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Evocation of geographical terms of a PDO/PGI. What elements should be taken into consideration?

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In the past few weeks, almost contemporaneously, two courts cases dealt with the scope of protection of the PDO “Aceto Balsamico Tradizionale di Modena” and the PGI “Aceto Balsamico di Modena”. Both courts agreed that ACETO and BALSAMICO are generic and common terms which do not fall under the scope of protection of PDOs/PGIs, but one of them found enough “evocation” to find infringement.

In the first case, the Consorzio for the protection of the PGI “Aceto Balsamico di Modena” contested the use of the terms BALSAMICO and DEUTSCHER BALSAMICO by Balema GmbH, for a vinegar-based condiment. On referral from a German Court, the CJEU on December 4, 2019 (case C?432/18), held that protection of the name “Aceto Balsamico di Modena” applies to the whole denomination, while individual non-geographical components of this denomination may be freely used. Even if protection, pursuant to Art. 13 of Regulation No. 1151/2012, may cover also each single part of a DOP/IGP, generic or common terms that lack geographical connotation can be used, even jointly, and also translated, by anyone in the EU.

Some months earlier, the Court of Bologna had held that Casa del Balsamico Modenese S.r.l.’s condiment BALSAMOSO infringed the PDO “Aceto Balsamico Tradizionale di Modena” because it was able to evoke it. Casa del Balsamico appealed arguing that BALSAMOSO did not have any geographical connotation and the components “aceto” (vinegar) and “balsamico” (balsamic) were common terms. Moreover, the mentioning of Modena was due to mandatory requirements, such as indication of the company’s address.

The Court of Appeal of Bologna, with decision No. 1943/2019 of 17 September 2019, upheld the first-instance decision. Even though it recognized (like the CJEU would do few months later) that “aceto” and “balsamico” were generic terms that even when coupled did not enjoy the protection conferred by the PDO, and even though the dominant element of the packaging was BALSAMOSO, still BALSAMOSO, in combination with other secondary elements of the packaging, was capable to evoke the PDO and mislead the public on the characteristics of the products.

In particular, the Court of Appeal took into consideration a number of separate elements such as the company name and address, the representation of the map of Italy highlighting the city of Modena, and finally, the claim “*precious condiment, fruit of the ancient tradition of the Cattani family, guardian of the art of making Balsamic vinegar, for five generations*”, which altogether

were found to “evoke” the PDO.

Now, with the “Glen” decision of the CJEU (case C-44/17) in mind, we all know that the decisive criterion for interpreting the term ‘evocation’ is whether, when the consumer is confronted with a disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected. “Evocation” does not require that the protected designation itself be used. However, how deep can one dig into the specific details of the labelling or packaging? The requirement of an image “triggered” in the mind seems to require something of immediate recognition, of prima facie evidence, while the Court of Appeal engaged in dissecting the labelling/packaging in an almost incremental analysis. We are not sure that this is what “evocation” really means, nor that the approach is in line with the latest CJEU case law. We will see in further cases!

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