITY LABELS

After establishing in general terms in Article 26 that the use of the protected name as an ingredient in the labelling of the composite product is a form of infringement of the quality

designation, the provision in question seeks to correct the scope of this premise by admitting its lawfulness under certain conditions which, clearly, seek to coordinate all the interests at stake. The Community legislator has therefore sought to correct the breadth of such a statement by establishing not only a kind of limitation on it through the recognition, under certain conditions, of the lawfulness of such practice and, with it, the use of the protected name by third parties, but also, in a context of fair economic transactions, by preventing confusion between the processed food and the select ingredient, which must be clearly identified in all cases.

However, this limitation on the powers of exclusion is not absolute and unconditional, nor does it logically lead to the liberalisation of the use of the protected name by third parties outside the circle of legitimate users. On the contrary, a careful reading of the rule reveals that the Community legislator has made it subject to the fulfilment of three cumulative requirements. In particular, and always in accordance with the literal wording of the provision in question, the protected name may be used on the processed food if the following conditions are cumulatively met: (i) the processed product does not contain any other product comparable to the designated ingredient; (ii) the qualified ingredient is used in sufficient quantity to confer essential characteristics on the composite product; and (iii) the percentage of the designated ingredient is indicated on the food label.

Under these conditions, the legislator authorises the use of the protected name in '...the name of that processed product, on its labelling or in its advertising material...', as it does not appear that the conditional use of the protected name in the processed product could cause, under the conditions noted, any kind of detrimental effect on the interests of the quality designation and that the possible transfer of reputation to the final food product could be classified as unlawful. On the contrary, in addition to the benefit obtained by consumers who have more information about processed food products suitable for consumption, the use of the protected name in the presentation of such products not only does not harm the quality designation, but clearly benefits it by enabling the extension of its commercial prestige and reputation to other, often distant, areas of production.

3.3 CRITICAL APPROACH TO THE LIMITATION OF EXCLUSIVITY

A careful reading of the provision and its comparison with the 2010 Communication, as well as with the case law handed down on the matter to date, suggests that the EU legislator has sought to accommodate both, positioning itself in favour of the lawfulness – subject to conditions – of this use of the protected name, which means that the resolution of the regulatory conflict moves towards a scenario of coordination and weighing up of all the competing interests, as is the case in trademark law. The text analysed here is based precisely on the possibility of including quality figures in the list of ingredients or in the name of the compound food, provided that a triple condition of a negative, positive and formal nature is respected, which seems to be dependent on the regulation of the limitations of the exclusive trademark right contained in European trademark law. However, even though we believe this combination of underlying interests in this scenario to be appropriate, the wording of the provision is far from clear and raises a number of questions, which we set out below in separate sections.

i. Broad scope of the limitation

A first issue to be addressed concerns the scope of application of the provision, which, in our view, is extremely broad. Note how the provision establishes the conditions for the lawful use of the protected name in relation to the processed food in which a protected ingredient appears, regardless of its commercial presentation, i.e., whether or not it is packaged. This being the case, it is clear that the provision has a broad scope, as it applies to any incorporation of a protected ingredient in the processing of a food product. Consequently,

whenever such an action is carried out on an unprocessed product and a protected ingredient is incorporated into its composition, the provision in question is activated and, therefore, the requirements set out therein must be met if the presence of that selected ingredient is to be communicated in the name of the processed product, its labelling or its advertising material, which, in our view, is applicable to any marketing channel for such processed products.

It is clear that the exception therefore has a broad scope because, far from referring exclusively to packaged products, it refers to food at an earlier stage of production (processing) and regardless of the channel used to market it to end consumers. This being the case, all economic operators are required to carry out a kind of self-assessment of their compliance with the requirements for this practice to be considered lawful, which complicates its supervision by the bodies responsible for managing, promoting and defending quality labels.

ii. Absence of another comparable ingredient

The provision we have been studying establishes, as a first requirement for activating the limitation of the ius excludendi alios of quality figures, a negative requirement that revolves around the absence in the processed product of '...another product comparable to the ingredient designated by the geographical indication...'. However, the EU legislator does not specify what is meant by 'comparable product' and, correspondingly, on what basis it should be determined. This omission is not trivial because its specification allows for the scope of the exception we have been studying to be broadened or narrowed. That is why the last paragraph of Article 27 of the Regulation has empowered the Commission to adopt delegated acts to specify this particular aspect.

While such delegated acts are pending and national and EU case law is riddled with judicial rulings on the interpretation of this expression, we propose that the parameter on which such a classification is based should not revolve exclusively around their nature and possible substitutability between them. On the contrary, it must also take into account the mark they are capable of leaving on the processed food. In our view, ingredients of the same nature can be considered comparable, as can those which, without being of the same nature, have the same essential organoleptic effect on the final product.

iii. Attribution of Special Characteristics to the Processed Product

The article 27.1 establishes, as a second requirement, that "...the ingredient designated by the geographical indication must be used in quantities sufficient to confer essential characteristics on the processed product..." This is a positive requirement of a teleological or finalistic nature, since the rule does not limit itself to requiring the presence of the protected ingredient in a relevant quantity, but rather its incorporation in an amount adequate to produce an essential effect in the processed food. Note, in this regard, how the rule requires that these essential characteristics of the food derive from the use of the ingredient in the quantity necessary to obtain this result. This requirement appears to be in line with the interpretation of the Court of Justice, which has expressly denied that the quantity of the protected ingredient is relevant in and of itself. Please read legal grounds 51 and 53 of the CJEU judgment of 20 December 2017, case C-393/16 (Champagner Sorbet)[3], which states that "...the quantity of said ingredient in the composition of the foodstuff constitutes an important, but not sufficient, criterion..." and that "...the reputation of a PDO, within the meaning of those provisions, is exploited if that foodstuff does not have, as an essential characteristic, a flavor generated primarily by the presence of such an ingredient in its composition".

[3] Available on the website www.curia.europa.eu.

Or, to put it another way, and in accordance with the position of the Court of Justice, the inclusion of a protected name in the presentation of a processed product containing an ingredient subject to a PDO or PGI will only be possible if, regardless of the quantity included in the composition of the product, it is sufficient to provide the final food with organoleptic effects that imply essential characteristics of the product, but whose a priori determination is not, however, easy in practice.

iv. Formal Requirement

Letter c) of the first paragraph of article 27.1 mandates the requirement to indicate "...the percentage of the ingredient designated by the geographical indication in the processed product..." which raises some comments. On the one hand, and unlike the two previous requirements that focused on the composition of the final food, this requirement is formal in nature and refers to the information that must be conveyed on the final food regarding "...the percentage of the ingredient...".

On the other hand, and as a consequence of asserting that this statement shall be indicated on the label of the processed product, the legislator seems to narrow the scope of the provision we have been studying. By requiring that the percentage of the ingredient be included on the label of the processed product, a requirement is being introduced that is only applicable to a specific type of final food; namely, that which is packaged[4] and, correspondingly, processed products that do not have any label would be excluded from the exception to the ius excludendi alios, as is the case, for example, with unpackaged processed products sold in the HORECA channel.

What's more, the Community legislator has remained silent on the exact location on the label where the percentage of the ingredient must be indicated, which seems to leave the economic operator free to decide on a case-by-case basis. However, the content of another provision cited above offers some guidelines that could suggest the location of the required information. We refer to Article 37.7 of Regulation (EU) 2024/1143, which, regulating some details of the labeling of these final foods that include a protected ingredient, mandates that, if the labeling includes the indications "protected designation of origin" or "protected geographical indication" or their abbreviations (PDO or PGI), these "...shall be placed next to the name of the ingredient...".

3.4 LEGAL CONSEQUENCE EXPECTED IN THE NEW REGULATION

If the three requirements examined above are met cumulatively, the economic operator is explicitly authorized to use the protected name that designates an ingredient "...in the name of that processed product, on its labeling, or in its advertising material...", so the exclusion rights granted to the circle of legitimate users would not be triggered by this fact. This freedom granted to third parties regarding the location of the protected name is not trivial. It should be noted, in this regard, that the appearance of the protected name in the name of the processed product, through a descriptive sales name, or in its commercial advertising, offers greater visibility in the market, compared to its use in other parts of the labeling, such as, for example, in the list of ingredients. When used in the name of a food or in its commercial advertising, it performs a pseudo-distinctive function, since it allows for the creation of a new food category—one comprised of the protected ingredient—within the specific typology of the final food product. This contrasts, however, with the appearance of the protected name

[4] It is perhaps worth recalling the definition of packaged food contained in point (e) of the second paragraph of Article 2 of Regulation (EU) No 1169/2011, which states that this term refers to "any sales unit intended to be presented without further processing to the final consumer and to the general public, consisting of a food and the packaging in which it has been put up before being put up for sale, whether the packaging covers the food in whole or only partially, but in such a way that the contents cannot be modified without opening or modifying the packaging; the definition of "packaged food" does not include foods that are packaged at the request of the consumer at the point of sale or packaged for immediate sale."

in the list of ingredients, which, while clearly serving an informative purpose for consumers, most often goes unnoticed.

However, as underlined by the Agreement of September 19, 2024, of the Coordination Board for Differentiated Quality (MECOCADI) of the Ministry of Agriculture, Fisheries, and Food of the Government of Spain[5], This right to use the protected name in the name of the food cannot become a breeding ground for deceptive market practices, which would logically activate the exclusion powers initially excepted. This is reiterated in various passages, stating that "...(t)he name of the geographical indication must be clearly identified as an ingredient..."; that "...(n)everywhere it appears, it will never induce the belief that it is anything other than an ingredient" and that "(t)he name of the GI may form part of the sales name of the processed product, provided that it does not induce the belief that it is said processed product that is entitled to bear the geographical indication" For this reason, on the occasion of this Agreement, not only has the inclusion of expressions been proposed that allow for the clear identification that the protected product is an ingredient of the final food, as occurs, for example, with the expression "made with" or similar, but also the use of European logos associated with quality figures, together with the name of the final food, as contained in Article 37.7 of Regulation (EU) 2024/1143, has been prohibited, since this practice is likely to mislead consumers.

3.5 SPECIAL RULE FOR PACKAGED COMPOSITE PRODUCTS

In addition to the requirements examined above for considering the lawful use of the protected name of an ingredient in the sales name of a processed product and, therefore, for exempting the powers of exclusion of a quality designation, the Community legislator has introduced separate provisions specifically dedicated to those processed foods that, containing a protected ingredient, are offered to the market in packaged form. Far from referring to processed products in general, as is the case with the previously examined paragraph, the focus has been on those that are packaged.

Thus, regarding the first of these provisions, it is contained in the second paragraph of article 27, which imposes a formal obligation regarding prior communication to the recognized producer group (rectius, the quality management body) not only to express the economic operator's interest in including the protected name in the sales name of the packaged product, including advertising materials, but also to demonstrate that it meets the requirements contained in the first paragraph of the same article. The legislator has therefore placed the burden of proof of compliance with these requirements on the economic operator interested in using it, who must undertake an evidentiary effort in this regard. It will only be after the expiration of the period provided for the acknowledgment of receipt (4 months) or after the acknowledgment of receipt itself, that the use of said mention in the name of the packaged food may begin. Finally, the producer group has been empowered to accompany the acknowledgment of receipt with information—of a non-binding nature for the economic operator—on the use of the geographical indication.

It is therefore clear that the producer group's only task is to verify the economic operator's self-assessment regarding compliance with these requirements. In the event of disagreement, the group would have to resort to administrative or judicial means to try to prevent such use of the protected name. In other words, the second paragraph of Article 27 allows the producer group of the quality symbol access to (i) prior information on the intentions of an economic operator and, consequently, (ii) the inspection of the self-

[5] The text of the Agreement can be consulted at https://www.mapa.gob.es/es/alimentacion/temas/calidad-diferenciada/n_20_2024_ver0_acuerdo_etiquetado_productos_procesados_con_ig_como_ingrediente_tcm30-696257.pdf

assessment of compliance with the requirements carried out by the latter, with the aim of detecting any deviations that may harm the interests of the specific quality symbol and, if such deviations are found, to react, including through judicial means, in defense of the former. This is a provision that, however, distances itself from Article 41.2 of Regulation (EU) 2023/2411, on the protection of geographical indications for artisanal and industrial products, which provides for a type of prior license in favor of the economic operator granted by the management body of the specific quality figure, by ordering that "(a) protected geographical indication designating a part or component of a manufactured product shall not be used in the sales designation of that product, except where the applicant in whose name the geographical indication has been registered has given its consent to such use.." ( ). It is worth mentioning an opinion contrary to this approach, justified by the unjustified limitations on free competition in the market for processed products and by the contradictions with the guiding principles of a circular economy (CALABRESE, 2023, p. 340).

Regarding the second provision dedicated to packaged foods, the third paragraph of the article under review allows the parties to reach a contractual agreement on "... the specific technical and visual aspects of how the geographical indication of the ingredient is presented in the name of the prepacked food in labelling, elsewhere than in the list of ingredients, or in advertising material...." This section allows for a twofold observation. On the one hand, compliance with these technical and visual requirements relating to the use of the protected name in the name of the packaged food is conditional on the conclusion of an agreement between the producer group and the economic operator, but there is no obligation to reach one. This creates an uncertain scenario regarding the specific use of the protected name by a third party outside the circle of legitimate users, such that, always within the context of fair transactions, they can freely decide how to present this information on the composition of the food on the market. But in addition, and on the other hand, a second observation must be made regarding the limitation provided for this agreement, since, as can be deduced from the letter of the provision, the contract would refer to the technical and visual aspects of the name protected in the food name to be included in any part of the packaging other than the list of ingredients or in the advertising material, which means, once again, the recognition of a certain freedom for the economic operator to use the protected name in the list of ingredients of the composite product or in the advertising material, being obliged in the latter case only to a formal performance consisting of the aforementioned notification.

However, this free use of the protected name of the selected ingredient in the packaging of the processed food, whether in the sales name of the same, or in the list of ingredients or in its commercial advertising, does not seem trivial to us and could be the breeding ground for many dishonest practices that would fall outside the exclusion powers by meeting the requirements of Article 27.1 of Regulation (EU) 2024/1143. The way this information regarding the composition of the processed product is presented on the market is not an irrelevant matter and can, from the consumer's perspective, confer an undeserved halo of prestige and reputation due to the inclusion of the protected ingredient. Therefore, a specific provision regarding the ex ante intervention of the producer group to control the use of the protected name and prevent situations such as those described would have been appropriate.

4 CONCLUSIONS

Having completed our examination of Article 27 of Regulation (EU) 2024/1143, it is appropriate to present, by way of conclusion, some critical reflections on its content and scope. In this regard, while the political decision to exempt the exclusion powers recognized by Article 26 of the same regulatory body to the circle of legitimate users is interesting, the truth is that, in our view, the legal technique employed is deficient, due to significant omissions, obvious contradictions, and a certain lack of definition in the scope of application

of the provision and in the specification of the criteria on which the requirements that allow the exception to the ius excludendi alios are based; as well as in the identification of the spaces where the protected name may be lawfully used (name, labeling, and advertising material).

Furthermore, the diminished role of the producer association in this area is striking, since, in light of the content of the second and third paragraphs of article 27, it does not have the power to regulate the use of the protected name as an ingredient in a food. Quite the contrary, once the use of an ingredient of the product by an economic operator outside the circle of legitimate users has been decided upon, having self-assessed positively regarding compliance with the requirements set forth therein and having made the relevant communication prior to use, the producer group's only option is to initiate an administrative sanctioning procedure or, where appropriate, a judicial proceeding to corroborate non-compliance with the requirements set forth in the first paragraph of Article 27 and, where appropriate, to prevent the use of the protected name.

We therefore believe that producer groups should regain a greater role in the protection of quality labels when the protected products are used as ingredients, as is the case with non-agricultural quality labels, where, while powers of preventive control over the use of the protected name are recognized, a type of license agreement is signed in favor of the interested party. The potential strain on free competition in this case is offset by a multitude of beneficial effects for consumers, such as (i) greater control over the traceability of the protected products and the use of the protected names by third parties outside the legitimate circle of users; (ii) the guarantee of food authenticity; and (iii) a corresponding reduction—if not outright elimination—of acts of deception and reputational exploitation in economic transactions. And to this end, we believe it is very useful to regulate this particular use of the name protected by the Specifications of each quality category. As has already been argued elsewhere (MARTÍNEZ GUTIÉRREZ, 2018, p. 127; ID, 2021, p. 139; MINELI, 2014, p. 46), The inclusion of specific rules on this matter within this core document for each quality classification constitutes, in our view, the best way to establish an objective and uniform regulation of the use of the protected name on the labeling of processed products. In fact, and although restricted to specific cases, the Commission has ruled in favor of this inclusion. Read point 2.2 of the 2010 Commission Guidelines, which restricts the inclusion of these specific rules in the specification only "...if they aim to address a clearly identified specific difficulty and if they are objective, proportionate, and non-discriminatory...".

However, this possibility does not appear to be unfeasible and could cause internal tensions in the internal market and restrictions on the free movement of goods, as we have found them consolidated for years not only in various governing documents for national quality classifications, but also in the internal regulations on agri-food quality in some Member States. Thus, as regards the former, we could mention the PDO Mexillón de Galicia-Mejillón de Galicia, in whose Single Document we can read the following:

“Los productos en cuya elaboración se utiliza como materia prima el «Mejillón de Galicia DOP», incluso tras un proceso de tratamiento tecnológico o conserva, podrán despacharse al consumidor en envases que hagan uso de la mención «Elaborado con Denominación de Origen Protegida Mejillón de Galicia» sin aposición del logo comunitario, siempre que:

— el «Mejillón de Galicia DOP», certificado como tal, constituya el componente exclusivo de la categoría de productos correspondiente, y

— los usuarios de la mención «Elaborado con Denominación de Origen Protegida Mejillón de Galicia» estén autorizados.

En este sentido, el Consejo Regulador, como titular del derecho de propiedad intelectual otorgado por el registro de la denominación Mejillón de Galicia DOP autorizará el uso de la

mención «Elaborado con Denominación de Origen Protegida Mexillón de Galicia» en productos elaborados.

El Consejo Regulador inscribirá a los usuarios autorizados para el uso de la mención «elaborado con Denominación de Origen Mejillón de Galicia» en los registros correspondientes y velará por el correcto uso de la denominación protegida".

Correlatively to this provision, article 23 of the Regulation of the protected designation of origin Mexillón de Galicia-Mejillón de Galicia and its Regulatory Council (approved by the Order of the Ministry of the Sea dated March 20, 2019), after regulating the use of the mention "made with the protected designation of origin Mejillón de Galicia", orders the following: "Para velar por el correcto uso de la denominación protegida y con el fin de verificar el cumplimiento de lo expuesto en los artículos precedentes, las empresas transformadoras deberán estar inscritas en el correspondiente registro del Consejo Regulador y explícitamente autorizadas".

The PDO Pimentón de la Vera also follows this same line. See article 3.3 of the Regulations of its Regulatory Council (approved by Decree 97/2017, of June 27) and section 5.2 of procedural rule 06, which, entitled "companies that produce and market products in which Pimentón de la Vera is an ingredient," states the following:

"…Los productos en cuya elaboración se utilice como materia prima D.O.P. "Pimentón de la Vera" podrán hacer referencia a esta denominación, sin el símbolo comunitario, en el etiquetado de sus productos, siempre que:

1. el pimentón certificado como D.O.P. constituya el componente exclusivo de la categoría de productos correspondientes; y

2. los elaboradores afectados estén autorizados por el Consejo Regulador a efectos de su control y de la necesaria supervisión del uso correcto de la denominación protegida…".

Regarding the internal regulations of another Member State, we could mention the case of Italy, which has a regulatory instrument that penalizes the use of the protected name when used as an ingredient without authorization from the quality management body. Read, in this regard, the Decreto legislativo 19 novembre 2004, n. 297, su Disposizioni sanzionatorie in applicazione del regolamento (CEE) n. 2081/92, relativo alla protezione delle indicazioni geografiche e delle denominazioni di origine dei prodotti agrícola e alimentari, in whose article 1.1º c) the following is established:

> *"…per prodotti composti, elaborati o trasformati che recano nell'etichettatura, nella presentazione o nella pubblicità, il riferimento ad una o più denominazioni protette, è sottoposto alla sanzione amministrativa pecuniaria da euro duemilacinquecento ad euro sedicimila. Non costituisce violazione di cui alla presente lettera il riferimento alla denominazione protetta:*
>
> *1) quando gli utilizzatori del prodotto composto, elaborato o trasformato sono autorizzati dal Consorzio di tutela della denominazione protetta riconosciuto ai sensi dell'articolo 53 della legge 24 aprile 1998, n. 128, come sostituito dall'articolo 14 della legge 21 dicembre 1999, n. 526, e risultano inseriti in apposito registro attivato, tenuto e aggiornato dal Consorzio stesso.*
>
> *In mancanza del provvedimento di riconoscimento del Consorzio la predetta autorizzazione può essere concessa dal Ministero delle politiche agricole e forestali - Direzione generale per la qualità dei prodotti agroalimentari e la tutela del consumatore, che provvede anche allá gestione del citato registro;*
>
> *2) o quando il riferimento alla denominazione protetta è riportato soltanto tra gli ingrediente del prodotto confezionato che lo contiene o in cui è elaborato o trasformato…".*

There is no evidence, therefore, that the internal market has been strained in Spain or Italy, nor does it appear that restrictions on free competition have been imposed by subjecting the use of the protected name to express authorization when the protected product is used as an ingredient in the composition of a processed food. This is because, in addition to benefiting the prestige, notoriety, and reputation of the quality mark, this requirement

guarantees the authenticity of the protected products and, therefore, reduces the risk of deception in commercial transactions. This, while benefiting consumers, also underlines the importance of the producer group that manages the protected name.

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