

EU Law on Food Naming

The Prohibition Against Misleading Names in an Internal Market Context

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EU Law on Food Naming



**Copenhagen
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The prohibition against misleading names
in an internal market context

Mette Ohm Rørdam

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LIST OF ABBREVIATION

AG	Advocate General
B2B	Business to business
B2C	Business to consumers
CAP	Common Agricultural Policy
CJEU/the Court	Court of Justice of the European Union
CMO	Common Market Organisation
EU	European Union
FIR/ Food Information Regulation	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, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004
GFR/General Food Regulation	Regulation (EC) no 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

Para(s).	Paragraph(s)
PGI	Protected Indication of Origin
PGI/PDO Regulation	Regulation (EC) No 510/2006 of 20 March 2006 on the Protection of Geographical Indications and Designations of Origin for agricultural products and foodstuffs
PDO	Protected Designation of Origin
SEA	Single European Act
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty of the European Community
TEEC	Treaty of the European Economic Community
TEU	Treaty on the European Union
UCPD/Unfair Commercial practices Directive	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, the purpose of regulating commercial practices, which includes information on labels, is to protect consumers' economic interests

PART 1: INTRODUCTION

“Out of the ground the Lord God formed every beast of the field and every bird of the air, and brought them to Adam to see what he would call them. And whatever Adam called each living creature that was its name.”¹

CHAPTER 1: INTRODUCTION, METHODOLOGIES, STRUCTURE AND DELIMITATIONS

1 Introduction

The food industry, one of the most important and largest industries in the world,² will always be subject to much public focus and political attention. It is and always will be a heavily regulated area, from *farm to fork*.³ Various agendas, purposes and aims motivate the regulation of the industry, which, in addition to the extensive regulations themselves, make the food industry a complex legal area. Existing regulation includes rules on feed, import, composition and relatively new initiatives related to health claims and nutrition labelling. According to Article 1(1) of the General Food Regulation,⁴ three central objectives of EU food policy are safety and health, free movement of goods, and fair⁵ practices in trade, including consumer protection.

¹ Genesis 2:19, The New King James version of the Bible.

² See http://ec.europa.eu/enterprise/sectors/food/eu-market/index_en.htm and Van der Meulen, B. (2009). *Reconciling Food Law to Competitiveness*, p. 10: “The food industry is the most important manufacturing sector in the European Union”. It has been of major importance for many years, see e.g. Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 4, and Cecchini, P., Catinat, M., and Jacquemin, A. (1988). *The European Challenge, 1992, the Benefits of a Single Market*, p. 30; see also p. 57.

³ See in general http://ec.europa.eu/food/index_en.htm.

⁴ Regulation (EC) no 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, hereafter termed the “General Food Regulation” or the “GFR”. Of course, this is a simplified description of the objectives, which, as will be shown, has more dimensions.

⁵ The term fair is often mentioned in relation to sale and marketing of food. A definition of fair/fairness is provided in Chapter 8. “Fairness” is not a legal term, but it is used in this thesis to cover fair commercial practices (in B2B and B2C) and fair competition. Competition is generally used as a process; rivalry among firms. See Colander, D. C. (2008). *Microeconomics*, p. 238. Fair commercial practices and fair competition overlap (especially regarding consumer protection) and are mentioned in the Food Information Regulation: 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, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council,

More specifically, the aim is that food⁶ shall be safe, that no barriers to trade shall exist and that adequate information must be provided when food is marketed. When the production and marketing of food is related to the Common Agricultural Policy (“CAP”), other objectives influence food law, such as social and cultural objectives.

An estimated 95 percent of food legislation within the European Union⁷ stems from harmonised EU legislation,⁸ leaving only approximately 5 percent in the hands of the Member States.⁹ Out of all food legislation, “labelling is considered the single most important legal issue for food businesses,”¹⁰ and it is thoroughly regulated in EU.

Currently, the focus is increasing in Europe on food information¹¹ (for example, on labels and in labelling) and on the provision of adequate consumer information on food packaging.¹² In 2011, the European Parliament and the Council adopted a new Food Information Regulation,¹³ which brought new aspects to labelling, such as making declaration on nutrition mandatory. Labelling has been emphasised for several years, and more than 40 EU laws specifically or substantially relate to food labelling.¹⁴

and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, hereafter termed the “Food Information Regulation” or the “FIR”.

⁶ For a definition of food, see The General Food Regulation, Article 2. For a further elaboration on the term, see also Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 26.

⁷ European Union, EU and Community are in this thesis considered similar and used interchangeably.

⁸ Speech given by food policy adviser K. De Winter at the Danish Consumer Agency’s conference on Food within Europe, 28 February 2008. Food law is almost fully Community-based, according to the Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament, Better Training for Safer Food”, Com (2006) 519 Final, p. 3.

⁹ It is not clear to what degree these numbers is a consequence of judge-made deregulation. See Section 4.1.2. and in general Chapter 9 for more on how EU law limits national regulation of food names.

¹⁰ Van der Meulen, B. (2009). *Reconciling Food Law to Competitiveness*, p. 69.

¹¹ Food information is defined as “information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication”, cf. the Food Information Regulation, Article 2(2)(a). With this new Regulation, terminology has changed a bit, since “labelling”, rather than “food information”, was previously used to define what the legislation concerned. The term “food information” is broader and covers more than “labelling”, such as information provided through modern technology tools. This thesis focuses on information provided on labels/food packages, and for this reason, the terms used in relation to the rules refer both to labelling and food information.

¹² Previously, the focus in law was on “labelling”, but since 2011, the focus has been broader on “food information”, where it is provided. Since food information is, still, primarily provided on labels, this thesis focuses on labelling rules.

¹³ See footnote 5.

¹⁴ See O’Rourke, R., (2005). *European Food Law*, p. 56.

Therefore, labelling constitutes a heavily regulated legal area, especially in relation to which and how information about the food must be provided.¹⁵ Both the amount¹⁶ and quality of information are regulated, for example, through mandatory particulars such as the food name and the prohibition against misleading labelling, including a prohibition against misleading names.

2 Food names

This thesis is part of the cross-disciplinary Danish project “*FairSpeak 1, Spin or fair speak – when food products start talking*”, anchored at Copenhagen Business School, which sets out to develop tools and methods for analysing the condensed information on food labels.¹⁷ Research by the FairSpeak project group has demonstrated that potentially misleading food names on food labels is an important topic for authorities, businesses and consumers.¹⁸

The name¹⁹ of a food product identifies that exact product and contains significant product information that is especially valuable to the consumer. The name functions as a cue enabling the consumer to identify a product and make a choice based on the nature, composition and so on of the particular product²⁰ and having such condensed information lowers search costs.²¹ Further, the product name serves to differentiate one food product from other similar products, and therefore, is an important aspect in the competition, especially when it is possible to reserve the use of a food name, as with certain geographical indications such as Parma ham. Within food industry regulation, the importance of food names is illustrated by the fact that the name is one

¹⁵ Examples of analyses of the complexity of food labelling legislation in the EU include The European Evaluation Consortium (TEEC), “Evaluation of the food labelling legislation, final report”, European Commission, Health and Consumer Protection Directorate-General, “Labelling: Competitiveness, consumer information and better regulation for the EU”, and Van der Meulen, B. (2009). *Reconciling Food Law to Competitiveness*.

¹⁶ Some argue that the food industry is actually facing the problem of “information overload”; see for example, Hagenmeyer, M. (2008). *The Regulation Overkill: Food Information*, and Leible, S. (2010). *Consumer Information Beyond Food Law*.

¹⁷ See more at <http://fairspeak.org/>.

¹⁸ See below in Section 5.3 for more about the FairSpeak results. For an example of the importance of the topic, see also <http://www.ft.dk/samling/20121/almindel/ftf/spm/1/index.htm>.

¹⁹ The term “name” is used in this thesis to cover names, descriptions, designations, indications and so on. The term “name” is used in the horizontal regulation on food information; the FIR article 2(2)(n)-(p). A food name is used to describe a food product. Indication and designation are used for certain types of geographical names. The term “naming” is used to describe the process of naming the particular product.

²⁰ See Grunert, K. (2005). *Food Quality and Safety: Consumer Perception and Demand*, European Review of Agricultural Economics, p. 378, and Economides, N. S. (1988). *The Economics of Trademarks*, p. 527. See also Hausman, A. (2012). *Hedonistic rationality: Healthy Food Consumption Choice using Muddling-through*.

²¹ See Landes, W., and Posner, R. (2003). *The Economic Structure of Intellectual Property Law*, p. 170, Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*, p. 271.

of the mandatory particulars to be provided on labels. However, to reap the benefits of having names - such as lower search costs - the name must be adequate and precise to a certain degree, and provide the information needed. Some name consistency is necessary.²² Since information on food labels is generally difficult to both read and understand,²³ accuracy and precision in naming becomes even more important. As the identifier of a product, the name contains important information on anything from the nature and the ingredients of the food to the means of production.²⁴

If the naming of food were as easy and straightforward as Adam's naming of animals cited in Genesis, there would be no reason to explore this topic.²⁵ To a large degree, naming is determined by historical, psychological and linguistic factors and many complexities relating to the naming foods arise because of the cultural and linguistic diversities of the European Union, where the Member States are *united in diversity*.²⁶ However, naming is governed by law, which aims at harmonising and removing divergences, at least partly.

The regulation of food names within the EU is characterised by shifting tendencies and ideas. Treaty-based rules for example on free movement and general principles like the principle of mutual recognition is central for regulation of food naming in EU, as they define the limits of EU law²⁷ and to what degree Member States can regulate naming of food. In secondary EU law, attention is especially on consumers' abilities to comprehend information, including food information,²⁸ that is, by prohibiting misleading information. Many factors affect this ability, for example, the increased abundance and complexity of products, discovery of new ingredients and methods of production, constant development in communication methods and varying definitions

²² For a parallel related to trademarks, see Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*, p. 269.

²³ For example, this was the conclusion reached by the European Commission in European Commission, Health and Consumer Protection Directorate-General, "Labelling: Competitiveness, consumer information and better regulation for the EU".

²⁴ The name of a food product as the identifier is also important in relation to other areas than consumption, such as taxation and rules on import, areas not elaborated on in this thesis.

²⁵ For an example of the difficulties in the naming of minced and mechanically separated meat, see European Commission, DG SANCO, Plenary meeting of the advisory group on the food chain and animal and plant health, summary record of 14 March 2011.

²⁶ Motto of the European Union, see http://europa.eu/abc/symbols/motto/index_en.htm.

²⁷ The Treaty sets the outer limits for EU law in general, this follows from the principle of conferral (see Article 5(2) TEU).

²⁸ See Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C 92/1-16, p. 3.

of adjectives such as *fresh*, *natural*,²⁹ *pure* and *traditional*.³⁰ The development within the food industry also has led to a need for protection of traditional food production, which some rules within secondary law aim to preserve.

As a result, EU law on food names is complex because of the different sets of rules, aims and objectives related to food naming.

3 Objective, research question and research outline

This thesis aim to structure, clarify and discuss the different EU rules on food naming by addressing practical difficulties and to answer the following research question:

How is food naming regulated in the EU and to what degree are Member States free to regulate the naming of food, by way of legislation and/or by enforcement of the prohibition against misleading names?

First, the different objectives and scopes of the different sets of rules in secondary law are analysed; that is, what are the rationales behind the rules and which names are regulated and how? Economic theory is applied to this analysis to further explain and discuss the rationales behind secondary EU law on food naming. Second, a legal analysis of the different kinds of EU rules related to food naming is conducted to address the main questions concerning food naming, based on identified problem areas. The objective is to establish criteria for solving practical difficulties with food naming to avoid potentially misleading names, for example, when using geographical names. Third, an analysis is made of primary law and general EU principles and

²⁹ Sometimes these adjectives are defined in legislation. The term “natural” in relation to flavourings can be used for substances or preparations derived directly from an animal or vegetable material cf. Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods, Article 16. For a practical example of the use of such adjectives, see http://www.confectionerynews.com/Regulation-Safety/Natural-flavours-identified-in-nature-to-have-major-industry-impact-report/?c=OJR6kC9KvZTDbtwTt2UfDw%253D%253D&utm_source=Newsletter_Subject&utm_medium=email&utm_campaign=Newsletter%252BSubject and http://www.foodnavigator-usa.com/Regulation/General-Mills-must-defend-made-with-real-fruit-claim-for-Fruit-Roll-Ups-court-rules/?c=OJR6kC9KvZSTso5qazfVHQ%253D%253D&utm_source=Newsletter_Subject&utm_medium=email&utm_campaign=Newsletter%252BSubject.

³⁰ See The European Evaluation Consortium (TEEC), “Evaluation of the food labelling legislation, final report”, p. 9.

their interaction with the different rules found in secondary law. The intension is to clarify to what degree are Member States free to regulate the naming of food, by way of legislation and/or by enforcement of the prohibition against misleading names.

This thesis contributes to the existing legal literature and research by thoroughly examining and discussing the different sets of legal rules on food naming and clarifying valid law, *de lege lata*. Further, the thesis contributes by analysing the boundaries for national discretion, again providing clarification of *de lege lata* in relation to potentially misleading names.

This thesis intends to benefit businesses by clarifying *de lege lata* and especially the interaction between different EU rules, and their interaction with national rules. In addition, through the legal analyses, the analysis of the borderlines between the rules, including application of economic theory, and the subsequent discussions this thesis provides perspectives that could contribute to the future regulation of food names in the EU.

4 Food naming in a legal context

In 2003, the European Commission concluded that current legislation on food names was sufficient to allow consumers to understand the products they buy and that the problems attached to naming were solved.³¹ In contrast, the starting point of this thesis is that this conclusion is incorrect, and that EU law on food names is not transparent.

A large number of Danish cases on potentially misleading names confirm that difficulties exist in relation to the legislation.³² Further, the variety of goals and objectives embedded in the EU legislation combined with national differences in enforcement of consumer(s) (protection), differing national cultures and production traditions add to the complexity of naming.³³ As stated

³¹ The European Evaluation Consortium (TEEC) for the European Commission, DG SANCO, “Evaluation of the food labelling legislation, final report”, 2003. The conclusion was reached without further elaboration. A similar conclusion was reached in 1997, see Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 56.

³² See section 5.3 for an overview of the empirical data.

³³ In Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff, Com (85) 603 Final, p. 2, the Commission characterised the food sector as featured by “1) the extreme sensitivity of public opinion in this field, 2) the very detailed nature of many national laws, 3) the almost complete lack of standards (in the sense of directive 83/189/ECC) defining the composition of products.” Van der

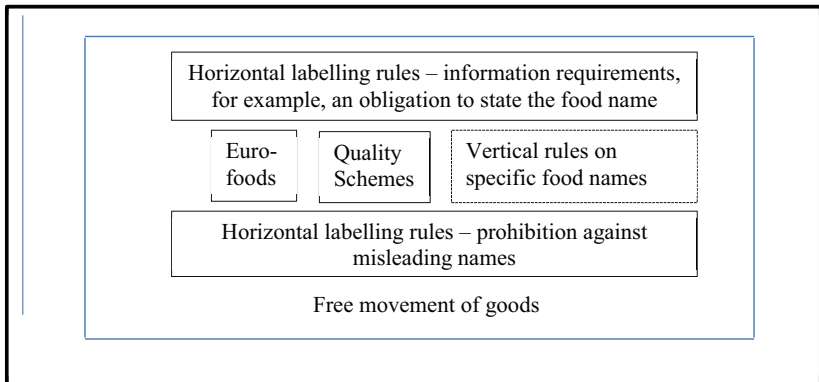
in the General Food Regulation, Recital 4 of the Preamble, “*There are important differences in relation to concepts, principles and procedures between the food laws of the Member States.*”

Thus, the differences between Member States are accepted, but the practical implications of these differences are not clearly addressed in law.

4.1 Rules concerning food naming

The structure of food naming legislation is rather complex, and the rules regulating food naming merge different fields of law related to consumer protection, the internal market and the CAP. General horizontal rules applicable to all food products establish mandatory information required for labels and so on and regulate how this information should be provided. Generally, food products must be authentic, that is, the food must match the information provided on the packaging/label. Detailed vertical rules establish requirements for the specific (and additional) labelling information, such as the use of certain food names.

An illustration of the regulation looks like this:



Meulen, B. (2009). *Reconciling Food Law to Competitiveness*, p. 15, concludes that the opposite characterises EU food law: “*Food legislation has been designed to pursue a limited number of objectives.*”

The rules are found in both Directives (the Eurofood rules) and Regulations (the horizontal labelling rules, including the prohibition against misleading names, and the Quality Schemes).³⁴ The rules are initiated and adopted at the EU level; therefore, they constitute compromises. However, not specific to EU food law, the implementation and application as well as the primary responsibility for complying with and enforcing the harmonised rules are left in the hands of national authorities and food businesses. Of course, the discretion left to national authorities varies according to the level of details of the EU rules.

Primary law found in the Treaty-based rules and general principles,³⁵ here regarding free movement of goods, define the fundamental borderlines for EU law on food names, and for this reason, these limit how food legislation can and must be applied. The Treaty-based rules are especially important where the application of secondary EU law (Directives and Regulations and the CJEU interpretation hereof) is ambiguous, or where such law is in itself ambiguous. Further, many of the principles and legal rules central for food naming have been developed in case law concerning primary law.

4.1.1 The prohibition against misleading names

A central rule in relation to naming, and consumer information in general, is the prohibition against using information, including names, likely to mislead consumers. A broad and flexible, perhaps even vague, legal rule such as the prohibition against misleading consumers initially leaves discretion to the authorities and courts enforcing such prohibitions.

The legal concepts attached to the prohibition are complicated and intertwined. Moreover, EU law defines these concepts. For example, the Court of Justice of the European Union (“CJEU” or “the Court”) has established in its case law the criteria for misleading labelling (and advertising), as well as for concepts like “*the average consumer*”. However, the more precise case-by-case evaluation of the misleading nature of a certain food name and enforcement of the rules are left at national level. As an example, the use of the food name “*neutralmarineret kylling*” (neutrally

³⁴ The rules are introduced in section 4.1.1 to 4.1.5.

³⁵ General principles are for example the principle of proportionality and the principle of mutual recognition. For a definition of a “principle” of law, see Harbo, T. (2010). The Function of the Proportionality Principle in EU Law, p. 159. See Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 108-113 for more on the hierarchy of norms in EU law.

marinated chicken) has been found to mislead Danish consumers. By an agreement between the Danish Veterinary and Food Administration, the Danish Consumer Council and the Danish food industry, products previously sold under that name must instead be marketed under different names like “*kylling tilsat X % lage*” (chicken added X % brine), with all letters in identical font size.³⁶

Within the individual Member States, it is often an ungrateful task to be the authority responsible for controlling whether a name is correct or misleading. In February 2012, the Danish Veterinary and Food Administration was criticised from different sides for a decision ordering the Danish Juice Bar “Joe and the Juice” to change the use of names like “Strong bones” and “Immunity”. The order was withdrawn due to the criticism, which argued that the authorities interpreted the prohibition against misleading consumers too strict.³⁷ At EU level, the recently adopted rules from the common organisation of agricultural markets establishing a requirement to provide consumers with the scientific name of fish is an example of a piece of legislation which has been heavily criticised for being rigid.³⁸

Consumers in the Member State where a product is sold provide the benchmark for evaluating the potentially misleading information, thus initially establishing application of legal standards in the Member State of sale as well as country-of-destination control. This practice is in accordance with the FIR and with the definitions of misleading/unfair practices found in the *lex generalis* Unfair Commercial Practices Directive,³⁹ in which the benchmark is the consumer whom a

³⁶ See <http://www.agra-net.com/portal2/fcn/home.jsp?template=pubarticle&artid=1287146443646&pubid=ag096> or http://www.foedevarestyrelsen.dk/Nyheder/Nyheder/2010/Sider/Nyt_navn_til_neutralmarineret_kyllingekoed.aspx. The issue of national legal names, whether regulated by law or administrative practices, is addressed in Chapter 9. See also Nissen, N. K., Sandøe, P., and Holm, L. (2012). Easy to Chew, but Hard to Swallow - Consumer Perception of Neutrally Marinated Meat.

³⁷ See <http://www.foedevarestyrelsen.dk/Nyheder/Pressemeddelelser/Arkiv%202012/Sider/Sex-on-the-beach'-er-fortsat-tilladt.aspx>. See also the continuing debate at political level, <http://www.ft.dk/Search.aspx?q=joe+and+the+juice&tab=3&samling=2011#tabs>. See also Ipsen, A. (2012). *Vildledende markedsføring af fødevarer i Danmark - med fokus særligt på funktionelle fødevarer*, p. 39–40 for a description of the case. In July 2012, the Danish Veterinary and Food Administration again decided on the case; see <http://www.foedevarestyrelsen.dk/Nyheder/Nyheder/Arkiv%202012/Sider/Ny-afgørelse-om-juicenavne-hos-Joe-and-the-Juice.aspx>.

³⁸ The rules are parallel to the “Eurofoods” rules in the sense that the scientific name is the same throughout EU. The rule providing for obligatory information on the scientific name of fishes has been heavily criticised in the Danish Media; see Berlingske Business, 18 February 2012. Retrieved from: <http://www.business.dk/foedevarer/fiskehandlere-skal-laere-latin>, and Politiken, 26 March 2012. Retrieved from: <http://politiken.dk/debat/profiler/morten-loekkegaard/ECE1580983/da-europa-gik-i-fisk/>.

³⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, the purpose of regulating commercial practices, which includes information on labels, is to protect consumers’ economic interests, hereafter the “Unfair Commercial Practices Directive” or “UCPD”.

practice reaches or to whom it is addressed.⁴⁰ In case law, the Court has established that the misleading potential of say, a certain form of labelling is a matter of the national courts,⁴¹ in light of its own national laws.⁴² The interpretation of whether a name is likely to mislead consumers depends on a number of factors differing among Member States. However, because of the principle of mutual recognition, legal names in the Member State of production can be used. Thus, mutual recognition establishes that the rules in the Member State of production apply, and within food law, this is actually combined with country-of-origin control.⁴³

The legal uncertainties arising in relation to food naming and the prohibition against misleading names are actually rather general in an EU law context.⁴⁴ First, they relate to the conflict between exactly country-of-origin and country-of-destination control, and in this regard a conflict between legal rules and standards in the Member State of production versus these in the Member State of sale.⁴⁵ As a general rule, based on the principle of mutual recognition,⁴⁶ Member States may not forbid marketing of products legally⁴⁷ produced and marketed elsewhere in the EU. At the same time, Member States are required to prevent any misleading practices, taking into account the differences in perception of consumers in the Member States, cf. Article

⁴⁰ Conflict-of-law rules also confirm that the internal law of the state, in which a conduct has an effect should, apply to that conduct, see Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsføringsretten*, p. 242.

⁴¹ E.g. Fietje, Case 27/80, Judgment of the Court of 16 December 1980, Criminal proceedings against Anton Adriaan Fietje, para. 12, De Kikvorsch, Case 94/82, Judgment of the Court of 17 March 1983, Criminal proceedings against De Kikvorsch Groothandel-Import-Export BV, para. 12, Gut Springenheide, Case 210/96, Judgment of the Court of 16 July 1998 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, para. 36, Geffroy, Case 366/98, Judgment of the Court of 12 September 2000, Criminal proceedings against Yannick Geffroy and Casino France SNC, para. 18

⁴² Estée Lauder, Case 220/98, Judgment of the Court of 13 January 2000, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH.

⁴³ This follows from Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. According to Articles 3 and 1, official controls in the country of origin be carried out in order to shall verify compliance with general rules on fairness and labelling. However, there is a possibility to check compliance in the Member State of destination where this is done by means of non-discriminatory checks (see Article 3(6)).

⁴⁴ Similar uncertainties have been in focus in consumer law in general and focus on questions concerning full harmonisation of measures of consumer protection, non-market values in EU harmonisation etc. See especially in this regard Weatherill, S. (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation.

⁴⁵ These conflicts are of course only apparent, where the food has crossed borders. For more on this, see Chapter 9. Focus in this thesis is in general on substantive law, not procedural law, see Section 7. However, the conflict described here is central.

⁴⁶ See section 4.1.2.

⁴⁷ Legally is for now to be understood as *not illegal*. Chapter 9 analyses to what degree Member States can regulate names.

1 of the Food Information Regulation.⁴⁸ The exact borderlines between the rules are unclear. Second, legal uncertainties relates to issues surrounding general conflicts⁴⁹ between EU harmonisation versus Member States' competences to enforce EU rules and regulate in certain areas, embedded in the principle of subsidiarity,⁵⁰ cf. Article 5 of the Treaty on the European Union ("TEU").⁵¹ A relevant question concerns to what degree naming is harmonised. Third, legal questions arise in relation to the general difficulty of properly balancing rigid and flexible rules within the fields of consumer protection and fair competition. The specific objectives underlying the legal area such as protection of (agri)culture as a parallel to the more general objectives of free movement, fair competition and consumer protection bring new dimensions to the more general existing discussions.

4.1.2 Free movement of food

A very important aim of the European Union is the establishment of the Internal Market, reducing the former frontiers between Member States to secure free movement of goods, persons, services and capital, cf. Article 26 of the Treaty on the Functioning of the European Union ("TFEU"). Articles 34 and 35 TFEU protect the free movement of goods, including food products, by prohibiting Member States from restricting cross border trade, and thereby increasing competition across borders.⁵²

The *raison d'être* of the Internal Market lies in economic theory. Grounded on ordo-liberalism, the cornerstones of the EU are free movement and competition rules.⁵³ The aim is that the creation of an internal market initiates more competition and further choices of goods and services benefitting both consumers and businesses within the Internal Market.

⁴⁸ This conflict between the concept of mutual recognition and the application of the prohibition against misleading names is addressed throughout this thesis. The conflict is analysed in Chapter 9, Section 2.4.

⁴⁹ Sweet, A. S. (2011). The European Court of Justice, p. 150, mentions both inter-judicial conflicts and cooperation between CJEU and the national courts as issues related to supremacy.

⁵⁰ For literature on the principle of subsidiarity, see for example, Dehousse, R. (1992). Does Subsidiarity Really Matter?.

⁵¹ The article numbering of the Lisbon Treaty is used throughout this thesis. However, where the former numbers are used in relevant legal texts, for example judgments, the numbering of both the former and the Lisbon numbers are included.

⁵² See Chapter 9, Sections 2 and 3 for more analyses on Articles 34 and 35 TFEU.

⁵³ Maduro, M. P. (1999). *We, The Court*, p. 128 and Gerber, D. J. (1994). Constitutionalizing the Economy: The German Neoliberalism, Competition Law and the "New" Europe.

Judgments by the CJEU have paved the way for integration and the creation of the Internal Market.⁵⁴ The Court has formulated general principles and provided for the removal of national rules that hindered free trade.⁵⁵ As a result, national rules on the composition of food and food naming have been deregulated, so-called negative harmonisation.⁵⁶

Many of the principles of free movement have been promulgated in cases that directly or indirectly concerned naming of food,⁵⁷ for example, *Dassonville*⁵⁸ and *Cassis de Dijon*.⁵⁹ These cases led to the introduction of the principle of mutual recognition,⁶⁰ which as a ground rule prohibits Member States from applying national standards⁶¹ for the use of certain food names to imported products. As an example, in the *Bier* case⁶², German rules⁶³ on the purity of beer were found to constitute an obstacle to cross-border trade.⁶⁴ Generally, primary EU law forbids a

⁵⁴ See e.g. Maduro, M. P. (1999). *We, The Court*, p. 110–113.

⁵⁵ Note that despite the fact that the CJEU cannot within the preliminary procedure give judgment on national measures' compatibility with the Treaty, the CJEU often gives rather clear indications on compatibility.

⁵⁶ "Negative harmonisation" covers integration or harmonisation that removes differences in national laws, for example, through judgments from the CJEU establishing that national law cannot be upheld because it hinders free movement. "Positive harmonisation" covers integration or harmonisation that replaces national laws with common European laws. Some refer to negative integration under the free movement provision as "repressive activity", whereas positive harmonisation under e.g. Article 114 TEFU is referred to as "constructive activity"; see Welch, D. (1983). *From 'Euro beer' to 'Newcastle brown', A Review of European Community Action to Dismantle Divergent 'Food' laws*, p. 48.

⁵⁷ From 1996–1998, the food sector accounted for the greatest number of infringement cases before the CJEU; see Lauterburg, D. (2001). *Food Law: Policy and Ethics*, p. 35. See Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament, Mutual recognition in the context of the follow-up to the Action Plan for the Single Market", Com (1999) 299, p. 13, for an overview of cases of infringement of mutual recognition. From this overview, the food sector is clearly the most commonly affected sector.

⁵⁸ *Dassonville*, Case 8/74, Judgment of the Court of 11 July 1974, *Procureur de Roi v Benoît and Gustave Dassonville*.

⁵⁹ *Cassis de Dijon*, Case 120/78, Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

⁶⁰ For general overviews of the case law concerning free movement of food; Holland, D., and Pope, H. (2004). *EU Food Law and Policy*, MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, and O'Rourke, R., (2005). *European Food Law*.

⁶¹ The term "standard" is used broadly in this thesis, referring to a norm for a product regarding its production, composition, labelling and so on. The definition is not identical to the one defined by the European Council in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, Article 1(6).

⁶² *Bier*, Case 178/84, Judgment of the Court of 12 March 1987, *Commission of the European Communities v Federal Republic of Germany*.

⁶³ For an overview of German regulation of food, see Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, pp. 93–94.

⁶⁴ Interestingly, following the *Bier* judgment, the Commission proposed to amend the First Labelling Directive by requiring ingredient labelling of alcoholic beverages, cf. Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 222. There is still no general obligation to ingredient label alcoholic beverages containing

Member State from conditioning the sale of food under a certain name on compliance with recipe rules in that Member State, thus indirectly prohibiting the sale of products lawfully marketed under that name in another Member State. Further, requirements that producers use a specific name, which is unknown to or less highly regarded by consumers, or prohibitions against using a well-known name are likely to make product marketing more difficult and to impede trade.⁶⁵ Last, national recipe rules tend to “*crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned*,”⁶⁶ thereby impeding trade. The application of EU rules on free movement of goods secures “*a more favourable environment for stimulating enterprise, competition and trade*”.⁶⁷

According to the TFEU and case law on free movement, national rules and food standards can exist only where such standards can be justified. Since derogations from the free movement of goods must be interpreted restrictively,⁶⁸ and since the principle of proportionality applies, national rules on food composition have been difficult to justify. The obligation to mutually recognise imported products is rather clear, but several things remain unclear: the precise criteria for requiring recognition, the possibility of demanding additional labelling and whether and how the principle of mutual recognition is connected to the prohibition against misleading consumers. The central question is to what degree can Member States regulate food naming or enforce the prohibition against misleading names without conflicting with the obligation to recognise product from other states. Moreover, it is unclear to what degree primary EU law limits Member States’ ability to regulate the naming of domestically produced food.⁶⁹

more than 1.2 percent alcohol by volume, cf. FIR Article 16(4), but some of the German concerns in the Bier case are addressed by rules regulating the specifications of alcohol as well as rules on additives.

⁶⁵ This follows from several judgments summarised in the Commission v Spain (chocolate I)-judgment, Case 12/00, Judgment of the Court of 16 January 2003, Commission of the European Communities v Kingdom of Spain, para. 82.

⁶⁶ The Bier judgment, para. 32.

⁶⁷ The Commission’s White Paper on the Completion of the Internal Market, Com (85) 310 Final.

⁶⁸ See Commission v Ireland, Case 113/80, Judgment of the Court of 17 June 1981, Commission of the European Communities v Ireland, para. 7.

⁶⁹ There are many examples of national composition rules; for example, in Denmark, the use of the term “alkoholfri” (alcohol free), is conditioned on a limit of content of alcohol per volume at 0.1 and which in the most of Europe is set at 0.5. See <http://www.ft.dk/samling/20111/almdel/suu/spm/485/svar/883424/1119151.pdf>. In Italy the production and composition of pasta has and still is heavily regulated, see the Italian rules on the use of durum wheat in pasta in Presidential Decree N° 187, dated 9 February 2001, see <http://www.pasta-unafpa.org/pdf/ITALIA.pdf>. The existence of national legal names is addressed in Chapter 9. The Netherlands also has a number of food standards, see Von Heydebrand, H. (1991). Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice got it Wrong?, p. 404, which notes: “An interesting example on how producers can profit from enactment of food standards are the Netherlands. The country is the biggest net exporter of foodstuffs in the Community. It has traditionally maintained an extensive

4.1.3 The Eurofoods rules

Alongside negative integration based on the rules on free movement, Regulations and Directives, so-called positive harmonisation, heavily regulate the food sector. The initial reasons for developing an EU food policy are linked to the CAP and the strategies for the development of the Single Market.^{70,71} The first legislative initiative within the food industry was related to food colorants⁷² and preservatives in foods. In 1964, the first Directive on preservatives in foods was adopted⁷³ because harmonisation of the various national laws was necessary to allow for free trade and fair competition (see the Preamble of the Directive).

In 1973, the first Directive harmonising food names was introduced – the First Cocoa/Chocolate Directive.⁷⁴ These first *composition rules*⁷⁵ were followed by the adoption of similar legislation regarding the production and marketing of honey,⁷⁶ fruit juices,⁷⁷ coffee extracts and chicory extracts⁷⁸ as well as fruit jams, jellies and marmalades and chestnut purée.⁷⁹ Today, composition standards and definitions exist for a number of products, including olive oil, sugar, meat products, milk products, eggs and poultry, mineral water, wine and spirits, and spreadable fats.⁸⁰

system of food standards. The government has authorized commercial associations (Produktschappen, Bedrijfshappen) to pass these standards.”

⁷⁰ The terms “Single Market”, “Internal Market” and “Common Market” are used interchangeably in this thesis. See also Mortelmans, K. (1998). The Common Market, The Internal Market and the Single Market, What’s in a Market, p. 101–136 and Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, p. 4 for discussions on the differences between the terms.

⁷¹ See Hartvig Danielsen, J. (2009). *EU-landbruksretten, landbrugets retsforhold I*.

⁷² See Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 1 and Gray, P. S. (1991). The Perspective to 1992, p. 12.

⁷³ Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorised for use in foodstuffs intended for human consumption.

⁷⁴ Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption, hereafter the “First Cocoa/Chocolate Directive”.

⁷⁵ Some use the term “recipe law”; for example, see MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*. Others use the term “retail approach”; for example, see Lister, C. (1992). *Regulation of Food Products by the European Community*. In this thesis, the terms “Eurofoods rules” or “composition rules” are primarily used.

⁷⁶ Council Directive 74/409/EEC of 22 July 1974 on the harmonisation of the laws of the Member States relating to honey, hereafter the “First Honey Directive”.

⁷⁷ Council Directive 75/726/EEC of 17 November 1975 on the approximation of the laws of the Member States concerning fruit juices and certain similar products, hereafter the “First Fruit Juice Directive”.

⁷⁸ Council Directive 77/436/EEC of 27 June 1977 on the approximation of the laws of the Member States relating to coffee extracts and chicory extracts.

⁷⁹ Council Directive 79/693/EEC of 24 July 1979 on the approximation of the laws of the Member States relating to fruit jams, jellies and marmalades and chestnut purée, hereafter the “First Jams Directive”.

⁸⁰ See Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). See also http://ec.europa.eu/agriculture/simplification/cmo/index_en.htm and O’Rourke, R., (2005). *European Food Law*, for

The harmonisation of food names in these Directives is one of the most complete because very detailed requirements are set. The composition rules can be seen as a perfect example of “unification” of food names within the European Union because they established detailed requirements for the composition, labelling and so on of food sold under the specific names. So-called Eurofoods are established with these rules, but not without problems.⁸¹

4.1.4 The labelling rules

At the end of the 1970s, a horizontal set of rules was drafted alongside the initiatives vertically regulating food labelling, which resulted in the First Labelling Directive.⁸² This Directive had as its prime consideration “*the need to inform and protect the consumers*” (see the Preamble). Article 2(1) of the Directive, introduced a general principle prohibiting the use of misleading labelling, including misleading food names. This prohibition is closely linked to the consumers’ ability to make informed choices⁸³ based on the information they are given, and the labelling rules prescribe exactly the mandatory information required to safeguard informed choice.

By the middle of the 1980s, the establishment of Eurofoods through harmonisation of food names and recipes was recognized as an impossible task.⁸⁴ The departure from harmonisation in this way within the EU underlined the importance of broad and general labelling rules.⁸⁵ In the mid-1990s, a series of food crises such as “mad cow” disease resulted in a new awareness of the importance of food safety.⁸⁶ In 2000, the Commission published a White Paper on food safety,⁸⁷

an overview of these rules. This thesis does not go into details of the individual definitions, but rather provides an overview of the rules.

⁸¹ For a critical view on recipe rules, see Ohm Søndergaard, M., and Selsø Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?* These problems are addressed throughout this thesis.

⁸² Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, hereafter “the First Labelling Directive”.

⁸³ See Howells, G. G., Micklitz, H. W., and Wilhelmsson, T. (2006). *European Fair Trading Law: The Unfair Commercial Practices Directive : Markets and the Law* p. 123.

⁸⁴ Commission of the European Communities, “Completion of the Internal Market: Community legislation on foodstuff, Communication from the Commission to the Council and the European Parliament”, Com (85) 603 Final. In this communication, the Commission concluded that recipe law should no longer be the solution for approaching the need for consumer protection for three reasons, p. 8: “1) ...neither possible nor desirable to confine in a legislative straitjacket the culinary riches of ten (twelve) European countries, 2) legislative rigidity concerning product composition prevents the development of new products and is therefore an obstacle to innovation and commercial flexibility, 3) the tastes and preferences of consumers should not be a matter of regulation.”

⁸⁵ For more on this change in policy, see Chapter 2, section 3.

⁸⁶ See MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, chapter 5.

which led to the adoption of the Food Law Regulation that re-introduced the broad and general prohibition against misleading⁸⁸ food labelling in Article 16.

In 2011, the new Food Information Regulation was adopted, containing a list of mandatory particulars and a general information requirement that food information be fair and not misleading (see Article 7). In addition, the Regulation introduced some new rules concerning the naming of food.⁸⁹

4.1.5 The Quality Schemes

Adding to the patchwork of regulation in the areas of food naming, EU legislation on protection of national geographical food names was introduced in 1992.⁹⁰ The specific EU Quality Schemes, including the rules on Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialities Guaranteed (TSG), aim to protect rural areas, fair competition and consumers.⁹¹ The legislation provides a “food name monopoly”, whereby specific food names are reserved for producers complying with the product specifications. These names are considered intellectual property,⁹² and are offered protection similar to that granted to trademark holders, but with important differences. The idea behind the rules is that *“the diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets”* (see Recital 2 of the Preamble of the PGI/PDO Regulation).⁹³ Today, more than 1,000 PGI/PDO have been

⁸⁷ Commission of the European Communities, “White Paper on food safety, presented by the Commission”, Com (1999) 719 Final.

⁸⁸ Ironically, a lot of different terms are used in the different sets of rules, such as “fair”, “fraudulent”, “deceptive”, “misleading”. See Chapter 8. In this thesis, the terms “deceive” and “confuse” are used as synonyms for the term “mislead”.

⁸⁹ See especially Chapter 5.

⁹⁰ Council Regulation (EEC) No 2081/1992 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, hereafter “the First PGI/PDO Regulation”.

⁹¹ Organic production is also considered as a quality scheme, but these rules do not concern questions of naming and are not included in this thesis.

⁹² Intellectual property refers to a right to prevent others from acting in certain ways, for example, by using a certain name. Industrial property is part of intellectual property and refers to other intellectual property than copyright, such as trademarks and PGI/PDOs. This definition is inspired by the Commission’s definition at http://ec.europa.eu/agriculture/quality/schemes/ipr/index_en.htm.

⁹³ Council Regulation (EC) No 510/2006 of 20 March 2006 on the Protection of Geographical Indications and Designations of Origin for agricultural products and foodstuffs, hereafter “the PGI/PDO Regulation”.

registered, including third country names, and applications for new names are continuously filed.⁹⁴

5 Methodologies, approaches and tools

First a short methodological remark: Naming is considered a “horizontal” topic because it concerns all types of food, and therefore, general labelling requirements/rules also are considered horizontal because they apply to all foods. However, some vertical rules concerning specific foods (Eurofoods and Quality Schemes) complement as well as replace the horizontal requirements for both naming and related issues. The vertical areas also overlap. For example, in case a PGI/PDO is registered for a Eurofoods product, such as honey from Alsace (Miel d’Alsace), the product, labelling and naming must comply with both sets of vertical rules as well as with the horizontal rules. Within food law, the general labelling requirements and the prohibition against misleading names are considered as *lex generalis*, whereas the vertical labelling rules concerning specific food names are considered as *lex specialis*. In the wider context of EU law, food law is considered as *lex specialis* in relation to general commercial practices legislation and the Treaty-based market rules on free movement. In this thesis, the commercial practices legislation will be addressed in relation to misleading names, and the *lex generalis* and *lex superior* rules on free movement and CJEU case law connected hereto will be addressed when analysing the interactions between different EU rules and when analysing to what degree Member States are free to regulate the naming of food.

5.1 The application of economic theory

In structuring the various rules and the borderlines between them, economic theory is applied in order to analyse the economic reasoning of the rules’ objectives.⁹⁵ Thus, economic theory is used to explain the structure and reasons/rationales behind EU law on food names to provide more thorough legal analyses.⁹⁶ Microeconomic theory can explain the (decision) behaviour of market

⁹⁴ See the DOOR database for an overview: <http://ec.europa.eu/agriculture/quality/door/list.html>.

⁹⁵ This is based on the assumption that economics is implicit in EU law, and market interference in general. See Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis*.

⁹⁶ Application of economic theory to law is not unusual and can function both to explain the law as well as to analyse the value/efficiency of law, Nielsen, R., and Tvarnøe, C. D. (2011). *Retskilder og retsteorier*, p. 436. The

agents (individuals and firms) and allocation of resources,⁹⁷ and in neoclassical theory, the market agents are rational and resources are allocated based on utility.⁹⁸ Microeconomic theory related to state intervention in the market to correct market failures that prevent agents from acting rationally and allocating resources optimally is very important.⁹⁹ Economic theory is applied when analysing the aims and objectives of state intervention within the food industry and the food law, and in discussions. Focus is on microeconomic theory, but macroeconomic theory is succinctly applied to explain social objectives. The analyses of consumer protections and the prohibition against misleading names examine whether the legal rules reflect the economic rationales for regulating the market.

5.2 Legal method

To clarify the state of law and answer the research question, legal analyses based on the traditional legal method are employed. The analyses set out to determine current valid law (*de lege lata*) in relation to food naming, through an analysis of the relevant existing sources of law. For the purpose of the legal analyses in this thesis, the sources of law are the EU Treaties, EU principles, EU Regulations and EU Directives described above. Further, EU case law is another central source; see below. The interaction between the different sources of law, primarily legislative instruments in secondary and primary law, is a core focus of this thesis, especially in Chapter 9.¹⁰⁰

The traditional legal method will be used to clarify the criteria for solving practical difficulties including the interaction between the EU rules regulating food naming. The overall aim is to provide clear answers on current valid law in relation to the objectives and the research question.

thesis focuses on explaining law and the reasons for regulating food naming by different sets of rules. Questions concerning the value/efficiency of law are addressed as part of the legal dogmatic analysis.

⁹⁷ For a general introduction to microeconomics, see Burkett, J. P. (2011). *Microeconomics: Optimization, Experiments, and Behavior*.

⁹⁸ Knudsen, C. (1997). *Økonomisk metodologi. Bd. 2, virksomhedsteori og industriøkonomi*, p. 24 and Chapter 2.

⁹⁹ See Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis*, chapter 4.

¹⁰⁰ See Unberath, H., and Johnston, A. (2007). The Double-headed Approach of the ECJ Concerning Consumer Protection, p. 1242, for more on the interaction between secondary and primary law within the field of consumer protection.

5.2.1 Case law

Case law is a very important source of law. The main prohibition against misleading food names is very broad and flexible, and case law provides necessary clarification. Case law on free movement has established fundamental principles for food naming within the EU. Relevant case law for this thesis stems mainly from judgments by the Court of Justice of the European Union.

The importance of CJEU's case law follows from the fact that the Court has exclusive responsibility to provide authoritative interpretation of EU law.¹⁰¹ Judgments from the CJEU are likely to be followed in subsequent similar cases,¹⁰² although no doctrine of binding precedents exists and CJEU judgments concern specific cases and the interpretation of law related to them. This practice follows from the CILFIT judgment.¹⁰³ However, the CJEU may re-examine its previous conclusions – and is not reluctant to do so¹⁰⁴ – but the Court is more likely to follow its previous decisions than to depart from them.¹⁰⁵ Case law concerning the harmonisation provided for in the labelling rules is very blurred and inconsistent. For this reason, relevant case law will mainly be analysed in historical order to sort out to what degree the Court agrees or disagrees with previous conclusions and to give a more complete picture of the current state of law.

When considering case law, a distinction must be made between the *ratio decidendi* of the judgement and *obiter dictum*. The *ratio decidendi* is binding, and the *obiter dictum* is not.¹⁰⁶ In this thesis, whether a certain part of a judgment is considered to be an *obiter dictum* will be noted and the consequences for the legal dogmatic analysis are included.

Opinions of the Advocates General (“AG”) will also be taken into account, especially where they complement the CJEU's judgements. Opinions of the AGs are not binding, but they often are

¹⁰¹ Chalmer, D., Davies, G., and Monti, G. (2010). *European Union Law*, p. 143.

¹⁰² Langenbucher, K. (1998). Argument by Analogy in European Law, p. 508 and Mcleod, I. (2005). *Legal Method*, p. 212.

¹⁰³ CILFIT, Case C-283/81, Judgment of the Court of 6 October 1982, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, para. 13-14.

¹⁰⁴ For example, see Keck, Joint cases C-267 and 268/91, Judgment of the Court of 24 November 1993, Criminal proceedings against Bernard Keck and Daniel Mithouard, para. 14.

¹⁰⁵ Mcleod, I. (2005). *Legal Method*, p. 212.

¹⁰⁶ Neergaard, U., and Nielsen, R. (2010). *EU ret*, p. 230.

referred to¹⁰⁷ because the AG can raise important, detailed questions not found in CJEU judgments. In this thesis, AG opinions contribute to the investigation and understanding of case law.

5.2.2 Interpretation

Literal, context and teleological interpretation work together and are complementary and partly intertwined. All three approaches are used, without specific reference to the chosen approach. Literal interpretation is primarily used when language differences occur. Context interpretation is used to determine the objectives behind valid law, and it is used when the relevant legislation is unclear. The analyses of the objectives behind the different rules include focus on the Preambles of relevant legislative acts¹⁰⁸ and on underlying policies, for example in Communications from the Commission.¹⁰⁹ The overall focus is on a teleological interpretation like used by the CJEU.¹¹⁰

In the CILFIT judgment, the CJEU stated, in paragraph (“para.”) 20 (emphasis added):¹¹¹

“...every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”

¹⁰⁷ Chalmer, D., Davies, G., and Monti, G. (2010). *European Union Law*, p. 145 and Nielsen, R., and Tvarnøe, C. D. (2011). *Retsskilder og retsteorier*, p. 181. Mcleod, I. (2005). *Legal Method*, p. 71, consider that Advocate Generals’ opinions in some cases are similar to dissenting orders.

¹⁰⁸ The Preambles function as provisions on objectives, cf. Grand Duchy, Case 168/98, Judgment of the Court of 7 November 2000, Grand Duchy of Luxemburg v European Parliament and Council of the European Union, para. 64.

¹⁰⁹ See also section 5.2.3

¹¹⁰ See Neergaard, U., and Nielsen, R. (2010). *EU ret*, p. 116, Nielsen, R., and Tvarnøe, C. D. (2011). *Retsskilder og retsteorier*, p. 141, and Hartley, T. (2010). *The Foundations of European Union Law*, p. 72.

¹¹¹ A similar statement was given in the Humblet Case 6/60, Judgment of the Court of 16 December 1960, Jean-E. Humblet v Belgian State. Here the Court found (p. 574–575): “*Literal interpretation of the text supports the view advocated by the applicant . . . Nevertheless it is not sufficient for the Court to adopt the literal interpretation and the Court considers it necessary to examine the question whether this interpretation is confirmed by other criteria concerning in particular the common intention of the high contracting parties and the ratio legis*”. Similar statements are given in Hauptzollamt Kiel, Case 158/80, Judgment of the Court of 7 July 1981, Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel, para. 3 and in Electrotechnische Industrie, Case 135/83, Judgment of the Court of 7 February 1985, The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie, para 13.

The CILFIT judgment makes clear that interpretation of the CJEU is dynamic and purposive, the *teleological* approach. The CJEU considers the relevant context and the objectives of EU law in general, however not entirely free from textual constraints.¹¹² The *effet utile* principle, according to which rules should be interpreted in the way that most effectively matches the objectives of EU law, is part of the teleological approach.¹¹³

The focus here will be on establishing *de lege lata* at the present time; however, reference will be made to the history of law, as well as to proposals for changes in the current rules, where relevant, to gain a wider understanding of the rules, their specific backgrounds and objectives. Since the main source of labelling legislation is a Regulation adopted in 2011, no case law exists. For this reason, case law concerning previous rules on labelling, as well as on other issues, are included, with the caveat that judgments might not be followed in the future because of changes in legislation.

Contextual interpretation is essential in this thesis because the aim is to structure and clarify the borderlines between the different legal rules related to food naming, by focusing on the different objectives behind them. Further, since “*it is a common feature of Community law that new rules in one sector can have consequences in other sectors*”,¹¹⁴ understanding how the different legal areas concerning food naming function together in different contexts becomes even more relevant. In this regard, both binding and nonbinding legislation must be considered, such as Treaty rules and soft law and acts of similar rank governing the same or related matters, e.g. rules on commercial practices, trademarks and protection of wine and spirits.¹¹⁵ It is recognised that a legal text, either legislation or case law, will seldom have a single plain or literal meaning without putting the text into context.¹¹⁶ Especially within the specific areas of food law (and agricultural policy) and consumer protection, which in general are heavily influenced by politics,

¹¹² Mcleod, I. (2005). *Legal Method*, p. 329.

¹¹³ Millett, T. (1989). Rules of Interpretation of E.E.C Legislation, p. 180.

¹¹⁴ O’Conner, B., and Kireeva, I. (2003). What’s in a Name? The “Feta” Cheese Saga, p. 119.

¹¹⁵ See Gragnani, M. (2012). The Law of Geographical Indications in the EU, p. 272, noting that regulation and protection of food, wine and spirits with the Quality Schemes are identical. Actually, the Commission has considered merging the four different legislations on protected geographical names; see same reference, p. 280.

¹¹⁶ Mcleod, I. (2005). *Legal Method*, p. 7.

the law should not be considered without also observing the historical and political context, at least to some degree.¹¹⁷

5.2.3 Preparatory works

The literature suggests that using teleological interpretation minimizes the importance of preparatory works of Community legislation.¹¹⁸ The CJEU seldom uses preparatory works to interpret legislation, and it has underlined that interpretations in Communication by the Commission has no binding effect.¹¹⁹ Further, the Court does neither place importance on national preparatory works.¹²⁰ However, in this thesis, preparatory works is considered part of the teleological approach because these works sometimes clarify objectives. Further, in the GB-INNO-BM judgment¹²¹ the Court established that a national rule contrary to Article 34 TFEU (Article 30 TEF at the time of the judgment) could not be justified by requirements concerning consumer protection if the national rule denied consumers access to information. Access to information is considered as central in relation to consumer protection. The Court referred to the policies and programmes on consumer protection (preparatory work) in its judgment.¹²² For these reasons, where necessary, this thesis takes into account preparatory works, especially in relation to clarification of the objectives underlying relevant legislation.¹²³

¹¹⁷ Issues of contextual matter with less significance to determining valid law are indented and written in smaller type.

¹¹⁸ Millett, T. (1989). Rules of Interpretation of E.E.C Legislation, p. 180.

¹¹⁹ See Krohn, Case 74/69, Judgment of the Court of 18 June 1970, Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co, para. 9.

¹²⁰ See Skov Æg, Case 402/03, Judgment of the Court of 10 January 2006, Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen, para. 42.

¹²¹ GB-INNO-BM, Case 362/88, Judgment of the Court of 7 March 1990, GB-INNO-BM v Confédération du commerce luxembourgeois.

¹²² See also Hartley, T. (1996). Five Forms of Uncertainty in European Community Law, p. 275–278, who argued that despite the Court's disclaimer in Antonissen, Case 292/86, Judgment of the Court of 26 February 1991, The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen, that preparatory works (in the concrete case a declaration) have no legal effect and cannot be used for interpretative purposes if no reference is made to such in the relevant provisions, the Court was still influenced by the declaration when judging the Antonissen case.

¹²³ For example, European Commission, "Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff", Com (85) 603 Final, which "constitute a comprehensive explanatory memorandum" (p. 19) to a number of Directives including the First Labelling Directive. Also Commission guidelines are included, such as Commission Communication – Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients, 2010 OJ C 341, pp. 3–11.

5.2.4 Language versions

EU legislation is drafted in several languages and all texts are equally authentic (see the CILFIT judgment). Consequently, uncertainty is bound to follow from this multilingual nature of EU law.¹²⁴ In some cases, different language versions can be used to clarify rules, terms and legal expressions that might be unclear in some languages. For this reason, EU law should be interpreted based on the purpose of the law and in light of the official language versions. In this thesis, the sources of law will be analysed using different language versions, where the different versions provide different answers to questions in the legal dogmatic analysis. Focus will be on the English, French, German, Danish and Swedish versions with the intention that these versions will clarify unclear rules.

5.2.5 Academic literature

Legal as well as other academic literature is included and used to complement and supplement the analyses in this thesis. Further, academic literature is used to broaden the perspectives, support and criticise views and improve the discussions. Especially when considering and analysing the objectives of the different sets of rules, economic literature is included to analyse, question and discuss the legal rules.

5.2.6 Approaches and perspectives

This thesis focuses on the substantive and not procedural matters of law, such as remedies and claims for damages. However, issues on applicable law will be addressed to determine which substantive rules govern specific questions.¹²⁵ The research question will be approached from a business perspective, focusing mainly on which rules apply to food naming and who enforces these, thereby enabling businesses to act lawfully and manoeuvre the different legal regimes. The

¹²⁴ See Hartley, T. (1996). Five Forms of Uncertainty in European Community Law, p. 269, who also argued that the French, English and German versions are probably preferred by the Court.

¹²⁵ It must be noted that many of the problems and complexities within food law are attached to general as well as specific procedural matters related especially to the institutional structure of the EU. The co-existence of both horizontal and vertical rules also has been approached at EU level; see Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com(97) 176 Final, Part III. Legal uncertainty as a result of the institutional setting in the EU are discussed in Hartley, T. (1996). Five Forms of Uncertainty in European Community Law. See also Bakardjieva Engelbrekt, A. (2010). Institutional Theories, EU Law and the Role of the Courts for Developing a European Social Model.

rules – at least the major part of the material ones – apply to businesses and their behaviour.¹²⁶ Further, since businesses (including producers in collaboration with advertising agencies and the like) name food products, clarification contributes primarily to businesses. Businesses must bear in mind the rules protecting consumers, and therefore, consumer protection will still be an important part of this analysis despite the fact that a business perspective is the chosen approach.

5.3 Empirical data from the FairSpeak project

Various empirical studies have confirmed the importance of precise food names. This thesis uses the FairSpeak research group's collection and analyses of data on potentially misleading names to examine food naming and related specific practical difficulties.

In 2008, the FairSpeak research group studied Danish administrative cases from 2002 to 2007¹²⁷ in an extensive investigation of cases of potentially misleading labelling and presentation¹²⁸ of food products. The aim was to identify practical real-life cases that consumers, authorities or others¹²⁹ initiated against food businesses and to detect various potential conflicts. The FairSpeak research group focuses on consumers' ability to understand the condensed information found on food labels. The Danish administrative cases provided 821 examples of potentially misleading labelling and presentation of food.

All cases were thoroughly analysed to identify potentially misleading “labelling elements” (the name, facts and figures, verbal claims, non-verbal claims, brands/trademark or other marks).

¹²⁶ This is a truth with modification for harmonisation through Directives. In this thesis, implementation is not addressed. It is assumed that the rules address the private subjects, which they are supposed to address after national implementation. Attention is paid to the fact that Directives are not always implemented as intended; see for example Ohm Søndergaard, M., and Selsøe Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?* for a critical view on the Danish implementation of the Fruit Juice Directive.

¹²⁷ The administrative cases are those handled by the local control authorities and those on appeal to the Danish Veterinary and Food Administration.

¹²⁸ The FairSpeak research group also focuses on how food is presented, for example, how and where it is placed in the supermarket.

¹²⁹ Also, competitors and consumer agencies initiate a great number of cases on misleading labelling and presentation of food.

Second, the analysis determined what the consumers were supposedly “misled about” (content, nutrition and health, origin, production process, ethics and ecology, sensory aspects).¹³⁰

The FairSpeak research group concluded that more than 25 percent of the cases concerning potentially misleading labelling of food brought before the Danish food authorities in 2002–2007 concerned misleading food names.¹³¹ The cases concerned many different kinds of food naming problems and provided the FairSpeak research group with a preliminary overview of the practical difficulties of food naming.

The FairSpeak research group has concluded that food naming is a key aspect in the overall assessment of the fairness of food labelling. Thus, there are clear indications from general linguistic and cognitive research that “having a name for it” is crucial to human categorization and the fixation of categories over time.¹³² This is mirrored by the many real-life cases concerning the food name. Moreover, experimental investigation shows e.g. a vast effect of food names containing geographical indications on consumer product expectations¹³³ and a connection between name acceptance and the immediate sensory properties of the product.¹³⁴ The importance of naming finds further support by a recent study on the impact of product names, in which the authors showed that consumers are likely to draw wrongful inferences regarding nutritional value due to ambiguity in food naming.¹³⁵ Research has also shown that consumers do not read or see all information presented on food packages.¹³⁶ Actually, it has been established that consumers only look at packages which they later choose not to buy for 0.5–1 second (which gives them time to read 2–3 words) while they look at packages which they choose to buy for 2–3 seconds (which gives them time to read 6–8 words).¹³⁷ Economic theory

¹³⁰ For more on the analysis, see Smith, V. et al.: (2009). *Fair speak: Scenarier for vildledning på det danske fødevarermarked*, and Smith, V. et al: (2011). Assessing In-store Food-to-Consumer Communication from a Fairness Perspective: An Integrated Approach.

¹³¹ See Smith, V. et al: (2009). *Fair speak: Scenarier for vildledning på det danske fødevarermarked*, p. 120. The study showed that 27.2 percent of all potentially misleading elements concerned food names, 272 out of 1,000 elements (some of the 821 cases concerned more than one misleading element).

¹³² Vygotsky, L. S. (1962 [1934]). *Thought and language*, Gumperz, J. J. and Levinson, S. C., (1996). *Rethinking linguistic relativity* and Cohen, H. and Lefebvre, C. (2005). *Handbook of categorization in cognitive science*.

¹³³ Zlatev, J., et al. (2010). Noun-noun compounds for fictive food products: Experimenting in the borderzone of semantics and pragmatics and Smith, V., Zlatev, J. and Barratt, D. (In review). Unpacking noun-noun compounds: Interpreting novel and conventional food names on plain paper and on simulated labels

¹³⁴ Smith, V., et al. (In Press). What’s (in) a Real Smoothie: A Division of Linguistic Labour in Consumers’ Acceptance of Name-Product Combinations? Smith, V., Møgelvang-Hansen, P., & Hyldig, G. (2010). Spin versus fair speak in food labelling: A matter of taste? *Food Quality and Preference*.

¹³⁵ See Irmak, C., Vallen, B., and Robinson, S. (2011). The Impact of Product Name on Dieters’ and Nondieters’ Food Evaluations and Consumption.

¹³⁶ See Commission of the European Communities, “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007–2013”, Com (2007) 99 final.

¹³⁷ Gidlöf, K. et al, (Forthcoming). *What Materially Distorts Economic Behaviour? Unfair Commercial Practices versus Everyday Decision Quality*.

on utility maximisation corresponds with these conclusions, since time is a limited resource and that time spent on reading will take time away from more beneficial ways to spend it.¹³⁸ These conclusions show that single words such as the name are very important pieces of information. Economists have argued that trademarks and brand names as identifiers of quality in relation to experience goods such as food is the most important piece of information, due to the condensed information embedded in these identifiers.¹³⁹ However, they cannot replace the name as a denominator of a product category¹⁴⁰ because such is important for competition between different producers (and trademarks). The number of cases on food naming in Denmark and on EU level as well as other surveys confirms the importance of having a name.¹⁴¹ More importantly, they imply that consumers do in fact both look at the name of a food product and try to make sense of it with the consequence that some of them are misled about the name. The importance of (non-misleading) names is also confirmed by a pilot eye-tracking study done by the FairSpeak project group.¹⁴² This study showed that of all the verbal information on the food label, the product name has the highest probability of attracting visual attention. A tendency by the industry to undersupply information makes legislation on single mandatory particulars like the name necessary.¹⁴³ Consumers identify products by their name and *“often the most decisive sign for the consumer concerning the nature of a food product is the name under which it is sold.”*¹⁴⁴

In-depth insight on the real conflict scenarios in food naming was gained from the FairSpeak research. Examples derived from this thorough analysis of all Danish administrative cases from 2002–2007 will be used to describe existing practical difficulties. Based on a legal dogmatic analysis, these practical difficulties are analysed in Part 3.

¹³⁸ For economic theory on this, see Becker, G. (1965). A Theory of the Allocation of Time, who thoroughly analysed how time (costs and benefits) is allocated to work and non-work activities.

¹³⁹ See Nelson, P. (1970). Information and Consumer Behavior, Economides, N. S. (1988). The Economics of Trademarks, and Landes, W. M., and Posner, R. A. (2012). Trademark Law: An Economic Perspective.

¹⁴⁰ How precisely the product name reflects product characteristics is addressed in Chapter 4.

¹⁴¹ O'Rourke, R., (2005). *European Food Law*, p. 58 mentions a survey by the Confederation of Family Organisations in the EU (Coface) in six Member States, which indicated that in these countries the sell-by-date was considered the most important information on the label followed by the list of ingredients, storage instructions and the name of the product.

¹⁴² See Clement, J., and Selsøe Sørensen, H. (2008). Do Average Consumers Read and Understand Food Labels? Outline of a Pilot Study.

¹⁴³ Market failures and costs of providing information explains this undersupply; see Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 592.

¹⁴⁴ O'Rourke, R., (2005). *European Food Law*, p. 58.

6 Structure

Part 1 of this thesis introduces the topic, and Part 2 sets out to introduce the various EU rules by analysing the scopes and objectives behind in order to structure the borderlines between them. Chapter 2 contains an overview of the three different sets of rules, and their scopes: the horizontal labelling rules (the Food Information Regulation), the Eurofoods rules and the Quality Schemes rules. For Eurofoods, the focus is primarily on the rules for fruit juices, but the rules for honey, cocoa/chocolate and coffee also are included because a combined analysis of these rules provides a wider perspective. For the Quality Schemes, the focus is on the rules on PGI/PDOs, drawing analogies to TSGs where necessary. Chapter 3 contains an analysis of the objectives of the legal rules on food naming, including an examination of the objectives and rationales behind regulation based on application of economic theory.

Part 3, entitled “What’s in a Name – Food Naming Problems”, analyses the specific rules on food naming to provide an answer to the first part of the research question. The individual chapters introduce the practical difficulties in detail based on examples from Danish administrative cases. Thus, the analyses of the different sources of law address experienced practical difficulties. Chapter 4 focuses on precision of food names and analyses the difficulties related to finding a name precise enough to provide adequate information to consumers without narrowing the product’s competitive field. In this chapter, the different sources of law on legibility – the obligation to label clearly – is also analysed. Chapter 5 focuses on problems related to identity, specifically the practical difficulties in naming products that refer to specific ingredients and in which traditional ingredients have been replaced. The practical problems arise because the name signals something different from what consumers expect and may be misleading; for example, the product name signals a specific composition when an ingredient appears in the name. This chapter also includes an analysis of the regulation of the naming of products that have undergone some sort of “product (r)evolution” in which more essential characteristics of a traditional product have been changed and a completely new product has been made.¹⁴⁵ Chapter 6 focuses on the use of geographical names.¹⁴⁶ Some food names commonly refer in one way or another to geography, such as “Italian salad”, “made in France” or

¹⁴⁵ The difficulties also relate to “imitation” problems. Imitation is meant to designate a product that is similar to but not identical to another product. Imitation probably has a negative ring to it, but this is not the intention. However, it is not possible to replace the term since other similar terms like “copy” also have negative connotations.

¹⁴⁶ Geographical names are names linking the food product in some way to a geographical area, whether it refers to the place of production or the place where the product was first produced.

“Parma ham”. Such names may indicate the origin of the product and its production, but also simply may refer to the origin of the product recipe or the product’s ingredients. The different sources of law on the use geographical names are analysed, with a focus on obligations to and possibilities for referring to origin and on the prohibition against misleading consumers. Further clarification is provided on the borderlines between EU protected (PGI/PDOs) and other geographical names. Chapter 7 focuses on the language difficulties that exist within an EU market with 23 official languages, clarifying which language(s) can and must be used in the individual Member States. Further, relevant sources of law are examined in relation to translation and the potential practical difficulties in light of the obligations to recognise products lawfully marketed in other Member States and to prevent consumers from being misled. Chapter 8 focuses on the general prohibition against misleading consumers, providing clarification of the general principle of fairness, the prohibition against misleading consumers and relevant benchmarks.

“Part 4: Mutual Recognition and National Legal Names” seeks to answer the second part of the research question. The part analyses the ways in which EU law on food names defines borderlines for national legal names; for example the setting of quality composition standards for both imported and domestically produced food. First part of the chapter focuses on naming of imported products. An analysis is here provided of the principle of mutual recognition, and how and to what extent the principle interacts with the different sets of rules regulating food naming, primarily the prohibition against misleading names. Second part of the chapter focuses on naming of domestically produced food by addressing the boundaries set by both primary and secondary law.

“Part 5: Conclusions”, Chapter 10 presents the conclusions to clarify and structure the rules on food naming and to answer the research question.

7 Delimitations

EU legislation concerning food naming is found in both Regulations and Directives. Without further analyses of the doctrines of horizontal, vertical and indirect effect,¹⁴⁷ national implementation of the Directives will not be analysed.¹⁴⁸

Food law includes many different sets of legislation, ranging from regulation of feed, import, composition, organic production to health claims and nutrition labelling. Although the choices of production and processing of food, including the use of GMOs and organic production, can affect what name best suits the individual product, this thesis focuses only on the aspects of food law concerning information and labelling in B2C relations. For this reason, areas of food naming placed purely under the CAP are not included, but analogies will be made where they contribute to further understanding.

The rules on health and nutrition claims also apply to food naming; however, this area of law is based on scientific evidence of the claimed health and nutrition effects, and for this reason the assessment of whether a name is correct or misleading depends to a large degree on the value of such evidence. The prohibition against misleading names is still the central legal rule in relation to these claims, and therefore, the more specific rules are left aside.

By focusing on food information, aspects that purely concern food safety, including rules on pre-market approval in relation to e.g. novel foods, will not be analysed.¹⁴⁹ A close parallel to food information is the area of fraud within the food industry. As no substantive rules on food information can prevent intentional fraud and as the focus is on substantive law, this topic will not be further analysed.¹⁵⁰ However, the topic of food identity and the borderlines between

¹⁴⁷ See Neergaard, U., and Nielsen, R. (2010). *EU ret*, p. 223–235.

¹⁴⁸ The obligation to interpret national rules in the light of EU law does not always imply that national courts and authorities follow EU law. This is the case where clear national measures leaving no room for interpretation exist and where the national measures do not conform to EU law. This of course makes grounds for the Commission to bring an action against such a Member State for failure to fulfil its obligations, subsequently perhaps giving individuals rights of action for damages against that Member State.

¹⁴⁹ Attention has been paid to the parallel issues that exist in relation to this field, such as how to define when a food is a novel food. Food safety issues also contain other justifiable grounds for limiting free movement based on the precautionary principle. This as well as primarily burden-of-proof issues may contribute to discussions, but are not included in the scope of this study.

¹⁵⁰ For an example of fraud problems, see Glaberson, H. (2011). New test can detect fake whisky, say scientists, at <http://www.beveragedaily.com/Regulation-Safety/New-test-can-detect-fake-whisky-say-scientists>, concerning how whisky producers have developed tests to control the authenticity of Scotch.

imitation, inspiration and (r)evolution will be addressed. This focus on substantive law also results in delimitation from enforcement; although major problems exist with enforcement, the clarification of substantive law may contribute to future enforcement of the rules. Further, it results in delimitations from analyses of procedural aspects on applicable law. Although clarification of concepts such as “country-of-origin-control” and “rules in the Member State of production” probably could provide answers to many general questions, this is not the focus of this thesis.

In relation to food information, this thesis focuses purely on the rules for information appearing on food packages and labels. Therefore, rules relating to non-prepacked¹⁵¹ food such as some fruits or to display scientific names of a fish, which is not a labelling requirement, are not included. For this reason, rules and theory on advertising information are included only where they contribute to the understanding of labelling, even though that raises potential criticism of this study. Consumers’ understanding of food (and corresponding names) might be dependent on other things besides the label, such as where the product is placed in the supermarket, the form of packaging,¹⁵² the way it is presented and so on, or a combination of these. Parallel analyses could be provided of such rules and could be an interesting topic for subsequent research and for putting the regulation of food naming in EU into perspective.

The area of food names, especially PGI/PDOs, is in itself a very complex area, which of course underlines why analysing, clarifying and structuring the area is relevant. The legal rules on food names are found in national, regional (EU law) and international (WTO – TRIPs) law as well as in bi- and multilateral agreements. This thesis focuses only on the Internal Market and EU rules on food names, thereby leaving aside interesting international dilemmas, such as those attached to the fact that the European protected name “Champagne” is considered a generic term in the US.¹⁵³ Left out are also international rules such as those in TRIPs, which have been highly

¹⁵¹ For a definition of prepacked food, see FIR Article 2(2)(e).

¹⁵² For a judgment on national legislation on specific kinds of packaging, see Rau, Case 261/81, Judgment of the Court of 10 November 1982, *Walter Rau Lebensmittelwerke v De Smedt PVBA*. It can be argued that the restrictive effect of such rules is limited.

¹⁵³ See for more on this see Rovamo, O. (2006). *Monopolising Food Names – The Protection of Geographical Indications in the European Community*, p. 25.

debated and which affect EU law in an interesting way.¹⁵⁴ Further, the standardisation of food naming embedded in the Codex Alimentarius¹⁵⁵ is not the focus of this thesis, but the importance of the standards and guidelines established here for EU law on food names is of course addressed. The delimitations are necessary to provide an in-depth analysis.

Some delimitation is necessary to strike a proper balance when analysing a horizontal issue such as food naming to which many specific vertical rules apply. The EU rules on PGI/PDOs already have been analysed thoroughly in the legal literature.¹⁵⁶ For this reason, this thesis does not analyse that field of law in detail, but focus instead on the rules that are important for understanding food naming in general. Questions concerning the rationale behind the protection of PGI/PDOs will be addressed, but more specific rules that already have been subject to thorough analyses (such as the relationship between PGI/PDOs and trademarks) will be analysed only to address the practical problems. The rules on “Eurofoods” neither be analysed in details.¹⁵⁷ Further, the thesis neither tries to give an overview of EU law on free movement, but focus on case law in this area, which is relevant for food naming. For this reason, many rules and judgments are left aside, of course.

The monopoly created under the PGI/PDO schemes is much stronger than that of the TSGs; most likely, this is the reason why the first mentioned scheme has been much more successful.¹⁵⁸ For these reasons, this study focus primarily on the PGI/PDO rules, and TSG rules are included only where these rules bring new aspects for understanding the PGI/PDO rules. The Quality Schemes

¹⁵⁴ See e.g. Rangnekar, D. (2003). *Geographical Indications - A Review of Proposals at TRIPS Council: Extending Article 23 to Products Other than Wines and Spirits* and Kur, A. (2007). Nothing but a GI thing: Geographical Indications under EU Law

¹⁵⁵ The Codex Alimentarius Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. See <http://www.codexalimentarius.net/>

¹⁵⁶ See e.g. O'Connor, B. (2004). *The Law of Geographical Indications*, Rovamo, O. (2006). *Monopolising Food Names – The Protection of Geographical Indications in the European Community*, London Economics. (2008). *Evaluation of the CAP policy on protected designations of origin (PDO) and protected geographical indications (PGI)*, and Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsføringsretten*, chapter 16.

¹⁵⁷ See for more on the Eurofoods, O'Rourke, R., (2005). *European Food Law*, Chapter 6, and MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, Chapter 3.

¹⁵⁸ On 4 October 2012 only 38 TSG names had been registered, 20 awaiting registration, whereas 1,078 PGI's and PDO's had been registered 270 awaiting registration. See The DOOR database about registration and filling of PGI/PDO

<http://ec.europa.eu/agriculture/quality/door/list.html?jsessionid=pL0hLqLXhNmFQyF11b24mY3t9dJQPflg3xbL2YphGT4k6zdWn34!-370879141>. It is tempting to suggest that the uncertainty attached to the TSG protection is also accountable for the lack of interest in registering such names. The TSG rules will as mentioned only be used to draw analogies in order to more clearly understand the rules related to PGI/PDO's.

are currently under review, and the Commission has proposed a number of changes to the current system.¹⁵⁹ These are included where they bring interesting aspects to the topic of food naming, but since adoption of new rules remains uncertain, they are not the primary focus of this thesis.¹⁶⁰

The prohibition against the use of misleading food names is founded in EU law. However, it is for the Member States, based on certain EU founded criteria, to decide whether a certain food name is in fact misleading. Comparative analysis of differing national interpretations of the prohibition seems like a logical element of this thesis, in relation to identification of the legal complexities. However, this thesis's main objective is not to provide comparative studies, but rather to clarify EU law, and indirectly, the difficulties Member States experience when dealing with EU rules on food naming. This thesis does not discuss whether and how consumer protection and the right to information exist because the assumption is that such protection is essential. Instead, this study focuses on what consumer protection and the right to information imply.¹⁶¹ This results in delimitation from the subject of consumer protection in general and the right to information as a Treaty-based right (see Article 169 TFEU).

Member States' ability to regulate food naming on the national market is a central topic of this thesis. National measures regulating food names can take various forms, such as naming in legislation, through administrative guidelines or through enforcement by authorities or courts. In this thesis, no differentiation between the forms of the regulation is made.¹⁶² Also, this thesis does not analyse whether regulation of food names at the Member State level is attached to the form of the regulation.¹⁶³

Competition and fair competition are central terms used here, but competition law is not included in the analyses.

¹⁵⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, Com (2010) 733 Final, hereafter, the "Quality Schemes Proposal."

¹⁶⁰ For an overview of the proposed new rules, see Dévényi, P. (2011). The New Proposal on Agricultural Product Quality Schemes - Quality Legislation on Quality Questions?

¹⁶¹ See Leible, S. (2010). Consumer Information Beyond Food Law, p. 318–324.

¹⁶² A differentiation is not considered necessary because of the obligation to interpret national law in accordance with community law; see Neergaard, U., and Nielsen, R. (2010). *EU ret*, pp. 235–240.

¹⁶³ Note that of course different practical difficulties arise in relation to the different forms of regulating food naming; it appears more difficult to claim that a specific enforcement of the prohibition against misleading names contradicts with EU law than to claim that a national composition standard embedded in national legislation does.

Contributions from other form of sciences and research different from pure legal research could contribute to further understanding, for example, the use of economic theory when analysing objectives behind the legal rules. Focus on consumer protection and consumer choices implies considerations on what governs choices. Some theories and research areas are concentrated on the rationality behind choices.¹⁶⁴ Some are focused on which motives control the choice and others on whether consumers in different situations have enough time, knowledge and so for to make a choice.¹⁶⁵ Economic theory is applied when analysing the objectives of the rules; otherwise, the focus is on legal analyses. Analyses of the effect of the rules or suggestions of a more normative kind are not included. Further, although, comments are made on the rules and the clarity they provide, it is beyond the scope of this thesis to analyse whether the rules are justified based on economic theory.¹⁶⁶

The area of law concerning food naming is rather complex in structure, probably in part because of the EU *sui generis* institutional settings.¹⁶⁷ Despite the interesting aspects of political and economic science embedded in a dissertation on EU law and the institutional settings of the Community, such issues are only indirectly addressed when analysing the borderlines and the interaction between the different rules.

8 Terminology

In light of the focus of this thesis, clarification of terms used is necessary to prevent (further) misunderstandings and deception. Terms and concepts are defined as they are introduced, either in the text or in the footnotes. References to the legislation and the terminology used also can be found in the listed literature, and the list of abbreviations contains information on abbreviations used in this thesis.

¹⁶⁴ See Trzaskowski, J. (2011). Behavioural Economics, Neuroscience, and the Unfair Commercial Practises Directive.

¹⁶⁵ See Clement, J., Selsø Sørensen, H., and Gabrielsen, G. (2010). Match and Mismatch between Consumer Knowledge and Packaging Design.

¹⁶⁶ For a thorough analysis of the efficiency of intellectual property rights, see Landes, W., and Posner, R. (2003). *The Economic Structure of Intellectual Property Law*.

¹⁶⁷ The *sui generis* of the EU is a result of the combination between supranational elements and the supremacy of EU law with national enforcement and areas of shared competences. See Hlavac, M. (2010). Less than a State, More than an International Organization: The Sui Generis Nature of the European Union.

PART 2: THE DIFFERENT RULES

“A superior regulatory program would permit the market to operate, while at the same time assisting consumers to make rational value choices by compelling manufacturers to provide essential information.”¹

CHAPTER 2: INTRODUCTION TO THE DIFFERENT SETS OF RULES

1 Overview

This chapter introduces three different sets of rules on food naming – the labelling rules, the Eurofoods rules and the Quality Schemes – along with relevant historical overviews. Further, an analysis of the different legal bases, *de jure* aims and objectives² is provided and an overview of the names and food products subject to the different rules is presented.

2 The labelling rules

Since the 1980s, food labelling and naming in the EU has followed a path of information, implemented by various labelling rules and supplemented by a large number of judgments by the CJEU.³

¹ Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 610.

² Note that the articulated aims and objectives might not necessarily be the only objectives which are *de facto* reached.

³ This is evident from the CJEU’s general conclusion that requiring additional information, in cases of potentially misleading names, is more proportional than prohibiting the use of the name in question. See in general Chapter 9. The literature has expressed different opinions about this path of information. See for example Gray, P. S. (1991). The Perspective to 1992, p. 11 stated: “*The path of information rather than legal prescription in matters other than safety is the only way in which diversity and liberty can be served.*” Within consumer law academics have generally argued that consumers’ bounded rationality limits how much information they can comprehend, which sets natural limits for the information path. See for example, Bakardjieva Engelbrekt, A. (2011). Empowering the European Consumer in Old and New Markets: What place for EU Law?, pp. 404-406 on tensions between protection and empowerment, the latter a matter of securing informed choices.

In October 2011, the new Food Information Regulation (FIR) was adopted.⁴ It is based on the European Commission Proposal for a Regulation on the Provision of Food Information to Consumers⁵ of 2008, which was finally adopted after more than three years and a number of recommendations and amendments. The Food Information Regulation repeals the former Directive on labelling of food, the Second Labelling Directive,⁶ as well as a number of other Directives.⁷ The labelling rules in the FIR are horizontal in the sense that they apply to all food, as defined in the General Food Regulation.⁸ Therefore, Eurofoods and Quality Schemes foods are also subject to the FIR rules unless specific rules apply (see the Severi judgment⁹ para. 58). The horizontal character of the labelling rules and the occasional application of many different sets of rules are not without conflicts.

The Bellamy and British Wholesale judgment¹⁰ illustrates the horizontal character of the labelling rules and the difficulties attached to using multiple sets of rules and to identifying relevant obligations. In the case, it was questioned whether a Member State could demand the use of a particular name, in this case “pasteurised milk”. The Court of Justice did not answer the question because it found the description of the case insufficient. However, the Advocate General (“AG”) addressed whether Member States could make the use of the term “pasteurised” mandatory.¹¹ The term is used to describe a treatment method used for milk (which is standardised as a Eurofood). The AG confirmed that according to the specific Eurofoods rules on milk it must be indicated whether the milk is raw, whole, semi-skimmed or skimmed,

⁴ The new Regulation entered into force on 13 December 2011, but the rules are not mandatory to follow until 13 December 2014, the obligation to indicate a nutrition declaration from 13 December 2015. For this reason, the Second Labelling Directive still applies. Primarily, the new and forthcoming rules are addressed, but where differences between the existing and pending rules appear substantially different, these are addressed.

⁵ Commission Proposal for a Regulation of the European Parliament and of the Council on the Provision of Food Information to Consumers (Com (2008) 40 final), hereafter, the “Proposal to the FIR”.

⁶ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, hereafter, the “Second Labelling Directive”.

⁷ See Dévényi, P. (2011). The New Regulation on the Provision of Food Information to Consumers - Is New Always Better? for an overview of the timeline for the adoption of the FIR.

⁸ See The General Food Regulation, Article 2. See also Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 26, for a further elaboration on the term

⁹ Severi, Case 446/07, Judgment of the Court of 10 September 2009, Alberto Severi v Regione Emilia Romagna.

¹⁰ Bellamy and British Wholesale, Case 123/00, Judgment of the Court of 5 April 2001, Criminal proceedings against Christina Bellamy and English Shop Wholesale SA, party liable at civil law.

¹¹ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 16 January 2001, Bellamy and British Wholesale, Case 123/00, Judgment of the Court of 5 April 2001, Criminal proceedings against Christina Bellamy and English Shop Wholesale SA, party liable at civil law.

when milk is marketed. Following this, he argued that additional mandatory indications for Eurofoods could follow from the general labelling rules (here the First Labelling Directive) and stated, in para. 29: *“As for the requirement that the word pasteurised should appear on the packaging, Article 5(3) of Directive 79/112 provides that the name under which the product is sold is to include or to be accompanied by particulars as to the physical condition of the foodstuff or the specific treatment which it has undergone...”* By concluding that the term “pasteurised” was mandatory, the AG broadened the scope of the labelling Directive, which mentioned a number of treatments to be indicated (see below), but which made (or makes) no reference to pasteurisation.¹²

The Darbo judgment¹³ also illustrates the difficulties attached to parallel and overlapping rules on naming and labelling. In the Darbo judgment, it was questioned whether a German prohibition against the use of the term “naturein” (“naturally pure”) for jams containing pectic gelling agents was contrary to the rules on free movement. Jam is (and was also at the time of the case) a Eurofoods product. The Court confirmed its conclusion from the Sauce Béarnaise judgment¹⁴ that the list of ingredients provided consumers with adequate information about ingredients such as pectin, and for this reason consumers could not be misled about the name “naturally pure.” Despite this rather straightforward conclusion, the CJEU further added that pectin was specifically accepted as a substance in the Eurofood “special quality jam”, without explaining how this influenced the conclusion or whether it altered the previous conclusions reached in the Sauce Béarnaise judgment in which the product or the substituting ingredients were not specifically regulated.¹⁵

Food businesses have the responsibility to comply with the rules on labelling. In this sense, the new Food Information Regulation constitutes an important formalistic change from legislation through a Directive to the adoption of a Regulation. The FIR also brings important substantial changes, for example, by making nutrition labelling mandatory.

As has been the state of law since the adoption of the First Labelling Directive, the Food Information Regulation obliges food businesses to state the name of the food on the packaging

¹² For more on ways of production or treatment that must be indicated, see below. In the Smanor, Case 298/87, Judgment of the Court of 14 July 1988, proceedings for compulsory reconstruction against Smanor SA, the importance of the treatment methods mentioned in the labelling rules was also addressed.

¹³ Darbo, Case 465/98, Judgment of the Court of 4 April 2000, Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG

¹⁴ The Sauce-Béarnaise judgment, Case 51/94, Judgment of the Court of 26 October 1995, Commission of the European Communities v Federal Republic of Germany, concerned the replacement of traditional ingredients such as egg and butter in Béarnaise. See Chapter 5 for more on this judgment.

¹⁵ In Chapter 5, the conflicts related to replacement of ingredients are addressed.

(Article 9(1)(a) of the FIR) with no exceptions.¹⁶ The exact reason why the name is mandatory is not explicitly stated in either the FIR, any of the previous Directives or in the preparatory works, but clearly the requirement relates to consumers' right to information concerning the nature and composition of foods.¹⁷

The FIR does not address problems related to the naming of food products¹⁸ and does not include a significant change in the rules regulating the naming of food products, compared with the First and Second Labelling Directives.¹⁹ Despite numerous revisions of the original rules on labelling,²⁰ the substantive rules on food names do not seem to have provided significant additional clarity regarding *how to name* a food product.²¹

The adoption of some of the new rules indicates a politic awareness of more specific consumer requests for certain products, for example, in relation to meat, where composition requirements concerning the designation “minced meat” are now established.²² It is also stated that the name of the meat needs to carry an indication of the presence of proteins from other animals where such have been added. See Annex VI of the FIR, part A, B and C for more details on specific accompanying particulars. The attention paid to the sale and marketing of meat products are very likely influenced by the 1990s food scandals related to meat products, such as “mad cow” disease.

The FIR does not deal directly with the naming of food products, but it defines in Article 2(2) three types of food names, which are analysed in Section 2.3.

¹⁶ Exceptions exist for other mandatory particulars in cases of labelling of for example glass bottles intended for reuse, packaging or containers with a surface less than 10 cm² and alcoholic beverages containing more than 1.2 percent by volume of alcohol.

¹⁷ See Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C 92/1-16, p. 9.

¹⁸ See Chapter 9 for more thorough analysis and discussion of the Regulation.

¹⁹ The Commission, however, acknowledged in its Proposal to the FIR, that origin labelling is a problematic area. Origin labelling is attached to the name of the food to a certain extent, at least in regards to PGIs and PDOs. The general rules on origin labelling are addressed in Chapter 6.

²⁰ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer has been amended several times.

²¹ The definitions of the three types of names defined in the FIR have undergone changes, clarifying some questions, but also introducing new ones. These are analysed in Section 2.3.

²² Ironically, the standardisation of “minced meat” resembles the Eurofoods way of regulating, despite a previous decision to abandon this way of regulating food names.

Further, the FIR determines that the name cannot be replaced with a name protected as intellectual property, a brand name or a fancy name (see Article 17(4)). This Article replaces the previous rule in the First and Second Labelling Directives, which states: “no trademark, brand name or fancy name may be substituted for the name under which the product is sold” (see Article 5(2) in both Directives). The scope of Article 17(4) appears wider and a literal interpretation suggests that names protected as intellectual property, such as indications/designations protected by one of the Quality Schemes, cannot replace “the name”. Therefore, according to the wording of Article 17(4), Champagne, Feta and other geographical names should be complemented by another food name to comply with the FIR definitions. This is a rather significant change in the naming and labelling of food and it seems unlikely that the intention is to change the naming of food and the objectives and functions of geographical names protected as intellectual property. In light of the purpose and context of Article 17(4), the conclusion can be drawn that names under the EU Quality Schemes can replace the food names defined in FIR, and that the term “intellectual property” should not be taken literally.

The term “fancy name” is not defined anywhere in the legal texts on labelling. Clarification seems necessary, considering the constant development of new foods and confirmed by the regulation of novel foods.²³ To prevent confusion, new foods evidently must require new names, but when the line between “fancy” and “new” is unclear,²⁴ then producers or authorities have huge discretion, perhaps to consumers’ detriment. However, new names must be informative and not misleading, and consequently, descriptive information might have to appear on labels to complement new names, at least during the market introduction of the food product.^{25,26}

The name must include or be accompanied by particulars regarding the physical condition of the food or the specific treatment it has undergone (for example, powdered, refrozen, freeze-dried,

²³ For more on novel foods, see http://ec.europa.eu/food/food/biotechnology/novelfood/index_en.htm

²⁴ At some point, the now well-known (but still not very precise) name “smoothie” must have been a “fancy name”. For more on the name “smoothies” and consumers’ perceptions, see Smith, V., et al, “What’s (in) a real smoothie: A division of linguistic labour in consumers’ acceptance of name-product combinations?”

²⁵ Legibility of such accompanying information is addressed in Chapter 4.

²⁶ Chapter 5 includes an analysis of valid law concerning the difficulties of naming new products; see especially Section 4.

quick-frozen, concentrated, smoked) in all cases where omission of such information could mislead the purchaser²⁷ (see Annex VI of the FIR which also includes more detailed rules on such particulars).²⁸

2.1 Legal basis

The legal basis/bases of EU harmonisation are important because of balance of powers and competences inherent in the *sui generis* system.²⁹ The legal bases also contribute to placing the rules within their legislative context.³⁰

The two first labelling Directives as well as the Food Information Regulation have their legal bases in the current Article 114 TFEU, related to the establishment and functioning of the Internal Market. Article 114 is rather broad in scope, excluding only harmonisation of fiscal provisions, those relating to free movement of persons and to the rights and interests of employed persons.³¹ Following the Tobacco Advertising I judgment,³² harmonisation according to Article 114 shall only be provided where it leads to an improvement in the functioning of the Internal Market by eliminating obstacles to trade or removing distortions to competition.³³

²⁷ In Annex VI the term “purchaser” is used rather than “consumer”, but this is not presumed as a substantive difference as the “purchaser” also includes “consumers”.

²⁸ Foods that have been frozen or treated with ionizing irradiation shall be accompanied by indications of such. This has not always been the case and discussions are on-going concerning consumers’ rights and needs for information on production processes or treatment. See Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 49.

²⁹ See Bradley, K. S. C. (2011). Powers and Procedure in the EU Constitution: Legal Bases and the Court. The legal bases are also important in relation to the degree of harmonisation provided by the substantive rules. See Chapter 9.

³⁰ However, note that some inconsistencies exist. See Bradley, K. S. C. (2011). Powers and Procedure in the EU Constitution: Legal Bases and the Court p. 93, which accepts the inconsistent use of legal bases and notes: “...the Court has not been entirely consistent either as regards the relevance of the legislative context of the contested act”.

³¹ See Weatherill, S. (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation.

³² Tobacco Advertising I, Case 376/98, Judgment of the Court of 5 October 2000, Federal Republic of Germany v European Parliament and Council of the European Union.

³³ See De Witte, B. (2006). Non-market Values in Internal Market Legislation. In N. N. Shuibhne (Eds.), *Regulating the Internal Market*, p. 61.

Consumer protection is also mentioned as an aim in Article 114,³⁴ which like the more specific Article 169 TFEU,³⁵ sets out to ensure a high level of consumer protection.³⁶ However, the establishment and functioning of the Internal Market is the central aim.³⁷

2.2 Objectives

National recipe rules have existed long before any idea of a single market arose.³⁸ Rather than a means to protect traders from competing product imports, such rules primarily were a means to ensure the product quality, regulate distribution, avoid fraud and protect consumers and public health.³⁹ However, with the establishment of a single internal market, such rules became, were viewed, as a way to protect national producers who already were complying with their countries' recipe rules. The Member States were thereby given further incentives for protecting traditional production.⁴⁰ Of course, these rules could hinder cross-border trade, and therefore, harmonisation – stemming from positive regulation or through judge-made negative harmonisation – provided for

³⁴ See Nebbia, P., and Askham, T. (2004). *EU Consumer Law*, p. 11, characterising consumer policy as instrumental to internal market policy. See also Opinion of the European Economic and Social Committee on the Legal Framework for Consumer Policy, 2006, OJ C 185, pp. 71–79 analysing the legal basis in consumer policy.

³⁵ The Economic and Social Committee has suggested more use of Article 169 TFEU as a legal basis in relation to consumer protection measures; see Opinion of the European Economic and Social Committee on the Legal Framework for Consumer Policy, 2006, OJ C 185, p. 74. See also Weatherill, S. (2006). *Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation*, p. 37, who on the contrary argues that Article 169 (presently Article 153) is not “*sturdy enough to support harmonization*”.

³⁶ It must be noted that Article 114 as a legal basis compared to Article 169 leaves more room for fully harmonising measures of consumer protection, which have also initiated criticism based on arguments concerning both Article 169 and the principle of subsidiarity.

³⁷ Note that the functioning of the market is also dependent on confident consumers, and thus some level of consumer protection, see Chapter 8, especially Section 3.1.1.

³⁸ German legislation on the purity of beer (*Biersteuergesetz*) was introduced in 1516, see MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, p. 3, and Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 143. See also Kireeva, I. (2012). *Origin Labelling in the European Union*, p. 551, which dated legal acts governing the sale of wine in Yugoslavia back to 1222.

³⁹ See Gray, P. S. (1991). *The Perspective to 1992*, p. 12, which cited the British Food and Drug act of 1875: “...no person shall sell to the prejudice of the purchaser any article of food or anything which is not of the nature substance or quality demanded by the purchaser...” See also Brouwer, O. (1988). *Free Movement of Foodstuffs and Quality Requirements: Has the Commission got it Wrong?*, p. 243–244, and Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 144. In a sense, this is much in line with many of the aims underlying the CAP today. See Nedergaard, P. (2006). *Market Failures and Government Failures: A Theoretical Model of the Common Agricultural Policy*.

⁴⁰ National composition rules/standards are clearly established for many different reasons including also interests in branding the quality of national products.

solutions to this problem.⁴¹ Labelling became the proportional substitute for restrictive national rules on composition. The CJEU established and verified this idea throughout its case law on free movement, initiated with the Cassis de Dijon judgment,⁴² and in the Denavit judgment,⁴³ the CJEU concluded, “...it is accepted that labelling is one of the means that least restricts the free movement of those products within the Community” (see para. 24).

At the same time, labelling rules were a way to address the developments in food production where food composition became (and becomes) more varied and, hence, less predictable.⁴⁴ Setting common standards⁴⁵ for information ensured that all EU consumers received a minimum amount of information about food and also worked as a harmonised set of rules for producers to follow when their food products were sold in the common market.

Throughout European history of regulating food information and labelling, two general objectives have been continuously in focus: the free movement of food within the EU and consumer protection.^{46,47} These objectives are mentioned in many sources of law, for example the First Labelling Directive and FIR Article 3.

⁴¹ Also, notification procedures and the Commission’s power to freeze introduction of new national measures has indirectly contributed. See Cecchini, et al, (1988). *The European Challenge, 1992, the Benefits of a Single Market*, p. 30; see also pp. 57–61 for the costs of national recipe rules.

⁴² Cassis de Dijon, Case 120/78, Judgment of the Court of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.

⁴³ Denavit, Case C-39/90, Judgment of the Court 20 June 1991, Denavit Futtermittel GmbH v Land Baden-Württemberg.

⁴⁴ See Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 41. See also Chapter 3 of this reference for an historical overview of labelling rules. Economic theory can be used to explain the need for obliging producers to provide information in such cases; see Chapter 3.

⁴⁵ See Chapter 1, footnote 60 for a definition of the term “standard” used in this thesis. See also Section 2 below.

⁴⁶ In this thesis, the term “consumer protection” covers both consumers’ political and economic rights and interests, but the focus is on the latter. For more on consumer protection related to food, see Lister, C. (1992). *Regulation of Food Products by the European Community*, pp. 21–23 describing the major role played by the European Parliament in the development of EU consumer policies. Consumer protection is an area of great interests to many academics and the harmonisation of consumer protection as initially a matter of social policy is very controversial. In this thesis, focus is not on the historical developments within EU consumer protection law, but for overviews see e.g. Micklitz, H., “Jack is out of the box - The efficient consumer-shopper” and Bakardjieva Engelbrekt, A., “Empowering the European consumer in old and new markets: What place for EU law”.

⁴⁷ Przyrembel, H. (2004). *Food Labelling Legislation in the EU and Consumers Information*, p. 360, identified three aims of labelling: 1) information of the consumer, 2) protection of the consumer, and 3) fairness in trade. In this thesis, “information of consumers” is considered part of “consumer protection”. Fairness in trade is here a matter of securing both fair commercial practice and fair competition. See Chapter 8 for more about fairness.

Different terms are used in the English (“pursue” and “aim”), German (“dient” and “Ziel”) and French (“tend” and “vise”) versions of the FIR in relation to the objectives of *consumer protection* and *free movement*. However, in the Danish and Swedish versions the same words (“formål” and “upphå”) are used. The difference in terminology found in the English and German versions is not considered to be materially relevant to the relation between the two objectives, but the difference in terminology is interesting.

The objectives have been further elaborated, in different European programmes on consumer protection, (for example, the preliminary programme of the European Economic Community for a consumer protection and information policy⁴⁸), in case law and in the early Commission Directive on the abolition of measures, which have an effect equivalent to quantitative restrictions.⁴⁹ The two objectives are in a way complementary because the protection of consumers results in confident consumers facilitating cross-border trade, and cross-border trade enhances competition⁵⁰ also on matters related to for example consumers’ rights. Actually, throughout the programme for the EU consumer policy strategy 2007–2013, consumer protection by providing safe products and fair and transparent markets resulting in confident consumers is described as a key element for improved functioning of the Internal Market.⁵¹ However, in some cases, the two objectives are incompatible

⁴⁸ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C 92/1-16.

⁴⁹ Commission Directive of 70/50/ECC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

⁵⁰ See Weatherill, S. (2011). *Consumer Policy*, p. 840, which notes that “*Cassis de Dijon*’ serves as a clear illustration of the use of EU trade law to enhance consumer choice in the face of restrictive national rules on market regulation.”

⁵¹ Commission of the European Communities, “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007-2013”, Com (2007) 99 Final. The strategy focuses on the lack of cross-border shopping because of a lack of confidence. However, in this thesis, consumer confidence in relation to cross-border shopping is not considered crucial because most food purchases occur within national borders; see Commission of the European Communities, “Report on cross-border e-commerce in the EU”, SEC (2009) 283 Final from 5 March 2009. Instead, free movement in food is relevant where businesses export to other Member States. This discussion is relevant to future regulation of the food industry. If consumer policy focuses on strengthening consumer confidence in cross-border shopping, but is not significant to food, maybe the principles of the general consumer policy should not simply be duplicated in relation to food. For more on this discussion, see Chapter 8, Section 3.1.1. For an example of development and problems in online food shopping that could enhance cross-border trade, see http://www.foodanddrinkeurope.com/Consumer-Trends/Online-food-sales-perfect-for-M-S-but-not-yet/?utm_source=newsletter_daily&utm_medium=email&utm_campaign=Newsletter%2BDaily&c=OJR6kC9KvZQfSF05nGmxVA%3D%3D.

because it is not possible to fully protect consumers without restricting free trade.⁵² Therefore, balancing between the objectives is necessary.

Focus on removal of barriers to cross-border trade was founded in the Treaty of Rome, whereas consumer protection was not mentioned in the Treaties prior to the adoption of the Maastricht Treaty.⁵³ Therefore, consumer protection is a newer, and in a sense, secondary aim and a means to reach economic benefits.^{54,55}

The economic rationales related to free movement of goods and consumer protection are thoroughly analysed in Chapter 3 utilizing economic theory.

2.3 The “names”

Rules on food labelling, now found in the Food Information Regulation, have since the adoption of the First Labelling Directive defined three types of food names.⁵⁶ These are to be used in the following order of priority (see Article 17(1) of the FIR): *the legal name, the customary name and the descriptive name*. Where no legal name exists, the customary name may be used, and where there is no customary name or it is not used, a descriptive name may be used. The name in combination with other (mandatory) information must provide sufficient information to consumers, and if not, further descriptive information must appear in close proximity to the name (see Article 17(2) of the FIR).⁵⁷

⁵² For example, because of national differences in what consumers notice on labels.

⁵³ See Nebbia, P., and Askham, T. (2004). *EU Consumer Law*, Chapter 2, for development of EC consumer protection.

⁵⁴ This conclusion also was drawn from the EU consumer policy strategy 2007–2013. As noted by Nebbia, P., and Askham, T. (2004). *EU Consumer Law*, p. 2: “There is, however, still no legal basis for dealing with consumer policy as a legitimate area unconnected with the internal market, and this restricts the scope of measures taken in this area.”

⁵⁵ Concerns on consumer protection and confidence also are mentioned as a means to attain a functioning market (see Articles 26 and 27).

⁵⁶ The “descriptive name” was not been defined in the legislation before 1997, but it was mentioned that a description could be used. See Section 2.5.

⁵⁷ This is further analysed in Chapter 4, Section 3.

2.3.1 The legal name

The legal name refers to the name provided for in the Community provisions applicable to it, for example, the rules described below (Eurofoods and PGI/PDOs). In the absence of such Community provisions, the legal name is the name provided for in laws, regulation or administrative provisions in the Member State where the product is sold.⁵⁸ Thus, legal names are names established by lawmakers (or administrative authorities). Only very few names are actually regulated by Community provisions, compared with the number of potential food names.

2.3.2 The customary name

The customary name refers to the name *accepted, without further explanation*, by consumers in the Member State where the product is sold. The italicized words are new to the definition compared with the previous labelling Directives. Clearly, the customary name must consist of one or a few words, which distinguishes it from the descriptive name that might be a more explanatory name. However, what constitutes an *accepted* name is questionable.⁵⁹

For businesses engaged in cross-border trade, discovering the customary names that consumers use in different EU Member States might require some effort. For this reason, the CJEU has established the principle of mutual recognition, based on primary EU law on free movement and to facilitate cross-border trade. A similar principle is found in the FIR.⁶⁰

2.3.3 The descriptive name

The descriptive name is perhaps the least manageable of the three types of names because it refers to a name sufficiently clear to enable consumers to know the true nature of the food product and distinguish it from products with which it might be confused. This name covers some sort a common description of the food product, whether a single word or a more lengthy description. No significant

⁵⁸ In Chapter 9, an analysis is provided of to what degree Member States are free to define national legal names, by legislation and/or by enforcement of the probation against misleading names. It will be shown that the definition of the “legal name” appears peculiar.

⁵⁹ For more on this, see Chapter 4, Section 3.1.

⁶⁰ See Section 2.4.

difference seems to exist between a descriptive name of a food product and a customary name combined with descriptive information; therefore, no differentiation is made here between a description, descriptive information and a descriptive name. A descriptive name must be provided if there is no customary name or the customary name is not used.⁶¹

2.4 *Mutual recognition of names*

The definitions of the different names and their order of priority initially suggest greater difficulties for businesses engaged in cross-border trade. If no Community rules exist, food businesses may have to change the name of a food product to comply with national rules or customs in the Member State where the product is sold. However, the principle of mutual recognition applies when naming a food product. Therefore, the product name legally⁶² used in the Member State of production may be used in the Member State where it is marketed/sold (see Article 17(2)).⁶³ Mutual recognition of food names is thus positively harmonised in the FIR and the principle applies to all three kinds of names (legal, customary and descriptive).⁶⁴ This implies, for example, that a name in one Member State can be used in another Member State where the name may not be the one normally accepted for that particular food. An importer of food is allowed to use more than one name, both the customary name in the state of sale and the customary name in the production state.⁶⁵ In this way, importers could “customise” a foreign name.

⁶¹ Most likely descriptions/descriptive names are used only in the absence of customary names, because using shorter phrases with more distinctiveness is beneficial; see Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*, pp. 276–288.

⁶² See Chapter 1, footnote 46, for a definition of *legally*. Legally used must not be confused with a legal name.

⁶³ In Chapter 9, Section 2, a thorough analysis is provided of the principle of mutual recognition in relation food naming.

⁶⁴ Mutual recognition was included in the legislation by amendment to the First Labelling Directive, see Directive 97/4 of the European Parliament and of the Council of 27 January 1997, and see below.

⁶⁵ Where the names in the different countries differ very much, the use of two different names also may actually mislead consumers because of confusion or information overload. For more on information overload, see Chapter 4, Section 4.1.

FIR Article 17(2) limits the requirement to recognise names legally used in other EU Member States:

“...where the application of the other provisions of this Regulation, in particular those set out in Article 9, would not enable consumers in the Member State of marketing to know the true nature of the food and to distinguish it from foods with which they could confuse it, the name of the food shall be accompanied by other descriptive information which shall appear in proximity⁶⁶ to the name of the food.”

The parallels between this rule and the definition of the descriptive name are obvious. To prevent consumers from being confused, in these cases, the name must be accompanied with a description in proximity to the name. Only in exceptional cases – if an imported food product differs so much⁶⁷ in its composition and manufacture from products marketed under this name in the importing Member State that an accompanying description (or a descriptive name) is not sufficient to secure correct information to consumers – the name in the Member State of production shall not be used (see Article 17(3)).

2.5 Concluding remarks on the labelling rules

The labelling rules have been adopted to facilitate cross-border trade while also securing a minimum amount of information for consumers. The substantive horizontal rules on food names are not straightforward, but can be summarised like this: A food business shall use the legal name. Where no EU legal name exists, the food business can use, in the following order of priority, the legal, customary or descriptive name used in the Member State of production and/or the legal name used in the Member State of marketing, or alternatively, the customary or descriptive name in this state. If the legal or customary name in combination with other mandatory particulars does not enable consumers to identify the product, an accompanying description is necessary (the use of a descriptive name is required). If this description does not ensure correct information for consumers

⁶⁶ This rule constitutes an important change and is addressed in Chapter 5.

⁶⁷ This phrase is analysed in Chapter 9, Section 2.3.2.

because the product from the Member State of production differs too much from products sold under this name in the Member State of sale, the name cannot be used.

These rules defining the different names and their order of priority are rather confusing and appears rather rigid; and, interestingly, it could for example be questioned whether the definition of the descriptive name and the rules on accompanying description found in FIR Article 17(2) are not already covered by primarily the prohibition against the use of misleading names.⁶⁸ It is decisive that consumers are able to distinguish foods carrying a certain name from other foods with which it might be confused.⁶⁹

This approach to naming does not differ significantly from the original rule, except from the fact that it is now explicitly stated that an accompanying description should appear in proximity to the name (for example, where the list of ingredients does not enable consumers to know the true nature of the product).⁷⁰ However, the original rule appeared simpler, and the many parallel rules existing today only seem to bring confusion concerning especially the hierarchy of the rules, that is the principle of mutual recognition and the prohibition against misleading names.

To illustrate: According to Article 5(1) of the First Labelling Directive, the name or a description hereof had to be “*sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused*”. This must also initially be considered to be parallel to a prohibition against the use of a misleading name (or description). In 1997, the Council and European Parliament under the co-decision procedure amended a rule similar to the current one (more precisely defining the three types of names and the order of priority), including the amplification of the principle of mutual recognition (now found in FIR Articles 17(2)-(3)).⁷¹ Following this names used in other Member States had to be recognised, but descriptive information could be required where consumers were not sufficiently informed about true nature. The objective behind this amendment was precisely to bring the rules on food names in line with the principle of mutual recognition. However, it could be argued

⁶⁸ Of course, interpreted in light of primary law. In Chapter 4 on precision of names, a more thorough analysis is provided of what follows from the existence of these different names. In Chapter 8, an analysis is provided of how to evaluate whether a name is misleading/confusing.

⁶⁹ However, the exact evaluation of this appears to leave little room for demanding additional information, because of how “true nature” is determined, see Chapter 9, Section 2.3.1.

⁷⁰ This rule initially appears important because it safeguards how and where relevant information must be provided, however the analyses in Chapters 4 and Chapters 5 on precision of names and product identity will show that the substantive consequence of this rule is questionable.

⁷¹ Directive 97/4 of the European Parliament and of the Council of 27 January 1997 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.

that this general principle already applied, verified by the many judgments on the subject by the CJEU.⁷² Further, it seemed as if the previous rule in Article 5(1) already determined when exceptions to mutual recognition existed; when consumers were not sufficiently informed and therefore confused. Adding to the complexity, in the amending Directive it was also stated that the Council and Parliament considered that “*the labelling rules as regards the exact nature and characteristics of products need to be further improved*”. This statement appears contrary to for example the Commission’s conclusion in its 1985-Communication, which said that legal uncertainty would be eliminated by prohibiting use of the name of the Member State of production, only where this was necessary to protect consumers from being misled and businesses from unfair competition.⁷³ It seems as if, there has not been complete awareness on the potential interaction between central rules like the prohibition against misleading names, the principle of mutual recognition concerning food naming, and the definitions of different names, as well as how the rules should be balanced against each other. This confusion is highlighted throughout this thesis, especially in Chapter 4, Section 3.2.

To determine valid law, further understanding is needed concerning the differences between *sufficiently clear to enable consumers to know, true nature and distinguish it from food with which it can be confused and differs so much*. In this thesis, these legal terms are related to practical difficulties of food naming, which are addressed in Part 3. In addition, they are also related to the principle of mutual recognition as it is defined in the FIR, and for this reason the legal terms are also relevant when considering to what degree Member States can regulate food naming, which is addressed in Chapter 9.

3 Eurofoods

Food standards have a long history within the European Union,⁷⁴ as well as in other parts of the world.⁷⁵ EU food standards, here termed “Eurofoods”, are found in legislation, primarily Directives, that establish definitions of products and product categories (names), standards in relation to

⁷² See Chapter 9, Section 2 for an analysis of the most important cases.

⁷³ European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final, p. 12.

⁷⁴ See MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, p. 3.

⁷⁵ See Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity on US food standards.

composition and production as well as general labelling requirements. The rules set minimum quality standards for the use of certain food names and relating to the quality of composition and/or information.⁷⁶ The Eurofoods rules define different legal names.

The Eurofoods rules fully harmonise food names, both formally and substantively, because the rules at a detailed level establish requirements that producers of regulated food products must follow. Despite this, the Eurofoods are primarily harmonised through Directives, which in a sense contradicts the harmonisation they provide,⁷⁷ and which to a larger degree makes room for Member States to regulate product names within the category when they implement the Directives. An example is the Danish implementation of the Fruit Juice Directive.⁷⁸

Community law on Eurofoods is applicable to all products marketed in the Community, and products produced according to the required methods can be marketed without restriction in all Member States. Compared with the flexible rules found in the general horizontal labelling rules, for example, the prohibition against the use of misleading names, the Eurofoods rules facilitate cross-border trade to a higher degree by standardising competitive parameters such as food composition.⁷⁹ The Eurofoods rules also assign significance to the product name because names falling under these rules contain more specific information than under the *lex generalis*.

⁷⁶ Quality standards are not unique to food or goods in general; see Consolidated version of 27 February 2008 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, especially Chapter 6 which obliges Member States to set standards to guarantee good quality postal services. Similar rules can be found in Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.

⁷⁷ The Commission actually has sought greater use of Regulations in legislation rather than to adopt measures primarily by means of Directives. See Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 23. The Food Information Regulation is an example of this change from regulating by Directives to Regulations. A similar approach has not been followed for Eurofoods.

⁷⁸ See Ohm Søndergaard, M., and Selsøe Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?* for an analysis of the Fruit Juice Directive. The latest update of the Directive brings the special Danish definition of juice in line with the definition found in Fruit Juice Directive, which in the Danish version defines the term “saft” and in the English defines the term “juice”. For issues of language difficulties see Chapter 7, and for issues on national legal names see Chapter 9.

⁷⁹ Welch, D. (1983). *From ‘Euro beer’ to ‘Newcastle brown’, A Review of European Community Action to Dismantle Divergent ‘Food’ laws*, p. 52.

At the EU level, food standards were introduced in the 1960s, but in 1985, the Commission stated that regulation by EU food standards had to be fully abandoned,⁸⁰ concluding that Eurofoods rules were not the approach to be taken in relation to consumer information and food. Instead, the Commission advocated for adequate labelling on nature and composition, mutual recognition and a prohibition against misleading labelling.⁸¹ General horizontal rules were found to be a more appropriate approach to consumer protection and fairness in trade than rigid rules that left no room for innovation. The Commission clearly refused the argument that a lack of Community compositional rules would lead to a reduction of food quality,⁸² an argument advanced in the academic world.⁸³

It was the intention that the “new approach” within food law should be based on horizontal rules and mutual recognition.⁸⁴ However, in its 1985 Communication, the Commission concluded consultations with representatives of agriculture, industry, labour, commerce and consumers in order to “*determine whether and, if so, how the Community should encourage industry to adopt an active policy for foodstuffs.*”⁸⁵ The Commission tried to address the criticism that followed the Commission’s conclusion to aboard regulation by means of composition rules. The Communication also clearly advocated for shifting approach to technical harmonisation and standards, inspired by a Council Resolution of 7 May 1985.⁸⁶

In its 1997 Green Paper on food law,⁸⁷ however, the Commission concluded that no European standards on food composition had been adopted and that the encouragement made in the 1985 Communication had

⁸⁰ European Commission: “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff”, Com (85) 603 Final.

⁸¹ This signals a shift towards a more market oriented approach, where intervention in the market is lowered and the “regulation of the market” is left more to the market itself. See Chapter 3 for more on this.

⁸² European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff”, Com (85) 603 Final, p. 12.

⁸³ E.g. Lister, C. (1993). The Naming of Foods: The European Community’s Rules for Non-brand Food Product Names, Brouwer, O. (1988). Free Movement of Foodstuffs and Quality Requirements: Has the Commission got it Wrong?, Von Heydebrand, H. (1991). Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice got it Wrong?.

⁸⁴ See Pelkmans, J. (1987). The New Approach to Technical Harmonisation and Standardization, p. 253. See also Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, 1986, OJ C 167, p. 1.

⁸⁵ Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff, Com (85) 603 Final, p. 13. (Emphasis highlighted.)

⁸⁶ Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards. See Pelkmans, J. (1987). The New Approach to Technical Harmonisation and Standardization.

⁸⁷ Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final.

not been successful.⁸⁸ It further concluded: “*However, at the national level, there has been an increasing use of standards or equivalent instrument such as codes of practice, which brings with it the risk of new de facto barriers to intra Community trade.*”⁸⁹ Today, several references to especially the Codex

Alimentarius standards exist, but without any clarification of the legal basis of such standards.⁹⁰ As a result, the strategies for legislation of Eurofoods are contradictory and blurred.⁹¹

The change in policy regarding Eurofoods also was initiated alongside the signing of the European Single Act (“SEA”), an important institutional change that increased the number of actions and decisions to be taken under the qualified majority voting procedure. The Eurofoods laws were initiated under the unanimous approval devise, but in contradiction, that approach to food naming was abandoned just prior to the signing of the SEA.⁹² Evidently, difficulties were attached to the time-consuming unanimity voting process.⁹³

This raises the question as to why the Community abandoned the previous policy, when the possible success of it could be enhanced with the signing of SEA. In a 1981 Council Resolution, it was stated:

*“Following a study of the feasibility and value of drawing up general rules on labelling for all massconsumption [sic] non-food products, it would appear to be more useful to work out rules for each specific category of products so that they are more directly related to the properties of each product.”*⁹⁴

Interestingly, in 1981, product and information standardisation was still seen as the way forward in relation to consumer protection and information policy. However, this way of regulating food names was officially abandoned shortly after in 1985. One could argue that the introduction of the concept of mutual

⁸⁸ For a list of other standards initiated by EU, see <http://www.newapproach.org/Directives/DirectiveList.asp>.

⁸⁹ Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 15.

⁹⁰ For example, the Proposal for a Directive of the European Parliament And of the Council amending Council Directive 2001/112/EC relating to fruit juices and certain similar products intended for human consumption clearly states in the explanatory memorandum that the proposed amendments to the Fruit Juice Directive were aimed to bring the EU rules into compliance with Codex Alimentarius standards and Code of Practice of the European Fruit Juice Association. However, the EU legislation still sets detailed requirements for production and composition. See Chapter 8, Section 4.3 for more on the importance of Codex Alimentarius Standards.

⁹¹ Brouwer, O. (1988). Free Movement of Foodstuffs and Quality Requirements: Has the Commission got it Wrong?, p. 256, states: “...on the one hand the Commission rejects Community legislation with regard to quality requirements, on the other it consigns a role to Directive 83/189, which is designed, inter alia, to simplify and speed up Community legislation. It would be desirable if the Commission could clarify its intensions...”

⁹² All Directives were adopted based on Article 100 TEEC (current Article 114 TFEU). However, the First Honey Directive and the First Fruit Juice Directive were also adopted based on Article 43 TEEC (current Article 43 TFEU) as their legal basis. Qualified majority was already established for proposals under Article 43 from 1966 (see Bradley, K. S. C. (2011). Powers and Procedure in the EU Constitution: Legal Bases and the Court p. 87), but the Eurofoods were adopted according to the unanimity procedure, see Welch, D. (1983). *From ‘Euro beer’ to ‘Newcastle brown’, A Review of European Community Action to Dismantle Divergent ‘Food’ laws*, p. 57.

⁹³ See Pollack, M. A. (1997). Representing Diffuse Interests in EC Policy-making, pp. 585–586 on the number of Directives successfully adopted under unanimous decision making.

⁹⁴ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy.

recognition made Eurofoods irrelevant. In the *Cassis de Dijon* judgment, the Court verified⁹⁵ the concept of mutual recognition, opening the way for “negative integration”. Negative integration removes barriers to cross border trade stemming from divergences in national compositional rules, and consequently the need for positive harmonisation through detailed Eurofoods law becomes less relevant.⁹⁶

The CJEU has constantly stated that in the absence of harmonisation, the Community must accept differing national rules. Leaving harmonisation of compositional standards, (the Eurofoods regulation) constituted a move towards further acceptance of national divergences. Of course, changing the methods of harmonisation and decision-making is related to this acceptance of divergences among the Member States of the EU. One could argue that such acceptance must be pervasive in other areas as well, such as in traditional national names. Further, the accept of national divergences seem to have primarily benefitted businesses.⁹⁷

In analysing the changes, the political value of implementing more EU rules and thereby improving the success of the Community should not be forgotten. The possibility of majority decision making and regulating with more flexible tools and broader concepts and principles was a way to increase the outcome of EU law.⁹⁸ In this sense, the introduction of more (and flexible) rules also prepared a defence to the heavy criticism raised against the Eurofoods.⁹⁹

Following the change in policy, new compositional standards have been adopted, for example, on meats and spreadable fats.¹⁰⁰

⁹⁵ The *Cassis* judgment was not revolutionary in the sense that it changed free movement law overnight; rather, it concisely collected and confirmed previous judgments.

⁹⁶ See Weatherill, S. (2006). *Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation*, p. 30. Keep in mind that negative integration is dependent to a large degree on Member States’ willingness to refer preliminary questions to the CJEU, which could be a rather time-consuming process for an importer. Also actions brought against a Member State under Articles 258 and 259 TFEU is time consuming. See Welch, D. (1983). *From ‘Euro beer’ to ‘Newcastle brown’, A Review of European Community Action to Dismantle Divergent ‘Food’ laws*, p. 67.

⁹⁷ Chapters 8–9 address how divergences are accepted in relation to consumer protection and traditional production methods, and so on.

⁹⁸ For some interesting points on the importance of the SEA, see Dehousse, R., “Does Subsidiarity Really Matter?”, pp. 2–6.

⁹⁹ Critics have questioned the resources spent, the particular choices of regulated products over others and the relatively high complexities and uncertainties attached to the rules. See Maduro, M. P. (1999). *We, The Court*, p. 283 and p. 295, in which he argued: “...the provision of clear and meaningful information is a better response to regulatory issues than prohibitions and compositional limitations.” See also, Ohm Søndergaard, M., and Selsø Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?* Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 593. These scholars argued that food standards deprive consumers the choice among a variety of products and characterised food standard regulation as “market-replacement”.

¹⁰⁰ See http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/112064_en.htm and http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/121107_en.htm. These are part of the CMO and agricultural policy.

As another example of standardisation, the FIR introduces a definition of minced meat (see Appendix VI, B). Moreover, in relation to the Regulation of health and nutrition claims,¹⁰¹ the Commission has defined names by establishing so-called nutrition profiles by which the amount of sugar, fat, salt and other ingredients in products are fixed. Before companies may make claims and market their products for their nutritional value, the products must comply with the relevant nutrition profile.

As late as 2011, the sectorial approach to regulation of food returned to the forefront.¹⁰² Despite opposition, the Eurofoods inspired way of regulating food names has not been completely abandoned and Eurofoods are found in many different pieces of legislation.

The Commission itself also accepted the need to establish quality specifications for products in order for the Single Common Market Organisation (CMO) for milk products to operate effectively and to avoid fraud.¹⁰³ CMO rules on price support and intervention measures could not operate as intended without the qualification of products entitled to support or subject to other measures. The food naming under the CMO is primarily related to the Common Agricultural Policy, and the supporting objectives are related to both public health issues and the CAP objectives, as defined in Article 39 TFEU. For that reason, they are not the core focus of this thesis; however, the CMO rules are part of the food composition requirements and have an indirect aim of improving competition and free movement.¹⁰⁴

Therefore, although the Eurofoods' model for regulating food naming has been abandoned in principle, standards on composition still exist and new ones are occasionally adopted. Further, Eurofoods remain a central part of valid law, as the existing Eurofoods are also constantly updated, including the adoption of completely new rules for these products.¹⁰⁵

For example, the new Fruit Juice Directive introduces a number of new rules, despite an intention to regulate only essential requirements, which is positively articulated in the Juice Directive (see recital

¹⁰¹ See Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, art. 4(2)(a) and art. 8(1) and appendix. For more on nutrition profiles, see <http://www.efsa.europa.eu/en/efsajournal/pub/644.htm>

¹⁰² See Opinion of the European and Social Committee on the "Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes", 2011, OJ C 218, p. 64. See also European Commission, "Communication on the free movement of foodstuffs within the Community", 1989, OJ No. C 271/3, p. 6, which focuses on food naming: "*The Commission will also examine how to improve the accuracy of the designation of foodstuffs, particularly in the standard of claims made in their labelling.*"

¹⁰³ Commission of the European Communities, "The general principles of food law in the European Union, Commission Green Paper", Com (97) 176 Final, p. 5 and p. 30. For more on the CMO, see http://europedia.moussis.eu/books/Book_2/6/21/04/?all=1.

¹⁰⁴ Competition is improved through harmonisation of composition, which facilitates free movement.

¹⁰⁵ In addition, see the Food Information Regulation, Article 16(4) which states that the Commission shall consider the need to propose a definition of 'alcopops'.

1).¹⁰⁶ As a new rule (see Annex I), adding sugar to fruit juice is forbidden. It could be argued that such a rule regulates the name more rigidly. The Directive also introduces a new rule for indicating the fruits included in the juice. Prior to the amending Directive a fruit juice made from more than one type of fruit could be named “mixed fruit juice” or could have the name of the primary ingredient, such as “apple juice,” with the other types of fruit indicated elsewhere. Now the name “mixed fruit juice” can only be used when the juice contains three or more types of fruit. As another example, tomatoes are now included in the list of fruits in the Fruit Juice Directive, and juice made from tomatoes is now subject to these rules.¹⁰⁷

3.1 Legal basis

The Eurofoods Directives are related to the Internal Market and are adopted as part of the Internal Market’s operation and development (see Article 43 TFEU) and its establishment and functioning (see Article 114).

Article 43 TFEU is attached to the Common Agricultural Policy (CAP), and the objectives herein form part of these rules, which to a certain degree are related to social objectives and rural protection.¹⁰⁸ However, the objectives mentioned in the Directives described below are primarily related to internal market issues. (Article 114 TFEU is described above.)

The Honey Directive¹⁰⁹ and Fruit Juice Directive¹¹⁰ are adopted under Article 43 TFEU (at the time of the adoption Article 37 TEC), whereas those for the cocoa/chocolate¹¹¹ and coffee and chicory extracts¹¹² are adopted under Article 114 TFEU (at the time of the adoption Article 95 TEC). The

¹⁰⁶ The amending directive is Directive 2012/12/EU of the European Parliament and of the Council of 19 April 2012.

¹⁰⁷ For more on fruit juices, see Ohm Søndergaard, M., and Selsø Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?*

¹⁰⁸ See Section 3.1.2.

¹⁰⁹ Council Directive 2001/110/EC of 20 December 2001 relating to honey, hereafter, the “Honey Directive”.

¹¹⁰ Council Directive 2001/112/EC of 20 December 2001 relating to fruit juices and certain similar products intended for human consumption, hereafter, the “Fruit Juice Directive”.

¹¹¹ Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, hereafter, the “Cocoa/Chocolate Directive”.

¹¹² Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts, hereafter, the “Coffee and Chicory Extract Directive”.

First Fruit Juice Directive was actually adopted under both Article 114 TFEU (presently Article 100 TEEC) and Article 43 TFEU (presently Article 43 TEEC). Nevertheless, it is interesting to note that these relatively identical Eurofoods rules are adopted under different legal bases and policy areas, without any further explanation.

3.2 Objectives

Different objectives are mentioned in the various Eurofoods Directives. The prime objective for the Fruit Juice Directive is to enhance competition¹¹³ and the functioning of the Internal Market (see recital 3.)¹¹⁴ In the Coffee and Chicory Extracts Directive, Recital 2, consumer protection against misleading names is an objective; however, consumer protection is simply a means to the end of maintaining a well-functioning market, which is impossible when consumers are confused. Consumer protection is thus secondary. Despite this, guaranteeing a minimum level of quality for the products regulated throughout the EU will *de facto* protect consumers because consumers are guaranteed (at least when fraud is not apparent) that Eurofoods will be identical despite the country of production.

In the recitals of the Honey Directive, the only objective mentioned is the free movement of goods in the Internal Market.

For the Cocoa/Chocolate Directive, the differences in production of chocolate among Member States were the primary force driving harmonisation.¹¹⁵ The addition of vegetable fats to chocolate products has been a major subject in the harmonisation process. In 1973, shortly after the accession of Denmark, Ireland and Britain to the EU, the First Cocoa/Chocolate Directive¹¹⁶ was adopted. In

¹¹³ The effect on competition of such standards could be discussed. On one hand standardisation leads to more homogenous goods that foster competition. On the other hand, standardisation removes one competitive parameter (quality), which would make concerted practice on price easier. It is beyond the scope of this thesis to investigate this paradox further.

¹¹⁴ For more on the free movement and competition objectives, see Chapter 3, Section 2.

¹¹⁵ See for more on this, see Lauterburg, D. (2001). *Food Law: Policy and Ethics*, p. 121–123.

¹¹⁶ Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption.

these countries, contrary to rules in the original six Member States, chocolate could legally contain vegetable fats other than cocoa butter, and for this reason, an exemption was included in the Directive. The derogation allowed chocolate containing vegetable fats to be produced and sold in Denmark, Ireland and Britain. However, this was not accepted in the other Member States, which created trade barriers.¹¹⁷ The regulation of cocoa and chocolate had – and still has – as its primary objective to ensure the free movement of these products. However, the first attempt to harmonise clearly showed the difficulties¹¹⁸ when differences in production originally existed among Member States.¹¹⁹ The difficulties attached to the initial adoption of these rules have most likely contributed to the subsequent abandonment of this way of regulating.

In the current Cocoa/Chocolate Directive, the addition of vegetable fats up to 5 percent is permitted in all Member States, and harmonisation is now more complete.¹²⁰ However, the statement “contains vegetable fats in addition to cocoa butter” must be placed in the same field of vision as the list of ingredients, but clearly separated from the list and in letters at least as large and in bold as the sales name (see Article 2(2) of the Cocoa/Chocolate Directive). Although this requirement to provide “*correct, neutral and objective information in addition to the list of ingredients*” (see recital 9) can be seen as consumer protection, those specific words are not mentioned anywhere in the Cocoa/Chocolate Directives.¹²¹ More likely, the obligation to highlight any addition of vegetable fats marks a compromise that was necessary for the full harmonisation.¹²² This obligation

¹¹⁷ For a further description of the derogation, see Du Bois, I. (1991). *An Industry’s Point of View*, p. 35, and Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 199.

¹¹⁸ See Cecchini, et al, (1988). *The European Challenge, 1992, the Benefits of a Single Market*, p. 61, which calculated that the costs of differing rules in relation to vegetable fats in chocolate accounted for 30 percent of the costs arising due to fragmented rules. This was even after some sort of harmonisation, as the report is from 1988.

¹¹⁹ Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 173, notes: “*German consumers opposed a ‘Euro-chocolate’ standard on the grounds that it would weaken German’s chocolate quality...*” As noted by Du Bois, I. (1991). *An Industry’s Point of View*, p. 35, the case of the cocoa/chocolate directives “*clearly shows the diversity of tastes and gastronomic cultures in Europe.*”

¹²⁰ This has not been without conflicts; for example *Commission v Spain* (chocolate I), Case 12/00, Judgment of the Court of 16 January 2003, *Commission of the European Communities v Kingdom of Spain*, and in *Commission v Italy* (chocolate II), Case 14/00, Judgment of the Court of 16 January 2003, *Commission of the European Communities v Italian Republic*.

¹²¹ See also De Witte, B. (2006). *Non-market Values in Internal Market Legislation*, p. 84, which notes that in the Cocoa/Chocolate Directive “*only the internal market objective is prominently mentioned...*”

¹²² See Chapter 9 for an analysis of the degree of harmonisation provided by Eurofoods.

contradicts the conclusions made in the Sauce Béarnaise and Darbo judgments¹²³ and shows that the regulation of food naming is not in any way consistent.¹²⁴

As with the Coffee and Chicory Extracts Directive, the Fruit Juice Directive also mentions that unfair competition and consumer misunderstanding could result from differences among national laws concerning fruit juices, which could impair the common market (see recital 3). In these Directives, consumer protection serves to secure the functioning of the Internal Market.

From these Directives, consumer protection clearly is not a *de jure* objective on its own, but rather a means of securing free movement and the functioning of the Internal Market.

The competitiveness of the European industry is an objective not clearly mentioned in law, but perhaps most likely underlying the initial regulation of Eurofoods. As an example, in the Cecchini report, a major challenge that followed opening of the EU market was identified for several sectors: *“EC companies have resisted better on European markets, but even so there is a real danger that in sectors like pharmaceuticals, foodstuffs and certain high tech areas, the main beneficiaries of market integration could be non-Community – be they American, Swiss, Japanese or from among the newly industrialized countries.”*¹²⁵ In order to address this challenge, it is rather interestingly noted: *“An ever more potent weapon in the arsenal of competitive conflict, Europe-wide standards (for products, processes, financial reporting, information etc.) are an essential lever for both prising [sic] open national markets and welding them together through technical alliances.”* European standardisation was seen as a means to have innovation and business synergies for European businesses. The conclusion was that standardisation could protect the European industry from competition from outside Europe. Today, many EU standards are, however, based on international standardisation of food, especially through the Codex Alimentarius.

3.3 The regulated names and their generic nature

Products covered by Eurofoods legislative standards include beef and veal, eggs, fresh and processed fruit and vegetables, honey, hops, milk and milk products, olive oil, pig meat, poultry,

¹²³ See above in Section 2.

¹²⁴ The inconsistencies will result in interpretation difficulties to arise in relation to the obligation to label additional ingredients that replace traditional ingredients and in relation to evaluating whether consumers are misled about product characteristics attached to a name. For more on these topics, see Chapters 5 and 8.

¹²⁵ Cecchini, et al., (1988). *The European Challenge, 1992, the Benefits of a Single Market*, p. 89.

sheep meat, sugar, wine, cocoa and chocolate products, coffee extracts and chicory extracts, fruit juice, fruit jams, jellies and marmalades, spirits, and butter, margarine and blends.¹²⁶

In 1974, Commissioner of the Internal Market Finn Gundelach explained that the aim of the Commission in relation to Eurofoods “*was not to produce a network of laws covering all foodstuffs but to harmonize only those laws which were necessary for the removal of trade obstacles in those foods which were the subject of significant intra-Community trade.*”¹²⁷ However, those food products subject to significant intra-Community trade were ones that could more easily be traded in different Member States because the product characteristics did not differ substantially. Ironically, the food (names) harmonised in the Eurofoods rules actually were not that divergent in their characteristics at the time this means of regulating was introduced. Roy Jenkins, president of the Commission from 1977–1981, admitted that harmonisation was possible only where differences among Member States were small.¹²⁸ Harmonising areas with only minor differences makes little sense, and considering the costs, it appears un-proportional to regulate such names.¹²⁹ For example, the First Jams Directives took 14 years to pass, despite the fact that “jam” was already close to being a European generic term.¹³⁰ Considering what has been described here, the value of Eurofoods even for businesses can be questioned. However, considering the constant updates, some value must exist, most likely within clearly defining the products belonging to the generic category.

Both mandatory and optional rules on naming are found in the Eurofoods rules, which do not make compliance easier. A mandatory name has to be used for products fulfilling the requirements attached to the name, providing a greater degree of legal certainty than with optional names.¹³¹ The names listed in the Cocoa/Chocolate Directive are examples of mandatory names (see Article

¹²⁶ See Commission of the European Communities, “Green Paper on agricultural product quality: product standards, farming requirements and quality schemes”, COM (2008) 641 final, p. 7. For an overview of the legislation, see http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/index_en.htm.

¹²⁷ Welch, D. (1983). *From ‘Euro beer’ to ‘Newcastle brown’, A Review of European Community Action to Dismantle Divergent ‘Food’ laws*, p. 54.

¹²⁸ Welch, D. (1983). *From ‘Euro beer’ to ‘Newcastle brown’, A Review of European Community Action to Dismantle Divergent ‘Food’ laws*, p. 54.

¹²⁹ Of course, the costs depend on the method of decision, and are higher when subject to unanimous approval.

¹³⁰ Generic is defined in the PGI/PDO Regulation as *the common name of an agricultural product or a foodstuff in the Community* (see article 3(1)). This definition of generic is used throughout this thesis and is analysed in Section 4.3.2.

¹³¹ Controlling whether the mandatory names are in fact used is a matter addressed in procedural rules. However, not that in some cases the mandatory name might not be the name consumers identify the specific product by. For example most “smoothies” are actually “juices” and some carry double-names in order to inform consumers while also applying with the law. See in this regard Smith, V., et al. (In Press). What’s (in) a Real Smoothie: A Division of Linguistic Labour in Consumers’ Acceptance of Name-Product Combinations?

3(1)).¹³² Optional names can be used when the attached requirements are fulfilled, but no obligation exists; consequently, identical products could bear different names if a company chooses not to use the optional name.¹³³

Optional quality terms exist for products like poultry, eggs, honey, olive oil, milk and spreadable fats; for example, regulated terms include “free range” and “free range – total freedom” for poultry and “fresh” and “extra or extra fresh” for eggs.¹³⁴ These quality terms are attached to the name and also work as *identification marks*, enabling consumers to compare different products (and their prices) and make their best choice. The more identification marks with underlying complex legal rules, the more consumers have to comprehend to make the comparison. However, the rules on voluntary information found in the FIR might limit the way these optional terms can be provided.¹³⁵

The food products regulated under the Eurofoods standards can be said to have a *European generic nature*.¹³⁶ Although, as mentioned, these foods already were uniform/generic in character prior to adoption of the rules, standardisation has strengthened the generic nature of the products.

Examples of Eurofoods being classified as generic names are most evident in relation to olive oil, where the name “olive oil” is characterised as a generic name.¹³⁷ Previously, the designation “Riviera” was characterised as a generic term.¹³⁸ Products not regulated specifically in EU law, but which have been

¹³² However, exceptions still exist because the United Kingdom and Ireland can authorise the use of different names; for more on this, see Chapter 9, Section 3.1.

¹³³ Optional names are generally seen as value-adding, and for this reason it appears illogical not to use such a name where it is possible. An example of an optional name is the additional term “free-range” used for poultry. Also the indication of “no vegetable fats other than cocoa butter added” can be seen as a voluntary indication (see the Cocoa/Chocolate Directive, Recital 10).

¹³⁴ For an overview of these terms and the acts defining them, see European Commission, Proposal for a Regulation of the European Parliament and of the Council on agricultural product quality schemes, Com (2010) 733 Final, p. 53.

¹³⁵ For an opposite opinion of the value of these optional identification marks, see Opinion of the European and Social Committee on the “Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes”, 2011, OJ C 218, p. 117. This opinion expresses the desire for more regulated indications, optional or mandatory. The use of voluntary information is addressed in Chapter 4, Section 4.1.

¹³⁶ See also MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, p. 91.

¹³⁷ See Opinion of the Economic and Social Committee on the Commission Report to the Council and the European Parliament on the quality strategy for olive oil, and the Proposal for a Council Regulation amending Regulations No 136/66/EEC and (EC) No 1638/98 regarding the extension of the period of validity of the aid scheme and the quality strategy for olive oil, 3.1.2.3.7.2. For classification problems in relation to the terming of “olive oil” as generic, see point 3.1.2.3.7.3.

¹³⁸ See the International Olive Oil Agreement of 1979, 1979, OJ L 327, p. 2, Article 13. However, the designation should be followed by the word “type”.

declared generic, can also be termed Eurofoods. An example of this is vinegar, which has been termed as a generic name. In the *Commission v Italy* judgment (vinegar I),¹³⁹ the CJEU concluded that vinegar does not alone cover wine vinegar and that the term is generic based on the Common Custom Tariff. In the *Glocken* judgment,¹⁴⁰ pasta was defined as a generic name.

However, classifying food products as “generic” is not without consequences. This is clear in relation to the protection of geographical names, addressed in Section 3, but also in relation to other foods, like Eurofoods, because it appears that products sold under “generic” names has enhanced access to any of the national markets in the EU.¹⁴¹

In a Commission report concerning olive oil, the Commission addressed the problem of too broad generic terms. It was stated, in point 1.3.3.2:¹⁴² *“The unaware consumer of an olive oil is somewhat imposed on by this use of the generic name for olive oils as the name for one particular category. He may also be disconcerted by the organoleptic heterogeneity of the olive oils offered to him. There is also a market for olive oil blends containing very little virgin oil, especially for preserves and industrial cooking.”* And in point 2.1.1: *“What is more of a problem for the consumer is the use of the name ‘olive oil’ for blends of refined olive oil and crude olive oil. Using the generic term for a particular category not only hampers communication between those in the industry but above all is misleading for the consumer who is not sufficiently well informed. Without detracting from the category ‘olive oil’ which is nonetheless a good product from the nutritional point of view, it should be given a specific identification.”* These statements show the problems arising when a too broad European name is used. They also demonstrate – despite the discussion on the objectives above – a concern about not deceiving consumers, whether or not this is the main concern.¹⁴³

Clearly, the regulation of Eurofoods is a complex legal area in which the task of understanding the rules entails understanding the objectives behind them, the reasons for regulating the specific food products, the borderlines to other labelling rules and also the technical details behind the rules.

¹³⁹ *Commission v Italy* (vinegar I), Case 193/80, Judgment of the Court of 9 December 1981, Commission of the European Communities v Italian Republic, para. 26

¹⁴⁰ *Glocken*, Case 407/85, Judgment of the Court of 14 July 1988, 3 *Glocken GmbH and Gertraud Kritzing* v USL Centro-Sud and Provincia autonoma di Bolzano.

¹⁴¹ The terminology used is not related to the concept of “market access” within internal market law. For more about this, see Chapter 9.

¹⁴² Commission Report to the Council and the European Parliament on the quality strategy for olive oil, Com (2000)855 final, Brussels, 21 December 2000.

¹⁴³ In Chapter 4, the precision of names is addressed.

Actually, it could be argued that the latter is not a matter for legislators, but rather for technicians, suggesting that regulation by way of Eurofoods rules should be reconsidered.¹⁴⁴

4 Quality Schemes

CJEU rulings on free movement and case law have shaped the law on trade names in EU for a long period. Case law on the free movement of goods has resulted in removal of many national rules on food naming, protecting the national agricultural and food products, because of their effect on cross-border trade, and only few aims have been accepted as justifications for restricting free movement of trade. The removal of national composition requirements may lead to fewer cultural variations and less diversity but also to a legal vacuum.

The Eurofoods rules described above reduced these problems in some ways, and in 1992, an additional system for regulating trade names was introduced.¹⁴⁵ The Quality Schemes system established rules regulating and protecting traditional specialities (TGS), geographical indications (PGI) and designations of origin (PDO). The system formed part of a Community Programme “*avowedly intended to ensure the continued quality of European Foodstuffs*.”¹⁴⁶

Today, TSG are regulated by Regulation 509/2006¹⁴⁷ and PGIs and PDOs are regulated by Regulation 510/2006.¹⁴⁸ These Regulations set up a system in which national groups of producers or processors working with the same agricultural product or foodstuff can apply for registration of

¹⁴⁴ Many references are made to international standards, but the regulation of food standards in no way follows what was the intention of using more standards when dropping this method of regulation in 1985. This dilemma is addressed when valid law is put into perspective in Chapter 11.

¹⁴⁵ The first initiatives to adopt Community policy on protected trade names are found in European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final.

¹⁴⁶ Lister, C., “The naming of foods: The European Community’s rules for non-brand food product names”, European Law Review, 1993, p. 198.

¹⁴⁷ Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed, hereafter the “TSG Regulation”.

¹⁴⁸ Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, hereafter the “PGI/PDO Regulation”.

traditional, geographical or in some instances non-geographical names.¹⁴⁹ The application is addressed to the relevant Member State, which ensures that the protection requirements are met and then forwards the application to the Commission.¹⁵⁰ The Commission investigates whether the requested names can be protected and, following any possible objection proceedings, protection is accepted and names are subsequently registered.

The protected names constitute a form of collective intellectual property right where the property right and the attached protection are related to the product itself, rather than to the right holders.¹⁵¹ The registered names link the agricultural product or foodstuff to traditions, origin or geographical places. When a name is registered under one of the Regulations, only producers complying with more specific rules provided for in a product specification can market products under that name.¹⁵² The system of protected geographical names in this sense “monopolises”¹⁵³ the use of registered trade names by reserving that name to producers within a defined area.

¹⁴⁹ No doubt these systems and the procedures they prescribe entail competition law conflicts because competitors meet – via trade associations that in some cases require enrolment – and agree on product characteristics and qualities, normally competition parameters; see Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 15, Heide-Jørgensen, C., et al. (2009). *Konkurrence retten i EU*, chapter 4 and Fejø, J. (2009). *EU-konkurrence retten*, chapter 2. See also the European Commission, “Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes”, Com (2010) 733 Final, p. 20 in which the potential anticompetitive conducts embedded in the Quality Schemes are indirectly addressed. In the European Parliament, “Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes”, 2010/0353/COD, the suggestion was made to authorise Member States to adjust supply to demand in relation to PGI/PDO, which could also potentially influence competition and free movement of goods. See also Delhaize, Case 47/90, Judgment of the Court of 9 June 1992, *Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA*. The topic is not further investigated in this thesis.

¹⁵⁰ The Member States play an important procedural role in the schemes by also monitoring the use of the protected names.

¹⁵¹ The rules institute a regime of collective rights as opposed to trademarks, which constitute individual rights. However, the functions and effects of such protected names and marks are very similar, despite the fact that protection of these geographical names is even stronger than trademark protection; see Rovamo, O. (2006). *Monopolising Food Names – The Protection of Geographical Indications in the European Community* and Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsførings retten*, chapter 10.

¹⁵² Opposite to the majority of the Eurofoods, the use of these names is optional, however when a registered name is used, it is mandatory to indicate by word or symbol that it is a protected name, unless the food originates from outside the EU.

¹⁵³ Monopoly is not the most precise term to describe the consequences of registration, since only under rare circumstances can trade names be reserved for one company; see Commission Regulation (EC) No 1898/2006 of 14 December 2006, laying down detailed rules of implementation of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Article 2. However, many consider the collective and reserved rights attached to the PGI/PDOs as monopoly; see Rovamo, O. (2006). *Monopolising Food Names – The Protection of Geographical Indications in the European Community*.

4.1 Legal basis

The system has its legal basis in Article 43 TFEU on the CAP, briefly described above. Initially, rules established under the CAP fulfilling the aims of Article 43 do not strictly belong to food law or internal market policies.¹⁵⁴ However, the Commission concluded, “*in the field of quality, it does not appear that the differences of approach resulting from the different objectives of internal market and agricultural legislation give rise to problems of incoherence and inconsistency.*”¹⁵⁵ Regulation of food quality can thus be adopted under the CAP, fulfilling objectives related to both the CAP and the functioning of the Internal Market.

Although, the Quality Schemes can be related to the functioning of the Internal Market, the requirements attached to measures adopted under Article 114 do not apply. For this reason, the measures do not have to satisfy the Internal Market test established in the Tobacco I judgment, which stated that a measure adopted in relation to an internal market policy must adequately contribute to the functioning of the Internal Market.¹⁵⁶ Therefore, the objectives linked to the CAP predominate.¹⁵⁷

4.2 Objectives

Different objectives underlie the Quality Schemes,¹⁵⁸ although initially, the Quality Schemes system was adopted to benefit the rural economy by encouraging diversification of agricultural production

¹⁵⁴ European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final, p. 13.

¹⁵⁵ Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. vii.

¹⁵⁶ See De Witte, B. (2006). Non-market Values in Internal Market Legislation, p. 75 and Weatherill, S. (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation, pp. 53–54. The legal basis, and the differences in legal bases between the different rules on food naming, is important for the further analyses, especially for understanding the borderlines between the rules.

¹⁵⁷ See Gragnani, M. (2012). The Law of Geographical Indications in the EU, p. 273. The author notes that the PGI/PDO are at a crossroad between public and private interests (social interest and IP, with connected macro- and microeconomic rationales; see Chapter 3). This thesis does not analyse the implications of this.

¹⁵⁸ See Jokuti, A. (2009). Where is the What if the What is in Why? A Rough Guide to the Maze of Geographical Indications, pp. 119–120, in which the author mentions the following (international) reasons for protection of geographical names: regional policy elements, consumer protection objectives, articulated demands of communities in developing areas and cultural and economic interests. More specific reasons mentioned include avoidance of misleading

and promoting products with certain characteristics.¹⁵⁹ In this sense, the system sets out to protect and preserve national and rural production of food,¹⁶⁰ and therefore indirectly contradicts the general CJEU conclusion that crystallising consumer habit conflicts with the establishment of a common market.¹⁶¹

The common agricultural policy, one of the most important policy areas within the EU, has both economic and social objectives that form part of the Quality Schemes:¹⁶²

The PGI/PDO system establishes protected positions in the EU marketplace for selected products with a certain quality, identified by their name and the mandatory indication or symbol. Establishing the EU scheme to replace the national practices and legislations regarding geographical names initially seemed to be directed at securing free trade and free movement of goods.¹⁶³ However, the EU Quality Schemes do not prevent parallel national rules to protect geographical names,¹⁶⁴ which illustrates that the free movement objective and the functioning of the Internal Market are not central to the Quality Schemes rules.¹⁶⁵

labelling, economic incentives and rewards for localities and cultural grounds. De Almeida, A. (2008). Key Differences Between Trade Marks and Geographical Indications, p. 406 states: “*Appellations of origin and geographical indications, in spite of being resources in a competitive world, are also – and this is provided they are correctly regulated – means of consumer protection, quality assurance, conservation of the environment and support of fair competition*”.

¹⁵⁹ See European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final.

¹⁶⁰ Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, mentions protection of indigenous peoples’ knowledge as important (pp. 17–18), but concludes that knowledge is not protected *per se*, p. 34.

¹⁶¹ See Chapter 1, Section 4.1.2.

¹⁶² See Commission of the European Communities, “Perspectives for the Common Agricultural Policy – Communication to the Council and the Parliament”, Com (85) 333, p. 1. See also Hartvig Danielsen, J. (2009). *EU-landbrugets retten, landbrugets retsforhold I*, p. 20.

¹⁶³ See European Commission, “The future of the rural society – Communication transmitted to the Council and the European Parliament on 29 July 1988”, Com (88) 501, pp. 43–44.

¹⁶⁴ See Warsteiner, Case 312/98, Judgment of the Court of 7 November 2000, Schutzverband gegen Unwesen in der Wirtschaft eV v Warsteiner Brauerei Haus Cramer GmbH & Co. KG, para. 49. For more on this, see Chapter 6, Section 4.2, and Chapter 9, Section 3.2.

¹⁶⁵ As with trademark legislation, EU and national rights can exist parallel to each other. Uniform protection of intellectual property is considered an important part of the internal market (see Article 118 TFEU). However, Article 345 TFEU safeguards Member States’ sovereignty within the area of intellectual property and protection of such can justify restrictions to trade (see Article 36 TFEU). Some have characterised the PDO/PGI regulations as a derogation from the principles of free movement, while others have viewed them as protectionism, impeding competition and leading to more expensive and less nutritional food. See MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, p. 115, and Lister, C. (1993). The Naming of Foods: The European Community’s Rules for Non-brand Food Product Names, p. 199–201. Thesis does not address the negative effects of legislation.

In the *Canadane* case, the AG¹⁶⁶ summarised earlier CJEU case law and stated, “*the legal protection of geographical names safeguards producers’ interests against unfair competition and protects consumers against information which may mislead them.*”¹⁶⁷ The protection of producers’ interests¹⁶⁸ established by the EU Quality Schemes is an intellectual property rights protection afforded to the names and products that fulfil the (quality) criteria set in law (in the product specification). Common EU rules ensure uniform protection within the Community. Economic objectives are attached to protecting consumers and to securing fair competition (here only by means of intellectual property rights protection).¹⁶⁹ The focus within intellectual property law regarding trademark infringement mainly has been on the dilution of the trademark rather than consumer confusion,¹⁷⁰ which also seems to be true for PGI/PDO, when considering the protection provided to PGI/PDO.¹⁷¹

¹⁶⁶ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 24 June 1997, *Canadane*, Case 317/95, *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v Hellenic Republic (Ypourgio Emborion, Ypourgiou Oikonomikon, Ypourgiou Ygeias, Pronoias kai Koinonikon Asfaliseon and Ypourgiou Georgias)* p. 4702.

¹⁶⁷ In *Exportur*, the CJEU defined indications of provenance as, para. 11 (emphasis highlighted): “*intended to inform the consumer that the product bearing that indication comes from a particular place, region or country. A more or less considerable reputation may attach to that geographical provenance*”. See also Broude, T. (2005). Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law, p. 16, which characterises Geographical Indications as being founded on a “combined quasi-intellectual property/consumer protection platform”.

¹⁶⁸ Protecting producers against unfair competition is broader than intellectual property rights protection. See Chapter 8 for a definition of “fair/fairness”.

¹⁶⁹ For more on the economic objectives, see Chapter 3. Protection of IPR is also attached to consumer protection because protection hinders free riding and deception.

¹⁷⁰ Landes, W., and Posner, R. (2003). *The Economic Structure of Intellectual Property Law*, p. 6.

¹⁷¹ For more on the protection, see Section 4.3.1.

Despite that PGI/PDOs establish a clear link to intellectual property rights, quality and culture, the rules do not mention protection or promotion of culture.¹⁷² However, culture is mentioned in the Quality Scheme Proposal,¹⁷³ recital 1 of the preamble (emphasis highlighted):

“The quality and diversity of European Union agricultural production is an important strength and competitive advantage for European Union producers and part of the Union's living cultural and gastronomic heritage. This is due to the skills and determination of European Union farmers and producers who have kept alive traditions while taking into account developments of new production methods and material.”

Bringing cultural protection and preservation of culture to food naming can add a dimension to valid law and especially to the extent of harmonisation that can be provided.¹⁷⁴

The protection of geographical names is as mentioned parallel to the protection afforded to trademarks.¹⁷⁵ In relation to trademarks, protection is provided to distinctive names or common names that have become distinctive because of the way they have been used. The protection motivates an investment in the products carrying the protected trademark to establish and maintain reputation and gain profits. Contrary, the products sold under PGI/PDOs are not purely the result of a single (group of) producer(s)’ investments, but a product of culture and history, or perhaps

¹⁷² This is contrary to clear aims of other intellectual property rights legislation, such as the InfoSoc Directive, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Promotion of cultural creativity and production (by ensuring returns to creators/authors, and so on) is mentioned as an aim in the Directive, preamble recital 9–12. Reference is given to Article 167 TFEU (the previous Article 151 EC). This general Treaty provision is not related to the Quality Schemes. See also Stern, S. (2007). Are GIs IP?, which argues that GIs are not IP in the traditional sense because they are not products of intellectual input and in fact, are not property. For a contrary view, see Rangnekar, D. (2009). The Intellectual Properties of Geography.

¹⁷³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, Com (2010) 733 Final; hereafter the “Quality Schemes Proposal”.

¹⁷⁴ For more on protection of culture, see Chapter 9, Section 2.2.2.2. The relevant rationales behind cultural protection (quality-oriented rationales) are considered parallel to the rationales behind IPR protection; see Broude, T. (2005). Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law, pp. 16–17 and p. 35, in which Broude stated, “...culture cannot of itself justify any GI protection...” For a general overview of protection of geographical indication based on cultural grounds, see Chesmond, R. (2007). Protection or Privatisation of Culture? The Cultural Dimension of The International Intellectual Property Debate on Geographical Indications of Origin.

¹⁷⁵ See Chesmond, R. (2007). Protection or Privatisation of Culture? The Cultural Dimension of The International Intellectual Property Debate on Geographical Indications of Origin, p. 383 and Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 9.

inspired by culture and history, stemming from outside the geographical area to which the protection of the food names is attached.¹⁷⁶ Therefore, unlike protections for classic intellectual property rights, protection of PGI/PDOs cannot be based solely on economic rationales, such as to motivate innovation, and the social objectives behind the rules are clearly very central.¹⁷⁷

The social objectives of the Quality Schemes are connected to the improvement of rural economies (recital 2 of the PDO/PGI Regulation), according to which: *“The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas.”* Protecting and promoting products from rural areas provides incentives for further supply of such products.

These social aims benefit local producers¹⁷⁸ and aid the local population through improved living condition, such as maintenance of jobs and safeguards for the environment.¹⁷⁹ In initiating a strategy for the rural society in the EU, the Commission noted that activity and employment are in some regions indispensable if depopulation of the countryside is to be avoided.¹⁸⁰ In this regard, *“the promotion of high-quality products could become of substantial importance”*.¹⁸¹

¹⁷⁶ In Feta II, Joined cases 465/02 and 466/02, judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities, the argument was that Feta comes from throughout the Balkans and not only Greece, see para. 43. See also Chesmond, R. (2007). Protection or Privatisation of Culture? The Cultural Dimension of The International Intellectual Property Debate on Geographical Indications of Origin, p. 381.

¹⁷⁷ Note that there are normative differences between rules based on economics and rules related to social/cultural policies. However, in this thesis only the economic rationales for the different rules are addressed.

¹⁷⁸ The Quality Schemes Proposal, article 4, more directly states that *“securing fair returns”* to producers is an objective. The objective is also attached to a general strategy of promoting EU products; see European Commission, “Green Paper on the promotion measures and information provision for agricultural products: a reinforced value-added European strategy for promoting the tastes of Europe”, Com (2011) 436 Final.

¹⁷⁹ See Opinion of the European and Social Committee on the “Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes”, OJ 2011 C 218, p. 116. See also Broude, T. (2005). Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law, p. 20 which mentions “historical purity of production” as an aim behind PGI/PDO rules.

¹⁸⁰ Commission of the European Communities, “Perspectives for the Common Agricultural Policy – Communication to the Council and the Parliament”, Com (85) 333, p. VI.

¹⁸¹ European Commission, “The future of the rural society – Communication transmitted to the Council and the European Parliament on 29 July 1988”, Com (88) 501, p. 43.

As for Eurofoods, the competitiveness of the European industry is central to the protection of geographical indication and designations of origin. In a Commission report, these are characterised as key to the EU economy because of the value of exported products carrying PGI/PDOs.¹⁸² The diversity and quality of European agricultural production is considered a flagship of EU farmers' competitiveness, which is strengthened by the certification of products established by the Quality Schemes.¹⁸³ From an international perspective, the issue of PGI/PDOs becomes more complex because of problems of EU protectionism versus international rules on free trade.¹⁸⁴

4.3 PGI/PDOs and other geographical names

To be protected under the Quality Schemes, a name must be connected with quality and origin; that is, the name must conform with either the definition of a PGI or the definition of a PDO, as stated in Article 2:

“‘Designation of origin’ means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country,*
- the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and*
- the production, processing and preparation of which take place in the defined geographical area;*

‘geographical indication’ means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country, and*
- which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and*

¹⁸² See European Commission, “Why do Geographical Indications matter to us?”

¹⁸³ See the Quality Schemes Proposal, pp. 2 and 4.

¹⁸⁴ The international perspective is not the focus here, but for more on this topic, see Chesmond, R. (2007). Protection or Privatisation of Culture? The Cultural Dimension of The International Intellectual Property Debate on Geographical Indications of Origin; Kur, A. (2007). Nothing but a GI thing: Geographical Indications under EU Law, and Broude, T. (2005). Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law.

- *the production and/or processing and/or preparation of which take place in the defined geographical area.*¹⁸⁵

Prior to the introduction of EU Quality Schemes, the Court defined designations of origin in the Exportur judgment,¹⁸⁶ para. 11, as (emphasis highlighted) “guarantees, not only the geographical provenance of the product, but also that the goods have been manufactured according to quality requirements or manufacturing standards prescribed by an act of public authority and thus that they have certain specific characteristics.” Thus, a link was made between the product, the name, its origin and quality, and as the AG defined in the Bigi case,¹⁸⁷ para. 50, a PDO/PGI expresses “...*the historic, cultural, legal and economic reality that attaches to the registered name and to the product covered by that registration.*” In the AG opinion of the Canadane case,¹⁸⁸ p. 4702, the AG described geographical names as:

“They guarantee the geographical origin of the product and, to a greater or lesser degree, its type: in other words, that it has specific qualities and characteristics arising from its geographical origin ...They are also proof of the quality of the product, which is, in most cases, made under strict and precise conditions...They impart a good reputation to products amongst consumers because the geographical name guarantees the specific provenance, the type and the prescribed quality of the product.”

Also, traditional names, whether geographical or not, can be protected under the PGI/PDO Regulation, if such name designates an agricultural product or foodstuff fulfilling these conditions

¹⁸⁵ The definitions in the European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, COM (2010) 733 Final are quite similar; however, the language “*in exceptional cases*” attached to country names is removed from the PGI definition. The possibility to register country names can thus be improved with the adoption of the Quality Scheme Proposal is adopted.

¹⁸⁶ Exportur, Case 3/91, Judgment of the Court of 10 November 1992, Exportur SA v LOR SA and Confiserie du Tech SA.

¹⁸⁷ Opinion of Advocate General Léger delivered on 9 October 2001, Bigi, Case 66/00, Judgment of the Court of 25 June 2002, Criminal proceedings against Dante Bigi, third party: Consorzio del Formaggio Parmigiano Reggiano.

¹⁸⁸ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 24 June 1997, Canadane, Case 317/95, Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v Hellenic Republic (Ypourgio Emborion, Ypourgiou Oikonomikon, Ypourgiou Ygeias, Pronoias kai Koinonikon Asfaliseon and Ypourgiou Georgias).

(see Article 2(2)).¹⁸⁹ Thus, a link still has to exist between the product and origin or place of production and the product features. For example, the name “Feta” is considered to be such a traditional name (see the Feta I judgment, para. 47¹⁹⁰ and the Feta II judgment, para. 22 and para. 69).¹⁹¹

The difference between a PGI and PDO is not great: The PGI is attached more to the origin and its reputation, whereas the PDO is attached more to the environment and its influence on the product.¹⁹² Therefore, the link with origin is stronger for PDOs,¹⁹³ but the protection afforded to PGIs is identical to that for PDOs. However, the distinct definitions serve an important purpose: The narrow PDO definition monopolises the registered name to a higher degree, but also sets higher standards regarding the name’s reputation. The broader PGI sets lower standards for registration, but also enhances possible competition.¹⁹⁴

Products and foods listed in Annex I of the Treaty and in annexes to the Regulations can be protected under the schemes.¹⁹⁵ Although in principle the schemes establish a system to protect agricultural products in a broader sense, they primarily are connected to food products.¹⁹⁶

¹⁸⁹ Previously, under the First PGI/PDO Regulation, traditional names could only be protected as PDOs (see Article 2(3) of this Regulation).

¹⁹⁰ Feta I, Joined cases 289/96, 293/96 and 299/96, Judgment of the Court of 16 March 1999, Kingdom of Denmark, Federal Republic of Germany and French Republic v Commission of the European Communities.

¹⁹¹ Feta II, Joined cases 465/02 and 466/02, Judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities.

¹⁹² In the Carl Kühne case, a German court referred a preliminary question to the CJEU concerning whether the PGI “Spreewälder Gurken” was a misleading name. The Advocate General addressed the difference between names registered as PGI and PDO based only on article 2(3) of the First PGI/PDO Regulation. The difference embedded in this provision is no longer existent. See Opinion of Mr Advocate General Jacobs delivered on 5 April 2001, Carl Kühne, Case 269/99, Judgment of the Court of 6 December 2001, Carl Kühne GmbH & Co. KG and Others v Jütro Konservenfabrik GmbH & Co. KG.

¹⁹³ See De Almeida, A. (2008). Key Differences Between Trade Marks and Geographical Indications, p. 407.

¹⁹⁴ This provides for some flexibility in the rules. European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, COM (2010) 733 Final, p. 6, concludes: “...merging the instruments for protected designation of origin (PDO) and protected geographical indication (PGI) would diminish the added-value benefits of the PDO identification.”

¹⁹⁵ See O’Connor, B. (2004). *The Law of Geographical Indications*, p. 128 for an overview of products that cannot be registered as PGI/PDOs.

¹⁹⁶ See Dévényi, P. (2011). The New Proposal on Agricultural Product Quality Schemes - Quality Legislation on Quality Questions? p. 161.

4.3.1 The protection granted to PGI/PDOs

The protection granted to PGI/PDOs is a collective and optional protection granted to all products fulfilling the relevant product specification.¹⁹⁷ The protection is very broad¹⁹⁸ and protects registered names against illegal commercial use (see Article 13(1)):

“Registered names shall be protected against:

(a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;¹⁹⁹

(b) any misuse, imitation or evocation, even if the true origin of the product 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) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product.”

The protection granted according in Article 13(1)(b) against evocation is especially broad. In the Cambozola judgment,²⁰⁰ para. 25, the Court defined evocation as covering “...a situation where the

¹⁹⁷ The CJEU determined in Ravil, Case 469/00, Judgment of the Court of 20 May 2003, Ravil SARL v Bellon import SARL and Biraghi SpA, paras. 79–80 (emphasis highlighted) that the product specification contained a detailed definition, which “*determines both the extent of the obligations to be complied with for the purposes of using the PDO and, as a corollary, the extent of the right protected against third parties by the effect of registration of the PDO...*”

¹⁹⁸ This has been established by the AGs in both the Feta II case and in the Parmesan case; see Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 10 May 2005, Feta II, Joined cases 465/02 and 466/02, judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities and Opinion of Mr Advocate General Mazák delivered on 28 June 2007, Parmesan, Case 132/05, Judgment of the Court of 26 February 2008, Commission of the European Communities v Federal Republic of Germany. See also Rovamo, O. (2006). *Monopolising Food Names – The Protection of Geographical Indications in the European Community*; Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsføringsretten*, chapter 16, and Evans, G. E. (2012). *The Simplification of European Legislation for the Protection of Geographical Indications: The Proposed Regulation on Agricultural Product Quality Schemes*.

¹⁹⁹ For an indirect reference to a protected name in comparative advertising, see Landtsheer Emmanuel, Case 381/05, Judgment of the Court of 19 April 2007, De Landtsheer Emmanuel SA v Comité Interprofessionnel du Vin de Champagne and Veuve Clicquot Ponsardin SA.

term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected.” The Court further noted, in para. 27, that: “...it is possible, contrary to the view taken by the defendants, for a protected designation to be evoked where there is no likelihood of confusion between the products concerned.” Thus, the protection granted according to Article 13(1)(b) is not only connected to potential free riding and deception of consumers.²⁰¹

The Court concluded that the visual and phonetic similarity between Cambozola and the PDO Gorgonzola constituted evocation.²⁰² In the Parmesan-judgment, the CJEU concluded, in para. 49, that: “...the use of the name ‘Parmesan’ must be regarded, in the sense of Article 13(1)(b) of Regulation No 2081/92, as an evocation of the PDO ‘Parmigiano Reggiano’...” Again, visual and phonetic similarity was relevant (see para. 46). The phonetic similarity between Cambozola and Gorgonzola is evidently stronger than between Parmesan and Parmigiano Reggiano,²⁰³ which serves as an illustration of the wide protection of PGI/PDOs.²⁰⁴ In judgments concerning evocation, the focus has been on visual and phonetic similarity, and therefore, it is still uncertain whether a competing Danish Feta cheese could be marketed under the name, “Greek-inspired white cheese in brine”. This name does not incorporate any part of the protected designation, but it would probably trigger an image of Feta in the consumer’s mind.²⁰⁵

According to article 13 (1), if a compound designation contains a generic name, then others can use that name unless the use is false or misleading.²⁰⁶ The protection of compound designations and the

²⁰⁰ Cambozola, Case 87/97, Judgment of the Court of 4 March 1999, *Conorzio per la tutela del formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH*

²⁰¹ For more on this, see Chapter 3.

²⁰² See para. 27. The Court noted that the two names end in the same two syllables and contain the same number of syllables.

²⁰³ The phonetic similarity is questioned, according to the Danish version of the Opinion of Mr Advocate General Mazák delivered on 28 June 2007, *Parmesan*, Case 132/05, Judgment of the Court of 26 February 2008, *Commission of the European Communities v Federal Republic of Germany*. According to para. 58, there is no phonetic similarity. A similar wording is not found in the English, German, French or Swedish versions.

²⁰⁴ For more on evocation, see Gold, T. Z. (1999). *European Community: Trade Marks - Re Designations of Origin*.

²⁰⁵ See Chapter 6, Section 4.3 for how to evaluate potentially misleading geographical names, and see Chapter 9, Section 3.2 for the boundaries established by the Quality Schemes rules in relation to naming of domestically produced food.

²⁰⁶ Similar to the rules on compound names, it has been suggested that the protection of PGI/PDOs must also cover situations where PDOs or PGIs are used as ingredients; see Gragnani, M. (2012). *The Law of Geographical Indications*

parts of such designation was the issue in the Chiciak and Fol judgment.²⁰⁷ This judgment concerned the registration of the PDO “Époisses de Bourgogne” and whether the name “Époisses” without its compounds was protected. The Court found that although registration was made for the compound designation rather than only parts of it, this did not result in each of its parts being protected. Whether this judgment also implies that parts of a registered name can become generic is unclear.²⁰⁸

Temporary derogations from the protection and possible co-existence are found in Articles 3(3) and 13(3) and for trademarks in Articles 3(4) and 13(4),²⁰⁹ subject to different conditions.^{210,211}

4.3.2 Generic names

Generic names, which are common names of an agricultural product or a foodstuff in the Community, cannot be registered and protected, (see Article 3(1)).²¹² Article 3 (1) applies to names that have become generic as well as those that always have been generic (see the Feta I judgment

in the EU, p. 281. This also follows from guidelines; see Commission Communication – Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients, 2010 OJ C 341, pp. 3–11.

²⁰⁷ Chiciak and Fol, Joined cases 129/97 and 130/97, Judgment of the Court of 9 June 1998, Criminal proceedings against Yvon Chiciak and Fromagerie Chiciak (C-129/97) and Jean-Pierre Fol (C-130/97).

²⁰⁸ See Section 4.3.2.

²⁰⁹ Generally, PGI/PDO takes priority over trademarks (see Article 14). See also O'Connor, B. (2004). *The Law of Geographical Indications*, p. 115.

²¹⁰ The possibility of co-existence may weaken the link between the PGI/PDO, the product and origin, and also potentially may lead to more confused consumers. These negative effects have not been addressed in the EU; however, the United States and Australia disputed the possibility of co-existence before the WTO in 1999 and 2003, and the WTO panel found that the possibility of co-existence did not violate the TRIPs agreement. See Dispute Settlement 290, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm.

²¹¹ A similar rule to Article 13(3) is found in the European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, COM (2010) 733, Article 15 (1). However, Article 13(4) is modified in the proposal's Article 15(2). According to this the co-existence period could be extended to 15 years, if it is shown that the use of the name has not been a matter of profiting from the PGI/PDOs reputation or has misled consumers. This makes the possibility of co-existence more likely than under the current rule.

²¹² The use of a generic name is not unconditional; see the Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 10 May 2005, Feta II, Joined cases 465/02 and 466/02, judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities, para. 140, which states: "... 'generic' may not be defined as the opposite of 'exclusive'." Generic names must for example not be misleading, see Chapter 8 for a general analysis of the prohibition against misleading names. See also Chapter 9, Section 2.1 for an overview of cases where Member States could not reserve generic names.

para. 80).²¹³ The Member State applying to register a protected name on behalf of a group of producers must describe the link between the product's qualities and the geographical area of production and provide evidence that the product originates from that area. However, the Commission has exclusive authority to decide whether a name is generic (see the Severi judgment para. 44).²¹⁴

Initially, a proposal was made,²¹⁵ to draw up a non-exhaustive list of generic names (see the First PGI/PDO Regulation Article 3(3)). However, that proposal was later withdrawn²¹⁶ and for good reasons: Such a list could be only indicative and never conclusive.²¹⁷ Further, terming certain products as “generic”, without clearly defining a minimum set of product requirements, could in itself facilitate a race-to-the-bottom.²¹⁸

Generic refers to a common understanding about the characteristics of a food product, determined by factors such as production and consumption as well as law, among other criteria.²¹⁹ Determining whether a name, traditionally relating to an area, has become generic is based on a case-by-case evaluation and on vulgarising or breaking the link between the designation and the territory,²²⁰ which is essential for the intellectual property protection provided under the quality scheme.²²¹

²¹³ Feta I, Joined cases 289/96, 293/96 and 299/96, Judgment of the Court of 16 March 1999, Kingdom of Denmark, Federal Republic of Germany and French Republic v Commission of the European Communities.

²¹⁴ Severi, Case 446/07, Judgment of the Court (Fourth Chamber) of 10 September 2009, Alberto Severi v Regione Emilia Romagna.

²¹⁵ European Commission, “Proposal for a Council Decision drawing up a non-exhaustive, indicative list of the names of agricultural products and foodstuffs regarded as being generic, as provided for in Article 3(3) of Council Regulation (EEC) No 2081/92”, Com (1996) 38 Final.

²¹⁶ European Commission, “Communication from the Commission – Withdrawal of Commission Proposals which are no longer of topical interest”, Com (2004) 542 Final.

²¹⁷ London Economics, “Evaluation of the CAP policy on protected designations of origin (PDO) and protected geographical indications (PGI)”, p. 264, concluded that a list of generic names is unlikely to reduce uncertainty.

²¹⁸ For more about the race-to-the-bottom, see MacMaoláin, C. (2001). Free Movement of Foodstuffs, Quality Requirements and Consumer Protection: Have the Court and the Commission Both got it Wrong? See also Chapter 9.

²¹⁹ In the Feta II judgment, Joined cases 465/02 and 466/02, Judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities, the Court assessed the generic character of the name “Feta” by examining 1) the production situation inside and outside Greece, 2) the consumption of Feta and the perception of consumers inside and outside Greece, 3) the existence of national legislation specifically relating to Feta, and 4) the way the name was used under Community legislation.

²²⁰ See the Severi judgment, Case 446/07, Judgment of the Court of 10 September 2009, Alberto Severi v Regione Emilia Romagna, para. 51.

²²¹ Some of the most discussed and analysed cases concerning the generic nature of food names relate to registration of the name “Feta”. For an overview of the cases, see O’Conner, B., and Kireeva, I. (2003). What’s in a Name? The “Feta”

In the Grana Padano judgment,²²² the General Court summarised case law on the criteria for evaluating “genericness”, in para. 65, and concluded that following is relevant to determining whether a name has become generic (in this case Grana): “...*the quantity of goods which bear the name in question and are produced using non-traditional methods as against the quantity of goods produced using traditional methods, the market share held by goods bearing the name in question which were produced using non-traditional methods as against the market share held by goods produced using traditional methods.*” This confirms the Feta judgments and further suggests some sort of “majoritarian approach” to “genericness”, thereby confirming that the generic nature of a certain food name is based on a common European perception of that name.²²³

In an effort to override national laws permitting common uses of protected names, the PGI/PDO Regulation establishes that protected/registered names may not become generic (see Article 13(2)).^{224,225} But prior to registration, generic names may become generic (see the Feta cases). In the Feta II case, the Advocate General²²⁶ analysed why names that describe a product with a particular origin suddenly can become generic terms through popular usage. The reasons are attached to competitors’ intentions to take advantage of an established reputation of the name, followed by good faith use of the name as its geographical link weakens because of passivity among those affected,

Cheese Saga, For general discussions on “privatising” expressions of the common language, see Jokuti, A. (2009). Where is the What if the What is in Why? A Rough Guide to the Maze of Geographical Indications.

²²² Grana Padano, T-291/03, Judgment of the Court of First Instance of 12 September 2007, Consorzio per la tutela del formaggio Grana Padano v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

²²³ For more on the majoritarian approach in general in EU case law, see Maduro, M. P. (1999). *We, The Court*. See also European Commission, “Proposal for a Council Decision drawing up a non-exhaustive, indicative list of the names of agricultural products and foodstuffs regarded as being generic, as provided for in Article 3(3) of Council Regulation (EEC) No 2081/92”, Com (1996) 38 Final, p. 4. This decision determined that the generic character of names is based on a majoritarian approach.

²²⁴ Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 101. Despite numerous articles on “genericness”, no articles, to the author’s knowledge, analyse or discuss the exact content of Article 13(2). Therefore, an analysis is provided here.

²²⁵ Trademark protection can cease, and economists Landes and Posner argue in Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*, pp. 294–295, that this should be the case when “*the costs of continued protection (deadweight losses resulting from higher prices, higher costs to rivals in using alternative words, and the costs of licensing and defending the trademark) exceed its benefits (less consumer confusion, lower search costs and the gains associated with the incentive of firms to develop high quality goods).*” No similar reasoning has been provided in relation to PGI/PDOs.

²²⁶ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 10 May 2005, Feta II, Joined cases 465/02 and 466/02, Judgment of the Court of 25 October 2005, Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities, paras. 134–135.

consumers and authorities.²²⁷ Contrary to trademark law, the generic nature of a geographical name is linked only rather indirectly to passivity of the producers in the geographical area; that is, less responsibility exists for businesses to secure the distinctiveness of a geographical name. Following registration, no obligation exists because a registered name may not become generic. However, paradoxes surround this rule.²²⁸

First of all, the PGI/PDO Regulation neither obliges Member States to take certain steps to prevent a protected name from becoming generic, thereby illustrating a lack of consideration concerning the rule's intention.²²⁹ Second, an obligation to prevent unlawful use is an obvious way to strengthen the protection of registered names, but it also ensures that the names do not become generic in consumers' minds. Paradoxically, consumers' perception of a name is decisive prior to registration, which was the case in the Feta II judgment,²³⁰ but holds no importance past registration.²³¹ Third, the scope and aim of Article 13(2) can be questioned when considering the CJEU's conclusions in the Parmesan judgment.²³² In that case, the Commission brought an action against the German Government for failure to fulfil its obligations by refusing to proceed against the use of the name "parmesan" on products in its territory that did not comply with the specification for the PDO "Parmigiano Reggiano". As mentioned above, the Court concluded that "parmesan" could not be used because it evoked Parmigiano Reggiano. Therefore, the nature of the name "parmesan" and its

²²⁷ Note that the English version only refers to passivity by consumers and authorities, but that the French, Danish, German and Swedish versions also refer to passivity among other stakeholders ("those affected") ("des intéressés", "de berettigede", "der Betroffenen" and "de berördas"), which must indicate the traders/businesses producing the product in the original way in the geographical area.

²²⁸ None of the legal texts on PGI/PDOs address the rationale behind and the paradoxes in Article 13(2).

²²⁹ This is also confirmed in the Parmesan judgment, Case 132/05, Judgment of the Court of 26 February 2008, Commission of the European Communities v Federal Republic of Germany. However, in the Quality Schemes Proposal, Member States are obliged to take steps to prevent unlawful use of a PGI/PDO as well as control the use of registered names by surveillance of such use and pre-market approvals (see Articles 13(3), 33(3) and 34 of the proposal). Similarly, Article 42 of this proposal lays down the role of groups, focusing on their contribution to quality assurance of the products sold under protected names. See also Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation, article 118m(4), concerning designations of origin, geographical indication and traditional terms in the wine sector).

²³⁰ See Chapter 2, footnote 220.

²³¹ For a similar view concerning GIs in general and not the specific rule of Article 13(2), see Stern, S. (2007). Are GIs IP?

²³² Parmesan, Case 132/05, Judgment of the Court of 26 February 2008, Commission of the European Communities v Federal Republic of Germany.

potential generic nature are irrelevant.²³³ However, the CJEU assessed the generic nature of the name and concluded, in para. 57, that “*the Federal Republic of Germany has [...] failed to show that the name ‘Parmesan’ has become generic*”. This indicates the uncertain borderlines between protected and generic names; if “Parmesan” had become generic could it then be used or should the name still be prohibited because it evoked “Parmigiano”, and if this was the case why did the generic/non-generic nature of the name?

In addition to the above, some confusion has existed regarding what is entailed by “*may not become generic*”. A closer look at the different language versions of the previous, current and proposed rules as well as parallel legislation suggests that confusion is surrounding the rule provided in Article 13(2):²³⁴

	English	French	German	Danish	Swedish
First Regulation, article 13(3)	“ <i>may not become</i> ”	“ <i>ne peuvent devenir</i> ”	“ <i>können nicht zu ... werden</i> ”	“ <i>kan ikke blive</i> ”	“ <i>får inte bli</i> ”
Current Regulation, article 13(2)	“ <i>may not become</i> ”	“ <i>ne peuvent pas devenir</i> ”	“ <i>dürfen nicht zu ... werden</i> ”	“ <i>må ikke blive</i> ”	“ <i>får inte bli</i> ”
Proposal, article 13(2)	“ <i>may not become</i> ”	“ <i>ne peuvent pas devenir</i> ”	“ <i>dürfen keine ... werden</i> ”	“ <i>må ikke blive</i> ”	“ <i>får inte bli</i> ”
Single CMO, ²³⁵ article 118m	“ <i>shall not become</i> ”	“ <i>ne deviennent pas</i> ”	“ <i>dürfen nicht zu ... werden</i> ”	“ <i>bliver ikke</i> ”	“ <i>får inte bli</i> ”

The English and Swedish versions have consistent wordings, except for that in the Single CMO. The French version has almost consistent wording; however, the wordings in these three language versions seem ambiguous. That ambiguity is confirmed by the German and Danish versions of the different Regulations. Compared with “können/kan”, “dürfen/må” suggests an obligation to prevent the name from becoming generic. Such an obligation is, as mentioned, not articulated in the current rules. However, in the Severi judgment,²³⁶ the Court provided some guidance by stating that the “may not” should be

²³³ In this regard, note that none of the derogations from protection or the rules on co-existence would apply to the specific case.

²³⁴ Nowhere in the legal texts is there an explanation of these different wordings.

²³⁵ Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). This also was the wording of the previous rule; see Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, article 45(3).

²³⁶ Severi, Case 446/07, Judgment of the Court of 10 September 2009, Alberto Severi v Regione Emilia Romagna.

interpreted as “cannot”. Para. 47 states:²³⁷ *“Article 13(3) of Regulation No 2081/92, as amended, provides that names which are (already) protected cannot become generic. It does, admittedly, follow as an a contrario conclusion from that provision that names which are not yet protected, on the ground that they are the subject of an application for registration, may become generic, unless, by reason of some protection already in force, there is something to prevent this happening.”*²³⁸ The judgment thus confirms that the registration prevents the name from becoming generic, and verifies the ambiguous wordings of the provisions.

Registration is further important in relation to the general prohibition against the use of misleading names. It clearly follows from the Severi, Parmesan and Feta II judgments that names which are not registered can potentially be misleading; however, as soon as a name is registered as a PGI/PDO, consumers’ expectations have been considered and whether consumers in a single (or several) Member State(s) are misled at some point in time is not important.²³⁹

4.3.3 Other geographical names

In addition to PGIs and PDOs, other types of geographical names exist. These are:

1. Geographical names with no link to country or area of production, such as “Danish Pastries” and “Frankfurter Sausage”, where the geography indicates characteristics of a recipe originating from Denmark or Frankfurt.
2. Geographical names with links to origin, but with no specific link to quality; for example, “Made in Finland”

²³⁷ This is confirmed for spirits in the Cognac judgment, Joined cases 4/10 and 27/10, Judgment of the Court (First Chamber) of 14 July 2011, *Bureau national interprofessionnel du Cognac v Gust. Ranin Oy*, para. 51.

²³⁸ The French wording is “*ne peuvent devenir*”; the German, “*nicht . . . werden können*”; the Danish, “*ikke kan*” and the Swedish, “*kan...inte bli*”.

²³⁹ This is contrary to the rules for trademarks, according to which a misleading trademark can be liable to revocation, according to article 12 (2) of the Trademark Directive (Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks) and article 51 (1)(c) of the Community Trademark Regulation (Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark). See Chapter 6, Section 4.3. for more on potentially misleading geographical names and see Chapter 8 for more on the prohibition against the use of misleading names.

These names cannot be protected under the PGI/PDO Regulation, and therefore are regulated by the horizontal labelling rules. Chapter 6 provides an analysis of valid law concerning the use of geographical names.

5 Concluding remarks

Three different ways of regulating food naming within the EU have been presented above. Producers always have to comply with the general horizontal labelling rules, unless specific vertical rules replace the horizontal rules. For some products, the labelling must comply with all the rules. Therefore, the rules are heavily intertwined. Yet, the rules, and especially the objectives behind them, differ greatly. This analysis indicated that four main objectives are recognised in the different rules: the functioning of the Internal Market, consumer protection, fair competition²⁴⁰ (by means of protection of intellectual property) and social objectives. The economic rationales behind these objectives are addressed in Chapter 3.

²⁴⁰ The term “fairness” is analysed in Chapter 8.

CHAPTER 3: RATIONALES BEHIND FOOD NAMING LEGISLATION

1 Introduction

In general, market interventions are important because without some intervention and regulation, the market cannot function. Market failures may occur for various reasons, such as because asymmetric information exists (the seller of a product has more or better information than the buyer).¹

Legislation on food naming is exactly market intervention that exists for different reasons and rationales.

Chapter 2 identified four main objectives behind the three sets of rules related to food naming: free movement, consumer protection, fairness (by protection of intellectual property) and social objectives. For a deeper understanding of the rules on food naming, this Chapter analyses the objectives applying economic theory to explain the rationales behind the different objectives and their interconnections.

2 Free movement as an objective

Free movement of goods such as food can be reached by abolition of trade barriers, either removing national laws hindering free movement or adopting rules facilitating such.² Trade barriers or entry barriers lead to market power and pricing above the competitive level.³ National legal names – which, for example, may regulate ingredients that can be added to beer – may impede trade from other countries.⁴ Making cross-border trade easier and enhancing competition through open markets

¹ See Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis*, especially p. 54.

² For more on free movement and facilitation of trade, see Pelkmans, J., “European Integration: Methods and Economic Analysis”, especially chapter 1.

³ See Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis*, especially p. 56.

⁴ See Chapter 1, Section 4.1.2.

has positive effects on supply and price levels, improving overall welfare.⁵ This is the economic rationale for free movement of goods.

One way that EU law on food names secures competition across borders is through harmonisation of labelling requirements. This harmonisation ensures that businesses in general only have to comply with the harmonised rules rather than many differing national rules. Further, it also ensures that consumers are protected by providing them with a minimum amount of information.⁶ Market interventions must strike a balance between the costs of intervention and the benefits to businesses and consumers; therefore, there are limitations on what and how much is regulated. For example, the obligations following from the labelling rules are limited. This indirectly follows from the *Sauce Béarnaise* judgment,⁷ where the Court stated in para. 36 (emphasis highlighted):

“Contrary to the submission of the German Government, it does not follow that, because consumers do not sufficiently distinguish between the various methods of manufacture, the competitive advantage which certain producers may derive from the use of less expensive products cannot be regarded as permissible. As observed above, for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which, pursuant to Article 6 of the Directive, must appear on the labelling; in any case, as the Advocate General observed at point 40 of his Opinion, it is open to producers to draw the attention of such consumers to the fact that traditional ingredients are used.”

In this case, the German rules, which were considered to restrict cross-border trade, could not be justified on the grounds of consumer protection and fairness in trade (indirectly, the production of quality products). The EU labelling rules already protected consumers and enhanced competition and free trade by establishing a minimum amount of information that all

⁵ For micro- as well as macro-economic benefits of removing barriers to trade within Europe, see Cecchini, P., et al, (1988). *The European Challenge, 1992, the Benefits of a Single Market*. See also Gerber, D. J. (1994). *Constitutionalizing the Economy: The German Neoliberalism, Competition Law and the “New” Europe*.

⁶ For more on consumer protection, see Section 3.

⁷ *Sauce Béarnaise*, Case 51/94, Judgment of the Court of 26 October 1995, *Commission of the European Communities v Federal Republic of Germany*.

businesses must provide. If the German manufacturers of Béarnaise sauce did not think the mandatory rules provided optimal knowledge on their products' competitive differences, then it was up to the producers to highlight these qualities themselves.

The conclusion in the Sauce Béarnaise judgment establishes a link between free movement, fair competition and consumer protection – a link that is natural because of the similarity in economic rationales behind securing free movement, fair competition and consumer protection, that is, improving overall welfare through correction of market failures. Further, the judgment clarifies that businesses themselves must take responsibility, at least to a certain degree, to secure fair competition by highlighting their products' distinguishing features.⁸

3 Consumer protection as an objective

According to Article 169 TFEU, general prime objectives of the EU are to (1) promote consumer interests, (2) ensure consumer protection and (3) promote consumers' rights to information. The three objectives of article 169 TFEU are linked to the protection of health, safety and economic interests. Within food law, the objectives all appear relevant, and they are clearly intertwined, perhaps most clearly in relation to allergens and health and nutrition claims.

When legislators adopt rules to protect health and safety interests, they are concerned with protecting consumers from so-called market-related risks.⁹ Legislation can internalise externalities, such as health costs related to unsafe food,¹⁰ by prescribing that foods must be safe¹¹ and such as

⁸ See Chapter 5 concerning the alteration of the conclusion in the Sauce Béarnaise case. Chapter 8 discusses whether fair competition, excluding protection of intellectual property, is in itself an aim in EU law.

⁹ In this thesis, the term “market related risk(s)” is used broadly to characterise risk(s) associated with participating in the market, which brings externalities because of suboptimal choices; for example the purchase of unsafe, unhealthy or low-quality products is seen as having market-related risks. The term is borrowed from Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*. Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis* uses the term “risk regulation”; see p. 54. Golan, E., et al. (2001). *Economics of Food Labeling*, p. 138 uses the term “social welfare consequences”, thereby referring not only to the individual risks of consumption, but also to the fact that food consumption can affect the welfare of others.

¹⁰ See Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 25.

pollution by avoiding certain ways of production and consumption. In food law, requiring certain risk information to be provided, such as information on allergens, also protects consumers against market-related risks.¹² Nevertheless, in some cases, informing consumers about risks or lower quality is not sufficient protection, and measures are necessary to remove such market-related risks. Setting minimum safety standards, removing the risk of unsafe food and establishing minimum quality standards are ways to achieve such protection.¹³

Rules adopted to protect economic interests and the right to information are primarily aimed at improving consumers' role in the market by addressing market failures such as asymmetric information.¹⁴ Asymmetric information implies search costs¹⁵ for consumers and risk of suboptimal choices.¹⁶ Search costs are transaction costs, and individuals, as well as organisations, will rationally attempt to economise on transaction costs.¹⁷ By requiring disclosure of a certain amount of information and establishing quality standards for information, search costs can be curbed, resulting in overall improved efficiency.¹⁸ Therefore, this type of protection is clearly attached to the necessary information and is linked to consumers' choices.¹⁹

¹¹ Such a rule is found in the General Food Regulation, article 14. Similar rules on health issues are found in Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, in which requirements such as for the use of the term "light" are set down.

¹² See in this regard, Golan, E., et al. (2001). *Economics of Food Labeling*, p. 138.

¹³ For a discussions concerning quality, see Lauterburg, D. (2001). *Food Law: Policy and Ethics*, p. 119, which states: "In food law, the issues of quality usually arise in relation to the composition of food." See also the Commission of the European Communities, Green Paper on agricultural product quality: Product standards, farming requirements and quality schemes, COM(2008) 641 final, p. 4: "...EU farmers' most potent weapon is 'quality'...Quality is about meeting consumer expectation." Grunert, K. (2005). *Food Quality and Safety: Consumer Perception and Demand*. concludes that consumers tend to regard quality in relation to food as concerning taste, health, convenience and, for some, process characteristics.

¹⁴ Economic theory focuses on information acquisition as a matter of *search* and *experience*. See Stigler, G. J. (1961). *The Economics of Information* and Nelson, P. (1970). *Information and Consumer Behavior*.

¹⁵ Search costs will rise with the amount and complexity of the products among which consumers have to choose; see Nelson, P. (1970). *Information and Consumer Behavior*.

¹⁶ For more on asymmetric information and consumers' choices, see Section 3.1.

¹⁷ For more on transaction costs in economics, see Williamson, O. E. (1985). *The Economic Institutions of Capitalism*, Chapter 1.

¹⁸ Efficiency is here defined as wealth maximisation combined with distribution of wealth between parties in accordance with utility maximisation; see Posner, R. A. (1984). *Wealth Maximization and Judicial Decision-Making*.

¹⁹ See Stigler, G. J. (1961). *The Economics of Information*, p. 213, which states "*knowledge is power*"; however, accepting that knowledge to make best-value choices implies search costs. The economics of information and consumer choices is addressed throughout this thesis.

Correction of market-related risks through the setting of quality standards implies greater interference in the market than does adjusting for asymmetric information.²⁰ In consumer policy the two different types of market correcting rules – removal of market-related risks e.g. through quality and risk information – are often balanced against each other because the more information provided for consumers, the less protection against market-related risks is generally necessary.²¹ It is not possible to draw clear lines between rules aiming at correcting market-related risks and rules addressing the asymmetric information problem. Often rules will express both types of market interventions, and both types of rules can be seen as lowering search costs, however, by addressing different problems.

Somewhere in between these two ways of regulating the food industry is the issue of naming. The labelling rules, prescribing the obligation to state the name is clearly addressing the asymmetric information problem. The Eurofoods rules and the Quality Schemes set standards for composition, production and so on, and in this sense, despite no articulated aim, protect consumers from the risks of buying a substandard product.²² At the same time, these rules address an asymmetric information problem as they ensure all food products that carry a certain name have identical compositions.²³ This removes the need to comprehend complex information about ingredients, production ways or origin,²⁴ and very importantly, lowers search costs through guaranteeing a certain quality.²⁵ Recital

²⁰ Some term the choice of adjusting asymmetric information for a more “market-oriented approach”. See for example Micklitz, H. W. (2009). Jack is Out of the Box - The Efficient Consumer-Shopper and Clifton, J., Díaz-Fuentes, D., Fernández Gutiérrez, M., and Revuelta, J. (2011). *Is Market-Oriented Reform Producing a “Two-Track” Europe? Evidence from Electricity and Telecommunications*.

²¹ A more market-oriented approach that focuses on transparency is by many considered the main method of consumer protection today, a method criticised for failing to address issues such as bounded rationality. See Micklitz, H. W. (2009). Jack is Out of the Box - The Efficient Consumer-Shopper and Trzaskowski, J. (2011). Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive. According to Article 1 of the Unfair Commercial Practices Directive, the purpose of regulating commercial practices - which includes label information of other products - is to protect consumers’ economic interests. This directive is clearly related to correcting asymmetric information. For much more on the Directive, see Chapter 8.

²² Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 593, suggests that food standards are a means of protecting consumers against market-related risks, (what is here termed “market-replacement”). See below, Section 3.2.

²³ See Golan, E., et al. (2001). Economics of Food Labeling, pp. 130-131. See also Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis* p. 57, which characterises the costs of transactions to the parties involved (such as the cost of buying the “wrong” product) as “internalities”.

²⁴ A primary question is why some food products (names) should be regulated in one way and others another way. This thesis does not address this question. Chapter 9, Section 2.2.2 includes an analysis of the difference between restrictive

17 of the FIR illustrates how the labelling rules indirectly focus both on protecting consumers from market-related risks and on solving the problem of asymmetric information. In the recital it is stated that one of the prime considerations behind mandatory food information is enabling consumers to identify foods and make choices that suit their individual dietary needs.

3.1 Asymmetric information and consumers' choices

Consumer protection is enhanced when EU legislation on food labelling is enacted to replace national rules that are unenforceable because of their restrictions on cross-border trade. European labelling rules are primarily concerned with correcting the market failure of asymmetric information, which results in irrational purchase decisions and inefficient allocation of resources.²⁶ Labelling makes inspection of the product easier, lowering search costs. Consumers' rights to information must be secured through legislation because of the imbalance of power between producers and consumers.²⁷ The Food Information Regulation provides for informed choices by requiring that relevant information be displayed.

When buying food, consumers select between similar or identical foods, using the food name as an identifier to make the necessary comparisons.²⁸ This explains why providing information about the name of the food is mandatory (see the FIR, Article 9). According to Article 7 of the Food

national measures justified as correcting problems of asymmetric information versus correcting problems related to market-related risks.

²⁵ See Economides, N. S. (1988). *The Economics of Trademarks*; Schechter, F. (1927). *Rational Basis of Trademark law*; Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*.

²⁶ Labelling rules can be said to aim at providing a Kaldor-Hicks optimal solution by improving consumer benefits at a cost to producers, in a way to have the total benefit exceed total costs. See Beales, H., Craswell, R., and Salop, S. C. (1981). *The Efficient Regulation of Consumer Information*, p. 493. Determining efficient allocation is complex, if not impossible.

²⁷ See Chapter 8, Section 3.1 for a definition of the consumer as the weaker contractual party. See also Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C 92/1-16, p. 3, and Merrill, R. A., and Collier, E. M. (1974). "Like Mother Used to Make": An Analysis of FDA Food Standards of Identity, p. 596, which describes the failure of American manufacturers to voluntarily provide information.

²⁸ Today, many technological tools for comparing products exist to enable consumers to make their choices; see Commission of the European Communities, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region, A Better Functioning Food Supply Chain in Europe", Com (2009) 591, p. 8. However, consumers still need to find the products to compare, which may be identified exactly by name.

Information Regulation, food information, including the name, shall be accurate, clear and easy for the consumer to understand. Access to clear, consistent and evidence-based information is necessary for making choices.^{29,30}

A focus on consumers' choices initiates reflections on what governs such choices. Behind every choice are governing motives, thoughts, considerations or interests. According to Article 3, the Food Information Regulation seeks a high level of consumer protection by enabling consumers to make informed choices, particularly with regard to health, economic, environmental, social and ethical considerations.³¹ Thus, the FIR broadly addresses the issue of what governs choices, and thereby places emphasis hereon. Further, in the first Recital of the General Food Regulation, the free movement of safe and wholesome food is mentioned as an essential aspect of the internal market that *"contributes significantly to the health and well-being of citizens, and to their social and economic interests."*

The EU consumer policy strategy 2007–2013 also focuses on what governs consumers' choices, here termed "the best choice".³² A consumer's "best choice" is attached to a "value-for-money" agenda,³³ whether value concerns only economic considerations (price and quality)³⁴ or also

²⁹ This is mentioned in the Proposal to the FIR, which is considered preparatory work. Informing and educating consumers are generally on the European agenda; see http://www.eaea.info/doc/eaea/05_EAEA_Activity_Report_2007.pdf and <http://www.dolceta.eu/>; see also http://ec.europa.eu/consumers/empowerment/cons_education_en.htm

³⁰ The importance of accurate and adequate information for the functioning of markets has long been accepted in economic theory; see Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 6.

³¹ The term "considerations" is here used to characterise what lies behind choices, although the term "interests" is also used in the legal text. For now, the rationality of consumers is not considered; theories based on rational choices are simply applied. In Chapter 8, Section 3.1 an analysis of the notion of "the consumer" is provided, including remarks on consumer rationality.

³² Commission of the European Communities, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007–2013", Com (2007) 99 Final, p. 5–6. Decision No 1926/2006/EC of the European Parliament and the Council adopts the Consumer Programme for 2007–2013.

³³ For an overview on protection of consumers' economic interests, see Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C 92/1-16, pp. 6–8.

³⁴ In relation to economic considerations, the link between price and quality is clearly articulated in Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, 1981 OJ C 133/1-12, especially para. 3.

environmental, ethical or social considerations.³⁵ With inspiration from economic theory, value is thus a matter of utility or benefit and not only a matter of wealth.³⁶ For this reason, “value-for-money” appears to be an appropriate measure for evaluating whether consumers make the best choice based on the information provided, governed by whatever considerations. When considering how to evaluate potentially misleading names, “value-for-money” seems relevant; according to the general prohibition against misleading consumers it must be assessed whether a certain business practice has caused the consumer to take a different transactional decision than he would otherwise have taken, thus whether the decision is not the best “value-for-money” choice based on consumer considerations. The legislation introduces a variety of considerations assumed to underlie consumers’ choices and which could be accounted for when deciding whether a food name is misleading or not.

Social considerations, mentioned in both the FIR and the GFR, are not defined in the legislation, and *social*, in a broader sense, covers a wide variety of policy areas, interests and rights.³⁷ Clearly, consumer protection and social policy are linked,³⁸ especially in relation to issues of food safety and health. However, social aspects are relatively new within the area of consumer information.³⁹ Social considerations could be defined as an interest in how the individual choice affects others.⁴⁰ For example, the European Economic and Social Committee⁴¹ characterised consumers as more than mere

³⁵ See Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 3.

³⁶ My definition is heavily inspired by Coase, R. H. (1960). The Problem of Social Cost, and also by Posner, R. A. (1984). *Wealth Maximization and Judicial Decision-Making*.

³⁷ See http://ec.europa.eu/policies/employment_social_rights_en.htm

³⁸ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, under the heading “promotion of consumer interests”, states that the consumer should increasingly take part in the preparation of social decisions concerning him/her. For literature on social aspects and consumer protection, see Bakardjieva Engelbrekt, A. (2010). *Institutional Theories, EU Law and the Role of the Courts for Developing a European Social Model* and Szyszczak, E., and Davies, J. (2011). *Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest*, p. 161, which classifies consumer rights as the second generation of social law (whereas the first generation concerns “access rights”).

³⁹ A search of EUR-Lex on 10 May 2012 for “social” (title and text) and “interest”/“consideration” (title and text) and “consumer” (title) showed clear links between social aspects and consumer protection; however, the *social interests/considerations* of consumers are only mentioned a few times. A reference to *social factors* is also given in the Unfair Commercial Practices Directive.

⁴⁰ This definition is inspired by Coase, R. H. (1960). The Problem of Social Cost, which deals with how actions by individuals affect others and that social arrangements should be devised in regard to all costs (including opportunity costs) and benefits. Clearly, Coase deals with optimal allocation in society, whereas the rules on food labelling only speak of consumers’ social interests. However, parallels can be drawn.

users of products and services, but also as active players in society with interests in policies such as sustainable development. Following this opinion, the Committee suggested a review of Article 169 TFEU (at that time Article 153 TEF) to include parameters for high-level consumer protection, such as the promotion of consumers' legal, economic, social and cultural interests.⁴²

It can be assumed that *social considerations* relates to socially conscious consumption, for example, of ethical, organic and sustainable produce and fair trade⁴³ based on the value attached to such consumption. For this reason social considerations also are attached to the “best choice” and the “most-value-for-money” for the individual consumer. Initially, the focus on consumers' consideration does not appear to bring substantive changes, but it serves to illustrate that consumers are perhaps influenced by more considerations when purchasing food, compared to other products.⁴⁴

Therefore, the introduction of social considerations does not change the initial objectives of labelling legislation. Strangely enough, no obligations exist to provide information to meet these social considerations.

3.2 *Quality standards, market related risks and asymmetric information*

Standardisation of food provides a certain quality level for that food, which prevents consumers from buying substandard products that might be unhealthy or so forth.⁴⁵ Setting requirements for

⁴¹ Opinion of the European Economic and Social Committee on the Legal Framework for Consumer Policy, 2006, OJ C 185, p. 74. The opinion has not been followed. See Commission follow-up to the opinions of the Economic and Social Committee delivered in the second quarter of 2006 at http://www.eesc.europa.eu/resources/docs/suivi_avis_2t_06_en.pdf.

⁴² See also Weatherill, S. (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation, p. 37.

⁴³ Commission communication on the EU Consumer Policy strategy 2007–2013, in which the Commission characterises social labelling as fair trade and ethical trade, para. 53. Social aspects are also greatly attached to a concern for protection of farm workers in Commission of the European Communities, “Green Paper on agricultural product quality: Product standards, farming requirements and quality schemes”, COM (2008) 641 final. This is not directly related to consumers' choices, however, and is addressed below in Section 4. The trends in food policy confirm development in social aspects/considerations; see http://ec.europa.eu/food/food/sustainability/index_en.htm and Opinion of the Economic and Social Committee on “Ethical Trade and Consumer Assurance Schemes, 2006 OJ C 28, p. 72 et seqq., <http://www.welfarequality.net/everyone> and Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 14.

⁴⁴ See Chapter 8, Section 3.1.1 for a discussion about the role of consumers when purchasing food.

⁴⁵ The term quality generally is not used in relation to Eurofoods, but rather in relation to the Quality Schemes. However, the terminology is a bit mixed up. See Commission of the European Communities, “Green Paper on agricultural product quality: Product standards, farming requirements and quality schemes, COM (2008) 641 final, p. 5 where marketing standards defining product requirements for extra-virgin olive oil is characterised as quality measures – rules which are normally related to the CMO.

production methods and requirements for the minimum amount of say, fruit in juices, are considered requirements that affect quality.⁴⁶ Such rules are found both in the Eurofoods legislation as well as in the Quality Schemes.

An example of a direct link between the name and quality in relation to Eurofoods exists where the standards have to be classified according to a system of quality; for example, fruit and poultry that have to be classified in classes Extra, I, II or A and B, or a system of size classes, such as egg sizes of XL, L, M or S. For the Quality Schemes, the link between quality and the name is the basis on which the system is grounded.

The minimum level of quality *de facto* both enhances the competitive market structure by setting a standard for comparisons (more homogeneous products),⁴⁷ and protects consumers who do not read or understand for example the list of ingredients.⁴⁸ Additives can be used to give a certain taste or colour and may substitute a previously used ingredient.⁴⁹ Therefore, fixing a minimum content of a certain ingredient will secure consumer confidence in the products they buy. Food standards help prevent dilution and reformulation of traditional foods, while at the same time serve as identification marks.⁵⁰ Some even argue that food (quality) standards “*characteristically emphasize the importance of ensuring minimum product quality, rather than the virtues of an open marketplace and free circulation.*”⁵¹

⁴⁶ See also O'Rourke, R., (2005). *European Food Law*, p. 101 and Twigg-Flesner, C., and Schulze, R. (2010). Protecting Rational Choice: Information and the Right to Withdrawal, p. 139. See also Broude, T. (2005). Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law, p. 20, arguing that rules protecting geographical names are “...to a large extent quality-oriented, aiming to set a minimum quality level...”

⁴⁷ See Colander, D. C. (2008). *Microeconomics*, Chapter 11.

⁴⁸ As noted in Schechter, F. (1927). *Rational Basis of Trademark law*, pp. 528–529: “*Preventing confusion is an important function of trademarks.*”

⁴⁹ For example, Von Heydebrand, H. (1991). *Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community*: Has the Court of Justice got it Wrong? discusses how the colouring of mixtures of butter and vegetable oils (blends/spreadable fats) could confuse consumers regarding the composition of the product, which is also one of the reasons why spreadable fats are regulated today. Chapter 5 addresses these difficulties related to product imitations in general.

⁵⁰ See Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 562.

⁵¹ See Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 33.

Economic theory can explain the value of assuring minimum quality. In the presence of market failures (both market-related risks and asymmetric information) and thus uncertainty, adverse selection will lead low-quality products to drive good-quality products out of the market, resulting in market collapse.⁵² Discerning exact information about product quality, especially for packaged products such as foods that cannot be directly examined, is difficult.⁵³ Solutions to this asymmetric information problem include guarantees or brand name goods,⁵⁴ which in this sense could be considered as private parallels to public regulation of quality.⁵⁵ However, whereas brand names only associate a certain level of quality with one specific product within a category, the regulation of standards secures quality of all products within that category. At the same time, quality standards also solve the problem related to externalities of buying substandards, most obviously where the quality standards may forbid adding unhealthy ingredients such as sugar, as is (now) the case for fruit juices (see Annex 1(II)(2) of the Fruit Juice Directive). The stated rationale for regulating Eurofoods or for the Quality Schemes do not mention correcting problems of asymmetric information or guaranteeing consumers a minimum level of quality; however, consumer protection against unfair competition is mentioned,⁵⁶ although a secondary aim.⁵⁷

⁵² See Akerlof, G. (1970). The Market for "Lemons": Quality Uncertainty and the Market Mechanism.

⁵³ See Friedman, M. P. (1967). Quality and Price Considerations in Rational Consumer Decision Making, p. 15.

⁵⁴ See Landes, W. M., and Posner, R. A. (2012). Trademark Law: An Economic Perspective, p. 275, which characterises reduction of search costs as the essential economic function of trademarks. See also Economides, N. S. (1988). The Economics of Trademarks.

⁵⁵ See Schmalensee, R. (1978). A Model of Advertising and Product Quality and Nelson, P. (1970). Information and Consumer Behavior, which both argue that the search costs for experience goods such as food are most efficiently minimised by choices based on brand names and trademarks. See also Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 13, characterising food as both search, experience and credence goods, but primarily experience goods.

⁵⁶ See Chapter 2, Sections 3.2 and 4.2.

⁵⁷ This also illustrates that the term "fair" is used in a rather inconsistent way.

The CJEU has positively recognised that for some products, protection against negative externalities and the market-related risk of buying a substandard items may be necessary. In the *Buet* judgment,⁵⁸ which concerned canvassing and sale of teaching materials, the Court stated in para. 14 (emphasis highlighted):

“Finally, it needs to be stressed that since teaching is not a consumer product in daily use, an ill-considered purchase could cause the purchaser harm other than mere financial loss that could be longer lasting. Thus it has to be acknowledged that the purchase of unsuitable or low-quality material could compromise the consumer's chances of obtaining further training and thus consolidating his position on the labour market.”

Similar arguments for forbidding the use of certain food names or for requiring certain standards of quality have not been put forward, but purchasing low-quality food because of a potentially misleading name could be characterised in some cases as an *ill-considered purchase* resulting in *longer-lasting harm other than mere financial loss*.⁵⁹

Despite good arguments for harmonising food names, in details, the Eurofoods rules may hamper innovation because of their rigidity.⁶⁰ The same could be said in principle about the names registered according to the Quality Schemes, to the detriment of consumers, of course. The Commission itself has explicitly accepted the costs to innovation from standardising food names.⁶¹ Further, the rules are not easy to understand, and even though composition and production requirements for products like “juice” and “nectar” are rather detailed, consumers are not

⁵⁸ *Buet*, Case 382/87, Judgment of the Court of 16 May 1989, R. Buet and Educational Business Services (EBS) v Ministère public.

⁵⁹ Misleading food information causing obesity-related health problems was central in the US case, *Pelman v. McDonald's Corp.*, 02-cv-07821, U.S. District Court, Southern District of New York (Manhattan), in which an American teenager brought litigation against the fast-food corporation MacDonald's.

⁶⁰ See Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, pp. 600–604, which argues that recipe standards both prevent innovation and raise barriers to entry.

⁶¹ In Commission of the European Communities, “Green Paper on agricultural product quality: Product standards, farming requirements and quality schemes, COM (2008) 641 final, p. 8, the Commission stated that standards could inhibit “the marketing of innovative or uncommon products, or the destruction of comestible produce.”

necessarily aware of the differences between the products bearing these names.⁶² Similarly, understanding the exact details of all the names registered under the Quality Schemes seems impossible. With this in mind, the value of correcting problems of asymmetric information through standardisation of quality becomes insignificant; the benefits of solving the problem of asymmetric information appears to be unable to outweigh these costs. However, the Eurofoods and Quality Schemes set minimum requirements for quality and are still *de facto* protecting consumers, especially from certain market-related risks.

4 Fairness, by protection of intellectual property, as an objective

The protection established by the EU Quality Schemes is parallel to intellectual property rights protection.⁶³ The classical reasons⁶⁴ for the existence and protection of intellectual property, including names, include 1) facilitating and enhancing of consumer decisions and 2) creating incentives for firms to produce desired quality.⁶⁵

The *raison d'être* of intellectual property protection aiming at creating incentives for firm to produce desired quality is attached to economic theories on public/common goods. A public good is defined as a good “*which all can enjoy in common in the sense that each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good*”.⁶⁶ A word (such as a food name) can be seen as a public good. Public goods markets are characterised by

⁶² See Ohm Søndergaard, M., and Selsøe Sørensen, H. (2008). Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning? Through the doctoral programme and teaching courses on labelling attached to this thesis, students and others were questioned on their knowledge of the differences between “juice” and “nectar”, and in many cases, the students demonstrated confusion.

⁶³ For more on PGI/PDO as intellectual property, see Rangnekar, D. (2009). The Intellectual Properties of Geography and Stern, S. (2007). Are GIs IP? The latter argues that GIs are not IP in traditional sense because they are not products of intellectual input.

⁶⁴ Of course, these are connected to the functions of trademarks: (1) origin function, (2) quality function and (3) investment/advertising function. See Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsføringsretten*, pp. 295–296.

⁶⁵ Gangjee, D. (2007). Say Cheese! A sharper Image of Generic use through the Lens of Feta, notes at p. 179: “...*certain aspects of GI law [...] only make sense when viewed from an unfair competition or free riding prevention perspective. The fig leaf of consumer protection is easily blown aside by sufficiently determined gusts of litigation, leading to embarrassment all round.*”

⁶⁶ Samuelson, P. A. (1954). The Pure Theory of Public Expenditure, p. 387.

the risk of free riding and opportunistic behaviour that can drive the markets to break down,⁶⁷ and therefore, regulatory interference is necessary.⁶⁸ By imposing exclusivity and limiting the use of a specific food name,⁶⁹ such free riding can be avoided, and the quality and reputation attached to the name can be upheld. Of course, consumers also benefit from lowering search costs.⁷⁰

The exclusivity in the Quality Schemes is provided only when a clear link between the geographical (and in some cases like “Feta”, the non-geographical) name and quality exist. Therefore, generic names are not protected because a protection of common names/words would result in competitive difficulties at the detriment to the whole of society.⁷¹ In this sense, the value of intellectual property rights is attached to the credibility of the identification mark and how consumers perceive it. The mark, like trademarks is an indication of source,⁷² in this case source of origin. The Quality Scheme system is governed by public registration and control, as well as by private parties who can initiate actions against free riders.⁷³ However, the problem of free riding also could be addressed by a simple trademark or collective mark protection, and for this reason, the economic rationale behind the rules cannot stand alone.⁷⁴

In the recitals of the PGI/PDO Regulation, encouragement of diversification to achieve a better balance between supply and demand on the markets is mentioned as an aim (see Recital 2).⁷⁵ In this

⁶⁷ See Landes, W., and Posner, R. (2003). *The Economic Structure of Intellectual Property Law*, p. 14. This is also characterised as “prisoners dilemma”; see Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 19.

⁶⁸ See Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis* p. 58, and Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 19. See Cecchini, P., et al, (1988). *The European Challenge, 1992, the Benefits of a Single Market*, p. 90, in which the author concluded that it is a matter preventing firms from short cutting to gain market profits.

⁶⁹ In this sense, changing the character of the word into the special category of public goods, namely club goods; see Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, pp. 19–23, which characterises protected geographical names as “club goods” because of the excludability attached to these names.

⁷⁰ To cite Stigler, G. J. (1961). *The Economics of Information*, p. 224: “‘Reputation’ is a word which denotes the persistence of quality, and reputation commands a price (or exacts a penalty) because it economizes on search”.

⁷¹ Landes, W., and Posner, R. (2003). *The Economic Structure of Intellectual Property Law*, pp. 99 and 187.

⁷² See Schechter, F. (1927). *Rational Basis of Trademark law*.

⁷³ Dévényi, P. (2011). *The New Proposal on Agricultural Product Quality Schemes - Quality Legislation on Quality Questions?* p. 160, which notes that the new proposal suggests a shift in who must bear the costs of control in the Quality Schemes system, see in this regard Chapter 2, Section 4.3.2.

⁷⁴ The social objectives are analysed in Section 5.

⁷⁵ For a citation of this recital see Chapter 1, Section 1.

sense, the economic objective attached to the protection of geographical names is completely opposite to the objective governing “Eurofoods,” which was a matter of standardisation. In the PGI/PDO Regulation, as well as in the very first proposal on PGI/PDOs,⁷⁶ the search for a better balance between demand and supply is attached to a change in consumers’ demand for more quality (see Recital 3). As motivation to meet this demand, producers are rewarded with an intellectual property right for producing quality food. The holder of such a protected right can prevent others from interfering with his business, resulting in reduced competition; therefore, the right holder can reap economic profits.⁷⁷ However, the point is not to motivate innovation, but rather to prevent it and to keep producing in the same way and, more importantly, with the same quality.⁷⁸

It could be questioned whether the aim of “better balancing supply and demand) should be addressed through legislation.⁷⁹ Actually, the Commission concluded in its 1985 communication, “*the tastes and preferences of consumers should not be a matter for regulation*”.⁸⁰ By rewarding quality production with an intellectual property rights protection, in order to meet consumers demand for higher quality, legislators exactly interfere with the market in matters related to consumers’ tastes and preferences. Such interference should be made only when consumer demand would not be met otherwise. Legislation in relation to PGI/PDOs does not address the rationality of interfering with consumer preferences.⁸¹ In other areas, such as origin labelling in general, the CJEU has consistently held that national rules obliging businesses to mark their products with origin constitute a restriction to free movement that cannot be justified on

⁷⁶ Proposal for a Council Regulation (EEC) on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Sec (90) 2415 Final, OJ 1991, C 30, p. 9.

⁷⁷ It is explicitly mentioned in the TSG Regulation, recital 3, that the protection provides economic operators with instruments to “*enhance the market value of their products*”. See also Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 16.

⁷⁸ Innovation is not completely excluded. A product specification can be changed (see Article 9 of the PGI/PDO Regulation).

⁷⁹ For some interesting remarks on when and why to regulate, see Pelkmans, J. (2006). *European Integration, Methods and Economic Analysis* chapter 4.

⁸⁰ European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final, p. 9. See also Chapter 1, footnote 84.

⁸¹ The interference in demand and supply can neither be reasoned by CAP objectives. It is an articulated aim of the CAP to “reinforced security of supply” (see Commission of the European Communities, “Perspectives for the Common Agricultural Policy – Communication to the Council and the Parliament”, Com (85) 333, p. 1). But the establishment of EU Quality Schemes is not really a matter of securing supply, and the Commission itself also acknowledges on the same page that focusing on consumers’ demand is different from objectives to stabilise markets (another central issue of the CAP).

consumer protection grounds.⁸² Businesses that want to distinguish themselves from their competitors are free to draw attention to the specific quality of their products,⁸³ which implies that the market will meet consumers' demands for quality. From this perspective, the regulation of PGI/PDO and food quality is a sign of EU acceptance that consumers might not always be rational agents, cannot always cope with information on their own and, in some cases, need protection against so-called market-related risks.⁸⁴ Further, this could illustrate that the economic objectives and rationales attached to regulating PGI/PDOs are of less importance than the social objectives behind the rules.

5 Social objectives

One of the primary concerns of the Common Agricultural Policy (CAP) always has been to provide economic support to EU farmers by securing minimum prices.⁸⁵ Although the CAP has developed since its introduction in the 1950s, one of its primary aims remains to support farmers' incomes. The social objectives related to the Quality Schemes also are attached to supporting farmers' income as a way to avoid depopulation of rural areas. Depopulation can have complex economic, social, institutional, technical, cultural, political and geographic causes and therefore, negative externalities.⁸⁶ Important negative macroeconomic consequences are imbalance of ecosystems, devaluated properties⁸⁷ and high rates of unemployment.⁸⁸

A further dimension is attached to the Quality Schemes: Besides supporting farmers, it is now a matter of “*also encouraging them to produce high quality products demanded by the market and encouraging them to seek new development opportunities, such as renewable environmentally*”

⁸² See Commission v UK, Case 207/83, Judgment of the Court of 25 April 1985, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, para. 21. For more on origin labelling, see Chapter 6.

⁸³ Ibid and the Sauce Béarnaise judgment, para. 36; see Section 2.

⁸⁴ In Chapter 8, Section 3.1, the concept of the consumer is analysed and discussed.

⁸⁵ Hartvig Danielsen, J. (2009). *EU-landbruksretten, landbrugets retsforhold I*, p. 14.

⁸⁶ Goetz, Stephen J. and Debertin, David L. (1996). Rural Population Decline in the 1980s: Impact of Farm Structure and Federal Farm Programs, p. 517 and Mann, S. (2005). The Depopulation of Rural Areas and the Farming System.

⁸⁷ See Sáez, L. A., Ayuda, M. I. and Pinilla, V. (2011). Public Intervention Against Depopulation as a Local Policy: Justifications from Spain.

⁸⁸ See Keynes, J. M. (1978). Some Economic Consequences of a Declining Population for discussions on chaining population and consequences hereof. See Stephen J. and Debertin, David L. (1996). Rural Population Decline in the 1980s: Impact of Farm Structure and Federal Farm Programs, and Mann, S. (2005). The Depopulation of Rural Areas and the Farming System. on different programs/system to support rural areas.

*friendly energy sources.*⁸⁹ Therefore, the traditional and implicitly quality products are linked to environmentally friendly production. As a general trend in the EU, the focus is on sustainability and the social benefits that follow.⁹⁰ Sustainable production will internalise negative externalities.⁹¹ In relation to the Quality Schemes, it is not simply left to the market to provide food with the characteristics that consumers demand. Rather, certain forms of production must be encouraged and awarded a quality mark reserved for producers complying with such production.

Finally, the social objectives attached to the Quality Schemes are considered to relate to culture as guardians of local identity⁹² and protection of tradition, heritage and history.⁹³ Cultural grounds are separate from economic.

6 Concluding remarks

Four very different objectives are attached to EU law on food naming, but these objectives are intertwined. In some cases, the objectives support each other, while in other cases, fulfilling one aim precludes achieving the other aims. This implies that when enforcing the rules a balancing of interest is necessary. The objective related to the functioning of the internal market is a matter of providing easy access to the internal market. This market should include competition along with rewards of intellectual property rights for businesses that supply quality food. In relation to consumer protection, the rules aim to address problems related to both asymmetric information and market-related risks. Social objectives are also part of EU food law and are linked to protection of rural areas and the prevention of depopulation and pollution.

⁸⁹ European Commission, Agriculture and Rural Development, “Common Agricultural Policy Explained”; see http://ec.europa.eu/agriculture/capexplained/index_en.htm

⁹⁰ See also European Commission, Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes, Com (2010) 733 Final, p. 7.

⁹¹ Coase, R. H. (1960). The Problem of Social Cost.

⁹² See Broude, T. (2005). Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law, p. 25.

⁹³ See Chesmond, R. (2007). Protection or Privatisation of Culture? The Cultural Dimension of The International Intellectual Property Debate on Geographical Indications of Origin, p. 387.

These various objectives and aims – and especially the economic rationale behind them – must be kept in mind when addressing the practical issues of the food industry and analysing valid law from a teleological approach. Further, established aims of the EU must be taken into consideration when considering how Member States can regulate food naming on their national markets, such as by justifying restriction to free movement.

PART 3: WHAT’S IN A NAME – FOOD NAMING PROBLEMS

*“One thing is certain: In this case, labelling does not resolve the problem. ‘Pasteurized yoghurt’? It is like saying ‘a blonde brunette’”.*¹

CHAPTER 4: PRECISION OF NAMES

1 Introduction

To fulfil the function of being a mandatory particular, a name must contain information enabling consumers to make an informed choice; in other words, the name must be beneficial to consumers.² Consequently, the name must be accurate, clear and understandable (see recital 26 and Article 7(2)).³ The general problem of precision in food names can be illustrated by the following examples from the Danish administrative practice:

In Case No 2007-Ø4-274-00134, a consumer complained about the marketing of a product under the name “fiske pinde” (“fish sticks”). The consumer found the name misleading because the product was made from squid. The administrative authority handling the complaint noted that although squid are not fish, they belong to the “fish and fish products” categorisation based on the regulation of additives.⁴ However, in the Combined Nomenclature,⁵ squid are placed under the chapter “fish and crustaceans, molluscs and other aquatic invertebrates”, and are part of the

¹ Du Bois, I. (1991). An Industry’s Point of View, p. 39.

² In some cases, providing information to consumers will impose costs on businesses, see Wilhelmsson, T., and Twigg-Flesner, C. (2006). Pre-contractual Information Duties in the *Acquis Communautaire*, p. 453. Providing precise names could cause costs to rise, especially when names have to be translated. This chapter focuses on a legal dogmatic analysis, rather than economic theory and cost-benefit approaches to valid law.

³ Many different terms are used in this thesis to characterise the precision requirements. The terms “precise”, “accurate” and “clear” are used interchangeably and refer to how exact the name is, that is, whether it is broad or narrow, but also to the requirement that the name be readable, legible and visible.

⁴ The regulation of additives is rather complex, but for a list of the different food categories, see Commission Regulation (EU) No 1129/2011 of 11 November 2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council by establishing an EU list of food additives.

⁵ Commission Regulation (EU) No 861/2010 of 5 October 2010 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

sub-chapter “molluscs”. No exact conclusion is found in the case, but it illustrates the difficulties related to precision of names; that is, whether a broad or narrow category determines the accurate name. The producer of the “fish sticks” was German, and the concept of mutual recognition would suggest that the Danish authorities could not prohibit the use of the name “fish sticks” if it was legally marketed there.⁶ However, if the use of the name were found to be misleading to Danish consumers, the prohibition against misleading food information would prevent use of the name. Therefore, the case also illustrates the need for clarification on how to solve the conflict between mutual recognition (Member State of production rules) and the prohibition against misleading names (Member State of sale rules).⁷ This is a central part of the thesis research question.

In another case concerning a contrary conflict, Case No 2007-N1-274-00768, honey was marketed under a very specific name, “honning fra brune bier på Læsø” (“honey from brown bees on Læsø”). According to a Danish Order on beekeeping on Læsø⁸ – in which a definition of the brown Læsø bee (*Apis Melifera Melifera*) is given – documentation must be presented in order to use this name. Very few will be able to fulfil the requirements to market honey as originating from the brown bees.⁹ A competitor, who was more qualified than the average consumer to notice non-compliance with the rules, initiated the case. As indicated in Chapter 2, Section 2.3, this case verifies that consumers have little chance of knowing all the many detailed rules of food naming and, therefore, do not always experience deception.

These cases illustrate that broad names may account for one type of problem, and narrow names for another. The required accuracy of a food name – whether it can refer simply to a category such as “cheese”, be sectorial such as “soft cheese” or cover a species such as “brie”¹⁰ – is regulated in EU

⁶ See Chapter 9 for more on the principle of mutual recognition.

⁷ In the FairSpeak survey, focus unfortunately has not been on how the origin of the food products influenced the national authorities’ decision.

⁸ Today Executive Order No 122 of 19 February 2009. The Danish Order on beekeeping in Læsø was central in Bluhme, Case 67/97, Judgment of the Court of 3 December 1998, Criminal proceedings against Ditlev Bluhme, where the combatibility with the free movement provisions was addressed, see also Chapter 9, Section 2.2.

⁹ It is unclear from the case whether the producer fulfilled the requirements.

¹⁰ The terms used here are inspired by Lister, C. (1993). *The Naming of Foods: The European Community’s Rules for Non-brand Food Product Names*, p. 179.

law only to a limited degree.¹¹ EU law on food naming generally provides a clear duty to disclose certain pieces of information, such as the name, but few substantive requirements exist concerning the quality of the information provided,¹² notwithstanding Eurofoods and Quality Schemes.

A clear example of rules addressing the accuracy of naming is found in relation to fishery and aquaculture products. The commercial name of the species is a mandatory particular (see Article 4(1)(a) of the CMO for fishery and aquaculture products).¹³ In this regard, Member States must draw up and publish a list of the commercial designations accepted in their territories at least for all the species listed in the Annexes to the CMO. The list must indicate the scientific names for each species, the names in the official language or languages of the Member State and, where applicable, any other name or names accepted or permitted locally or regionally. In addition, Member States must recognise designations listed by other Member States for the same species in the same language. No reference to these rules was made in the Danish “fish sticks” case, despite the fact that these rules clearly regulate the accuracy of names for fishery and aquaculture products.

As a second example, according to recital 37 of the Food Information Regulation (FIR), the term sodium cannot be used, but should be replaced by the term salt. This regulation aims to ensure that the final consumer easily understands the label. The salt/sodium ratio is defined in Annex 1.

As a third example, ingredients must be designated by their *specific names*, according to Article 18(2) of the FIR; however, no further explanation is given for what this implies.

According to Article 17(1) of the FIR, three different types of food names exist: *the legal name*, *the customary name* and *the descriptive name*. As shown in Chapter 2, a descriptive name is comprised of more words than legal and customary names, which might imply that a descriptive name is more precise. It also appears to follow from the FIR that the descriptive name is more precise because it must be used when the legal or customary name, in combination with other mandatory labelling

¹¹ Note that in Codex Alimentarius, General Standard for the Labelling of Prepackaged Foods, Codex Stan 1-1985 (last amended in 2010), the name of the food is defined in Section 4.1, Section 4.1.1. states: “*The name shall indicate the true nature of the food and normally be specific and not generic*”.

¹² The reason for this might be that the European countries have very different stances towards duties to disclose information; see Wilhelmsson, T., and Twigg-Flesner, C. (2006). Pre-contractual Information Duties in the *Acquis Communautaire*, p. 446 and p. 455.

¹³ Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products.

information, is not *sufficient* for consumers to understand the product's true nature. The descriptive name has to be *sufficiently clear* (see Article 2(2)(p)).

To be clear and precise, the name must contain the necessary information (be accurate) and also be legible and visible, of course.

Section 2 of this chapter addresses the difficulties related to accuracy of names through an analysis of name precision following from the Eurofoods rules and the Quality Schemes, so-called EU legal names. Section 3 provides an analysis of the horizontal rules to determine what these rules establish in relation to the quality and amount of information required, with a focus on customary and descriptive names. Section 4 includes an analysis of the rules on legibility and visibility, including a look at conflicts arising in relation to information overload and the rules on voluntary information.

2 Precision and uniformity of EU legal names

Where EU legal names exist, the names are very precise because the law governing such names is often detailed. Similar precision might be embedded in national legal, and customary names, but because national rules can differ, the precision of these is questionable.¹⁴

¹⁴ See Section 3 for more on this.

The nature of the products carrying names defined in the Eurofoods rules and in the product specifications for PGI/PDO foods is determined by law to precision. The parallel CMO and Common Custom Tariff rules also classify products and determine the nature to some degree. The obligation to comply with the rules and product uniformity follow from the rules, which the Court confirmed in the Böllmann judgment¹⁵ concerning the definition of “turkey rumps” (see paras. 8 and 9):

“...The descriptions of goods covered by these organizations [CMOs] must therefore have exactly the same range in all Member States...Although it is true that in the event of any difficulty in the classification of any goods the national administration may be led to take implementing measures and clarify in the particular case the doubts raised by the description of the goods, it can only do so if it complies with the provisions of Community law and subject to the reservation that the national authorities cannot issue binding rules of interpretation.”

The CJEU also has clearly indicated that the precision of EU legal names is distinctive. In the Krohn judgment,¹⁶ which concerned interpretation of Common Custom Tariff designations, the court stated, in para. 9:

“An unofficial interpretation of a Regulation by an informal document of the Commission is not enough to confer on that interpretation an authentic Community character. Such documents, which no doubt have their value for the purpose of applying certain regulations, have, however, no binding effect, and thus cannot ensure that the descriptions of the goods to which they refer have the same scope in all the Member States. The uniform application of Community law is only guaranteed if it is the subject of formal measures taken in the context of the Treaty.”

Taken literally, this statement suggests that only EU legal names can be guaranteed to be identical in all Member States. Thus, EU legal names are very precise, both because they are uniform, and also because they allow almost no flexibility for deviating from the very detailed definitions. However,

¹⁵ Böllmann, Case 40/69, Judgment of the Court of 18 February 1970, Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann.

¹⁶ Krohn, Case 74/69, Judgment of the Court of 18 June 1970, Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co.

as noted in Chapter 2, examples of derogations from the definitions exist, such as with chocolate and juice.¹⁷ Furthermore, since the detailed rules are often obscure, it can be questioned whether the precision of the rules benefits consumers through securing accurate information.¹⁸ The Advocate General noted this problem in the *Canadane* case (p. 4702), stating that PGI/PDOs only guarantee “... to a greater or lesser degree, its type”. In other words, despite the fact that a PGI/PDO gives information on origin, it does not necessarily provide valuable information on the type of the product. Thus, without the corresponding product specification, these names are not that precise. Remember that in principle the Eurofoods and Quality Schemes rules do not aim to correct information problems, and despite the fact that the general horizontal rules apply to all foods, the names regulated according to these rules, as *lex specialis*, in principle may not fulfil the general requirement of being accurate (see Article 1(4) of the FIR). Paradoxically, the most precise names (precisely regulated) protect consumers imprecisely.

3 The quality versus the amount of information in the name

When no legal name exists, the customary or descriptive name can be used. As described in Chapter 2, the customary name is “the accepted name, without the need for further explanation”.¹⁹ The customary name can be used as long as it, in combination with other mandatory particulars such as the list of ingredients, ensures that consumers will know the product's true nature and can distinguish it from other foods with which it could be confused. In other cases, a description/descriptive name must be provided.²⁰

As mentioned most, of the cases concerning food naming has concerned national restrictive measures, but they have still provided some indications on EU law on food naming.

¹⁷ How this affect the degree to which Member States can regulate food naming is addressed in Chapter 9, Section 3.1.

¹⁸ See Ohm Søndergaard, M., and Selsøe Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?*

¹⁹ See Chapter 2, Section 3.1.

²⁰ See Chapter 2, Section 2.3 for more on the different types of names.

In general, the CJEU does not accept that Member States may restrict the use of certain customary or national legal names, because other mandatory particulars will provide necessary information for consumers to know about the concerned product. The Fietje judgment,²¹ serves as an example. In the case, the CJEU considered Treaty compatibility of the Dutch Likeurbesluit, which prescribed that products having certain characteristics should carry the category name “likeur”, “liqueur” or “licorette”. The products could also carry more specific names, but the category name served to inform consumers about the co-existence of certain specific ingredients. The Court concluded, in paras. 11–12, (emphasis highlighted):

“If national rules relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and to enable it to be distinguished from products with [which] it might be confused, it may well be necessary, in order to give consumers effective protection, to extend this obligation to imported products also, even in such a way as to make necessary the alteration of the original labels of some of these products. However, there is no longer any need for such protection if the details given on the original label of the imported product have as their content information on the nature of the product and that content includes at least the same information, and is just as capable of being understood by consumers in the importing state, as the description prescribed by the rules of that state.”

Naming should thus contribute to provide additional information. Of course, the conclusion must be read in its context of internal market rules, but the CJEU nevertheless provides interpretation as to when consumers are sufficiently informed, a requirement, which also follows from secondary law.

In the Van der Veldt judgment,²² the CJEU also addressed naming. In the judgment, it was concluded that the use of the name “preservative” was inadequate to provide information to consumers because it did not refer to a specific ingredient but rather to an entire category. For this reason, it was possible to require that the specific name or EEC number should be provided, although the labelling rules allowed for Member States to require indication of only the broad

²¹ Fietje, Case 27/80, Judgment of the Court of 16 December 1980, Criminal proceedings against Anton Adriaan Fietje.

²² Van der Veldt, Case 17/93, Judgment of the Court of 14 July 1994, Criminal proceedings against J.J.J. Van der Veldt.

category. It appears clear that the specific name provided additional information, however, the conclusion confirms the complexity of food naming. The balancing between different aims are central, and in some case a teleological interpretation provides consumers with more information (protection), however, in most cases free movement and business interests seems to outweigh consumer interests, and in this sense the Van der Veldt judgment is unique.

In the Sauce Béarnaise judgment,²³ the Court confirmed the conclusion from the Fietje judgment and went a bit further in order to secure free movement. In this judgment, the Court found that even though butter and eggs were traditionally used when producing béarnaise sauce in Germany, it was contrary to the Treaty rules on free movement of goods to require that the trade name be accompanied with a statement/description specifying the use of vegetable fats as a substitute for these ingredients, because “*sufficient information is available by way of the list of ingredients*” (see para. 36).²⁴ The German government argued that German consumers identify the name béarnaise sauce with butter and eggs. But this argument could not justify requiring a different/additional description, because *sufficient* information already was found in the list of ingredients.²⁵ However, if such a description could have been required, such description had to, and must, be *sufficiently clear*, both according to the previous and current labelling rules.^{26,27}

Comparing case law and the use of the term “sufficient”, with the requirement for descriptive names to be “sufficiently clear”, suggests a difference in the *de jure* requirements for customary (and national legal) names and those for descriptive names. *Sufficient* seems attached primarily to the amount of information; in other words, if other particulars, such as the mandatory particulars,

²³ Sauce Béarnaise, Case 51/94, Judgment of the Court of 26 October 1995, Commission of the European Communities v Federal Republic of Germany.

²⁴ To further cite the Court, para. 34 reads: “...consumers, whose purchasing decisions depend on the composition of the products in question, will first read the list of ingredients [...]. Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue.” In Chapter 9, an analysis is provided of the CJEU’s inconsistent use of Treaty rules in relation to cases concerning labelling of food.

²⁵ The conclusion in Sauce Béarnaise has been modified by new the FIR rules concerning product identification, which are analysed in Chapter 5.

²⁶ In the First Labelling Directive, the term *sufficiently precise* was used as the requirement for a descriptive name, and in the Second Labelling Directive the term *clear enough* was used. For more on this requirement, see Section 3.2.

²⁷ The Sauce Béarnaise judgment later was confirmed in the Darbo judgment. Darbo, Case 465/98, Judgment of the Court 4 April 2000, Verein gegen Unwesen in Handel und Gewerbe Köln eV V Adolf Darbo AG.

provide consumers with enough information to make an informed choice, no requirements exist concerning the quality of the customary or national legal name. On the contrary, *sufficiently clear* seems more attached to the quality of the information.²⁸ This difference confirms what indirectly follows from the Food Information Regulation: A rather broad national legal or customary name may be used because other mandatory information on the label provides sufficient information. But if no national legal or customary name exists, which may be true for new products, the description/descriptive name used to characterise the product must be sufficiently clear. At first, it seems logical that new (descriptive) names for new products should be sufficiently clear, because consumers have no previous experience with the products. However, on the other hand, requiring a certain amount of quality contained in the descriptive name suggests an acceptance of the fact that consumers do not read the ingredient lists, or other mandatory particulars. It is difficult to see why the list of ingredients cannot provide *sufficient* information for descriptive names when this is possible in relation to legal or customary names. Furthermore, the conflict between category, sectorial and species names is unresolved, which leaves businesses to choose how narrow a name to use when it comes to customary names.²⁹ In addition, if category names, such as cheese, can be used for any cheese type, new products also could more easily be named by category, and differentiation between cheese types would be more difficult as more types are developed.

Furthermore, it could be claimed that if the amount of information that can be given is not limited, it is simple to give *sufficient* information on the label.³⁰ Subsequently, in this sense it could be argued that the information contained in customary names is insignificant,³¹ unless of course, this is contradicted by the fact that the customary name has to be *accepted*.

²⁸ A literal interpretation of the different language versions confirms a difference between the requirement of being “sufficient”, attached to the legal and customary name, and the requirement of being “sufficiently clear”, attached to the description/descriptive name. In the French versions, the terms are “*suffisamment assurée par la liste des ingrédients qui doit figurer sur son étiquetage*” and “*suffisamment clair*”; in the German versions, the terms used are “*hinreichend*” and “*hinreichend genau ist*”. In the Danish versions, the terms used are: “*fornøden*” and “*tilstrækkelig tydelig*”, which are similar to the Swedish terms “*tillräckligt*” and “*tillräckligt tydlig*”.

²⁹ Based on theory of opportunism and self-interested behaviour by economic agents, such a choice would be based on optimising utility (and welfare) for the business singlehandedly. Williamson, O. E. (1985). *The Economic Institutions of Capitalism, firms, markets, relational contracting*, pp. 47–49.

³⁰ Some limits exist to the amount of information that can be provided on the label; see Section 4.1 below.

³¹ Note that in this sense that the rationales for requiring names at all can be questioned. Others have addressed the conflict/dilemma regarding the value of the information contained in the name. In the own-initiative opinion of 14 July

3.1 *The customary name, an accepted name*

The definition of the customary name is the name *accepted*, without further explanation, by consumers in the Member State where the product is sold. Nowhere is there an explanation for what *accepted* entails, and consumer acceptance of the customary name is new to the definition of food names.

Accepted must refer at least to a non-misleading name, since a basic requirement of food information is that it does not mislead (see FIR Article 7). In this sense, consumers' expectations are central, whether the customary name is related to non-misleading or acceptance.³² However, building an additional requirement into the definition of the customary name that the name must be accepted indicates that the requirement is actually additional to the basic requirement. For this reason, *accepted* could suggest that some degree of quality of the information contained in the customary name must exist.

In contract law, acceptance is a form of positive statement or conduct. Silence or inactivity does not in itself amount to acceptance (see for example CISG³³ Article 18(1)). However, within food law and consumer protection, the requirement that the customary name be *accepted* is hardly parallel to the private law apprehension entailing a positive statement or conduct. At the same time, this most likely neither implies that where no objection from consumers against a name has arisen, the name automatically becomes accepted. With this in mind, it is difficult to see how the inclusion of the term *accepted* provides anything of substantive importance to the definition of the customary name; rather it brings confusion.

The requirement that the customary name be *accepted* poses further questions related to this thesis. The definition of the customary name clearly establishes that the name should be accepted by consumers in the country of sale. Initially, the inclusion of *accepted* within the definition of the

2010 by the European Economic and Social Committee on "Consumer Information", the Committee stated that information to consumers should focus on suitability and quality of information rather than quantity of information. It characterised the main criteria for a "suitability test" as (p. 65): "*reliability, topicality, impartiality, precision, relevance, succinct nature, comprehensibility, clarity, readability and ease of access.*" There was no Commission follow-up on the opinion.

³² For more on consumers' expectations, see Chapter 8. A focus on consumer expectations is common within the field of consumer protection; see Wilhelmsson, T., and Twigg-Flesner, C. (2006). Pre-contractual Information Duties in the *Acquis Communautaire*, p. 459.

³³ United Nations Convention on Contracts for the International Sale of Goods (CISG).

customary name does not entail any differences regarding imported products because of the principle of mutual recognition. However, if *accepted* implies some degree of quality in the information in the sense that the name of a product in the Member State of sale is/must be a species name, it is more likely that an imported product differs because of the narrow categorisation. This raises questions concerning to how translation of names must be made and questions concerning to what degree Member State can prohibit the use of a certain food names, for example because it is too broad, when it has actually been legally used in another Member State.³⁴

It also could be discussed whether, because of rather unclear rules and a general tendency to give preference to free movement, national authorities will be more cautious in taking actions against customary names of imported foods.³⁵ However, to meet competition, food importers also will have some interest in providing consumers in the Member State of sale with information similar to the information provided by domestic producers. Therefore, importers could perhaps avoid many of the potential conflicts following the use of a customary name by simply using a descriptive name.

3.2 The descriptive name, a sufficiently clear name

As with a customary name, a descriptive name can be used where no legal name exists, which is the case only for a minority of products. For this reason, businesses are left with relatively large discretion in naming food products. However, a descriptive name has to be sufficiently clear to enable consumers to know the true nature of the food product and distinguish it from similar products. As the name suggests, a descriptive name is more comprehensive than the legal and customary names, which implies that it also contains more information. To the author’s knowledge, the CJEU has never judged in a case concerning a descriptive name, and therefore, it cannot be determined exactly how “sufficient clear” is defined in EU law. This is left to the Member States’ discretion.

³⁴ In Chapter 7, Section 3, the translation of names is addressed and in Chapter 9, Section 2 the obligation to mutually recognise is analysed.

³⁵ This might be the reason why no conclusion was made in the Danish “fish sticks” case described above.

As already mentioned it is difficult to see why a distinct definition of a descriptive name is necessary, since the general prohibition against the use of misleading food information parallels the requirements.³⁶ The definition only contributes to legal uncertainty and confusion as to which national standards apply in regards to precision. On one hand, the definition of the descriptive name combined with the obligation to mutually recognise names legally used in other Member States, suggests that it is the standards in the Member State of production which determines when a descriptive name is “sufficiently clear”. On the other hand, the CJEU generally has deferred to the national courts to consider whether a name is misleading, in the light of national law.³⁷ Similar reasoning must apply concerning whether a name is sufficiently clear to enable consumers to know the true nature of the food product and distinguish it from other similar products – which is actually also an exception to the principle of mutual recognition. Potentially, different Member States could have varying enforcement and evaluation of descriptive names, as they have in regard to the prohibition against misleading information,³⁸ and legal uncertainty is the result. The lack of clarity in regards to descriptive names and applicable law must be eliminated.

In conclusion, the rules on naming, apart from rules on EU legal names, provide very little guidance concerning what level of information must be provided in the food name, that is, how precise the name must be and who controls naming. In addition, confusion exists concerning which standards apply; whether it is the standards in the Member State of production or the standards in the Member State of sale. Unfortunately, the rules on legibility and visibility do not improve the legal uncertainty.

³⁶ See Chapter 2, Section 2.5.

³⁷ See the Fietje judgment, para. 12 and *Estée Lauder*, Case 220/98, Judgment of the Court of 13 January 2000, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*.

³⁸ See Lillholt Nielsen, K. (2012). Misleading? To whom?

4 Legibility and visibility

To assist consumers and improve satisfaction with food labels, mandatory particulars must be easily visible, clearly legible and indelible (see Article 13(1) and recital 26).³⁹ Legibility is defined as the physical appearance of information, determined by factors such as font size, letter spacing, spacing between lines, stroke width, type colour, typeface, width-height ratio of the letters, the surface of the material and significant contrast between the print and the background (see Article 2(2)(m)). Thus, the rules could be seen as a way to *enable consumers to know*.

To ensure the legibility of food information, the FIR introduces new rules on the minimum font size, which differs depending on various circumstances such as the size of the label and the given particulars (see Article 13 and Appendix VI).⁴⁰ Further, the FIR introduces obligations to provide certain pieces of information in the same field of vision, for example, the name and the net quantity. Exceptions exist for certain kinds of products and for small packages, while the legibility requirements are stricter for some types of information, such as ingredients capable of causing allergies or intolerances, which must be indicated by a typeset clearly distinguishable from the rest of the list of ingredients (Article 21(1)(b)).

The food name – including potential accompanying particulars – the net quantity of the food and the actual alcoholic strength by volume for beverages containing more than 1.2 percent alcohol must appear in the same field of vision (Article 13(5)). In Article 2(2)(l), the primary field of vision is defined as the field of a package most likely to be seen at first glance. However, the FIR establishes only obligations to provide information in this field in relation to the energy value. The name, considered as very important information, does not have to be provided in the primary field of

³⁹ Rules on legibility are generally uncommon; see Twigg-Flesner, C., and Schulze, R. (2010). Protecting Rational Choice: Information and the Right to Withdrawal, p. 140, for examples of other requirements concerning form and presentation in consumer law. However, within self-regulatory systems, the issue of legibility is addressed. According to Consolidated ICC Code of Advertising and Marketing Communication Practices (2011), Article 1C “*When presenting the offer, any font which, by its size or any other visual characteristic, is likely to materially reduce or obscure the legibility and clarity of the offer should be avoided.*”

⁴⁰ The minimum font size was originally proposed to be higher (see the Proposal to the FIR, Article 14(1)). However, the food industry argued heavily against the proposed font size; see Hagenmeyer, M. (2008). The Regulation Overkill: Food Information, which for example concerns the decision by the German Federal Court of Appeal that 2.2mm font size as opposed to the proposed 3mm would meet the requirements of clear legibility. In the adopted Regulation the comparable font size varies between 2.2 and 2.9 (x-height between 0.9 and 1.2mm).

vision. The information contained in the name could thus appear on the back, and brand names, illustrations and other voluntary information could be in the primary field of vision.⁴¹ Though trademarks, brand names or fancy names cannot replace the name of the food, these sometimes will be the particulars identifying the food, perhaps especially where the food name is a description placed on the back of the package.⁴² This also suggests that the value of the food name is questionable.

4.1 Voluntary information and the risk of information overload

The rules on voluntary information in the Food Information Regulation, indirectly addresses the criticism concerning the value of names. Recital 47 of the FIR states (emphasis highlighted):

“Experience shows that in many cases voluntary food information is provided to the detriment of the clarity of the mandatory food information. Therefore, criteria should be provided to help food business operators and enforcement authorities to strike a balance between the provision of mandatory and voluntary food information.”

FIR Articles 36 and 37 explain how voluntary information must be provided. Voluntary information must not be misleading, ambiguous or confusing, and where appropriate, based on scientific data (Article 36(2)). Most importantly, voluntary information, like brand names and trademarks, must not be displayed to the detriment of the space available for mandatory information (Article 37). The

⁴¹ The food industry has also argued heavily against rules on front of package labelling; see Hagenmeyer, M. (2008). *The Regulation Overkill: Food Information*.

⁴² For example, in Denmark, the European-wide “Rama, cremefine” is “Milda, cremefine”, and is marketed and labelled on the front package with this fancy name, while the name of the food “a basis for hot sauces, soups and savoury tarts – a mix of milk and vegetable oils” is placed on the back. The same can be said about soft drinks such as Coca-cola, in which the name is actually “soft drink” or “cola”, and is not placed on what can be considered the front of the cans. In these cases, consumers probably identify the product by the brand name “Coca-cola” or “cremefine”. In relation to trademarks this could potentially lead to revocation where the mark has become a common name; see Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, Article 12(2)(a). In relation to fantasy names, no similar risk exists, but in time, the name could potentially become a customary name. Smoothie is an example; see Smith, V., et al, *What's (in) a Real Smoothie: A Division of Linguistic Labour in Consumers' Acceptance of Name-Product Combinations?*

rules on voluntary information are unique,⁴³ and clearly the intention of the rules on voluntary information is to avoid “information overload” of consumers.⁴⁴ The legislators clearly signal an acceptance of the fact that too much information limits consumers’ processing abilities when they address the potential problem of information overload. Too much information makes processing information more time-consuming and can cause consumers to pay less attention to relevant information, which verifies that consumers have bounded rationality.⁴⁵ From a consumer protection perspective, an acceptance of consumers’ bounded rationality could lead to stronger protection and more control of the quality of information.

However, when it is unclear how precise the mandatory name must be, it is difficult to determine when information provided in relation to the name is voluntary, such as the additional information that honey was made from brown bees from Læsø, or the use of the name “smoothie” for “juice” products. For this reason, it is unclear when the rules on voluntary information apply to parts of a name, or a double-name.⁴⁶ In addition, the main focus of the rules on voluntary information seems to be on whether there is enough space on the label, rather than whether the information diverts consumers’ attention from the more important, mandatory information. Human information processing and decision making are selective, and therefore, consumers will not read all information provided to them.⁴⁷ However, they most likely will read the most accessible information.⁴⁸

⁴³ In general, rules on information set out to ensure a minimum amount of information is provided for consumers, for example, Article 7 of the Unfair Commercial Practices Directive on misleading omissions.

⁴⁴ Kireeva, I. (2012). Origin Labelling in the European Union, p. 550, notes that many labels contain too much information. For more on the “information overload” problem, see Grunert, K. (2005). Food Quality and Safety: Consumer Perception and Demand which argues that problems of information asymmetry are not reduced simply by giving more information to the less informed party. See also Hausman, A. (2012). Hedonistic rationality: Healthy Food Consumption Choice using Muddling-through which uses the term “cognitive load” to describe the difficulties of decoding food information. For more general research on information overload, see Miller, G. A. (1956). The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information, and Jacoby, J., Speller, D. E., and Kohn Berning, C. (1974). Brand Choice Behaviour as a Function of Information Load: Replication and Extension. For criticism of the theory on information overload, see Russo, J. E. (1974). More Information is Better: A Reevaluation of Jacoby, Speller and Kohn. However, it seems as if the potential problems of information overload have been accepted, even by food businesses; see, for example, Hagenmeyer, M. (2008). The Regulation Overkill: Food Information.

⁴⁵ See Jacoby, J. (1984). Perspectives on Information Overload, p. 433.

⁴⁶ See Chapter 3, Section 3.3.

⁴⁷ Jacoby, J. (1984). Perspectives on Information Overload, p. 434, and Hausman, A. (2012). Hedonistic rationality: Healthy Food Consumption Choice using Muddling-through, p. 796.

⁴⁸ Jacoby, J. (1984). Perspectives on Information Overload, p. 435.

Consequently, rules on legibility and visibility, aimed to provide consumers with relevant information while also avoiding information overload, must focus on which information consumers read rather than on what information is presented.

5 Concluding remarks

Three remarks must be made on valid law on the precision of names:

First, the name must contain information that the consumer cannot gain from other mandatory particulars. However, no obligation to provide valuable information exists in valid law, except regarding to EU legal names, which are actually not considered purely beneficial to consumers. A fair balance in relation to precision seems to be missing, and it actually appears very odd to have rather complicated and detailed rules on the definition of names, but not on how to name accurately and precisely.

Second, the effect of new initiatives on legibility and visibility is questionable.

Finally, these discussions concerning information disclosure and consumer rationality are closely linked to the approach to many information-related conflicts in labelling – whether consumers are misled or confused.⁴⁹ In the end, the flexible and imprecise criterion of whether consumers are misled/properly informed still leaves questions on applicable law unsolved.

⁴⁹ As with the general observation from the analyses of the labelling rules, the use of different term, such as “misled” and “confused”, as well as the existence of rather complex rules in different places in the regulation but attached to the same issue, further complicate food naming. See Hartley, T. (1996). Five Forms of Uncertainty in European Community Law, p. 270–272, which argues that bad drafting and unclear terms are more common in Community legislation than in British.

CHAPTER 5: FOOD IDENTITY

1 Introduction

EU law of food names provides no explicit guidance on how precise a name must be, which is clear from the analysis provided in Chapter 4. Furthermore, in the *Sauce Béarnaise* judgment, the CJEU established a rather clear rule regarding food naming: If a name has been legally used in one Member State, it can be used in other Member States, as a general rule, because the list of ingredients will provide consumers with sufficient information. The judgment concerned the sale of béarnaise sauce made without eggs and butter, which are traditional ingredients for the product in Germany. The identity of food is based on composition to a large degree,¹ and therefore, the name as an identifier of the food changed following the *Sauce Béarnaise* judgment.

Subsequently, food identity cases have been referred to the CJEU and the Court has either repeated the rule developed in the *Sauce Béarnaise* judgment or at least determined that it is more proportional to require additional information – with no specification as to where on the package such must be provided – than to require or prohibit a specific name.² However, these cases were decided prior to adoption of the Food Information Regulation (FIR), which introduces a number of new rules concerning food identity.

In Denmark, a large number of cases on potentially misleading food names also have been initiated, primarily by consumers who believed they were deceived by the marketing under a certain name because the product was not what they expected; that is, the name signalled a different identity. Most of these cases were not initiated until after the products were purchased and the consumers

¹ See Smith, V., et al, What's (in) a Real Smoothie: A Division of Linguistic Labour in Consumers' Acceptance of Name-Product Combinations? p. 4, for research on product identity based on sensory attributes, added facts, and added expert definitions.

² For example, the *Foie Gras*, Case 184/96, Judgment of the Court of 22 October 1998, *Commission of the European Communities v French Republic*, and *Guimont*, Case 448/98, Judgment of the Court of 5 December 2000, *Criminal proceedings against Jean-Pierre Guimont*.

realised that the product was not what they had intended to buy.³ A number of cases will illustrate the real life conflicts:

In Case No 2002-08-729-00027, the food authority raised a case against a producer of marmalade marketed under the name “*skovbær marmelade*” (wild berries marmalade) because raspberries were the only wild berries in the product and the amount of raspberries was limited. The ingredients were primarily apples, strawberries and blackcurrant, which was clear from the list of ingredients. The producer acknowledged the criticism and changed the name.

In two parallel cases, Case No 2004-07-722-09899 and Case No 2004-07-272-00010 (the first initiated by the administrative authority and the latter by a consumer complaint), the use of the name “*crème fraîche dressing*” was found to be misleading since the product contained only 20 percent *crème fraîche*. The decision was based on the argument that the product name and appearance caused the consumer to expect that the product primarily contained *crème fraîche*. On administrative appeal, in Case No 2004-20-272-01191, this decision was annulled and the name was found not to be misleading. It was argued that aside from water and vegetable oils, *crème fraîche* was the primary ingredient and that a content of 20 percent would characterise the product and enable consumers to distinguish it from similar foods (in this case other types of dressing that need not be stored in the refrigerator).⁴

In Case No 2003-10-274-00345, a consumer complained about a product marketed under the name “*fasanpaté*” (pheasant pâté), arguing that the name was misleading because the content of pheasant was only 20 percent. The administrative authority concluded without further argumentation that the name was not misleading because the pheasant content accounted for a third of the meat content in the pâté.⁵ However, the authorities imposed an obligation to label this more clearly.⁶

³ Note that in the majority of the cases, consumers actually only believe they have been deceived after having read the ingredients list, which paradoxically has provided information differing from consumers' perceptions of the name, and which was not checked (thoroughly) prior to purchase.

⁴ A similar case without any conclusion was Case No 2007-02-274-03069, in which it was questioned whether the name “*flødeskum*” (whipped cream) could be used for a canned product with a cream content of only 58 percent.

⁵ Note that it is not apparent from the case, from which animals the rest of the meat came, nor what the last 40 percent of the pate content was.

⁶ For a similar example of the UK Advertising Standards Authority's ruling on “almond milk”, see <http://www.foodnavigator.com/Legislation/Ads-for-almond-milk-with-2-almonds-not-misleading-rules->

These cases demonstrate that difficulties exist regarding food identity. The primary question is what does the use of an ingredient in the name signal? In other words, when do a product's ingredients and the amount of such render it authentic, that is, what does the use of an ingredient in the name indicate. Of course, the simple answer is that this depends on the concerned product. However, as in the case of the crème fraîche dressing, consideration must be made of products that are similar and those that fall outside the category of *products with which it can be confused*. These questions are addressed in Section 2, which examines valid law on “ingredient(s) appearing in the name”.

In Case 2006-02-274-01918, a consumer complained about a product sold under the name “guacamole dip” because no avocado was in the product. The ingredient had been substituted. The administrative authority determined that the name could be used because no legislation established requirements for the amount of avocado in guacamole. No evaluation regarding the misleading potential or the inaccuracy of the name was made.

In Case No 2002-04-272-00001, the use of the name “*hakkebøffer*” (hamburger steaks) was disputed by a Danish consumer organisation (“*Aktive forbrugere*”). The name – traditionally used in Denmark to denote steaks made purely of beef – was used for canned hamburger steaks in which some of the beef had been substituted with pork meat, and breadcrumbs and wheat protein had been added for reconstitution. The administrative authority accepted the ingredients/additives added for reconstitution because the traditional steak character could not exist for canned meat unless some reconstitution was made.⁷ However, the product could not be sold under the name “hamburger steaks” if some of the beef meat had been replaced by pork.⁸

In Case No 2007-01-274-00571 (and a number of corresponding cases), the use of the name “*makroner*” (macaroons) was disputed because almonds, the traditional ingredient, had been replaced by almond flavourings. The administrative authority found in favour of the complainant and concluded that consumers expect almonds to be present in products carrying the name “macaroons”, unless it was specified that the macaroons was made of a substitute, for example,

ASA/?c=OJR6kC9KvZSxD%2FCjth0Gcw%3D%3D&utm_source=Newsletter_Subject&utm_medium=email&utm_campaign=Newsletter%2BSubject

⁷ This suggests that canned meat cannot be confused with non-canned meat in Denmark!

⁸ It is difficult to see how this case is different in any sense from the case concerning guacamole dip.

coconut macaroons. The decision was annulled on appeal because for many years macaroons had been sold without almonds, which had changed the understanding of the name; therefore, consumers no longer expect products named “macaroons” to contain almonds.

The substitution or replacement of natural or traditional ingredients is the common denominator in these examples described above; in Section 3, practical difficulties connected hereto in relation to naming are addressed.

The case of almonds in macaroons, points out conflicts in food naming that develop as traditional names change slowly over time. In other cases, rapid change in the food production calls for the development of new names (such as “pizza topping” for a cheese substitute⁹ or smoothie for a fruit-based drink^{10,11}). Danish administrative practice also contains cases concerning naming difficulties after developments in food production:

A number of complaints about the name “*rullepølse*” (sausage of rolled pork meat) were initiated by a Danish consumer organisation (“*Aktive forbrugere*”), for example, Case No. 2005-S5-274-00776. The organisation argued that the name is misleading because the traditional primary ingredient, pork belly, had been replaced by pork filet, which changed the product in various ways. The complaints were all rejected and the sausage has since been sold under the traditional name but with a different composition. The “*rullepølse*” case concerned a food product for which the composition had undergone some sort of (r)evolution.

⁹ For a number of examples of “imitations”, see <http://arla.dk/Produkter/Kategorier/Ost/Ost---Ost-til-madlavning/>.

¹⁰ Although fanciful, the name “smoothie” is assumed to comply with the rules on food names in the FIR. However, a lot of other potential problems arise with the use of the name. Note that in many cases a “smoothie” will actually (also) have to carry the mandatory name “juice”, because it complies with the composition rules for juice, see also Chapter 2, section 2. However, by introducing this parallel name, consumers might potentially be confused; by too much information. See Chapter 8 for more on the prohibition against misleading names and Chapter 4, Section 4.1 for more on information overload.

¹¹ CaviArt® as a trademark for a caviar-substitute is parallel hereto. The CaviArt® trademark is complemented by the food name “seaweed-based caviar substitute”, but as a unique product on the market, is identified by its trademark. For more on this, see <http://www.cavi-art.com/>. The questions surrounding the use of the CaviArt “name” are similar to those surrounding the Cremefine “name” described in Chapter 4. In this thesis, the potentially misleading character of trademarks is not addressed. For a similar English case concerning the use of the name Vodka, see Tumbridge, J. (2010). *Diageo North America Inc v Intercontinental Brands (ICB) Ltd: Vodka is special: The VODKAT case*.

Another example is a complaint from 1995,¹² in which a consumer complained about a product composed of 100 percent raw minced fish sold under the name “*fiskefars*”.¹³ On appeal, it was determined that the product did not contain the necessary ingredients for it to use the name “*fars*” because no eggs, spices, flours, or the like had been added. Contrary to the “hamburger steaks” case, the consumer here felt deceived because the product name elicited the expectation that the (traditional) composition of the product had been altered with flavourings and other added ingredients.

Product and name (r)evolution and questions concerning when a traditional name can be used for a non-traditional product and when it cannot are analysed in Section 4.

2 Ingredient(s) appearing in the name

Food products are identified, at least partly, by their composition. Some ingredients are naturally present in food bearing certain names; for example, it is difficult to imagine vanilla ice cream without vanilla, and such naming would probably be considered misleading. In the Sauce Béarnaise judgment,¹⁴ the CJEU indirectly addressed the issue of information on ingredients in the interpretation of Article 5(1) in the First Labelling Directive, defining the three different types of names in the labelling rules. In the judgment, the Court held, in para. 40, that “...*any additional particulars accompanying the trade description must be necessary for the information of consumers...*” The statement provided in a specific context and used as an argument for why additional information could not be required; it was already apparent from the list of ingredients. However, *e contrario* an ingredient appearing in the name must be characterised as a “particular accompanying the name” thereby signalling its importance as a piece of information on composition.

¹² Because of the time of its preparation, the case was not an initial part of the FairSpeak survey, but a reference to it popped up in another case. The case is included here because it illustrates an interesting dilemma in relation to the development of food production.

¹³ No exact translation exists, but normally *fars* is used to make meat/fish-balls.

¹⁴ Béarnaise Sauce, Case 51/94, Judgment of the Court of 26 October 1995, Commission of the European Communities v Federal Republic of Germany. In the Bellamy and British Wholesale case, the AG noted that pasteurisation in relation to milk is a specific treatment, and its omission confuses consumers.

Today general rules on ingredients appearing in the name exist and are found in the Food Information Regulation. According to FIR Article 22(1)(a), where an ingredient appears in the food name, the quantity of that ingredient must be stated in the list of ingredients.¹⁵ However, although an ingredient appears in the name, quantitative indication is not required if that ingredient does not govern the choice of consumers in the country of marketing, because the variation in quantity is not essential to characterise or distinguish the food from similar¹⁶ foods (see Annex VIII, 1(a)(iv)). It is hard to see how indicating an ingredient in the name, and thus pointing out the existence of a specific ingredient, does not motivate consumer choices.¹⁷ Adding to the complexity, according to FIR Article 22 (1)(c), an indication of quantity is mandatory for an ingredient that is essential to characterize the particular food, whether or not it appears in the name.¹⁸

For Eurofoods and Quality Schemes foods, the amounts of ingredients are already regulated to a certain degree, and it could be argued that quantity indication is unnecessary. However, since the rules in the FIR are horizontal and applicable to all foods, introducing an obligation to indicate quantity for ingredients appearing in the name also brings a new obligation for certain producers of Eurofoods and Quality Schemes foods. Only in cases where the vertical rules explicitly provide for other obligations or where the exception of Annex VIII, 1(a)(iv) applies, will the general requirement in FIR Article 22(1)(a) not apply.

Examples exist of parallel vertical rules concerning ingredients labelling: For example, it follows from the Fruit Juice Directive Article 3(2) that the name of the fruit must appear in the name when the juice is made from a single fruit, thus indicating that no other fruits are present. If the juice is made of two or more

¹⁵ According to Article 19(1)(e), the list of ingredients can be omitted when a food includes only one ingredient and the name of the food is identical to the ingredient or when the name enables the nature of the ingredient to be clearly identified.

¹⁶ Here the term “similar” is used, but it is not considered to be different from “products with which it might be confused”. In Section 2.1, an analysis of this sentence is provided.

¹⁷ See in Section 2.1 for a discussion on quantity indications of ingredients.

¹⁸ In the 1970s, the United States Food and Drug Administration introduced “common or usual name” concepts, which obliged producers to label the quantity of the primary ingredient or essential elements in certain food products; see Merrill, R. A., and Collier, E. M. (1974). “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, p. 613–614.

fruits, the name must¹⁹ be composed of a list of the fruits used; however, the volume of the fruit juices or purées included must be indicated only in descending order in the list of ingredients (see Article 3(3)).

The Cocoa Directive recital 11, states that the use of a composite sales name, containing one of the Eurofoods regulated by the Directive, can be recognised as long as the name complies with the general horizontal rules, that is, the quantity is stated. Specific requirements regarding quantity indication exist in relation to the total dry cocoa solids content. According to Article 3(3) of the Directive, the labelling of certain products must indicate the total dry cocoa solids content by including the words: “cocoa solids: ... percent minimum”.

Regarding the Quality Schemes, no specific rules exist for labelling of ingredients, and therefore, the horizontal rules apply. Controversies seem embedded in the obligation to label ingredients for PGI/PDOs. First of all, PGI/PDOs are protected because of their quality reputation attached to either origin or environment, which suggests a certain degree of consumer knowledge about the product characteristics. Second, securing identification (without the need to read the ingredient list) includes the obligation to state “protected designation of origin”, “protected geographical indication”, or the use of the EU symbol of these designations (see recital 5 of the PGI/PDO Regulation). If producers are obliged to provide ingredient labelling, the value of the identification mark provided by these quality schemes may be questionable.²⁰

However, the Commission has established guidelines for labelling of protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients.²¹ From these, it follows that PGI/PDOs may be legitimately used in the list of ingredients, fulfilling the horizontal rules of for example indication of ingredients in dissenting order. The PGI/PDO ingredient may also be used in or in close proximity to the trade name, if the following three conditions are met: The food product must not contain a comparable ingredient, should contain the product produced in accordance with the PGI/PDO product specification in sufficient quantities to confer essential characteristics,²² and should indicate in or in close proximity to the trade name – or alternatively, in the list of ingredients – the percentage of this ingredient included. Thus, similarly to the horizontal

¹⁹ However, where the juice is manufactured of three or more fruits, the indication of the fruits used may be replaced by the words “several fruits” or a similar wording, or by the number of fruits used.

²⁰ The value Quality Schemes are further called into question because their effect is limited; see especially London Economics, London Economics. (2008). *Evaluation of the CAP policy on protected designations of origin (PDO) and protected geographical indications (PGI)*, p. 261.

²¹ Commission Communication – Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients, 2010 OJ C 341, pp. 3–11.

²² See Section 2.1 for an analysis of the requirement that ingredients are essential.

rules, quantity indications are required. Although the PGI/PDO constitutes only an ingredient, it is still mandatory to use the indications or symbols and, in this sense, clearly to indicate that only an ingredient is a PGI/PDO, and not the final product itself.²³

2.1 Discussions on indication of quantity of ingredients

Briefly explained, Articles 22(1)(a) and (c) and Annex VII, 1(a)(iv) seem to indicate that quantity must be stated for essential ingredients, whether or not the ingredient is indicated in the name.

Further, an indication of an ingredient in the name does, according to these rules, not necessarily suggest that the ingredient is essential, which is rather controversial. First of all, because the rules are contradictory.

Second, according to the general rule on fairness in the FIR Article 7(1)(b) and (c), businesses are prohibited from attributing properties to a food that the food does not possess and from suggesting that a food possesses special characteristics, which all similar products also possess. Stating an ingredient in the name in itself suggests that the ingredient characterises the food and/or distinguishes it from an otherwise similar product by a variation in the quantity of that ingredient; it suggests special characteristics, which similar products – not indicating the ingredient – do not possess. Therefore, the appearance of an ingredient in the name would be misleading if the quantity were not essential to distinguish it from otherwise similar products. For this reason, it is difficult to see how and when especially the exception in Annex VIII *de facto* works.

A number of additional questions can be raised in relation to these rules, which are not easily answered and which are not reduced by the overall difficulties related to questions on applicable law. Introduction of these rules leaves one central question unanswered: What is an essential

²³ To the author's knowledge, there is no case law from the European Courts on the use of PGI/PDOs as ingredients, but the District Court in Berlin ruled on 23 August 2005 regarding use of “*mit Spreewälder Gurken*” (with Spreewälder Gherkins) on a potato salad sauce. The court found that the PGI could not be used for the product because the qualifying features of the PGI did not confer essential characteristics to the final product. See “With Spreewälder Gherkins” (*mit Spreewälder Gurken*), District Court Berlin, 23 August 2005, Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungsreport (GRUR-RR) 2005, p. 353. See Hartmann, M. (2006). Reference to a Protected Geographical Indication on a Composite Food Product, p. 306.

ingredient and who is to determine this – should it be based on standards in the Member State of production or in the Member State of sale?

The rules on origin labelling could add some guidance as to what is an essential ingredient. According to Article 26(3) of the FIR, if the country of origin or place of provenance of a food is given but is not the same as that of the primary ingredient, the labelling must indicate this difference. This rule indicates that information concerning primary ingredients is essential to consumers, although only in the sense that businesses must indicate divergences from what is otherwise stated. The primary ingredient is defined as “*an ingredient or ingredients of a food that represent more than 50 percent of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required*” (see Article 2(2)(q) of the FIR). The primary ingredient appears essential, although this is not articulated in law.

What further seems to follow from these rules on essential ingredients, as well as from the *Sauce Béarnaise* and the *Darbo*²⁴ judgments, is that the list of ingredients is a very important piece of information. Consumers must primarily seek information on essential ingredients in this list, which perhaps makes it a more important than the name for understanding the *true nature* of the product. However, some connection is made between the information contained in the name and in the list of ingredients. If the name indicates the existence of certain essential ingredients, these must be indicated in the list of ingredients.

In conclusion, the rules on ingredient(s) appearing in the name and essential ingredient(s) add an unnecessary complexity to the already complex set of labelling rules. In a way, the rules could signal a desire to regulate more rigidly by addressing actual problems; however, the rules have inherent controversies. Again, the general prohibition against misleading consumers, based on what they expect of or associate with a certain name, seems to be sufficient to deal with the naming problems that these rules try to solve.

²⁴ *Darbo*, Case 465/98, Judgment of the Court 4 April 2000, Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG.

2.2 “Products with which it can be confused”

Clearly, names must not cause confusion among products, and some understanding about which products might be confused is important when dealing with product identity difficulties and in name selection.

In the *Commission v Italy (vinegar)* judgment,²⁵ the Commission contested the Italian prohibition against using the name “vinegar” for products other than ones obtained from the acetic fermentation of wine. The CJEU acknowledged that the Italian government rightly sought to protect consumers who were accustomed to the name to be used for only wine vinegars (see para. 27); however, the Court continued by maintaining that more proportional means existed, such as “*the compulsory affixing of suitable labels giving the nature of the product sold and containing a description or additional information specifying the type of vinegar offered for sale, provided that such a requirement applies to all vinegars including wine-vinegar.*” Vinegar was considered a *generic* term because of its placement in the Common Custom Tariff, which was central to why additional information could be required. Products belonging to the same generic type can apparently be confused with each other and therefore, producers can be obliged to provide additional information, such as specifying the characterising ingredients.

The issue of confusion was also relevant in the *Sauce Béarnaise* case, in which the German government argued that consumers could confuse béarnaise sauce containing egg, butter and shallots, with imported béarnaise sauce prepared from vegetable fats. The CJEU noted, in para. 33: “*Admittedly, it cannot be ruled out that in certain cases the requirement that an additional statement accompany the trade description is necessary in order to avoid any confusion on the part of consumers.*” This was not the case with the béarnaise sauce; however, no further explanation was given and the judgment did not explain why the two types of béarnaise sauce could not be confused with each other.

²⁵ *Commission v Italy (vinegar)*, Case 193/80, Judgment of the Court of 9 December 1981, *Commission of the European Communities v Italian Republic*.

The Milk Substitute case²⁶ concerned a French ban on importation and sale of substitutes for milk powder and concentrated milk under any name. The French government argued that such legislation was justified on the grounds of consumer protection, based on (1) the problem of informing consumers that what they are being offered for consumption are substitutes, (2) the risk of confusion on the part of the consumers as to the characteristics of the product in question, and 3) the possibility that because they are cheaper substitutes these will gradually supplant milk products and thus deprive consumers of any choice. The CJEU acknowledged that the aim of ensuring proper information to consumers could justify restrictive measures, also stating, in para. 10: “...*in this case such information may be provided in particular in the form of adequate labelling detailing the nature, the ingredients and the characteristics of the product on offer.*” In this case and unlike in the Sauce Béarnaise judgment, the risk of confusion could justify requiring additional information, because milk substitutes could be confused with milk.

The vertical rules also on occasion touch upon the issue of “product with which it can be confused”.

According to Article 3(1) of the Cocoa Directive, the sales names listed in the Directive may be used additionally to designate other products, provided that the products for which the names are used cannot be confused with names listed in the Directive. Based on the Milk Substitute judgment, this could mean that cocoa substitutes, such as those made from carob,²⁷ cannot carry the name cocoa, however the name “chocolate ice cream” does not entail confusion.

Because of the wide prohibition against evocation of PGI/PDOs, the issue of consumer confusion is of lesser importance in relation to the Quality Schemes rules.²⁸

3 Substituting/replacing natural and traditional ingredients

Constant discovery and development of new additives, ingredients and methods of production are beneficial, such as in the case of sweeteners as a substitute for real sugar for people suffering from diabetes. However, as with the problems described and analysed above, in some cases an ingredient is natural to consumers, and the replacement of such an ingredient is likely to mislead.

²⁶ Milk Substitute, Case 216/84, Judgment of the Court of 23 February 1988, Commission of the European Communities v French Republic.

²⁷ See http://en.wikipedia.org/wiki/Ceratonia_siliqua

²⁸ See Chapter 2, Section 4.3.1.

Especially, substitution of naturally grown ingredients with processed ingredients has led consumers to react. An already mentioned example of this is the Danish case of guacamole dip in which avocado had been replaced by processed ingredients. A similar and general example exists in relation to the use of sweeteners as replacement for sugar, in combination with use of the name sugar.²⁹

According to Article 7(1)(d) of the Food Information Regulation, food information is misleading if the description of a food suggests the presence of a certain ingredient when, in fact, that ingredient has been substituted. In Annex VI, Part A, number 4, this rule is further elaborated (emphasis highlighted):

“In the case of foods in which a component or ingredient that consumers expect to be normally used or naturally present has been substituted with a different component or ingredient, the labelling shall bear – in addition to the list of ingredients – a clear indication of the component or the ingredient that has been used for the partial or whole substitution:

(a) in close proximity to the name of the product; and

(b) using a font size which has an x-height of at least 75 % of the x-height of the name of the product and which is not smaller than the minimum font size required in Article 13(2) of this Regulation.”

The ingredient substitution can be characterised as a description (or as a part of the descriptive name) because it must appear in close proximity to the name. Clearly, the rule annuls the principal conclusion in the Sauce Béarnaise judgment, since the substitution of eggs and butter in the sauce now must be indicated if these ingredients are expected to be normally used or naturally present.

In the Sauce Béarnaise judgment, the Court also held, in para. 36, that producers must draw consumers' attention to the fact that traditional ingredients are used. A similar conclusion was

²⁹ See http://www.foodnavigator-usa.com/Regulation/Sugar-industry-claims-corn-refining-companies-are-running-away-from-false-advertising-charges/?c=OJR6kC9KvZRJLQHgavhk6A%253D%253D&utm_source=Newsletter_Subject&utm_medium=email&utm_campaign=Newsletter%252BSubject.

reached in the *Glocken* judgment,³⁰ in which the Court, in para 22, held that the Italian government could restrict the use of the description “pasta made from durum wheat meal” to pasta products made exclusively from durum wheat, thereby enabling Italian consumers to express their preference for the product to which they were/are accustomed. Previously, producers of traditional products had to inform consumers about this, whereas now, following the adoption of the FIR, producers of products containing substitute ingredients must inform consumers about the presence of such.³¹

Parallel and general principles on substitution and adulteration are found in a 1989 Commission communication,³² in which it is noted: “*The principles set out above do not, however, preclude other measures adopted by the Community under the common agricultural policy and which would ban the use of certain substitute products (such as synthetic alcohol).*” According to the General Food Regulation, Article 8(1)(b): “*Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume. It shall aim at the prevention of the adulteration of food.*”

However – and this is a main question in this thesis – it is still uncertain how to determine what consumers normally expect or associate with a given name, and whether the mutual recognition principle takes precedence in cases where consumers’ expectations differ between the country of production and the country of sale. The focus on consumers’ expectations signals that the rules on replacement and substitution of ingredients are subject to an evaluation similar to the prohibiting against misleading names.

3.1 Substituting/replacing ingredients in product regulated by the vertical rules

The issue of substituting and replacing of ingredients is very important in relation to Eurofoods and Quality Schemes foods. Clearly, the standardisation of product names and authorisation of

³⁰ *Glocken*, Case 407/85, Judgment of the Court of 14 July 1988, 3 *Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano*.

³¹ See also the *Gilli* judgment, concerning Italian rules on vinegar: *Gilli*, Case 788/79, Judgment of the Court of 26 June 1980, Criminal proceedings against Herbert Gilli and Paul Andres.

³² European Commission, “Communication on the free movement of foodstuffs within the Community”, 1989 OJ No. C 271/3, p. 11.

ingredients suggest that substitution and replacement of ingredients as a principal rule are prohibited.

In relation to PGI/PDOs, only agricultural products or foods that comply with a product specification are eligible for protection (see Article 4(1) of the PGI/PDO Regulation). According to Article 13(1)(b), the registered names are protected against imitation or evocation, even where a name clearly indicates imitation through an expression such as “style”, “type”, “method”, “as produced in”, “imitation” or something similar.³³ Product identity is obviously central to PGI/PDOs and Article 13(1)(b) serves as an example. The protection granted by this rule is very wide and aims to prevent free-riding on an established reputation by businesses’ evoking or using the protected names to which they are not entitled.

It could be discussed whether the wide protection of product identity following from Article 13(1)(b) of the PGI/PDO Regulation corresponds to the economic rationales for granting protection. Free riding only seems possible if consumers could actually be misled/confused, which is not a requirement in relation to evocation. It also could be discussed whether a fear of dilution can justify this restriction when a PGI/PDO cannot become generic. The protection signals a difference between the role of the consumer in relation to PGI/PDOs and other food products.

Interestingly, use of the word “imitation” in relation to PGI/PDOs cannot signal to consumers that the concerned product is not original/traditional, but in relation to other products such as béarnaise sauce, it has been held that consumers will read even the back label to get information about the product they intend to buy.³⁴ Some acceptance of this imbalance is found in the FIR’s mandate that replacement of ingredients must be indicated in proximity to the product name. However, there is still a difference between the role of the consumer in the PGI/PDO rule and in the horizontal rules.³⁵

³³ For more about Article 13(1)(b), see Chapter 2, Section 4.3.1 and O’Connor, B. (2004). *The Law of Geographical Indications*, pp. 135–136.

³⁴ Actually, it is tempting to argue that consumers who buy PGI/PDO products are exactly those consumers “*who are heedful of the composition of a product*”, exactly those consumers who, according to the Sauce Béarnaise judgment, would get sufficient information from the list of ingredients.

³⁵ Recall, that the Quality Schemes do not initially aim at consumer protection. The concept of the consumer is analysed in Chapter 8.

For chocolate and cocoa products, substitution is also regulated. According to Article 2(2) of the Cocoa/Chocolate Directive, the statement “contains vegetable fats in addition to cocoa butter” must be placed in the same field of vision as the list of ingredients, but clearly separated from the list and in letters at least as large and in bold as the sales name.

Another example of rules on substituting and replacing ingredients is found in Community rules on designation for milk and milk products.³⁶ The CJEU provided an interpretation of the rules in the Milk Substitute and UDL judgments.³⁷ The CJEU held that the sale of substitute products cannot be forbidden per se and that the Member States may not use consumer protection as the objective “*to shield a product from the effects of price competition on the pretext of economic difficulties brought about by the elimination of barriers to intra-community trade*” (see para. 12). The price competition was a result of lower prices for substitute products, which have lower production costs. In the UDL judgment based on the definition of milk products, the Court concluded that a cheese in which the milk fat has been replaced by vegetable fat for dietetic reasons cannot be designated as “cheese” (see para 24). The CJEU also noted, in para. 15, that the Regulation 1898/87 was designed to protect designations used for the natural composition of milk and milk products in the interests of both producers and consumers. The Court further noted, in para. 33, that no exceptions could exist because this would impair the protection of the natural composition of milk and milk products (emphasis highlighted):

“...it is not established that the use of the term ‘cheese’ together with explanatory descriptions, such as those in question in the main proceedings, to designate products of which the milk fat has been entirely replaced by vegetable fat would be certain to prevent confusion in consumers’ minds as to the composition of the product which they are about to purchase.”

As for PGI/PDOs, it is interesting that for Eurofoods, consumers cannot act rationally and comprehend that ingredients have been substituted in a product sold under a description like

³⁶ Previously Regulation No 1898/87 on the protection of designations used in marketing of milk and milk products, which today is part of the Single CMO.

³⁷ UDL, Case 101/98, Judgment of the Court of 16 December 1999, Union Deutsche Lebensmittelwerke GmbH v Schutzverband gegen Unwesen in der Wirtschaft eV.

“*dietary cheese (dietary soft cheese) containing vegetable oil for a fat-modified diet*”, whereas such is possible with products falling outside the vertical rules. In some cases, it is not even necessary to indicate substitution!

4 Product (r)evolution

New food products and ways of producing food are constantly being developed, as seen in the regulation of novel foods, GMOs, additives, cloning and so on.³⁸ These rules establish control systems to ensure that product revolution³⁹ does not run out of control. When new or different products are introduced – product evolution – the product name is a way to signal this difference. This might be an advantage of importers of foreign produce because consumer habits are not yet crystallised, and new products carrying new names will bring new expectations and new experience.⁴⁰

The Food Information Regulation regulates the use of new names and the developments in food production in various ways. First, as already mentioned, a fancy name cannot replace the food name, which suggests that new names must inform consumers. Second, the FIR regulates the use of certain new names, for example in Annex VI, Part A, numbers 6 and 7, which refers to adding water to food, which is steadily increasing.⁴¹ Annex VI, Part A, number 6 prescribes that “*the name of the food shall include an indication of the presence of added water if the added water makes up more than 5 % of the weight of the finished product*”. According to number 7, labelling must indicate when a meat product, meat preparation and fishery product consists of different pieces of meat by

³⁸ For examples of development of new products, see Nissen, N. K., Sandøe, P., and Holm, L. (2012). Easy to Chew, but Hard to Swallow - Consumer Perception of Neutrally Marinated Meat, p. 1096.

³⁹ Revolution is used to describe a more fundamental change than evolution.

⁴⁰ See also Grunert, K. (2005). Food Quality and Safety: Consumer Perception and Demand, European Review of Agricultural Economics. However, Grunert accepts that special marketing efforts might be necessary to break through habitual behavior barriers in order for consumers to perceive new products.

⁴¹ See http://www.foodanddrinkeurope.com/Retail/Bringing-home-the-bacon-with-added-water/?c=OJR6kC9KvZSRqVBLaADwYg%3D%3D&utm_source=newsletter_daily&utm_medium=email&utm_campaign=Newsletter%2BDaily and <http://www.agra-net.com/portal2/fcn/home.jsp?template=pubArticle&artid=1287146443646&pubid=ag096> or http://www.foedevarestyrelsen.dk/Nyheder/Nyheder/2010/Sider/Nyt_navn_til_neutralmarineret_kyllingekoed.aspx

stating “formed meat” or “formed fish”, where such product may *give the impression* that it is made from a whole piece of meat or fish. The objective of these rules seems to be to address problems when (new) products imitate or give the impression that they are higher in quality than may be the case.

As analysed in Section 3.1, product (r)evolution is not actually present within the Eurofoods and Quality Schemes systems because these rules preserve traditional products by prescribing food standards. However, examples of attempted product evolution/imitation can be found, for example, in the UDL judgment in which the Court determined that the name cheese could not be used for a low-fat variant. Generally, focus is on the preservation of names, and product evolution/imitation is considered problematic.⁴² As an example, in the case of “soy beverages” the dairy industry has continuously fought the use of the name “soy milk”.⁴³

5 Concluding remarks

The Food Information Regulation introduces a number of new rules on product identity, aimed at requiring labelling of products that have ingredients appearing in the name, that contain substitute ingredients and that imitate traditional products because of food (r)evolution. Interestingly, many of these rules were not part of the Commission’s original proposal; however, following the Parliament’s first reading, these rules were amended.⁴⁴

⁴² See Glaberson, H. (2011). New test can detect fake whisky, say scientists, *Beveragedaily.com*, 28 July 2011, at <http://www.beveragedaily.com/Regulation-Safety/New-test-can-detect-fake-whisky-say-scientists>; see also Leible, S. (2010). Consumer Information Beyond Food Law, 2010. The Commission’s *Better Training for Safer Food Initiative* aims at fighting food crime in relation to counterfeit and substandard food products; see http://ec.europa.eu/food/training_strategy/intro_en.htm.

⁴³ See <http://www.foodnavigator.com/Legislation/Drawing-a-line-between-imitation-food-and-innovation>. However, coconut milk is allowed as a vegetable-based milk product; see 2010/791/EU: Commission Decision of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007.

⁴⁴ Originally, the focus of the rules was on the “imitation” problems, especially in relation to hams and cheeses; see European Parliament legislative resolution of 16 June 2010 on the proposal for a regulation of the European Parliament and of the Council on the provision of food information to consumers (COM(2008)0040 – C6-0052/2008 – 2008/0028(COD)). The reason behind the rules is not clear from the preparatory works; however, the rules might have been inspired by the debate concerning ingredient listing of alcoholic beverages, and the option to approach this by labelling of ingredients of specific characteristics to the product. See Commission Staff Working Document

According to the new rules, the quantity of ingredient(s) appearing in the name must be indicated, unless the ingredient(s) is/are not essential to characterise the product. The FIR also alters previous rules concerning the labelling of substitute ingredients, which followed from the Sauce Béarnaise judgment.⁴⁵ According to these new rules, the label must indicate when traditional ingredients have been replaced. However, what remains to be established is how and who is to decide which are the essential and traditional ingredients.

Comparing the rules in the Food Information Regulation with the vertical rules on Eurofoods and Quality Schemes, room for development of new products using traditional names is almost non-existent within the vertical rules. From a consumer protection perspective, the risk of consumer confusion has been conspicuously more important in food protected by the vertical rules – despite the fact that these rules do not *de jure* aim at consumer protection. From a business perspective, the requirement to label imitations and substitutes potentially could discourage businesses from innovating out of fear of being labelled “imitator”⁴⁶ or could lead businesses to select more fanciful food names, to consumers’ detriment. The desire to indicate imitation might exist only cases of imitation of products carrying certain reputations, such as PGI/PDO products. Ironically, for these geographical names, no such possibility exists.

accompanying the Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers, impact assessment report on general food labelling issues, SEC(2008) 92.

⁴⁵ Prior to the Court’s conclusion in this case, the Commission had actually recommended rules similar to the ones now found in the FIR, see European Commission, “Communication on the free movement of foodstuffs within the Community”, 1989 OJ No. C 271/3, p. 9.

⁴⁶ See Dévényi, P. (2011). The New Regulation on the Provision of Food Information to Consumers - Is New Always Better?, *European Food and Feed Law Review*, 4, 2011.

CHAPTER 6: GEOGRAPHICAL NAMES AND ORIGIN LABELLING

1 Introduction

Geographical names and origin labelling¹ have been important issues throughout the history of the EU and there are many different pieces of EU legislation related to these topics.² However, the Commission has generally considered requirements to origin label according to national or regional schemes as impediments to cross-border trade.³ Section 3 of this chapter provides an analysis of the EU sources of law on obligations to origin label food products, for example, by the use of geographical names. Before this, however, section 2 provides an analysis of the terms used in relation to geographical names, for example, “origin” and corresponding terms. The purpose of this is to define different types of geographical names to which different rules regarding the use of these can be attached.

Chapter 2 indicated that the protection of geographical names that fall under the Quality Schemes is rather comprehensive. EU-wide protection is only granted to names/designations/indications⁴ for which a link exists between the product and its specific qualities and characteristics due to the origin. Other geographical names are subject to other rules, such as those prohibiting names that mislead consumers.

¹ The term origin/origin labelling is used, despite the definition of “country of origin”, to cover any place from which a food product might originate.

² See, e.g., the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, Articles 23–26 and the definition of “place of provenance” in the Food Information Regulation Article 2(2)(g). For an overview, see Kireeva, I. (2012). Origin Labelling in the European Union.

³ See, e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region, A Better functioning food supply chain in Europe, COM (2009) 591, p. 10–11. See section 3 for possibilities to oblige food businesses to origin label according national law.

⁴ Also, the term “appellations” is sometimes used in relation to geographical names. No further analysis is provided on a potential distinction between “names” and “appellations”, but the “term” name is considered to be broader, because a geographical name does not necessarily indicate/designate where the concerned product comes from. This will be the case for generic names, such as Danish pastries, which is a common name for a type of product.

A number of Danish cases regarding potentially misleading names have concerned the origin of the food product.⁵ Many cases have concerned the use of geographical names for meat and fish products, for which origin labelling is mandatory; an example is Case 2003-10-274-00240, in which a consumer complained about a salmon product that was sold under the name “Norwegian salmon” but had a Swedish flag on the package to indicate the origin of the food business responsible for the sale of the product. In relation to the use of geographical names and their misleading potential, the Danish authorities do not seem to be consistent. The cases below illustrate this:

In Case 2002-05-271-00003, the administrative authority decided, ex officio, that the trademark “Cuba Caramel” for a spirit drink was misleading unless the name was accompanied by the description “Made in Denmark” in close proximity to the name.⁶

In Case 2004-04-722-24837, a complaint was filed against the use of the name “*ægte italiensk skinke*” (genuine Italian ham). The ham originally came from Holland, but had been exported to Italy where the ham was ripened by air-drying. The authority concluded that the name was not misleading, for two reasons: (1) the ham was actually produced in Italy, which was what the name “genuine Italian ham” also indicated, and (2) no rules prescribing origin labelling existed in Italy.

Three similar cases concerning a potentially misleading geographical name, referring to Italy, were Cases 2005-10-275-01731, 2006-N3-274-00163 and 2006-N3-274-00182. In these cases, competitors had complained about the use of the name “*Italienske boller*” (Italian buns) because they did not originate from Italy. The Danish authority stated that if the buns were produced according to an Italian recipe, using Italian flour, and if consumers were not misled in any other way as to the origin of the buns, the name were considered legal.

When comparing the conclusions in the different “Italian” cases to the “Cuba Caramel” case, it becomes clear that differences exist as to the evaluation of the misleading potential of different

⁵ Ninety of the 272 cases concerned origin of the food.

⁶ “Cuba Caramel” was introduced on the Danish market in 1998 and registered as a trademark in Denmark in 2001, which indicates (similar to the Joe and the Juice case described in Chapter 1) that the evaluation on whether a name is misleading even differs between two authorities in the same country. Despite the fact that the name is a trademark rather than a food name, the evaluation by the authority is based on the rules on indication of origin/provenance in the labelling rules. It can be questioned whether the product “Cuba Caramel” does deceive consumers in regards to origin, given that there is no specific link between Cuba and caramel, or Cuba and vodka which is the spirit base, and because the trademark is also a play on words.

names. Some names indicate origin, while others indicate a type of product, which is decided on a case-by case basis; this inevitably results in legal uncertainty. National evaluation of whether a geographical name is misleading can be a matter of different circumstances, such as the type of product or rules in other EU Member States. The “Italian” cases are examples of why answering the research question in this thesis is important. The cases raise important practical questions, which is contained in the overall research question: how do the principle of mutual recognition and the prohibition against the use of misleading names interact; for example, must the name “Italian buns” be recognised in other EU Member States and under what circumstances, and is it relevant for a Danish evaluation of a potentially misleading name that Italy has no rules on origin labelling?⁷

Section 4 provides an analysis of EU law on the use of geographical names, other than PGI/PDOs, in order to determine valid law, including an analysis of whether these other geographical names can be protected and, if so, under what circumstances. The aim is to clarify how the PGI/PDO Regulation and the wide EU protection granted to such names interacts with potential national protection of geographical names.

2 Country of origin, provenance, indirect geographical indication

In legislation regarding food names, as well as in case-law, many different terms have been used in relation to geographical names, including “country of origin”, “designation of origin”, “appellation of provenance”, “place of provenance”, “geographical indication”, and “indirect geographical indication”. This section analyses terms that are not defined in the PGI/PDO Regulation⁸ in order to clarify the potential differences in the substantive law governing these names.

According to the Food Information Regulation, “country of origin” must be determined in accordance with Articles 23–26 of Regulation (EEC) No 2913/92.⁹ According to Article 23(2), goods that are produced exclusively in a country from goods wholly obtained in that country, or

⁷ These questions are also addressed in Chapters 8 and 9.

⁸ See Chapter 2, Section 4.3, for relevant terms in the PGI/PDO Regulation.

⁹ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

from their derivatives, at any stage of production, are deemed to originate from that country. According to Article 24:

“Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.”¹⁰

The FIR also defines “place of provenance”. According to Article 2(2)(g), place of provenance is any place where a food is indicated to come from and which is not the “country of origin”. The name, business name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food.

In the Exportur-judgment,¹¹ the CJEU was asked whether a bilateral convention between France and Spain reserving the names “Turrón de Alicante” and “Turrón de Jijona” for Spanish products, in the territory of the French Republic were contrary to rules on free movement of goods. The judgment was made prior to the adoption of the PGI/PDO Regulation, which means that the conclusions on protection, etc. are irrelevant, but the Court provided important definitions related to geographical names, which most likely inspired the later regulation of PGI/PDO. In para. 11, “indications of provenance” were defined as:

“intended to inform the consumer that the product bearing that indication comes from a particular place, region or country. A more or less considerable reputation may attach to that geographical provenance... Indications of provenance are protected by the operation of rules designed to suppress misleading advertising, or indeed the abusive exploitation of another’s reputation.”

¹⁰ WTO and Codex Alimentarius rules provide that origin is the place of the last substantial change or transformation of a product. See Kireeva, I. (2012). Origin Labelling in the European Union, p. 552.

¹¹ Exportur, Case 3/91, Judgment of the Court of 10 November 1992, Exportur SA v LOR SA and Confiserie du Tech SA.

This definition was based on a comparative examination of national laws. The Court stressed, in para. 28, that indications of provenance can enjoy a high reputation amongst consumers and be an essential means of attracting custom, which could justify protection. The judgment also makes it clear that “indications of provenance” are distinct from “designations of origin”, as is the protection afforded to each.¹²

The Pistre judgment¹³ that followed the adoption of the PGI/PDO Regulation concerned a French law, which stated that prior approval was necessary for the reference to “mountain/montagne” on food labels.¹⁴ The CJEU, in paras. 36 and 53, confirmed that “indications of provenance” are different from PGI/PDOs. The CJEU stated rather firmly that a name including “mountain/montagne” was not an indication of provenance because it did not make a link to a specific place. Although it is not clear how the definition of “place of provenance” differs from “indication of provenance”, it is most likely that a name including “mountain/montagne” can neither be defined as a “place of provenance”, for the same reason that it is not an “indication of provenance”.¹⁵

¹² The difficulty with understanding the exact differences between protection of geographical indications and appellations of origin is partly linked to the confusing use of terminology in this judgment. The Court stated that indications of provenance were protected by rules related to fair competition whereas indications of origin were protected as intellectual property. See Chapter 8 for an analysis of the borderlines between fair competition and protection of intellectual property.

¹³ Pistre, Joined cases 321/94, 322/94, 323/94 and 324/94, Judgment of the Court of 7 May 1997, Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94).

¹⁴ The question referred to the CJEU in Pistre-judgment actually concerned Treaty based rules on free movement of goods and it was concluded that the French rules were discriminatory. The Advocate General in the case discussed whether the national measure at issue were either quality control measures or origin measures (see Opinion of Mr Advocate General Jacobs delivered on 24 October 1996, Pistre, Joined cases 321/94, 322/94, 323/94 and 324/94, Judgment of the Court of 7 May 1997, Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94)).

¹⁵ Interestingly, in the current debate concerning the future of the Quality Schemes, the quality attached to mountain origin is a topic: In European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council on agricultural product quality schemes, 2010/0353/COD, it is suggested that the Quality Scheme Proposal should also include a possibility to label food with “product of mountain farming”. Also, the EESC in Opinion of the European and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council on agricultural product quality schemes’, OJ 2011 C 218, pp. 114-117, calls for new thoughts on the possibility to include ‘mountain’ as optional quality term, see p. 114. A similar call is found in Opinion of the Committee of the Regions in “Towards an ambitious European policy for agricultural quality schemes, 2011 OJ C 192, p. 31. Dévényi, P. (2011). The New Proposal on Agricultural Product Quality Schemes - Quality Legislation on Quality Questions?, pp. 163-164, on the contrary questions why exactly mountains should be attached to special quality products and not other areas with special terrains etc.

There seem to be two main differences between “country of origin” and “provenance”. Firstly, country of origin is defined by national borders, whereas provenance can be a limited geographical area.¹⁶ Secondly, in order to characterise a country as the “country of origin”, a least a substantial and important part of the production must relate to this country. Whether the differences have any substantive importance will be clarified following the analyses provided in this chapter.

In the Prantl judgment,¹⁷ the term “indirect geographical indication” was introduced. While the term itself was not defined, the case concerned protection of *bocksbeutel* bottles (traditional German wine bottles) and whether it was possible to prevent Italian producers from using similar bottles. Thus, “indirect geographical indications” are symbols and the like that indirectly link to origin. Symbols cannot be protected under the PGI/PDO Regulation because the protection is only granted to names. What is evident from the judgment, however, is that an indirect indication such as a symbol may be protected without specifying under which set of rules, if it has been used for a long period of time by producers in order to distinguish their products. Nevertheless, the rules on free movement prohibit national legislation from allowing only certain domestic producers to use an indirect indication, based on consumer protection and fair trade,¹⁸ if a similar indication has been used by producers in other Member States, for a certain period of time and in accordance with fair marketing practice, cf. para. 38.¹⁹

It is questionable whether traditional national food names/products could constitute indirect geographical indications subject to protection. Examples could include the Danish “*rullepølse*”, Swedish “*Surströmming*” or even French “*foie gras*”²⁰ – prior to the *Foie Gras*-judgment;²¹ all of

¹⁶ “Origin”/“place of origin” is not defined, but in relation to PDOs, origin only refers to an entire country in exceptional circumstances; cf. Article 2 of the PGI/PDO Regulation. This indicates that the terminology is somewhat mixed up. For this reason, it seems that when food businesses use descriptive names like “XX originating from YY”, “YY” does not necessarily have to be a country. The term origin does not automatically link to the territory of an entire country.

¹⁷ Prantl, Case 16/83, Judgment of the Court of 13 March 1984, Criminal proceedings against Karl Prantl.

¹⁸ If the *bocksbeutel* had been protected as a three-dimensional trademark (an intellectual property right) under national law, the conclusion would probably have been different. See Chapter 8 for analyses and discussions on the borderlines between fairness and protection of intellectual property.

¹⁹ Italian bottles similar to the German had been used for more than a century, particularly in the Southern Tyrol. See section 4.2 for more on this.

²⁰ Approximately 80 percent of the worldwide *foie gras* production originates from France, see <http://www.elfoiegras.es/NdSite/OnLineCache/FMS/05/12/1b8dbf00aae77587baf66f19723f3b65/Dr.%20Guemene,%20>

these products are normally/traditionally produced in these countries, and the name seems to make this link.

In the Budvar I judgment,²² the Court also considered what it termed as “simple and indirect indications of geographical origin/source” as a name in respect of which there is no direct link between a specific quality, reputation or other characteristic of the product and its specific geographical origin.²³ Protection of simple/indirect indications potentially harms cross-border trade, which means it can only be justified if the protected name directly or indirectly identifies a region or place and has therefore not become generic²⁴ in the state of origin. The Court further noted, in para. 110 (emphasis highlighted):

“If it were established that the name Bud does not contain any reference to the geographical source of the products that it designates, the Court would have to hold that none of the information supplied to it by the national court shows that protection of that name is susceptible of preventing economic operators from obtaining an unfair advantage or consumers from being misled as to any of the characteristics of those products.”

Thus, only products that designate a geographical source, despite having no specific quality, etc., can be protected. However, the protection must be necessary to prevent unfairness and/or misleading

pasado%20presente%20y%20futuro%20de%20la%20alimentacio%26%23769%3Bn%20asistida%20y%20la%20produccio%26%23769%3Bn%20de%20foie%20gras.pdf. This is of course linked to the fact that many countries prohibit force feeding; see e.g. <http://www.nofiegras.org/legal.html>. In the Foie Gras judgment, no such arguments were put forward, and following this judgment, it cannot be claimed that foie gras is an indirect geographical indication; rather it is generic.

²¹ Foie Gras, Case 184/96, Judgment of the Court of 22 October 1998, Commission of the European Communities v French Republic.

²² Budvar I, Case 216/01, Judgment of the Court of 18 November 2003, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH, para. 54.

²³ The Budvar cases are rather complex but concern the conflicts arising due to the co-existence of a registered trademark (American Bud/Budweiser) and the geographical name Budvar for Czech beer. The questions in the cases relate to both the PGI/PDO Regulation and the free movement provisions, due to the fact that the Czech Republic was not a Member State of the EU at the time, and the protection was sought in Austria via a bi-lateral agreement. For more on the judgment, see O’Conner, B. (2004). Case C216/01 Budejovický Budvar - Judgment of the Court of Justice of 18 November 2003 pp. 577–588.

²⁴ The term “generic”, which is defined in the PGI/PDO Regulation, is used in many times by the CJEU and the Commission without any clarifications of what the term covers.

of consumers. It is not clear what “geographical source” constitutes, but in the Budvar II judgment,²⁵ para. 82, the Court clarified it by establishing that an indirect indication should at least be capable of informing the consumer that the product carrying the indication comes from a particular place or region. Thus, a link should exist between the geographical area and the product. It is also clear from this judgment that an indirect indication can become generic and cannot be protected under the PGI/PDO Regulation.

Three terms appear to be important in relation to geographical names: “origin”, “provenance” and “geography”.²⁶ It is not clear exactly how these differ from each other and whether this even has any impact on the evaluation of potentially misleading names.²⁷ However, it is clear that the link between a product and a geographical area can differ and that it is, as a rule, stronger when the term origin is used; and of course weakest where the term “indirect/simple” is used. The protection granted to the different types of geographical names also varies, from wide EU protection, when a name can fall under the PGI/PDO Regulation, to national limited protection based on either intellectual property protection,²⁸ which can potentially justify restrictions to cross-border trade or on fairness; this is questionable as justification for restricting cross-border trade.²⁹

²⁵ Budvar II, Case 478/07, Judgment of the Court of 8 September 2009, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH.

²⁶ For a different overview of the types of geographical names, see Jokuti, A. (2009). Where is the What if the What is in Why? A Rough Guide to the Maze of Geographical Indications.

²⁷ Note that the focus on differing terms does seem relatively new; the terms are not defined in the legislation prior to the FIR, which could explain why the terms used in the legislation do not match the definitions from case law provided here.

²⁸ According to the Warsteiner judgment, Case 312/98, Judgment of the Court of 7 November 2000, Schutzverband gegen Unwesen in der Wirtschaft eV v Warsteiner Brauerei Haus Cramer GmbH & Co. KG, paras. 49–50, the PGI/PDO Regulation does not prevent national rules protecting geographical names alongside the Regulation. In this regard, see Chapter 2, section 4.2.

²⁹ For more on this and a definition of the term fairness, see Chapter 8, Section 2.

3 Obligations to indicate origin/provenance/geographical area

In the Proposal to the FIR, the Commission noted with reference to the consultation of interested parties, “*that origin labelling is a problematic area*”.³⁰ Without further addressing this statement, the Commission proposed that the basic rules on origin labelling should remain the same as in the Second Labelling Directive.

It is the main rule that origin/provenance labelling is not mandatory. This seems rational when considering that the development within food production, with constant development of new production methods, implies that the place of production and therefore the origin/provenance of food could easily change. However, the Quality Schemes rules, as well as the case law on origin, provenance and geographical indications, imply a demand for knowledge about origin, an interest in food origin and that origin affects the characteristics of food.³¹

For this reason, it also follows from Article 7(1)(a) of the Food Information Regulation that fair information practices implies that food information, including food names, does not mislead consumers in particular as to the country of origin or place of provenance of a food. More specifically, Article 26 of the FIR regulates when origin/place of provenance labelling is mandatory; the second subparagraph, point (a) provides:

“Indication of the country of origin or place of provenance shall be mandatory:

*(a) where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance.”*³²

³⁰ See p. 4. Recital 4 of the PGI/PDO Regulation states (emphasis highlighted): “*In view of the wide variety of products marketed and the abundance of product information provided, the consumer should, in order to be able to make the best choices, be given clear and succinct information regarding the product origin.*”

³¹ In this regard, see Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, pp. 27–28, confirming a growing interest in origin labeling, however with striking differences across EU. See also Kireeva, I. (2012). *Origin Labelling in the European Union*, p. 552.

³² A similar rule to the FIR rule is found in Codex alimentarius rules. The overlap between Article 7(1)(a) and Article 26(2)(a) seems almost complete, and it verifies the importance of the general prohibition against misleading names.

Despite no obligation existing, food businesses can voluntarily provide the information, while observing other relevant rules, such as rules on voluntary information. According to Article 26(3) of the FIR, where the country of origin/place of provenance of a food is stated and is not the same as that of the primary ingredient,³³ this must be indicated, either by stating the country of origin/place of provenance of the primary ingredient or by indicating that it is different to that of the food.

Rules on origin labelling also exist for Eurofoods.³⁴ For meat, the name must always be accompanied by an indication of origin or place of provenance. The obligation to label the origin of beef has been thoroughly regulated in that it is mandatory to label the country of birth, the country of rearing, and the country of slaughter, cf. Article 26(9) of the FIR.³⁵ According to the Honey Directive Article 2(4), the country or countries of origin in which honey has been harvested must be indicated on the label, although such indication can be replaced by, for example, the term “blend of EC honeys”, if the honey originates from more than one Member State. The Directive does not specify where on the label the information on origin should be placed.

For fish (live, fresh and chilled) indication of the catch area³⁶ is mandatory, cf. article 4(1)(c) of the CMO for fishery and aquaculture products;³⁷ for wine, the obligation to origin label is thoroughly regulated in the Single CMO Regulation. Special rules on origin also exist in relation to olive oil cf. the Regulation on marketing standards for olive oils.³⁸ According to Article 5, a designation of origin shall relate to a geographical area and may mention only either a PGI/PDO or a Member State, the European Community, or a third country. Here, therefore, origin is also related primarily to larger geographical areas. The

³³ “Primary ingredient” is defined in Article 2(2)(q) as an ingredient or ingredients of a food that represent more than 50 percent of that food or is usually associated with the name of the food by the consumer and for which a quantitative indication is usually required. See also Chapter 5, Section 2.1.

³⁴ These requirements are found in the single Common Market Organisation (Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)), vertical Directives and in FIR appendix XI. Mandatory origin and provenance labelling exist for e.g. meat, honey, extra virgin and virgin olive oils, wine and some fruits and vegetables.

³⁵ For a general description of rules on origin labeling of beef, see Kireeva, I. (2012). Origin Labelling in the European Union.

³⁶ Twelve catch areas are listed in the Annex of Commission Regulation (EC) No 2065/2001 of 22 October 2001, which lays down detailed rules for the application of Council Regulation (EC) No 104/2000 with regard to informing consumers about fishery and aquaculture products. More precise catch areas may be indicated cf. article 5(2).

³⁷ Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products.

³⁸ Commission Implementing Regulation (EU) No 29/2012 of 13 January 2012 on marketing standards for olive oil (codification).

designation of origin mentioning a Member State or the Union shall correspond to the geographical area in which the olives concerned were harvested or in which the mill where the oil was extracted from the olives is situated. The complexity of EU law on indication of origin seems evident when considering these rules.

No obligation to origin label is found in the Quality Schemes rules. However, because the horizontal labelling requirements in the FIR also apply to Quality Schemes food, cf. recital 5 of the PGI/PDO Regulation, information of origin/provenance must be presented where failure to do so would mislead consumers as to the true origin/provenance. Since most of the PGI/PDOs are geographical names, such indication is already provided; the provenance of non-geographical names such as “feta”, however, is not automatically indicated. Feta is produced in certain areas in Greece, but not in all of Greece,³⁹ but most consumers probably link “feta” with all of Greece,⁴⁰ which could suggest that an obligation to indicate true provenance follows from FIR Article 26(2)(a). Further, if the geographical name “Greek-inspired white cheese in brine” triggers an image of feta in the mind of consumers, as suggested in Chapter 2, consumers might then attribute Greek origin to feta. Despite this, it is unlikely that a lack of indication of specific provenance would materially distort the economic behaviour and cause the consumer to make a transactional decision that (s)he would not have taken otherwise.⁴¹ In relation to PGI/PDOs, the link to origin seems to concern more than strict geographical origin, which is also why the names are afforded broad protection.

An obligation to indicate origin/provenance can also follow from national law. Article 39(2) of the FIR mandates Member States, subject to a notification procedure, to adopt national measures requiring origin labelling. However, such national measures may only concern food where there is a proven link between certain qualities of the food and its origin/provenance and where a majority of consumers attach significant value to the origin/provenance information.⁴² In case law prior to the adoption of the FIR, the CJEU has generally held that national rules obliging businesses to mark

³⁹ For this reason, the term provenance is used.

⁴⁰ It was argued in the Feta cases that the use of Greek symbols signaled a link between Greece and “feta”.

⁴¹ For more about the prohibition against misleading consumer, see Chapter 8, Section 3.

⁴² See in general Chapter 9 for more on how Member States can regulate naming, see Chapter Section 3.4.1 for more about Article 39.

their products with origin constitute a restriction to free movement, which cannot be justified on consumer protection grounds.⁴³

4 Use and protection of geographical names

The origin of a food product undoubtedly affects the quality, or at least the perception of quality,⁴⁴ that is attached to the product. Countries like Italy and France are known for their gastronomic products, which leads people to associate those countries to food with a certain level of quality.⁴⁵ This explains why a Danish producer of buns, inspired by a traditional Italian recipe, would name his buns “Italian buns”. This geographical name cannot be protected under the Quality Schemes rules, because the quality attached to Italian bread, for example, can be repeated elsewhere.⁴⁶ Furthermore, if the name does not make a specific link to geographical source, it cannot be protected by national rules aiming at preventing fairness and the like. However, the name must not be misleading, of course. It is clear from the Danish cases described above that the Danish administrative authorities did not find the name “Italian buns” misleading, while the name “Cuba Caramel” was considered to be misleading.

⁴³ See, e.g., *Commission v UK*, Case 207/83, Judgment of the Court of 25 April 1985, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, para. 21.

⁴⁴ Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 25, states: “‘Origin’ is one element within a wider set of factors that influence perceptions of quality”.

⁴⁵ In this regard, see Franzosi, M. (1996). ‘Made in...’ – ‘Made in Ruritania’ – ‘Made in Italy’, p. 613. Similar recognition of quality of Nordic food might be the result of the current development in Nordic gastronomy; see, e.g., <http://nynordiskmad.org/>. A tendency to use geographical names might arise as a consequence of more diversification between Member States in the 27+ EU.

⁴⁶ In this regard, see Rangnekar, D. (2004). *The Socio-Economics of Geographical Indications*, p. 19, who notes that the reasons for protecting geographical names under the Quality Schemes rules is linked to the fact that the quality of “the product concerned – with essential similar characteristics – cannot be produced in a different physical/human environment.”

It is clear from the case law analysed above that some geographical names are entitled to some sort of protection, even if they cannot be protected under the Quality Schemes. This was also firmly concluded by the CJEU in the Warsteiner judgement.⁴⁷ In the Exportur judgment, in para. 28, for example, the CJEU held (emphasis highlighted):

“It would have the effect of depriving of all protection geographical names used for products which cannot be shown to derive a particular flavour from the land and which have not been produced in accordance with quality requirements and manufacturing standards laid down by an act of public authority, such names being commonly known as indications of provenance. Such names may nevertheless enjoy a high reputation amongst consumers and constitute for producers established in the places to which they refer an essential means of attracting custom. They are therefore entitled to protection.”

Whereas PGI/PDOs are protected as European intellectual property rights, (some) other geographical names (stating country of origin or provenance or simple geographical indications) are attached to rules prohibiting misleading advertising and securing fairness in trade/preventing abusive exploitation. This follows indirectly from the Exportur and Budvar I judgments.⁴⁸ For this reason, it is necessary to clarify the requirements for protection and the scope of protection of these other geographical names.

4.1 The requirements for protection

It is clear from Chapter 2 and the Budvar II judgment that a geographical name does not necessarily inform the consumer that the product bearing the name comes from a particular place or region. Danish pastries, French toast Frankfurter sausage and Greek salad all designate different types of products, instead of where the specific product comes from.⁴⁹ Danish pastries are made all over the

⁴⁷ See footnote 28 of this Chapter.

⁴⁸ See para. 11 of the Exportur judgment, cited above, and para. 101 of the Budvar I judgment, also cited above. Note that none of the cases concerns protection of a geographical name in a Member State that is or cannot be protected as a PGI/PDO. However, it is assumed that analogies can be drawn from these judgments.

⁴⁹ Following a decision by the Danish administrative authorities, “Italian buns” also falls into this category, at least within the territory of the Danish State.

world, but they are based on inspiration from pastry from Denmark.⁵⁰ The reason is that these names have become generic (within the EU); they are common names⁵¹ that cannot be protected.⁵²

It is clear from the above analysis of judgments that in order to be protected in an EU-wide internal market, a geographical name must provide a link between the specific product and its origin; in other words, some sort of reputation must exist. Therefore, a geographical name can only be reserved for national producers if there is a link between the product and its origin/provenance, etc. If no such link exists, justification cannot be provided for the potential restriction to free trade following the reservation. It is not clear whether a link to quality must also exist. The reference to reputation made in the Exportur judgment might attach a quality requirement to “indications of provenance”.⁵³ In the Prantl judgment, an indirect geographical indication was a way to distinguish a product from other products, thereby suggesting some sort of (quality) reputation. On the contrary, the Budvar-I judgment attached no link to specific quality to the definition of an “indirect/simple geographical indications”.

Another requirement is that the name has not become generic within the Member State of origin, as this would have erased the link to a geographical place. In this regard, the Court has provided some guidance as the size of the geographical area. In the Sekt judgment,⁵⁴ the CJEU held that a national territory or a linguistic criterion cannot constitute an area that causes the products produced therein to possess certain qualities and characteristics. Protection and reservation of geographical names based on such criteria cannot justify restrictions to trade. This judgment also indicates that a quality link is necessary; however, this judgment came prior to the Exportur judgment, which introduced a wider definition of geographical names.

⁵⁰ Ironically, Danish pastries (or Kopenhagener Gebäck) are actually sold as “wienerbrød” in Denmark, referring to the Austrian capital, from where Danish bakers gained knowledge of pastry in the 18th century. See, e.g., <http://www.danske-konditorer.dk/fagspecialer/wienerdej>. This example can also illustrate why it is important to consider language difficulties, including problems of translation.

⁵¹ In this regard, see also the Deserbais judgment, Case 286/86, Judgment of the Court of 22 September 1988, *Ministère public v Gérard Deserbais*.

⁵² See Chapter 2, section 4.3.2.

⁵³ In this regard, see Stigler, G. J. (1961). *The Economics of Information*, who notes at p. 224: “*‘Reputation’ is a word which denotes the persistence of quality...*”

⁵⁴ Sekt, Case 12/74, Judgment of the Court of 20 February 1975, *Commission of the European Communities v the Federal Republic of Germany*. The judgement concerned German designations reserved for German wine producers and their potential restrictive effect on free movement.

Therefore, in order to obtain protection, a link must exist between a specific origin, (quality), and a specific product. This was also confirmed in the CMA judgment.⁵⁵ Here, the establishment of the German quality mark, “Markenqualität aus deutschen Landen”, was found to constitute a barrier to free movement because the mark promoted German food at the potential detriment of imported products. In this regard, the CJEU noted, in para. 27, that (emphasis highlighted):

“A scheme such as that at issue in the present proceedings, defining the area of provenance as the extent of German territory and applying to all agricultural and food products fulfilling certain quality requirements, cannot in any case be considered as a geographic indication capable of justification under Article 36 of the Treaty.”

The German government did not try to justify the measure as a matter of consumer protection, maybe because the CJEU had previously determined that origin labelling was not a matter consumer protection.⁵⁶

The Sekt and the CMA judgments initially indicated that it is not possible to protect a geographical name, whether it is an indication of provenance or an indirect geographical indication, that provides a link between a product and an entire country. Such names have a generic character within the Member State of origin, like “rullepølse” or “Italian pasta”.⁵⁷

However, despite the fact that such names cannot (initially) be protected, the prohibition against misleading consumers will still apply. For this reason, even though “Italian pasta”, for example, may be a generic name within Italy, the name still connotes a link to Italy and the specific Italian rules on pasta production,⁵⁸ which suggests that the use of such a name for non-Italian pasta would be

⁵⁵ CMA, Case 325/00, Judgment of the Court of 5 November 2002, Commission of the European Communities v Federal Republic of Germany.

⁵⁶ See Commission v UK, Case 207/83, Judgment of the Court of 25 April 1985, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, where the CJEU found that protection of consumers could not justify obligations to origin label. If the origin was linked to quality businesses would voluntarily provide the information on origin.

⁵⁷ Note again that the term “generic” is not used in a consistent way; in some cases generic refers to a common European understanding, while it in other cases refer to a national understanding.

⁵⁸ See Chapter 9 for more about these rules.

misleading. It could also be argued that the use of the name “Italian pasta” by other than Italian producers constitutes unfair competition and free riding on reputation, thereby indirectly linking a prohibition against the use of the name by foreign producers to “protection”.⁵⁹ The requirements to protect and to reserve a geographical name might formally be based on the existence of a specific link; however, at least for geographical names that directly signal something about the origin, a name such as “Italian pasta” might be reserved anyway based on general rules on fairness and prohibition against the use of misleading names.

It is possible to strengthen a geographical link between a product name and its qualities, which provides for potential (EU or national) protection. This follows from the Apple and Pear judgment⁶⁰, in which British growers who were displeased with an obligation to pay fees to a development council argued that the establishment of the council was contrary to EU law on free movement. The British government had established and funded the council, the tasks of which included promoting the production and marketing of standard products as well as promoting better definitions of trade descriptions and the use thereof. The development council organised campaigns relating specifically to English and Welsh apples and pears. The Court confirmed its previous case law establishing that publicly-supported discouragement of the purchase of imported products would be contrary to the rules on free movement.⁶¹ However, according to para. 19, these rules do not prevent “*drawing attention [...] to the specific qualities of fruit grown in the Member State in question or from organizing campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national production.*” It follows from this judgment that, if a certain quality reputation does not initially exist for a geographical name, it is possible to establish such a link. When a link is established, protection can be granted.⁶²

⁵⁹ The example illustrates the relevance of clarifying borderlines between fair competition and intellectual property protection, which is the aim of Chapter 8. Further, the example illustrate that conflicts with Treaty-based free movement rules are potential, which is why it is important to clarify the interaction with, especially, the principle of mutual recognition and the principle of proportionality. This is the aim of Chapter 9.

⁶⁰ Apple and Pear, Case 222/82, Judgment of the Court of 13 December 1983, Apple and Pear Development Council v K.J. Lewis Ltd. and others.

⁶¹ See, e.g., Buy Irish, Case 249/81, Judgment of the Court of 24 November 1982, Commission of the European Communities v Ireland.

⁶² It could be argued that Italy could initiate similar campaigns for “Italian pasta” and the specific quality due to the exclusive use of durum wheat and thereby establish a specific link. For more on this, see Chapter 9.

4.2 *The protection of geographical names*

If the requirements for protection are fulfilled, a Member State can, based on national legislation, prevent producers from other Member States from using the geographical name. However, the protection that can be afforded to national geographical names is limited if similar names have been used in another member state “*in accordance with a fair and traditional practice for marketing*” in that state, see para. 38 of the Prantl judgment.⁶³ This limitation initially seems to be in line with the principle of mutual recognition, which is why the protection that can be granted to national geographical names initially seems limited. However, a main difference that seems to exist between mutual recognition of food names in general and of geographical names is that the geographical name must not only be “legally used” in the other Member State, but it must also have been used “in accordance with a fair and traditional practice.” Chapter 8 provides a definition of “fair/fairness”. “Traditional” seems to indicate that the name has been used for a certain time period.⁶⁴

From the case law analysed above, it is clear that the protection afforded to geographical names that cannot be protected under the Quality Schemes is a matter of consumer protection and of securing fairness in trade/preventing abusive exploitation.⁶⁵ It is not clear whether there is a difference between securing fairness and preventing abusive exploitation, or whether the terms overlap.⁶⁶ However, the “Italian pasta” example seems to suggest that this is probably also irrelevant in the case of geographical names.

⁶³ Similar follows from the Miro Case 182/84, Judgment of the Court of 26 November 1985, Criminal proceedings against Miro BV, para. 24. In HAG, Case 192/73, Judgment of the Court of 3 July 1974, Van Zuylen frères v Hag AG, a similar conclusion is found in relation to protection of trademarks. See also the TSG Regulation, Article 9(3)(b) and 13(2) which establish that where the name is used in a “*lawful, renowned and economically significant*” manner for similar agricultural products or foodstuffs, it is not possible to reserve the use of the name.

⁶⁴ According to the TSG Regulation, “traditional” refers to a name which has been used for at 25 years, cf. Article 4(3), cf. Article 2(1)(b). In the Quality Schemes Proposal, p. 8, the Commission proposes to extend this to 50 years.

⁶⁵ In this regard, see also Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 24 June 1997, *Canadane*, Case 317/95, *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v Hellenic Republic (Ypourgio Emboriou, Ypourgiou Oikonomikon, Ypourgiou Ygeias, Pronoias kai Koinonikon Asfaliseon and Ypourgiou Georgias)*, where it is noted, in para. 35 that: “*The legal protection of geographical names safeguards producers’ interests against unfair competition and protects consumers against information which may mislead them.*”

⁶⁶ “Fairness” is analysed in Chapter 8.

In the Exportur judgment, a bilateral convention between France and Spain reserved the names “Turrón de Alicante” and “Turrón de Jijona” for Spanish products in the territory of the French Republic. In para. 37, the CJEU held (emphasis highlighted):

“The aim of the Convention is to prevent the producers of a Contracting State from using the geographical names of another State, thereby taking advantage of the reputation attaching to the products of the undertakings established in the regions or places indicated by those names. Such an objective, intended to ensure fair competition, may be regarded as falling within the sphere of the protection of industrial and commercial property within the meaning of Article 36, provided that the names in question have not, either at the time of the entry into force of that Convention or subsequently, become generic in the country of origin.”

A similar link between protecting indications of provenance and protecting industrial and commercial property was made in the Pistre judgment, para. 53. Thus, the protection that can be granted to geographical names that fulfil the above-defined requirements but cannot be registered as PGI/PDO is initially an intellectual property protection.

In the Budvar II judgment, the Court established, in para. 129, that the PGI/PDO Regulation is:

“...exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.”

Therefore, the protection is limited to the national territory of the Member States, which logically prevents a Member State from prohibiting the use of a geographical name, that is protected in that State, in other Member States. As mentioned, according to the Prantl judgment, para. 38, the protection cannot be upheld if imported products have been sold under a similar name in accordance with traditional and fair marketing practice.

5 Concluding remarks

(Geographical) origin/provenance is an important and complicated topic that is regulated in the EU through many different pieces of legislation that provide various rules on protection and use of these names. Definitions of different terms are provided, but it seems that the substantive rules do not differentiate between the terms, and the use of the terms in the legislation also appears to be inconsistent. The substantive rules only differ for indirect geographical names, because it is more difficult to establish a link between an indirect geographical name and a geographical place if the name has become generic in the Member State of origin; for example, it is more difficult to establish the link for “rullepølse” than for “Italian pasta”.

Geographical names linking a product to its origin that cannot be protected under the PGI/PDO Regulation can be protected as intellectual property under national law, which can justify a prohibition against imported products carrying identical names. However, the use cannot be prohibited where an imported product has carried a similar name for a certain period of time and in accordance with fair practices. In this regard, it is important to clarify what constitutes “fair”, and how this rule differs from the general principle of mutual recognition. In addition, an analysis of the prohibition against the use of misleading names will clarify how geographical names that do not provide a link to a geographical place can be used; that is, whether a geographical name like “Italian buns” must refer to a certain composition, certain production methods, a certain taste, etc. Chapter 8 provides analyses of the relevant sources of law in regards to fairness and the prohibition against misleading names.

Due to the different cultures and languages in the European Union, the use of geographical names (like food names in general) raises question concerning language difficulties. An example is the case of Danish Pastries,⁶⁷ which is a common name in England, but would probably be interpreted in Denmark as an indication of origin if the name was directly translated. Another important question in this regard could be whether the name “Italian buns” could be used in for example Germany if no (equivalent) name is normally used in Germany. These difficulties are addressed in Chapter 7.

⁶⁷ These are actually also often referred to in the UK (and elsewhere) simply as “Danishes” (i.e., without “pastry”).

CHAPTER 7: LANGUAGE DIFFICULTIES

1 Introduction

As mentioned in Chapter 1, there are 23 official languages in the EU, plus a larger number of unofficial ones.¹ Although multilingualism and linguistic diversities have been identified as aims in Europe,² multilingualism is bound to lead to difficulties for businesses involved in cross-border trade.³ One set of difficulties relates to which language(s) should be used for products sold in different language regions. Section 2 analyses the EU sources of law on language requirements for food labelling in order to determine which language(s) can and must be used in naming.

There also appears to be practical difficulties related to the translation of names. Correct translation is a matter of finding the most suitable word(s) in order to provide consumers with relevant and necessary information. It is also in the interest of businesses to provide understandable information so that they make their products attractive.⁴

The description of the Danish cases of potentially misleading food names in Chapter 5 shows that translation difficulties do exist. An example is the translation of the word “hakkebøffer”, the most suitable English translation for which might be “hamburger steaks”, although this is not quite identical to the Danish term. The same applies for “rullepølse”. No English equivalent of the Danish food name “fiskefars” seems to exist because the English descriptions covering similar products more clearly describe the composition (“cream of fish”, “minced meat”, “minced meat with flour and egg”).⁵ The Danish name is more ambiguous.

¹ See http://ec.europa.eu/languages/index_en.htm.

² Ibid.

³ See, in general, Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament concerning language use in the information to consumers in the Community,” Com (93) 456 Final, not published in the Official Journal, which acknowledges the lack of consistent regulation of language requirements within the EU.

⁴ However, in this regard, see Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament concerning language use in the information to consumers in the Community,” Com (93) 456 Final, not published in the Official Journal, pp. 8–9, for national consumer differences concerning language use.

⁵ These translations are found in the web-based version of Gyldendals Røde Ordbøger.

The problems related to translation are not unique for food naming, but the aim in section 2 is to clarify the valid law on translation of food names. Section 2 also aims to highlight the difficulties following multilingualism in the EU. An analysis is also provided of how PGI/PDOs can be translated and what this implies for the protection.⁶

2 Which language(s) can/must be used

The name of the food product shall appear in a language that is easily understood by the consumers of the Member States where a food is marketed. Within their own territories, the Member State may stipulate⁷ that the mandatory particulars shall be given in at least one or more of the official languages of the EU, c.f. Article 15(1)-(2) of the FIR.

In 1993, the Commission formulated its interpretation of the CJEU’s case law thitherto concerning language requirements.⁸ The Communication outlines the basic criteria derived from case law, and it also contributes to the understanding of the principles developed by the CJEU. In 1993, Article 14 of the First Labelling Directive regulated language requirements. The former Article 14 stated (emphasis highlighted):

“The Member States shall, however, ensure that the sale of foodstuffs within their own territories is prohibited if the particulars provided in article 3 and article 4 (2) do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed. This provision shall not prevent such particulars from being indicated in various languages.”

⁶ There is no need to analyse translations of Eurofoods, since the names are already defined in all the official EU language in the legal texts. Needless to say, difficulties still arise with Eurofoods, especially where national law prescribes definitions that are parallel; see section 3 for the example of “grape juice”.

⁷ The analysis below will show that this does not imply that food businesses can be obliged to provide information in a particular language. This is based on balancing of interest within primary law, and therefore serves as an example of the unclear borderlines between primary and secondary law; i.e. despite that secondary law clearly mandates Member State to stipulate a specific language, such stipulation is limited by judge-made balancing. For more on this see Chapter 9.

⁸ Commission of the European Communities, “Interpretative Commission Communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case”, COM (93) 532 Final, not published in the Official Journal. The Peeters case is referred to in this thesis as Piageme I.

On 27 January 1997, the European Parliament and the Council replaced this provision with a new (Article 13a of the amending Directive) in line with the existing rule.⁹ Accordingly, Article 13a required foodstuffs to be labelled in a language that would be easily understood by consumers and permitted Member States to stipulate, in accordance with the rules of the Treaty,¹⁰ that the labelling particulars required by the Directive are to be given in at least one or more official languages of the Community.

Despite the fact that the Communication concerns a different provision than the current one in the FIR, the FIR states that the original objectives and the core components of the labelling rules are still valid; c.f. Recital 9 of the preamble. Therefore, the principles derived from the Commissions Communication concerning languages in combination with the CJEU's case law following the issuing of the Communication are considered to be current valid law.

In its Communication, the Commission stated that “an easily understood language” generally means the official language(s) of the country of marketing. For this reason, Member States can stipulate that their official language(s) be used for the mandatory particulars. However, since the principle of proportionality involves weighing the benefits for consumers against the benefits of free movement, a national rule stipulating the exclusive use of that Member State's official language(s) would contradict EU law.¹¹ In the *Piageme II* judgment,¹² para. 18, the CJEU held that the same would apply where the use of another language was allowed at the same time: “*The obligation to use a specific language for the labelling of foodstuffs, even if the use of other languages at the same time is not precluded, also constitutes a requirement stricter than the obligation to use a language easily understood.*”

⁹ Directive 97/4/EC of the European Parliament and of the Council of 27 January 1997 amending Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs

¹⁰ This has been omitted in the FIR Article 15, but it seems implicit that secondary EU law, concerning rules on language requirements, must conform with primary EU law.

¹¹ This was exactly what the Court concluded in the *Piageme I* judgment, Case 369/89, Judgment of the Court of 18 June 1991, *Piageme and others v BVBA Peeters*, para. 17.

¹² *Piageme II*, Case 84/94, Judgment of the Court of 12 October 1995, *Groupeement des Producteurs, Importateurs et Agents Généraux d'Eaux Minérales Etrangères, VZW (Piageme) and others v Peeters NV*.

Therefore, national rules must allow for the use of other languages that are easily understood by consumers as alternatives to the official language(s) of the country of marketing. This was confirmed in the Goerres¹³ and the Geffroy judgments¹⁴ on the CJEU's interpretation of the language rules in the First Labelling Directive following the 1997 amendment, thereby corresponding to the FIR rule.¹⁵ In the Goerres judgment, the CJEU was asked whether German rules on language requirements in labelling were contrary to the labelling rules. The German rules made labelling in German mandatory, albeit with the possibility to present the mandatory particulars in another language, provided that doing so did not adversely affect consumers' right to information. The CJEU found, in para. 18 and 20 (emphasis highlighted):

“...national legislation which, whilst prescribing the use of a specific language for the labelling of foodstuffs, also allows, as an alternative, the use of another language easily understood by purchasers. Such legislation does not impose a stricter obligation than that of using a language that is easily understood. ... In that respect, it is for the national court to assess, in the light of all the circumstances of each individual case, the ease with which the information supplied can be understood. That assessment must be made in respect of each of the particulars required by the Directive and must take account of the fact that the Directive provides for the possibility of stating the required particulars not only by using a language but also by means of other measures such as designs, symbols or pictograms...”

The general point that the Communication made was that where foreign terms and expressions are easily understood by consumers, consumer protection cannot justify language requirements. In general, it is clear from the both the Commission Communications regarding the use of language in consumer information¹⁶ that the objectives behind the language rules and guidelines relate primarily

¹³ Goerres, Case 385/96, Judgment of the Court of 14 July 1998, Criminal proceedings against Hermann Josef Goerres.

¹⁴ Geffroy, Case 366/98, Judgment of the Court of 12 September 2000, Criminal proceedings against Yannick Geffroy and Casino France SNC.

¹⁵ See also Kessler, Case 303/97, Judgment of the Court (Fifth Chamber) of 28 January 1999, Verbraucherschutzverein eV v Sektkellerei G.C. Kessler GmbH und Co.

¹⁶ Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament concerning language use in the information to consumers in the Community,” Com (93) 456 Final, not

to protecting consumers by providing sufficient information regarding the nature, composition, etc. of the food they buy. However, it is also generally clear that the consumers’ interests must be balanced against the effect on the internal market and the free movement of goods of language requirement.¹⁷ However, use of foreign language(s) should remain the exception. The Commission mentions three situations in which this would be the case: (a) “*use of terms and expressions generally known to the consumer*”, (b) “*use of terms which are untranslatable or have no equivalent in the official language(s) of the Member State of sale*”¹⁸ or (c) “*use of terms and expressions easily understood thanks to similarity in spelling*”.¹⁹ This list is considered exhaustive.

In regard to the use of a language other than the official language(s), the Commission underlined that “*the fact that a language is used for a particular does not mean that the use of that language is justified for all the other particulars*.”²⁰ Every particular should be easily understood, and it is up to the Member State sale to determine whether a particular is easily understood by the consumers in the country in which it is marketed.²¹ Therefore, language requirement initially seems to deviate from other naming rules in one very important way; it can only be the Member State of sale, which can control whether a language is easily understood by consumers in that state.²²

published in the Official Journal and Commission of the European Communities, “Interpretative Commission Communication concerning the use of languages in the marketing of foodstuffs in the light of the judgement in the Peeters case”, COM (93) 532 Final, not published in the Official Journal.

¹⁷ See also written question P-3785/02 by Bruno Gollnisch (NI) to the Commission. Labelling in French of consumer products sold in France, 2003, OJ C 268E, pp. 48–49.

¹⁸ See section 3 for more on this rule.

¹⁹ Commission of the European Communities, “Interpretative Commission Communication concerning the use of languages in the marketing of foodstuffs in the light of the judgement in the Peeters case”, COM (93) 532 Final, not published in the Official Journal, pp. 7-8.

²⁰ This was exactly what the Court confirmed in the Geffroy judgment, see above.

²¹ In Denmark, the implementation of the Second Labelling Directive in “Mærkningsbekendtgørelsen” (Consolidated Act No 820 of 1 July 2011, with later amendments) in regards to language includes a rule prescribing the use of Danish or other languages where differences in spelling are non-essential. Examples from Danish cases include prohibiting the use of the English word “contain” as a substitute for the Danish word “indeholder”. See Mærkningsvejledning, Januar 2012 at http://www.foedevarestyrelsen.dk/Foedevarer/Maerkning/Faerdigpakkede_foedevarer/Sider/forside.aspx.

²² See however Section 3 for how this is modified.

The practical relevance of detailed language rules, both in the FIR and according to prior case law, can be discussed. In the general 1993 Communication of language use,²³ the Commission concluded, at p. 9: “Hence, while the obligation to provide a translation may be a potential barrier to trade because of the associated costs, these outgoings are not in general considered to be out of proportion to the new markets that are opened up.” From case law, however, it is clear that Member States may only stipulate the use of a specific language where it is proportional. Where consumers can understand one or several particulars, it is not proportional to require these to be translated.²⁴ The costs of translation are considered to be normal costs in relation to cross-border trade,²⁵ and since it is unlikely that no translation of labelling information would be necessary in relation to export of products to other countries, the additional costs of translating particulars that consumers in those countries could potentially understand “thanks to similarities in spelling” appear to be minimal. This weakens the argument that a requirement to use a specific language without allowing for alternatives is not proportional. At the same time, if a word is either “generally known to the consumer”, “untranslatable”, or without “equivalent(s)”, it cannot be translated, and the requirement to use a specific language becomes void. This confirms that the practical relevance of the rather detailed guidelines on the rules is debatable.

However, the rules are of course important for businesses that use multiple languages on labels and where it might be important to take up less space on the label by using words that are understandable to consumers in different countries due to similarities in spelling.

Generally speaking, the rules concerning language only apply to mandatory particulars. This follows *e contrario* from Article 36 on voluntary information.²⁶ However, it also follows that voluntary information must not be confusing to consumers. This suggests that voluntary information must still be understandable in a language sense.

The rules on voluntary information are also relevant for the use of multiple languages to disclosure of information, which has been an increasingly common practice.²⁷ As mentioned, voluntary

²³ Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament concerning language use in the information to consumers in the Community,” Com (93) 456 Final, not published in the Official Journal.

²⁴ See Chapter 9, Section 2.2.1 for an analysis of the principle of proportionality.

²⁵ This is also recognised in Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament concerning language use in the information to consumers in the Community,” Com (93) 456 Final, not published in the Official Journal, p. 9.

²⁶ See also Kessler, Case 303/97, Judgment of the Court (Fifth Chamber) of 28 January 1999, *Verbraucherschutzverein eV v Sektkellerei G.C. Kessler GmbH und Co*, para. 42.

²⁷ See Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 69.

information must not be presented at the expense of the mandatory particulars simply because the space available to provide food information on a label is limited.²⁸ The provision of information in more than one language is a choice that the food manufacturer makes, so it can therefore be characterised as voluntary.

The rules on voluntary information and language requirements, combined with the rules on legibility, initiate discussions regarding proportionality. Harmonisation of labelling rules strives to ensure an integrated marketplace; however, the rules on language requirements, voluntary information, and legibility limit the possibility to provide unified labels. The implied consequence of this is that labels must be altered for foods crossing borders. If food companies must alter their labels due to language differences, the difficulties related to also changing the name of the food due to a national custom in the Member State of destination and based on consumer protection will be reduced. For this reason, it could be argued that the justification for not recognising the name in the Member of production, and for requiring a change of the name, becomes more proportional.²⁹

3 Translation of food names

The FIR does not address the translation of labelling information, including food names. Similarly, the Communication on the use of languages in the marketing of food³⁰ does not address difficulties related to translation. However, the Communication does provide that the language of the Member State of origin can be used if a food name is untranslatable or has no equivalent(s) in the official language(s) of the Member State of marketing. The Communication does not specify when a word is untranslatable or has no equivalent(s),³¹ but considering that a name can be descriptive, it seems that only very rarely would it be impossible to translate a name by transforming it into a descriptive

²⁸ See Chapter 4, section 4.

²⁹ Justifying a requirement to change a name, legally used in another Member State, is of course not just a matter of weighing the cost of changing the label against the benefit provided to consumers. The disadvantages to importers related to the use of a different name are also part of the proportionality test. For more on the principle of proportionality, see Chapter 9., Section 2.2.1.

³⁰ Commission of the European Communities, “Interpretative Commission Communication concerning the use of languages in the marketing of foodstuffs in the light of the judgement in the Peeters case”, COM (93) 532 Final, not published in the Official Journal. The Peeters case are in this thesis named Piageme I.

³¹ It must be noted that the difference between a “translated name” and an “equivalent name” is minor. Where the name is newer or has not been translated before, translation would be the term used to characterise the language change, whereas names in time will have so-called equivalents.

name. As an example, the Danish “rullepølse” could for this reason be sold under the English description “sausage of rolled pork meat with X, Y”, where “X” and “Y” indicate specific characteristics that the company wants to draw attention to. A description could also simply accompany the Danish food name, and over time the Danish name could become a common/generic name in the EU, like foie gras. This would result in more autonomous naming, and producers from other countries could more easily use the name “rullepølse” without considering whether “rullepølse” was equivalent to a specific sausage of rolled pork meat. However, it would also lead to the removal of a possible link between the product name and its place of production/origin, which could be of interest to producers for other reasons. Therefore, the potential link between (the indirect geographical designation) “rullepølse” and production in Denmark will fade out if this name becomes generic.³² Differentiating between the uses of names based on languages could provide greater opportunities to preserve indirect indications. This means that translation is also a matter of business strategies.

The issue of equivalent names was central in the *Commission v Italy (vinegar)* cases. In *Commission v Italy (vinegar I)*,³³ the Commission had found that Italian rules reserving the use of the name “aceto” to only wine-vinegar constituted a restriction to trade and for this reason initiated proceedings against Italy for breach of the Treaty.³⁴ The Italian government claimed that it was necessary to restrict the use of the name in order to protect Italian consumers who “‘by time-honoured tradition’ treat all ‘vinegars’ as wine-vinegar owing to the semantic value of the word ‘aceto’ (vinegar). Consumers thus run the risk of being misled as to the essential nature of the raw material used and of the end-product” (see para. 35). The CJEU held that, according to the heading 22.10 of the Common Customs Tariff, the name “vinegar” did not cover wine-vinegar alone, for which reason vinegar was characterised as a generic name. Despite Italian consumers perhaps being

³² In this regard, see Chapter 6. The conflict between the costs and benefits of having EU generic names versus the possibility to preserve “national names”, such as geographical names, is a universal EU conflict. This is addressed in Chapter 9.

³³ *Commission v Italy (vinegar I)*, Case 193/80, Judgment of the Court of 9 December 1981, *Commission of the European Communities v Italian Republic*.

³⁴ The Italian rules had already been found contrary to primary EU law in *Gilli*, Case 788/79, Judgment of the Court of 26 June 1980, *Criminal proceedings against Herbert Gilli and Paul Andres*. Note that this was of course a preliminary ruling.

accustomed to “aceto” designating wine-vinegar alone, prohibiting the use of the name was not proportional. A more proportional means would be an obligation to provide additional information that specifies the type of vinegar.

In the *Commission v Italy (vinegar II)* judgment,³⁵ the same Italian rules were challenged. The Italian government clung to the fact that the name “aceto” was a traditional Italian name and that the use of this name for vinegar that was not made from fermentation of wine would mislead consumers; in other words, it was not equivalent to “vinegar”, but to “wine-vinegar”. In order to address the judgment in the first case, the Italian government had introduced the name “agro” to cover all vinegar-types; that is, “agro” would be the equivalent to “vinegar”. For this reason, the name “agro di vino” should appear on labels in addition to the name “aceto”. The CJEU ruled that the Italian government’s idea to substitute the name “aceto” with “agro”, a name that was hitherto unknown in Italy, could not be accepted. The reason for this was stated, in para. 12, as follows: *“The effect of the amended legislation is still that the traditional designation ‘aceto’[...] may lawfully be applied only to a category of products which are produced in substantial quantities in Italy, to the detriment of other categories of comparable products originating in other Member States.”*

It is clear from the vinegar cases that equivalents to names can be found in EU law, such as the Common Customs Tariff, where the nomenclature is provided in all the official EU languages. However, it is not clear how the equivalents are otherwise found, or who has the authority to decide whether a name in one language is equivalent to a name in another language. No such problem exists for some products, such as popcorn or cola, because the English words have been the common names throughout the EU. However, equivalents may not exist for other products, especially traditional national ones such as indirect geographical indications. Peculiarly, this was indirectly accepted by the Commission in the first of the vinegar cases. Perhaps due to intervention by France, the Commission agreed to only pursue the Italian rules in so far as they prohibited the use of the name “aceto” for vinegars of agricultural origin other than wine-vinegar, thereby accepting that synthetic vinegar could not carry the name “aceto”. No reason was provided for this decision, but it

³⁵ *Commission v Italy (vinegar II)*, Case 281/83, Judgment of the Court of 15 October 1985, *Commission of the European Communities v Italian Republic*.

appears ambiguous to accept, on one hand, that “aceto” refers to something traditional and therefore cannot be used for a synthetic product, while on the other hand refuse that the name only refers to an even narrower category of the non-synthetic kinds of vinegars. It is difficult to understand why synthetic vinegar could not be named “aceto di sintesi”.

The term “equivalents” is also mentioned in para. 34 of the German Bier judgment:³⁶ *“The German designation ‘bier’ and its equivalents in the languages of the other Member States of the Community may therefore not be restricted to beers manufactured in accordance with the rules in force in the federal republic of Germany.”* No reference was here made to the Common Custom Tariff or, for that matter, how to determine what the equivalents are.

Within trademark law, a number of cases have also concerned the use of words that, for linguistic, cultural, and social reasons, have different meanings in different Member States. These differences can lead to restrictions for cross-border trade because a word that is legally used in one Member State cannot be used in others due to the character of the word. In the Graffione judgment,³⁷ the CJEU held that such restrictions could be justified by measures that aimed to protect consumers. In this case, the trademark “Cotonelle” could not be used in Italy because it signalled that cotton was part of the product. In the Clinique judgment,³⁸ the German government could not forbid the use of the trademark “Clinique”, despite the fact that the word provided a link to pharmacies. This was based on the specific matters under which the products carrying this trademark were sold.³⁹

In addition to the difficulties of finding equivalents and translating names, another practical challenge arises regarding language requirements and translation. The challenge is related to the use of a language that is different from the official language in the Member State of marketing because the single words are known to the consumer. For example, the food name “grape juice” is a name that is easily understood by consumers in Great Britain and Denmark; however, the English name means something different from the Danish, which when translated would mean “grapefruit juice”.

³⁶ The Bier case, C-178/84, Commission of the European Communities v Federal Republic of Germany.

³⁷ Graffione, Case 313/94, Judgment of the Court of 26 November 1996, F.lli Graffione SNC v Ditta Fransa.

³⁸ Clinique, Case 315/92, Judgment of the Court of 2 February 1994, Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH.

³⁹ In this regard, see Weatherill, S. (2011). Consumer Policy, p. 842, noting: *“In Clinique the Court’s remark that consumers in other states did not suffer from confusion invites the retort that would one not expect them to, if the issue is peculiar to the German language.”*

To illustrate the challenge, this English food name must, according to the Fruit Juice Directive, actually be named “grape saft” in Danish.⁴⁰ The fact that consumers understand a given word or parts of the information provided does not necessarily prevent consumers from being misled about the true character of the food. The reason is that a certain food name in the Member State of sale carries special characteristics that are not identical to the characteristics of the Member State of production. This situation is addressed in the Commission’s Communication with the requirement that terms must be precise enough to indicate the true nature of the product to the purchaser. However, despite the fact that the guidelines, with good intention, outline some of the basic rules related to language use on labels, it is evident that the potential misleading character of a name or a translated/equivalent name must be based on a case-by-case evaluation.⁴¹

3.1 Translation of geographical names

Large and well-known geographical locations such as Rome or Paris have what could be termed “translated/equivalent designations” or “universal character”. However, smaller geographical places, such as Spreewälder, almost always have an embedded obvious choice of language. When such places constitute (a part of) a national protected geographical indication/appellation of provenance etc., translation issues are of minor importance, because the protection is limited to the Member State’s territory. For PGI/PDOs, however, translation seems to be of greater importance due to the Union-wide protection granted to these names.

PGI/PDOs are usually registered in the language of the Member State of origin and translations of the protected names are not part of the registration.⁴² For this reason, it is initially the “original” name in the “original” language that is protected, and in most cases this original name is also the

⁴⁰ The correct Danish food name for “grape juice” is “vindruer saft”. Prior to the latest amendment of the Fruit Juice Directive, the difference between Danish “grape juice” and English “grape juice” was more important than after the amendment, because “juice” in Denmark was something different from “saft”.

⁴¹ See Chapter 8 for more on how to evaluate the misleading character of a food name.

⁴² In this regard, see Opinion of Mr Advocate General Mazák delivered on 28 June 2007, *Parmesan*, Case 132/05, Judgment of the Court of 26 February 2008, *Commission of the European Communities v Federal Republic of Germany*, para. 41.

name used by the food businesses complying with the product specification.⁴³ According to Article 13(1)(b), however, a registered name is protected against any misuse, imitation or evocation; for example, where the protected name is translated. This also follows from the Parmesan judgment,⁴⁴ para. 43.

According to the TSG Regulation, the product specification must include the name of the product in one or more languages, cf. article 6(2)(a). However, according to article 13(3): *“In the case of names whose registration is sought in a single language, the group may specify in the product specification that, when the product is marketed, the label may contain, in addition to the name of the product in the original language, an indication in the other official languages that the product has been obtained in accordance with the tradition of the region, Member State or third-country from which the application originated.”*

In the first case concerning the name “Parmesan”, the Bigi case, use of the name “Parmesan” by a food business not complying with the product specification of Parmigiano Reggiano was at issue. In the case, the Advocate General noted in paras. 49–50 that (emphasis highlighted):⁴⁵

“...the noun parmesan is the literal translation in several languages [...] of the Italian term Parmigiano, on its own. Furthermore, for the majority of the intervening governments, [...] it alone denotes, in translation, the composite designation of origin Parmigiano Reggiano. I also take the view that the noun parmesan is the composite name Parmigiano Reggiano in translation. In my opinion it is more than the literal translation of that registered name; the word parmesan is its faithful translation, in that it expresses the historic, cultural, legal and economic reality that attaches to the registered name and to the product covered by that registration.”

The AG noted that the French Government had carried out historical research to show the equivalence of the names “parmesan” and “Parmigiano Reggiano”, although without concluding on

⁴³ Since PGI/PDOs can be used on a voluntary basis, translation of such names for businesses fulfilling the product specifications are not regulated. Of course, a translated name must always comply with the general horizontal rules; that is, not be misleading. See Chapter 8.

⁴⁴ Parmesan, Case 132/05, Judgment of the Court of 26 February 2008, Commission of the European Communities v Federal Republic of Germany.

⁴⁵ Opinion of Mr Advocate General Léger delivered on 9 October 2001, Bigi, Case 66/00, Judgment of the Court of 25 June 2002, Criminal proceedings against Dante Bigi, third party: Consorzio del Formaggio Parmigiano Reggiano.

the relevance of such. Nevertheless, the opinion and the arguments presented in the case indicate which elements need to be considered when determining how to translate a name. The CJEU did not analyse the issue of translation because the preliminary questions referred to the Court did concern derogations from protection. The Court simply noted, in para. 20, that the name “parmesan” had not become generic, and that a clear majority of all the governments that had submitted written observations found that “parmesan” is the correct translation of the PDO “Parmigiano Reggiano”. The statement, which was in line with the AGs opinion, is contradictory in a sense, since it is difficult to imagine that translation should and can be based on a majoritarian approach.⁴⁶

In the second parmesan case, the Advocate General noted, in paras. 52–53, on the equivalence between “parmesan” and “Parmigiano Reggiano”:⁴⁷

“In my view the evidence put forward by the parties does not allow me to conclude with certainty that ‘Parmesan’ is the equivalent and therefore the translation of ‘Parmigiano Reggiano’. It can only be established with certainty that the terms ‘Parmesan’ and ‘Parmigiano’ are equivalent and thus translations of each other. In any event, regardless of whether the word ‘Parmesan’ is the translation of the PDO ‘Parmigiano Reggiano’, I consider that ‘Parmesan’ may constitute an evocation of the PDO ‘Parmigiano Reggiano’ within the meaning of Article 13(1)(b) and therefore falls within the scope of the protection granted by the Basic Regulation to the PDO ‘Parmigiano Reggiano’.”

The CJEU followed the opinion but also went further than the AG regarding the importance of translation. The Court concluded that it was irrelevant whether the name “parmesan” is a translation of “Parmigiano Reggiano” or of “Parmigiano” alone, because the name evoked the PDO and the use of the name was therefore an infringement of the protection granted to “Parmigiano Reggiano”.

⁴⁶ See also in this regard, Opinion of Mr Advocate General Léger delivered on 9 October 2001, Bigi, Case 66/00, Judgment of the Court of 25 June 2002, Criminal proceedings against Dante Bigi, third party: Consorzio del Formaggio Parmigiano Reggiano, footnote 10, noting: “This statement of the Court is surprising because, in that case, four Governments submitted written observations, namely the Italian, Greek, German and Austrian Governments. Apparently, Germany and ‘to some extent’ Austria disagreed on the statement that ‘Parmesan’ is the correct translation of ‘Parmigiano Reggiano’. Two Member States, France and Portugal, only presented oral observations. They seem to have endorsed the position of Italy and Greece, and thus been included in what the Court considered a majority.”

⁴⁷ Opinion of Mr Advocate General Mazák delivered on 28 June 2007, Parmesan, Case 132/05, Judgment of the Court of 26 February 2008, Commission of the European Communities v Federal Republic of Germany.

Thus, the importance of translation is of lesser importance for the protection of PGI/PDOs due to the very broad protection against evocation.⁴⁸

The issue of translation has not been central in other cases concerning geographical names; in the Bavaria-judgment,⁴⁹ however, another interesting aspect of translation was briefly noted. In the case, the registration of the PGI “Bayerisches Bier” was addressed and, in this regard, a question concerning whether “Bayer” is/was generic was referred to the CJEU. The Court stated, in para. 104, that additional information from the Member States showed that (emphasis highlighted): *“that name has not become generic in Community territory despite evidence to the effect that the Danish translation of that name is becoming a synonym for the term ‘beer’ and hence a common noun.”* The Court was here referring to the Danish word “bajer”.

The conclusion in the Bavaria judgment verifies the majoritarian approach to genericness.⁵⁰ Unfortunately, the conflict that potentially arises when the generic Danish word “Bajer” is used and whether this constitutes evocation and infringement of the PGI “Bayerisches Bier” is overlooked.

4 Concluding remarks

Questions and conflicts related to language use and translation seems to be apparent for food businesses in practice. Despite the focus on this matter and the associated issuing of guidelines to help businesses, it seems impossible to address all potential conflicts. The rules are somewhat controversial and the practical relevance of some of the rules is debatable. For this reason, the general prohibition against the use of misleading food information, including naming, will potentially catch many of the conflicts that arise at the national level.

⁴⁸ See Chapter 2, Section 4.3.2.

⁴⁹ Bavaria, Case 343/07, Judgment of the Court of 2 July 2009, Bavaria NV and Bavaria Italia Srl v Bayerischer Brauerbund eV.

⁵⁰ See Chapter 2, section 4.3.2.

Neither the guidelines nor the judgments related to language and translation issues clarify whether the evaluation of the misleading character and the principle of mutual recognition are applied differently when difficulties exist due to EU multilingualism. It seems to be appropriate that it is for the Member State of sale to control naming, however, in some cases this is modified, for example where generic names are defined in EU law, in all the official languages.

CHAPTER 8: FAIRNESS AND THE PROHIBITION AGAINST MISLEADING NAMES

1 Introduction

Case-by-case evaluations of consumers' expectations etc. by application of the general prohibition against misleading names appears to be relevant in addressing the many practical difficulties surrounding food naming, despite the issuing of guidelines and rules on naming in the Food Information Regulation (FIR). Therefore, businesses need to know how this general prohibition can be applied.

According to Article 7 of the FIR, concerning "fair information practices", food information must not be misleading and must be accurate, clear and easy for the consumer to understand. According to Article 39, Member States can require additional information for specific types or categories of food to protect consumers, protect indications provenance or registered designations of origin or to prevent unfair competition. From these rules as well as the analyses in Chapter 4–7, fairness, including fair competition, is clearly relevant for understanding EU law on food names and for answering the research question.

Section 2 of this chapter includes an analysis of the relevant sources of law to determine what constitutes fairness and how fairness is connected with fair competition and the prohibition against misleading names. Section 3 contains an analysis of the prohibition against the use of misleading names. In Section 4, an analysis is provided of the practical application of the principle of fairness and the prohibition against misleading names, including an analysis of how these are applied within the vertical rules.

2 Fairness

Many references are made to the term “fair” (here also termed “fairness”) in EU food law,¹ but the term has not been defined in EU food law. In its 1989 Communication, the Commission stated that labelling rules aim to achieve both fair trade and the fairness of commercial practices.² However, the term has not been used explicitly in relation to business obligations in the labelling rules prior to the adoption of the FIR, which could indicate a substantive change.³

In the FIR, fairness is mentioned in relation to both consumer protection (the prohibition against misleading consumers and the obligation to provide accurate, clear and understandable information) and fair competition, thus fair/fairness must be a subordinate term including both consumer protection and fair competition.⁴ The General Food Regulation (GFR), preamble, Recital 23, states that the Community “*supports the principles of free trade in safe feed and safe, wholesome food in a non-discriminatory manner, following fair and ethical trading practices*”. Therefore, fairness also is related to free movement and anti-protectionism; fair trade.⁵ In Article 5(1) of the GFR on the general objectives of food law “fair practices in food trade” are linked to a high level of protection of human life and health and the protection of consumers’ interests.

¹ This is evident from the analyses in the previous chapters. See also Milk Substitute, Case 216/84, Judgment of the Court of 23 February 1988, Commission of the European Communities v French Republic, para. 11, and Miro, Case 182/84, Judgment of the Court of 26 November 1985, Criminal proceedings against Miro BV, para. 24.

² European Commission, “Communication on the free movement of foodstuffs within the Community”, European Commission, “Communication on the free movement of foodstuffs within the Community”, 1989 OJ No. C 271/3, p. 6.

³ In the previous labelling directive, the term “unfair competition” was used in a similar sense to Article 39 of the FIR, which is related to a Member State’s ability to regulate labelling; see Section 2.1, and Chapter 9, Section 3.4.

⁴ See Wilhelmsson, T., and Willet, C. (2010). Unfair Terms and Standard Form Contracts, which clearly relates fairness to consumer protection.

⁵ Primary law is not the focus of this chapter; see Chapter 9.

Fairness is not defined in either the GFR or the FIR, but according to Recital 5 of the FIR⁶ and other legal documents,⁷ parallels exist between the horizontal labelling rules and rules on fair commercial practices. In the Unfair Commercial Practices Directive, an unfair practice is defined in Article 5(2), as:

*“(a) it is contrary to the requirements of professional diligence, and
(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”*

Thus, fairness according to the Unfair Commercial Practices Directive is a matter of professional diligence and non-distortion of consumers’ behaviour. Article 5(4), further notes that a commercial practice⁸ in particular will be unfair if it is either misleading or aggressive; however, this Article does not specify how this is related to professional diligence or distortion of consumers’ behaviour. However, Articles 6–8 defines misleading actions, omissions and aggressive practices, and from these definitions it is evident that misleading and aggressive actions are those that distort the economic behaviour of the average consumer.⁹ Thus, a misleading practice/name is unfair, but a non-misleading practice is not necessarily fair.¹⁰

The term “professional diligence” is defined in Article 2(h) as (emphasis highlighted) “*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.*” Professional diligence is clearly related to “good faith”, but within the scope of the

⁶ According to recital 5, general principles on unfair commercial practices found in the Unfair Commercial Practices Directive should be complemented by specific rules concerning the provision of food information to consumers. The specific rules are those obliging businesses to present certain types of information.

⁷ See Section 3.

⁸ A “B2C commercial practice” is defined in Article 2(d) of the UCPD, and is directly connected with the promotion, sale or supply of a product by traders.

⁹ See Section 3.1.1 for an analysis of “the average consumer”.

¹⁰ See Section 3 for more on the prohibition against misleading names.

UCPD, only in relation to B2C commercial practices,¹¹ or consumer protection, despite the fact that “good faith” normally covers trade and competition activities in a wider sense.¹² The directive does not specify the scope of “skill and care that a trader may reasonably be expected to exercise”, but the flexible term seems to encompass “good faith”. Initially, from a consumer protection perspective, it could be questioned whether the definition of professional diligence contributes to a wider understanding of fair labelling because labelling rules, contrary to the UCPD rules, already prescribe business obligations in a very detailed manner:¹³ Does the obligation to act fairly in accordance with professional diligence and good faith provide additional consumer protection than the prescribed obligations in the FIR? The mere existence of a broad and general obligation to act fairly, including a general prohibition on misleading information, seems to indicate that this catches situations that are not specifically regulated.¹⁴

From Chapter 6, it was clear that Member States can reserve geographical names, but that imported products cannot be prevented from carrying identical names, where these have been used for a certain period and in accordance with fair practices. Since all food businesses according to the FIR must name food in a fair way, the rule developed in relation to geographical names only seem to differ from the obligation to mutually recognise names of imported products, legally used in the Member State of production, by requiring that the name has been used for a certain period.

Further, it is not ruled out that the EU food law, fairness concept is related to trade and competition in the wider sense, especially considering the objectives of the horizontal rules where free movement (trade) within in the EU as a means to strengthen competition is a central objective. Clearly, “competition” does not always constitute a commercial practice; whereas a commercial practice is directly connected with the promotion, sale or supply of a product by traders (see Article

¹¹ Fairness and good faith also are related terms in Article 3 of the Unfair Contract Terms Directive, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹² See Micklitz, H. W., Reich, N., and Rott, P. (2009). *Understanding EU Consumer Law*, pp. 81–89, which characterises “good faith” as different from consumer protection. The authors noted that the concept is not relevant in relation to misleading conduct, only unfair conduct, thus indicating that fairness is not related to misleading conduct. In addition, although professional diligence is mentioned in Article 7, it should not be taken as an indication that this is a governing/decisive criterion when stating misleading practices. In this thesis, fairness and good faith are considered to be terms that also cover protection of consumers by prohibiting deception; see below.

¹³ The Black List, Appendix I, of the UCPD lists prohibited actions rather than obligations to act in a certain way.

¹⁴ However, in relation to names, this is limited by the principle of mutual recognition; see Chapter 9.

2[d] of the UCPD), competition does not need to involve an action that is connected to the sale, supply or promotion of a product.¹⁵ Instead, competition is rivalry among firms in a broader sense,¹⁶ and is regulated by competition rules,¹⁷ intellectual property law and commercial practices law¹⁸ and perhaps also food law. For this reason, “fairness” and “professional diligence” could be related to the term “fair competition”, which, because of the introduction of the general requirement to act fairly, could function as a supplement/complement to consumer protection that immediately follows from the labelling rules and the obligation to provide specific information.

To sum up, fairness within food law is used in connection with many business actions related to both B2C and B2B practices as well as to competition. A fair action is one that is at the least not misleading to consumers; at the same time, an unfair action may not necessarily be misleading. This is confirmed by the Miro judgment,¹⁹ in which the CJEU considered whether prevention of unfair competition (misuse of the reputation of a traditional name) could justify a national measure that could restrict cross-border trade after having concluded that the national measure could not be justified based on consumer protection.

¹⁵ For another discussion on the definition of a commercial practice, see Trzaskowski, J. (2010). *Towards a Common European Marketing Law*, pp. 37–38.

¹⁶ See Colander, D. C. (2008). *Microeconomics*, p. 238.

¹⁷ See Béguelin, Case 22/72, Judgment of the Court of 25 November 1971, Béguelin Import Co. v S.A.G.L. Import Export. Competition law is not included in this thesis.

¹⁸ Competition law, commercial practices law and intellectual property law apply to firm behaviour deviating from fair competition. Interestingly, within competition law, the EU has exclusive competence (see Article 3 TFEU), and internal market and commercial practices are matters of shared competences (see Article 4); however, within intellectual property law, Member States, in principle, have exclusive competence (see Article 345 TFEU).

¹⁹ Miro, Case 182/84, Judgment of the Court of 26 November 1985, Criminal proceedings against Miro BV.

2.1 Fair competition

Definitions of fairness do not clarify whether “fair competition” and the obligation to act fairly in competition entails more than consumer protection and an obligation not to mislead consumers. According to general EU commercial practices law, this does not seem to be the case: In Recital 8 of the UCPD, the connection between consumer protection and fair competition is addressed (emphasis highlighted):

“This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.”

According to Article 1 of the Comparative Advertising Directive,²⁰ that Directive’s purpose is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted. Thus, within EU commercial practices law, regarding both B2B and B2C, “unfair competition” is that which hurts competitors because is it misleading to consumers and distorts their economic behaviour. The protection of competitors is linked to consumer protection.

The Dahlhausen judgment²¹ concerned advertising (a commercial practice) and the use of the symbol ® next to a trademark. The Court utilized the terms “fair trading” and “fair competition”. Here, “fair trading” was considered as a potential justification separate from consumer protection.²² On the other hand, the term “*unfair competition vis-à-vis competitors*” indicated that unfair

²⁰ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version); hereafter, the “Comparative Advertising Directive”.

²¹ Dahlhausen, Case 238/89, Judgment of the Court of 13 December 1990, Pall Corp. v P. J. Dahlhausen & Co.

²² See para. 22. A similar conclusion follows from Mars, Judgment of the Court of 6 July 1995, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH, para. 15.

competition could cover protection of both consumers and competitors, without specifying whether competitors could be protected only if consumers were misled.

Contrary to commercial practices law, “fair competition” within food law seems to be different from consumer protection and with no attachment to deception of consumers. FIR, Article 39(1) states (emphasis highlighted):

“In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States may, in accordance with the procedure laid down in Article 45, adopt measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of at least one of the following:

(a) the protection of public health;

(b) the protection of consumers;

(c) the prevention of fraud;

(d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition.”

“Protection of consumers” and “prevention of unfair competition” are included in separate points, which seems to indicate that these are separate arguments for requiring additional information about specific domestically produced or imported products, such as requiring a certain description be attached to the name or that a certain descriptive name be used.²³ This is in complete contrast with the conclusion reached in Chapter 5 and the rules on product identity. The obligation to present additional information in close proximity to the product name (in case of substitution of ingredients) should be based solely on consumers’ expectations, which is clearly related to consumer protection. However, in contrast to the rules on product identity analysed in Chapter 5, Article 39(1) indicates that fair competition differs from consumer protection.

²³ For more about the conflicts arising from the potentially differing rules for domestically produced and imported products, see Chapter 9, Section 3.

In the 1985 Communication,²⁴ “fair competition” also seems to differ from consumer protection. Here the Commission stated: “*Consumers must be correctly and adequately informed and not be misled; producers must be protected against unfair competition.*”

“Fair competition” in FIR Article 39(1) is related and parallel to intellectual property law; however, prevention of unfair competition is mentioned as a distinct justification, which appears to distinguish it from protection of intellectual property rights.

In the Exportur judgment²⁵ concerning protection of geographical names, which preceded adoption of the First PGI/PDO Regulation, the CJEU stated (para. 37, emphasis highlighted):

“The aim of the Convention is to prevent the producers of a Contracting State from using the geographical names of another State, thereby taking advantage of the reputation attaching to the products of the undertakings established in the regions or places indicated by those names. Such an objective, intended to ensure fair competition, may be regarded as falling within the sphere of the protection of industrial and commercial property within the meaning of Article 36...”²⁶

The conclusion is ambiguous, but it cannot be assumed to indicate that “unfair competition” by taking advantage of a reputation, e.g. by producing lower quality and thus free riding, is only related to protection of intellectual property. The CJEU also stated in the Exportur judgment, para. 11, that indications of provenance can be protected based on rules that prevent consumers from being misled or/and rules that prohibit abusive exploitation of reputation, which confirms that fair competition can differ from consumer protection.²⁷

²⁴ European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community Legislation on Foodstuff”, Com (85) 603 Final, p. 11.

²⁵ Exportur, Case 3/91, Judgment of the Court of 10 November 1992, Exportur SA v LOR SA and Confiserie du Tech SA.

²⁶ A similar conclusion follows from the Budvar I judgment, Case 216/01, Judgment of the Court of 18 November 2003, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH, para. 99.

²⁷ See Chapter 6, Section 2.

Despite the wording of Article 39(1) and the Exportur judgment, that geographical names can only be protected if it clearly designates qualities, such as trademarks. Chapter 6 clarified that protection of geographical names concerns intellectual property protection, whether within the entire EU or only a Member state.²⁸

Obviously, fair competition is not a well-defined, precise term, and seems to have various denotations depending on the set of rules that apply. Within the scope of EU commercial practices law, fair competition relates only to consumer protection. For the fully harmonised areas, e.g. within the scope of the UCPD, the same applies to purely domestic and cross-border situations. However, in minimum harmonised areas, fair competition can denote more than consumer protection in purely domestic situations. In relation to cross-border cases and case law concerning free movement and food naming, fair competition when related to consumer protection has never been accepted as a distinct justification for hindering free movement.²⁹ As an example, in the Sekt judgment,³⁰ the German government could not justify reserving the names “sekt” and “weinbrand” to German products on the basis of consumer protection and fair competition.

Another conclusion from the Sekt judgment is that restrictions on free movement could be justified if fair competition could be related to protection of intellectual property. Thus, fair competition is different when related to the protection of intellectual property rights.

Paradoxically, the term fair competition within Article 39(1) of the FIR initially seems to differ because it is neither consumer protection nor protection of intellectual property, and especially because it can be used as a means for Member States to justify requiring additional information, such as requiring a description or a descriptive name for certain types of foods. It is not unthinkable that Member States could have an interest in protecting traditional and national cultural food

²⁸ In recital 6 of the PGI/PDO Regulation, fair competition is mentioned as an aim behind the PGI/PDO rules.

²⁹ See Stuyck, J. (2007). *The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotion and the Law of Unfair Competition*, p. 163. Chapter 9 addresses the conflict between consumer protection and free movement/mutual recognition.

³⁰ Sekt, Case 12/74, Judgment of the Court of 20 February 1975, *Commission of the European Communities v the Federal Republic of Germany*.

products through special labelling requirements for such products. Therefore, defining fair competition could provide guidance.

Most likely, confusion in terminology stems from the different borderlines between competition law, intellectual property law and commercial practices law within the national legal systems of the EU.³¹ This situation is understandable and to a certain extent acceptable. However, the fact that the term “unfair competition” is unclear or incoherent in the EU legal texts is problematic, especially when considering the clearly important difference within primary law between names protected by intellectual property rights and other names.³² Even more problematic is that the term “unfair competition” within the FIR in no way corresponds to “unfair competition” in related areas of law.

3 The prohibition against misleading names

Despite the fact that fairness (and fair competition) seems to entail more than consumer protection, protecting consumers by prohibiting misleading names is central to the labelling rules. Article 16 of the General Food Regulation established the general requirements on presentation of food. The Article states, “*The information which is made available about them [food and feed] through whatever medium, shall not mislead consumers*”. This general prohibition against misleading consumers is used directly by national administrative authorities regarding misleading food labelling, including misleading names and it applies as a ground rule to both domestic and imported products. A similar and parallel prohibition is found in the Food Information Regulation Article 7(1), which states:

“1. Food information shall not be misleading, particularly:

³¹ See the Warsteiner judgment, Case 312/98, XX para. 32, Wilhelmsson, T. (2006). Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions, p. 471.

³² For general overviews of the case law concerning free movement of food, see Holland, D., and Pope, H. (2004). *EU Food Law and Policy*; MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market* and O’Rourke, R., (2005). *European Food Law*. See also Gomez, F. (2006). The Unfair Commercial Practices Directive: A Law and Economics Perspective, which states regarding to professional diligence (p. 25): “*The likelihood that legislators, regulators and Courts in the different Member States may have radically divergent views upon the role and content of such standard, particularly in view of the diverse context in which the standard has to apply, is very high, thus heavily questioning the plausibility of a coherent solution.*”

- (a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;*
- (b) by attributing to the food effects or properties which it does not possess;*
- (c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;*
- (d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.”*

Article 7(1)(a) is especially relevant for food names because it clearly prohibits the use of names which mislead consumers as to identity, provenance, and so on. Although the FIR does not specify how to determine if a name is misleading, analogies can be drawn from general commercial practices law. This follows, as mentioned, from recital 5 of the FIR as well as from a Communication from 1985, stating, “*Questions of a general nature concerning misleading advertising are not specific to foods*”.³³ Further, in a Consultative document on labelling by the Directorate General for Health and Consumer Protection³⁴, the DG stated that the UCPD could contribute to uniform and correct application of the prohibition against misleading consumers, of course, with the prohibition in the labelling rules as *lex specialis*.

³³ Communication from the Commission to the Council and the European Parliament, Com(85) 603 on Completion of the Internal Market: Community legislation on foodstuffs, p. 11.

³⁴ The Directorate General for Health and Consumer Protection, Directorate E – Safety of the Food Chain, “Labelling: Competitiveness, Consumer Information and Better Regulation for the EU”, 2006.

According to the UCPD Article 6(1), a practice is misleading if it contains false information or if it deceives or is likely to deceive the average consumer even if the information is factually correct, and if the practice causes the average consumer to take a transactional decision that he or she would not otherwise take. According to Article 6(2)(a), a commercial practice also is misleading if:

“in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks [sic], trade names or other distinguishing marks of a competitor.”

A consumer's distorted economic behaviour is decisive to establish that a name is misleading. Article 2(e) of the UCPD defines “to materially distort the economic behaviour of consumers” and makes a link between causing consumers to take a different transactional decision and using a practice to impair the consumer's ability to make an informed decision. Clearly, causing “the average consumer to take a transactional decision that he would not otherwise have taken” implies that the deception must be material, which also follows from Article 5(2)(b) of the UCPD.³⁵

According to the previous labelling Directives, Article 2, labelling that was capable of misleading consumers to a material degree was prohibited. Despite the fact that the wording of the previous rules and the “material degree” is not repeated in the FIR, it must be assumed that consumers must be misled to a material degree in order for the prohibition on misleading information to be applied. The inclusion of “material degree” does not seem decisive for the evaluation, as it was not included in the Danish versions of the previous labelling Directives.

According to Article 5(2)(b) of the UCPD, the misleading potential of a commercial practice (or a name) shall be based on an evaluation of how the average consumer whom the practice reaches or to

³⁵ See Section 2 above. This also follows from the Kessler judgment, Case 303/97, Judgment of the Court of 28 January 1999, Verbraucherschutzverein eV v Sektkellerei G. C. Kessler GmbH und Co, para. 33, which concluded that a purely abstract risk of confusion was not sufficient to constitute deception. See also Darbo, Case 465/98, Judgment of the Court 4 April 2000, Verein geen Unwesen in Handelund Gewerbe Köln eV V Adolf Darbo AG, para. 28.

whom it is addressed, experiences the practice (or the name).³⁶ A similar conclusion follows from Article 2(b) of the Comparative Advertising Directive. Therefore, it is essential to consider and define the target group/market segment.³⁷

According to Article 7(2) of the FIR, “*food information shall be accurate, clear and easy to understand for the consumer.*” Inaccurate names are always considered to be misleading; however, for unclear and not easily understood names, the consumer’s perception is decisive.³⁸

According to these definitions, attention must be paid to whether the average consumer gets a false impression and potentially could act upon this impression when considering a potentially misleading action/name.³⁹ There is no need to prove actual deception; proof that a certain food name is “likely to mislead” is enough (see Article 6 of the UCPD).⁴⁰ Based on the information provided, the targeted consumers’ expectations and their ability to process the information are central.⁴¹ For this reason, the concept of the (average) consumer(s) is essential.⁴²

3.1 The consumer(s)

The consumer is defined in many pieces of EU legislation, for example, in the newly adopted Directive on consumer rights,⁴³ which according to Article 2(1) defines the consumer as any natural

³⁶ This also follows from the Nissan judgment, Case 373/90, Judgment of the Court of 16 January 1992, Criminal proceedings against X, para. 15.

³⁷ See Viken, M. (2012). *Markedsundersøkelser som bevis i varemerke- og markedsføringsrett*, pp. 49–50.

³⁸ See Hagenmeyer, M. (2012). *Food Information Regulation*, pp. 84–85 and Viken, M. (2012). *Markedsundersøkelser som bevis i varemerke- og markedsføringsrett*, p. 133.

³⁹ See Gomez, F. (2006). The Unfair Commercial Practices Directive: A Law and Economics Perspective, p. 26.

⁴⁰ See also Bakardjieva Engelbrekt, A. (2005). EG-Direktivet om utillbørliga affärsmetoder: En studande omdaning av svensk marknadsrätt?, p. 250.

⁴¹ See the Darbo judgment, para. 36, as well as Wilhelmsson, T., and Twigg-Flesner, C. (2006). Pre-contractual Information Duties in the *Acquis Communautaire*, p. 459 and Weatherill, S. (2011). Consumer Policy, p. 843 and 857.

⁴² See Section 3.1 below.

⁴³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

person who, is acting for purposes that are outside his trade, business, craft or profession.⁴⁴ This definition tallies with the definition in most EU legislation, and identifies the consumer as the weaker (contract) party compared with individuals and businesses acting professionally.^{45,46} In food law, the consumer is not defined, but in the General Food Regulation, the final consumer is defined in Article 2(18) as “*the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity.*” This definition also characterises the consumer as a weaker party, or at least one less familiar with food, a notion that seems to cohere with the fact that labelling rules aim to eliminate asymmetric information where a stronger party does not automatically provide this.⁴⁷

The term “consumer” is very central to the rules on food names, especially the prohibition against misleading names. However, the term is based on two elements – the definition of “consumer” and the “reference consumer”.⁴⁸

3.1.1 The reference consumer

Within general commercial practices law, the concept of the average consumer within the target group/market segment as the reference for evaluating a potentially misleading action has been

⁴⁴ For more about the consumer concept, see Unberath, H., and Johnston, A. (2007). The Double-headed Approach of the ECJ Concerning Consumer Protection and Stuyck, J. (2000). European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market, pp. 376–377.

⁴⁵ See also Océano Grupo Editorial, Joined cases 240/98-244/98, Judgment of the Court of 27 June 2000, Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98), para. 25.

⁴⁶ The idea of applying protective measures is founded on the professional expertise of the provider vs. the non-professional activity of the user; see Micklitz, H. W., Reich, N., and Rott, P. (2009). *Understanding EU Consumer Law*, p. 50.

⁴⁷ Less than half of the Danish cases on misleading food names were initiated by consumers; see Smith, V., et al, (2009). *Fair speak: Scenarier for vildledning på det danske fødevaremarked*, p. 131. In Germany, two-thirds of all advertising cases were initiated by competitors; see Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, p. 116. This can imply that consumers are a weaker party compared with professionals who both understand the mechanisms of and the rules on advertising and labelling. See also Drexler, J. (2002). Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-binding Measures - Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?, p. 580.

⁴⁸ See Micklitz, H. W. (2009). Jack is Out of the Box - The Efficient Consumer-Shopper, p. 435, and Unberath, H., and Johnston, A. (2007). The Double-headed Approach of the ECJ Concerning Consumer Protection, p. 1250.

highly debated.⁴⁹ Having a reference consumer makes sense because of the difficulties of applying differing standards in law. The reference consumer is “*the average consumer*” or a “notional, typical consumer”,⁵⁰ “*who is reasonably well-informed and reasonably observant and circumspect*”⁵¹ taking into account social, cultural and linguistic factors”⁵² (see Recital 18 of the UCPD). According to this recital, the average consumer test is not a statistical test.⁵³ However, in the Gut Springenheide judgment, the Court did not rule out that an expert’s opinion or a consumer research poll can be used for the purpose of clarifying whether a practice or name is misleading to consumers.⁵⁴

Clearly, paradoxes are embedded in the concept of the average consumer. *Acquis communautaire* on consumer protection is founded on an image of the consumer as the weaker party in the business-to-consumer relationship; however, the definition of the “average consumer” characterises the consumer as a rational market participant.⁵⁵ The literature has noted many difficulties with this

⁴⁹ See Bakardjieva Engelbrekt, A. (2011). Empowering the European Consumer in Old and New Markets: What place for EU Law?; Gomez, F. (2006). The Unfair Commercial Practices Directive: A Law and Economics Perspective and Micklitz, H. W. (2009). Jack is Out of the Box - The Efficient Consumer-Shopper.

⁵⁰ The new and more explicit rules on legibility – for example, on font sizes – provides a rather categorical determination of what a typical consumer can observe.

⁵¹ This consumer concept comes from the European Court of Justice case law, for example, in Gut Springenheide, Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt, para 31, and Mars, Judgment of the Court of 6 July 1995, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH, para. 24.

⁵² This part originates from Estée Lauder, Case 220/98, Judgment of the Court of 13 January 2000, Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH, para. 29, and is also found in Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

⁵³ See Drexel, J. (2002). Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-binding Measures - Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?, p. 572, which notes, “... the ECJ’s definition of the consumer has to be interpreted as a legal concept rather than as an empirical one.”

⁵⁴ For more on the use of opinion polls, see Viken, M. (2012). *Markedsundersøkelser som bevis i varemerke- og markedsføringsrett*. See also Bakardjieva Engelbrekt, A. (2005). EG-Direktivet om utilsbørliga affärsmetoder: En studande omdaning av svensk marknadsrätt?, p. 249.

⁵⁵ See Bakardjieva Engelbrekt, A. (2011). Empowering the European Consumer in Old and New Markets: What place for EU Law?, p. 403, which characterises the European consumer as “*the informed and confident consumer, the active market participant willingly shopping across borders and exercising his or her rights as an EU citizen.*”

reference consumer, including how to determine “the average”,⁵⁶ whether consumer rationality has been overestimated⁵⁷ and the ability of consumers to utilise information.^{58,59}

Another question is whether the “average” consumer is a European or a national “average.” The legal texts seem to imply that the average is a national one, based on the fact that social, cultural and linguistic factors must be taken into account.⁶⁰ And, of course, the level of protection provided previously at national level influences the average.⁶¹ Consumers in some countries are more concerned and more aware of information than those in others; therefore, a food name could be misleading in one country without being misleading elsewhere. Likewise, information and

⁵⁶ See Landes, W. M., and Posner, R. A. (2012). *Trademark Law: An Economic Perspective*, p. 304; Gomez, F. (2006). *The Unfair Commercial Practices Directive: A Law and Economics Perspective*, p. 26, notes that the notion of the average consumer is controversial from an economist's perspective for several reasons. For example, the notion is a composite with no real world correspondence. Further, a clear definition of the population or variable range from which the average is drawn is missing.

⁵⁷ Wilhelmsson, T., and Twigg-Flesner, C. (2006). Pre-contractual Information Duties in the *Acquis Communautaire*, p. 454; Twigg-Flesner, C., and Schulze, R. (2010). *Protecting Rational Choice: Information and the Right to Withdrawal*, p. 144; Reich, L. A. (2003). *Consumption and Poncibò*, C. (2007). *The Challenges of EC consumer Law*.

⁵⁸ See Howells, G. G. (2005). *The Potential and Limits of Consumer Empowerment by Information*. In the “own initiative” opinion by the European Economic and Social Committee on Consumer Information, the key facts/premises for rational decision making were addressed as being particularly (p. 64): *a) a critical awareness of one's needs and a prioritization of preferences; b) the possibility of comparing various products and services on the market; and c) knowledge – technical and economic – of the quality and price of each good and service.* This highlights the importance of precise naming, whether of a food product or any other good or service purchased in the market.

⁵⁹ See also Opinion of the European Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on Consumer Rights”, COM(2008) 614 – 2008/0196 (COD), (2009/C 317/09); for example, para. 1.3.2: “*European consumers should not be seen solely in terms of the internal market or be viewed as rational market players, aware and well-informed, taking decisions purely on the basis of competition, with consumer protection amounting simply to providing more and better information.*”

⁶⁰ See Wilhelmsson, T. (2006). *Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions*, p. 490.

⁶¹ For an example of a difference between German and French consumer protection, see Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, pp. 114–123 and p. 163–166.

Reference is made to the business newsletter Lloyd's List characterising German advertising law as “*based on the idea of a totally immature, pathologically stupid, and absent-minded consumer*”, pp. 118–119. On the opposite, a French court is cited as stating, “*We must take into account the degree of discernment and the critical sense of the average consumer. The law is not intended to protect the mentally feeble.*” In the Prantl case, Opinion of Sir Gordon Slynn delivered on 24 January 1984, Prantl, Case 16/83, Judgment of the Court of 13 March 1984, Criminal proceedings against Karl Prantl, the Advocate General noted in para. 1306: “*According to Mr Prantl, German competition law is one of the most rigid in the world. Unfortunately the German case law on competition is based on the ‘image of an infantile, almost pathologically stupid and negligently inattentive average consumer’.*”

advertising has historically in some states been prohibited for certain products while in others it has been a matter of providing sufficient, suitable information and advertising.⁶²

The European Court of Justice has acknowledged that consumers' conceptions might vary from one Member State to another.⁶³ However, in the Clinique judgment, the CJEU noted, in para. 21, that the use of the name Clinique was not considered misleading in other Member States. Based on this fact and the fact that the products were sold exclusively in perfumeries and cosmetic departments of large stores indicated that the name "Clinique", despite its clinical or medical connotations in German, was not misleading. This judgment clearly suggests that evaluations in other Member States regarding the misleading potential of names could be important.⁶⁴

No doubt, consumers in various Member States are different, regarding what they buy, their practical and conceptual appropriations and their knowledge concerning products.⁶⁵ But the Court generally has emphasized that perceptions can change and that the single market contributes to that change. Thus, the concept of "the average consumer" is dynamic, which makes "taking into account social, cultural and linguistic factors", which are clearly influenced by history,⁶⁶ much more difficult.⁶⁷ For this reason, the Court has argued that "*legislation of a member state must not*

⁶² See also Viken, M. (2012). *Markedsundersøkelser som bevis i varemerke- og markedsføringsrett*, pp. 139–145 for differences among the Scandinavian countries.

⁶³ The Bier case, C-178/84, Commission of the European Communities v Federal Republic of Germany, para. 32. See also Graffione Case 313/94, Judgment of the Court of 26 November 1996, F.Ili Graffione SNC v Ditta Fransa, para. 22: "... it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another." See also Concord, Case 421/04, Judgment of the Court of 9 March 2006, Matratzen Concord AG v Hukla Germany SA.

⁶⁴ See Weatherill, S. (2011). Consumer Policy, p. 842: "*In Clinique, the Court's remark that consumers in other states did not suffer from confusion invites the retort that would one not expect them to, if the issue is peculiar to the German language.*"

⁶⁵ See Nissen, N. K., Sandøe, P., and Holm, L. (2012). Easy to Chew, but Hard to Swallow - Consumer Perception of Neutrally Marinated Meat.

⁶⁶ See Opinion of Mr Advocate General Léger delivered on 9 October 2001, Bigi, Case 66/00, Judgment of the Court of 25 June 2002, Criminal proceedings against Dante Bigi, third party: Consorzio del Formaggio Parmigiano Reggiano, which is analysed in Chapter 6, Section 3.1. See also Chapter 1, section 2.

⁶⁷ Even more complex perhaps is the concept of the vulnerable consumer. The existence of weaker consumers has been accepted for years. See Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, 1981 OJ C 133/1-12, para. 31: "*Within the framework of the general activities already undertaken, the commission will also study the promotion of the interests of specific groups of underprivileged consumers in order to cater better for their particular needs.*" However, it can be questioned whether this concept is at all relevant. See Stuyck, J., Terryn, E., and Van Dyck, T. (2006). Confidence through Fairness? The New Directive on Business-To-Consumer Commercial Practices in the Internal Market. See also Clifton, J., et al, (2011). *Is Market-Oriented Reform Producing a "Two-Track" Europe? Evidence from Electricity and*

*‘crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them’.*⁶⁸

The move towards more maximum harmonisation within general EU consumer protection law seems to be decisive for the concept of the “average consumer” as well as the underlying aims of consumer protection.⁶⁹ In the Commission’s Consumer Strategy of 2007–2013,⁷⁰ “*confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency*”. It has been argued that the Commission’s Consumer policy, including EU commercial practices law, combined with the introduction of maximum harmonisation enforces a concept of “*the economically efficient consumer*”⁷¹ rather than only the “reasonably well-informed and reasonably observant and circumspect” consumer. A central point to make is that this view of the consumer is based on the idea of consumers as “cross-border” shoppers who are active participants in establishing a complete internal market.⁷²

However, the role of consumers within food law seems different. Most food purchases occur within national borders,⁷³ which is unlikely to change due to the character of the products. Cross-border trade within the food industry is primarily initiated by businesses exporting to other Member States. Yet, there is no reference to this different in the role of consumers, and the Food Information

Telecommunications, p. 3, which defines two types of vulnerable consumers: those who find it more difficult than others to obtain or assimilate the necessary information and those who are exposed to a higher risk of worsening their own welfare when making inadequate decisions. The authors also conclude that knowledge in society has dramatically increased the complexity and information asymmetry surrounding consumption decisions. The concept of the vulnerable consumer is not addressed further here as it never has been mentioned in relation to food naming and labelling.

⁶⁸ The Bier case, C-178/84, Commission of the European Communities v Federal Republic of Germany, para. 32.

⁶⁹ The term “maximum” rather than “full” harmonisation is used here because it indicates that no room is left for Member States to regulate the level of protection; see Bakardjieva Engelbrekt, A. (2005). EG-Direktivet om utillbörliga affärsmetoder: En studande omdaning av svensk marknadsrätt?, p. 242.

⁷⁰ EU Consumer Policy Strategy 2007–2013, Com (2007) 99 final, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee.

⁷¹ See Micklitz, H. W. (2009). Jack is Out of the Box - The Efficient Consumer-Shopper and Bakardjieva Engelbrekt, A. (2011). Empowering the European Consumer in Old and New Markets: What place for EU Law?, p. 403.

⁷² See Communication from the Commission, Europe 2020, a strategy for smart, sustainable and inclusive growth, com (2010) 2020 final.

⁷³ See Commission of the European Communities, “Report on cross-border e-commerce in the EU”, SEC (2009) 283 final from 5 marts 2009, see also see http://www.foodanddrinkeurope.com/Consumer-Trends/Online-food-sales-perfect-for-M-S-but-not-yet/?utm_source=newsletter_daily&utm_medium=email&utm_campaign=Newsletter%2BDaily&c=OJR6kC9KvZQfSF05nGmxVA%3D%3D.

Regulation states only that the general principle of EU commercial practices law are analogous. Logically, then, the average consumer also should be the benchmark for evaluating whether a food name is misleading.⁷⁴ However, the FIR makes no reference to the average consumer, notwithstanding the rules concerning nutrition labelling.⁷⁵ Oddly, the relatively well-known and established concept of the average consumer is not mentioned in the general labelling rules on consumer information. The only terms used, notwithstanding rules on nutrition labelling, are “the consumer” or “the final/ultimate consumer”. The FIR also includes no obligation to take into account social, cultural and linguistic factors. Instead, Recital 16 states, “*Food information law should provide sufficient flexibility to be able to keep up to date with new information requirements of consumers and ensure a balance between the protection of the internal market and the differences in the perception of consumers in the Member States*.”⁷⁶ The differences in consumers’ perceptions seem to denote differences among countries. On one hand, this statement corresponds to the case law and the obligation to take into account social, cultural and linguistic factors; however, on the other hand, the wording of the statement seems to reduce the importance of these factors and their link to national history, which could suggest that the referenced consumer within food law is more European. Nevertheless, nothing in the FIR clarifies the benchmark and the referenced consumer within food law.

Various arguments could be made for why the average consumer, as an economically efficient agent in the market, should not be the reference for evaluating potentially misleading food names. First, the use of information for food products differs from the use of other product information, for example information for products that are not repurchased. Generally, for experience goods like food, less time is spent searching for relevant information,⁷⁷ which suggests that food names must not be misleading even for the absent-minded or vulnerable consumer. Second, food is essential

⁷⁴ The concept also has been used in case law concerning food names; see Section 4.3. It seems to be applied in the legal literature without further consideration; see Hagenmeyer, M. (2012). *Food Information Regulation*, pp. 79–85.

⁷⁵ See Article 35 and recital 10, which makes a reference to the EU Consumer Policy Strategy 2007–2013.

⁷⁶ See Section 4 and Chapter 9 for analyses on the balance between protection of the internal market and difference in perceptions between Member States.

⁷⁷ As noted by Nelson, P. (1970). *Information and Consumer Behavior*, p. 312: “...there will be goods for which this search procedure [inspection] is inappropriate – goods it will pay the consumer to evaluate by purchase rather than by search. If the purchase price is low enough, any even moderately expensive search procedure would be ruled out.”

from a societal angle; for example, because of considerations for allergic or elderly consumers, the image of the consumer could change.⁷⁸ Third, the special field of food law could justify considering the consumer as more than a mere contractual party.⁷⁹ When food law is considered in a broader perspective, taking account of potential social costs, collective rights seem more prominent than individual and contractual rights, which are important to other areas of consumer law.⁸⁰ In the FIR, the interests of “citizens” and benefits for them are mentioned as aspects or objectives of the rules (see recitals 2 and 9). Characterising the consumer as a citizen or mixing the terms is paradoxical because the terms refer to different roles of individuals.⁸¹ However, consumer protection has its roots in social policy,⁸² and re-establishing this link could bring new perspectives on the referenced consumer in food naming.⁸³ The wording of TEU Article 1, which states that “*decisions are taken as openly as possible and as closely as possible to the citizen*”⁸⁴ suggests that more room is left for national peculiarities when decisions involve citizens.⁸⁵ Therefore, it could be argued that the connection between food law and social issues justifies a different consumer from the one referenced within EU commercial practice law, that is, a more “national” consumer. This notion

⁷⁸ See Trumbull, G. (2006). *Consumer Capitalism, Politics, Product Markets and Firm Strategy in France and Germany*, pp. 33 and 51.

⁷⁹ See Stuyck, J. (2000). *European Consumer Law after the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market*, p. 397 for a different perspective of private law regulation versus technical regulation.

⁸⁰ For example, this is due to the lack of individual remedies. As a parallel, the UCPD does not address legal requirements related to taste and decency, which vary widely among Member States (recital 7), but only consumers’ economic interests are protected (Article 1). This also seems to imply that more collective or public interests fall outside of the more general areas of consumer law. See Bakardjieva Engelbrekt, A. (2005). *EG-Direktivet om utillbörliga affärsmetoder: En studande omdaning av svensk marknadsrätt?*, pp. 255–258, for a discussion about the purpose of the UCPD. For views on the relations between general EU consumer protection and private law, see Drexl, J. (2002). *Community Legislation Continued: Complete Harmonisation, Framework Legislation or Non-binding Measures - Alternative Approaches to European Contract Law, Consumer Protection and Unfair Trade Practices?*

⁸¹ See European Parliament, Committee of the Internal Market and Consumer Protection “Draft report on delivering a single market to consumers and citizens”, 2010/2011.

⁸² See Micklitz, H. W. (2009). *Jack is Out of the Box - The Efficient Consumer-Shopper*.

⁸³ See Micklitz, H. W. (2010). *Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law*.

⁸⁴ In the “own initiative” opinion of the European Economic and Social Committee on Consumer Information, 2011 OJ C 44, pp. 62–72, the Committee characterised consumers’ rights to information “as one of the rights of European citizenship”.

⁸⁵ In relation to services of general interest, protocol No. 26 annexed to the TEU and TFEU, article 1, it is mentioned as a shared value of the Union to include “...the differences in the needs and preferences of users [of services of general economic interest] that may result from different geographical, social or cultural situations.” See also in general Szyszczak, E., and Davies, J. (2011). *Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest*.

could be supported in Article 3(3) TEU, which states the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced. Despite this line of arguments, nothing in the legal texts indicates that the reference consumer within food law is different from “the average consumer,” and the attributes connected to this concept.

It has actually been argued that inconsistency is a virtue when it comes to the regulation of food, exactly because the regulation blends the different assumptions about consumers, providing both general labelling rules for the more rational consumers and recipe rules for the less rational.⁸⁶ A different argument for the complexities surrounding the regulation of food and the reference consumer might be found in different objectives underlying the combined and intertwined rules (see Chapters 2 and 3). Product naming has many different objectives, and adding health and safety aspects that are clearly linked to social objectives does not make consistency any more prevalent.

No doubt, legislation on labelling requirements and naming of food will largely depend on assumptions about consumers. The definition of the consumer and the reference consumer will surely influence how information can and must be provided as well as whether information, including the name, is adequate to guide consumers’ choices or is misleading. The more acceptance there is of cultural differences among consumers from different Member States within the EU, the more varied definitions of the average consumer there will be. This most likely will lead to greater consumer protection.⁸⁷ However, acceptance of differences also strengthens the differences, and the conflicts that arise in relation to mutual recognition may become greater. Therefore, further clarification of the central concept of “the average consumer” is essential for EU law on food names.

4 Application of fairness and the prohibition against misleading names

Despite the fact that many definitions are provided for a “misleading action”, potentially misleading actions and names must be considered on a case-by-case basis. The CJEU generally has stated that it

⁸⁶ See Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 46.

⁸⁷ See Wilhelmsson, T. (2006). *Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions*.

is reluctant to judge whether a particular presentation of a food is actually misleading,⁸⁸ and that such judgments are for the Member States to make.⁸⁹ However, the Court has provided more or less clear guidance regarding the specific characteristics of potentially misleading names and practices. For the majority of these cases, the CJEU’s decisions have revolved around conflicts between primary EU law and national prohibitions against misleading names or practices as well as protection against unfairness. Focus here is on the CJEU’s guidance on the application of fairness and the prohibition against misleading names.

4.1 Potentially misleading Eurofoods names

In general, EU legal names cannot be misleading,⁹⁰ although the regulation of these names is so complex that consumers cannot be expected to fully comprehend what the names cover.⁹¹ Further, the compulsory and complete system of names established by Eurofoods rules cannot be complemented by the adoption of national double names, even where these aim at informing national consumers and avoiding confusion. In the *Commission v Italy* (pure chocolate) judgment,⁹² the CJEU held that Italian rules that allowed chocolate not containing vegetable fats to be named “pure chocolate” were contrary to the prohibition on misleading names in labelling rules.⁹³ The Court held that the addition of vegetable fats does not substantially alter the nature of the product, which is also why vegetable fats can be added. Using the name “pure chocolate” for only some of the harmonised products “*suggest[ed] the existence of a difference between the essential characteristics of the products concerned*”, which is not apparent.⁹⁴ Therefore, the Italian rules

⁸⁸ Some guidance on consumers’ ability to process information is found in secondary law, for example in recital 37 of the FIR, which states that the term sodium cannot be used, but should be replaced by the term salt because this name is more easily understood by the final consumer.

⁸⁹ See *De Kikvorsch*, Case 94/82, Judgment of the Court of 17 March 1983, Criminal proceedings against De Kikvorsch Groothandel-Import-Export BV, para. 12.

⁹⁰ Hagenmeyer, M. (2012). *Food Information Regulation*, p. 166.

⁹¹ See Chapter 3, Section 3.2, and Ohm Søndergaard, M., and Selsø Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?*

⁹² *Commission v Italy* (pure chocolate), Case 47/09, Judgment of the Court of 25 November 2010, European Commission v Italian Republic.

⁹³ In the specific case Article 2(1) of the Second Labelling Directive.

⁹⁴ See paras. 40–42. For a similar Danish case concerning a trademark, see the *Rigtig Juice* judgment, *Ugeskrift for Retsvæsen*, 2001.2164(O). See Møgelvang-Hansen, P., Riis, T., and Trzaskowski, J. (2011). *Markedsføringsretten*, p. 109, for a short description of the case.

could not be upheld. This case indicates that voluntary information, such as trademarks or the type of farming and so on, can be misleading, which also follows from the Gut Springenheide judgment⁹⁵ concerning marketing of eggs.

In the Ramel judgment,⁹⁶ the CJEU determined that the fully harmonised area of wine production did not prevent the mixture of red and white wine to be sold under the name “rosé”. However, the name must not be misleading, and thus the name rosé can be used only for mixtures in so far as it is *“not inconsistent with an objective characteristic of the wine which enables it to be distinguished from red wine or white wine solely by reason of its colour”*, (see para. 27). The Ramel judgment indicates that product names with a double denotation can be misleading, if the product complies with only one of the denotations. The name’s misleading potential is evaluated in the same way as for other potentially misleading names (see Section 4.3).

4.2 Potentially misleading Quality Schemes names

Regarding Regulation 510/2006, the prohibition against misleading names does not relate to the use of the protected names, but is related to the protection of the PGI/PDO. Therefore, PGI/PDOs are protected against practices that can mislead consumers about the origin of the product (see Article 13(1)(c)).⁹⁷

Further, names that are misleading may not be registered, but only where the deception stems from conflicts with registered homonyms (Article 3[3]), plant varieties (Article 3[2]), or trademarks, (Article 3[4]).⁹⁸ Consumer perception is not mentioned in any other provisions concerning the registration of a name as either a PGI or a PDO.

⁹⁵ Gut Springenheide, Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt.

⁹⁶ Ramel, Case 89/84, Judgment of the Court of 14 May 1985, Fédération nationale des producteurs de vins de table et vins de pays, Confédération des associations viticoles de France and others v Pierre Ramel and others.

⁹⁷ According to article 4(3)(b) of the TSG Regulation, a name cannot be registered if *“it is misleading, a particular example being a reference to an obvious characteristic of the product or one that does not correspond to the specification and is therefore likely to mislead the consumer as to the product's characteristics.”*

⁹⁸ According to the Commission’s Decision of 20 December 2006 setting up a scientific group of experts for designation of origin, geographical indications and traditional specialities guaranteed, 2007/71/EC, the Commission may consult this

In the Budvar I judgment,⁹⁹ the Court clearly stated, in para. 76, that the registration of a PGI/PDO is not dependent on consumer perception, notwithstanding Articles 3(2–4), (emphasis highlighted):

“The scope of Regulation No 2081/92 is not determined by reference to such factors [whether or not consumers are misled], but depends essentially on the nature of the designation, in that it covers only designations of products for which there is a specific link between their characteristics and their geographic origin, and by the fact that the protection conferred extends to the Community.”

In the Feta II judgment, the German government claimed that a risk of consumer confusion about origin, because of Greek symbols used on non-Greek feta prior to the registration, had no bearing on the issue of whether a name is generic or whether it is a designation of origin that can enjoy protection. Unfortunately, the Court did not address the connection between protecting consumers against misleading names and protecting intellectual property, but simply stated that the argument was unfounded. Thus, consumer perception of a name matters¹⁰⁰ when determining whether a name has become generic; however, the classification of a name as generic is not influenced by potential consumer confusion and neither is the classification dependent on optimising consumer protection.

4.3 Fairness and other potentially misleading names

In the Deserbais judgment,¹⁰¹ which concerned marketing of cheese under the name “Edam”, the Court observed, in para. 22, that (emphasis added) “*an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term ‘naturally pure’ used on the label simply because the jam contains pectic gelling agent whose presence is duly indicated on the list of ingredients.*”¹⁰² This judgment aligns with the general conclusion that the

group on matter relating to the assessment of criteria regarding fair competition and risk of confusing consumers (see Article 2).

⁹⁹ Budvar I, Case 216/01, Judgment of the Court of 18 November 2003, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH.

¹⁰⁰ See Chapter 2, Section 4.3.2.

¹⁰¹ Deserbais, Case 286/82, Judgment of the Court of 22 September 1988, Ministère public v Gérard Deserbais.

¹⁰² The new rules on product identity, analysed in Chapter 5, will not change the conclusion reached in the judgment.

average consumer's overall impression of food information must be assessed.¹⁰³ The CJEU's general position has been that protections in the internal market should not be based on consumers' bounded rationality and limited time spent on food choices. If relevant information is provided somewhere on the label, then consumers are adequately protected. However, from the Deserbais judgment as well as others such as the Sauce Béarnaise-judgment,¹⁰⁴ it appears that the name of the food and the list of ingredients are two very central pieces of information that combine to provide a clear indication of the composition and other aspects of a specific food product.¹⁰⁵ For this reason, previous case law indicates that a name's potential to mislead must be based on an evaluation of the name in combination with the list of ingredients. However, the new rules on product identity seem to have modified this process, indicating a different perception of what the average consumer reads and comprehends.¹⁰⁶

The CJEU's general position also seems to be that the EU Internal Market should not limit consumer choices, for example, by prohibiting certain types of information.¹⁰⁷ Problems of information overload have not been addressed in case law. However, the FIR rules on precision and voluntary information (analysed in Chapter 4) modifies this by allowing limitations on the amount of information that must be presented to the consumer.

For these reasons, the adoption of the FIR might provide for future changes in relation to food naming and consumer protection.

¹⁰³ See Hagenmeyer, M. (2012). *Food Information Regulation*, p. 80. A similar conclusion follows from Nissan, Case 373/90, Judgment of the Court of 16 January 1992, Criminal proceedings against X, para. 11, and from Clinique, Case 315/92, Judgment of the Court of 2 February 1994, Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH, para. 21. See also Rau, Case 261/81, Judgment of the Court of 10 November 1982, Walter Rau Lebensmittelwerke v De Smedt PVBA.

¹⁰⁴ Béarnaise Sauce, Case 51/94, Judgment of the Court of 26 October 1995, Commission of the European Communities v Federal Republic of Germany.

¹⁰⁵ See Hagenmeyer, M. (2012). *Food Information Regulation*, p. 81.

¹⁰⁶ See Chapter 5 and see Chapter 9 for how this applies to imported products.

¹⁰⁷ This follows from the GB-INNO-BM-judgment, Case 362/88, Judgment of the Court of 7 March 1990, GB-INNO-BM v Confédération du commerce luxembourgeois. In this case, it was questioned whether a prohibition on stating the duration of a special offer and specifying a previous price to avoid confusion between special sales and biannual clearance sales was contrary to primary EU law. The CJEU held, in para. 18, “...national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.”

In the Milk Substitute judgment,¹⁰⁸ the CJEU actually indirectly accepted that it could be difficult to provide consumers with full information (para. 10). The specific circumstances – the use of milk substitutes in catering food and barriers to informing consumers about the substitutes – seem very important. The case indicated that under special circumstances and for special types of products, informing consumers is not sufficient to provide protection; instead, protection against market related risks of buying lower quality products might be relevant.¹⁰⁹ The analysis of rules on product identity in Chapter 5 also confirmed that the obligation to inform consumers about untraditional ingredients varies depending on product type.

The same logic seems to apply to the treatment of food products. In the Smanor judgment,¹¹⁰ the CJEU interpreted Article 5 of the First Labelling Directives in regards to a French prohibition on use of the name “yoghurt” for deep-frozen yoghurt. The Court found that Article 5(1), defining the different types of food names, should be interpreted in light of the Directive's general purpose and structure.

The Court further noticed that:

“As the deep-freezing of a product is expressly mentioned in that provision [Article 5(3)], it must be concluded that a Member State cannot refuse to permit a certain name to be used for a given product on the sole ground that that product has undergone deep-freezing treatment, so long as it continues to satisfy, after undergoing such treatment, the other conditions laid down by the national rules for the use of the name in question.”

France could thus not prohibit the use of the name “yoghurt” for deep-frozen yoghurt based on the fact that such treatment was not usual in France. However, it appears to be decisive that the treatment method is mentioned in the labelling rules, which could indicate that the Court would not reach a similar conclusion if the product had undergone an untraditional treatment. Further, the

¹⁰⁸ Milk Substitute, Case C-216/84, Commission of the European Communities v French Republic.

¹⁰⁹ See Chapter 3, Section 3. In the Milk Substitute case, the difficulties with providing consumers full information could not justify an absolute prohibition on importation because this prohibition was not proportional.

¹¹⁰ Smanor, Case C-298/87, Proceedings for compulsory reconstruction against Smanor SA.

CJEU clearly states that the treated product must continue to satisfy the conditions for the use of the name, thereby indicating that if this were not the case, information concerning the changed characteristics might not provide sufficient consumer protection.

Actually, on one occasion, the Court accepted that a name, in the specific case an ingredient, did not provide sufficient information. This was in the Van der Veldt judgment,¹¹¹ where the CJEU found that the use of the name “preservative” was inadequate to provide information to consumers because it did not refer to a specific ingredient but rather to an entire category.¹¹²

The Severi judgment¹¹³ also addressed the issue of misleading names. The judgment stated that Alberto Severi had sold sausages in good faith¹¹⁴ under the name “*salame tipo filino*” for a period of 10 years. “*Salame Filino*” was not registered as PGI/PDO, but it was registered as a collective trademark in Italy. During the case, questions arose concerning the generic nature of the name as well as its potential to mislead because of its reference to an area in Italy (Filino is an Italian municipality). The CJEU referred to its previous case law stating that national courts should determine on a case-by-case basis whether a name is misleading. The Court further noted, in para. 62 (emphasis highlighted): , “*Among the factors to be taken into account in order to assess whether the labelling at issue in the main proceedings may be misleading, the length of time for which a name has been used is an objective factor which might affect the expectations of the reasonable consumer . . .*”

Therefore, historic and culturally founded expectations do matter when evaluating the misleading potential of a name. However, the case did not concern cross-border trade, but was related to a purely internal conflict: the obligation to mutually recognise names legally used in other countries most likely changes this.¹¹⁵

¹¹¹ Van der Veldt, Case 17/93, Judgment of the Court of 14 July 1994, Criminal proceedings against J.J.J. Van der Veldt.

¹¹² See Chapter 4, Section 3 for more about this case.

¹¹³ Severi, Case 446/07, Judgment of the Court of 10 September 2009, Alberto Severi v Regione Emilia Romagna.

¹¹⁴ The term “good faith” is used without further elaboration as to what “good faith” constitutes.

¹¹⁵ See Chapter 9, Section 2.

The Miro judgment¹¹⁶ illustrates this conflict exactly. In the case, the CJEU considered a Dutch regulation prohibiting the use of the appellation “*Jenever*” for beverages containing less than 35 percent of alcohol. The CJEU found that such a regulation potentially restricted marketing of imported products in Holland. Since the national court had found that consumers were not misled in the specific case, the CJEU did not address that prohibition. However, the Court considered whether prevention of unfair competition (misuse of reputation of a traditional name) could justify the restrictive effect of the Dutch regulation. The CJEU unfortunately did not address the different arguments concerning fairness, which could have provided clarification of the term. The Court did not accept the justification, concluding, in para. 24, (emphasis added), “... *In a system of a common market, interests such as fair trading must be guaranteed with regard on all sides for the fair and traditional practices observed in various member States.*”¹¹⁷

Free movement and marketing foods easily across borders was deemed more important than fairness on the national market.¹¹⁸ It could be argued that constantly precluding Member States from justifying national food standards to prevent unfair competition does not observe all sides. Importers can gain a competitive advantage by free riding on the reputation that domestic producers may have built around a certain food name. But domestic producers cannot be protected against this free riding.¹¹⁹

International codes, such as the Codex Alimentarius,¹²⁰ can serve as guidelines when evaluating whether a certain name or labelling is misleading. The CJEU has used the Codex Alimentarius when interpreting national recipe rules. In the Smanor judgment, the Court found that based on such

¹¹⁶ Miro, Case C-182/84, Criminal proceedings against Miro BV.

¹¹⁷ A similar conclusion was reached in Prantl, Case 16/83, Judgment of the Court of 13 March 1984, Criminal proceedings against Karl Prantl.

¹¹⁸ See MacMaoláin, C. (2001). Free Movement of Foodstuffs, Quality Requirements and Consumer Protection: Have the Court and the Commission Both got it Wrong?, p. 427: “By allowing a foodstuff to be marketed under a specific name, where it is compositionally different from that generally marketed under the same name, the Court has legitimised deception.”

¹¹⁹ It could be questioned whether this judgment could modify the principle of mutual recognition because according to the judgment, a Member State apparently has to accept only products that have been marketed in accordance with fair and traditional practices. See more on this in Chapter 9.

¹²⁰ The Codex Alimentarius Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. See <http://www.codexalimentarius.net/>

guidelines for yoghurt, “*the characteristic feature of the product marketed as ‘yoghurt’ is the presence in abundant quantities of live lactic bacteria*”. As long as deep-frozen yoghurt was still characterised by the presence of live lactic bacteria it could be named yoghurt. However, in the Deserbais judgment, the Court found, despite a Codex Alimentarius guideline for the use of the name Edam, which defined Edam as containing minimum 40 percent fat that “*the mere fact that a product does not wholly conform with the standard laid down does not mean that the marketing of it can be prohibited*.” In the Smanor judgment, the free movement of goods was secured if the Codex guideline were followed, whereas in the Deserbais judgment, a restriction on free trade could be justified if the Codex guideline were followed. Thus, the CJEU let the importance of international standards be dependent on whether the specific standard in the specific case fostered free movement or not.

5 Concluding remarks

The general concept of fairness and the prohibition against misleading names initially appear to be very important to food naming because they provide flexible tools to control naming. Unfortunately, the concept of fairness is used inconsistently and it is unclear how the obligation to provide fair information or the possibility to require additional information to prevent unfair competition must be interpreted. The prohibition against misleading consumers is actually rather well defined, but the importance of the well-defined rule and especially related terms like “the average consumer” as a basis for evaluating food names is questionable. In addition, both fairness and the prohibition on misleading names must always be interpreted on a case-by-case basis; legal uncertainty exists. However, the FIR has introduced many new substantial rules related to naming that concern precision of names and food identity. At first glance, these rules seem to address potentially misleading names and clarify the business obligations in these cases. The reason for this is most likely found in an acceptance of the problems attached to a flexible standard, such as the lack of certainty.¹²¹ Therefore, the rules aim at providing further clarification regarding when a name is

¹²¹ In The European Evaluation Consortium (TEEC) for the European Commission, DG SANCO, “Evaluation of the food labelling legislation, Final Report”, 2003, a common theme is the flexible character of fairness and the prohibition

misleading. Nevertheless, the analyses in Chapter 4 and 5 showed that the application of these rules is dependent on consumer expectation and potentially deception; the rules are clearly connected to the prohibition against misleading information, including the name.

The prohibition on misleading food information covers all types of labelling information. However, most of the mandatory particulars (for example, the minimum durability date, the net weight and the alcohol content) do not require a rule as complex as this prohibition because the information is either true or false. In fact, the name is the only mandatory particular that is not completely objective, which can be misleading beyond a mere true/false test and is based on consumer perceptions. The misleading character of a name can be the result of a lack of precision, replacement of ingredients, the associations with a geographical name or difficulties with translation. However, paradoxically, the name is also the only particular for which the principle of mutual recognition is positively articulated in the secondary law (the FIR). Chapter 9 examines the more precise criteria for the obligation to mutually recognise names. Further, the conflicts arising from differences in standards for evaluating food names are addressed.

against misleading consumer. The DG notes that these are open to subjective interpretation, which leads to inadequacy of the legislation on food labelling and the presence of unclear rules.

PART 4: MUTUAL RECOGNITION AND NATIONAL LEGAL NAMES

“The Court’s understanding of Member State legislation is not a political one where complex choices and preferences are decided, but a regulatory one where the abstract market rationale prevails over the political bargaining process, despite a different rhetoric in the Preamble of the EU Charter which refers to the ‘respect of the diversity of cultures and traditions of the people of Europe as well as national identities of Member States’.”¹

CHAPTER 9: NATIONAL REGULATION AND EU LAW

1 Introduction

Article 1 of the Treaty on the Functioning of the European Union (TFEU) states, *“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”* The EU aims to achieve this goal by using the principle of conferral and the principles of subsidiarity and proportionality (Article 5 TFEU) to limit EU competences. According to the principle of subsidiarity, the EU shall only act if Member States cannot sufficiently achieve objectives in areas such as internal market, agriculture and consumer protection (Article 4(2) TFEU).² In areas such as protection and improvement of human health and culture, the EU has competences only to support, coordinate and supplement actions of the Member States without superseding Member States’

¹ Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, p. 25.

² The limited competence in relation to the internal market follows from the Tobacco Advertising I judgment, Case 376/98, Judgment of the Court of 5 October 2000, Federal Republic of Germany v European Parliament and Council of the European Union (see Chapter 2). See Weatherill, S. (2006). Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation, p. 39, which interestingly notes that *“...the Treaty is singularly unhelpful in defining the nature of an EC competence relative to national competence.”* It is in a sense contradictory that the principle of subsidiarity initially limits Union competences in the area of internal market, where harmonisation aimed at removing obstacles to trade due to differences in national legal rules is a main instrument. Dehousse, R. (1992). Does Subsidiarity Really Matter? p. 28, argues that the interdependence among related areas limits the utility of the principle of subsidiarity and also characterises the principle to be *“ill-adapted to the problems it is meant to solve”*. See also McCormick, N. (1993). Beyond the Sovereign State, p. 18, and Armstrong, K. A. (2002). Mutual Recognition, pp. 262–263, which argues that the principle of subsidiarity is not *“guided by any clear philosophy or even methodology as to the appropriateness of the Community legislative intervention . . .”*

competences (Articles 6 and 2(5) TFEU). A similar role of the EU is found in relation to consumer protection (see Article 169(2)(b) TFEU). These rules express political choices, but as noted by Reich the CJEU has – based on a market rationale – provided judge-made law influencing both food culture and consumer protection.³

The balancing between competences and aims is complex, and despite intentions to respect diversity and leave what can be left at the Member State level, EU law appears to set significant boundaries for national regulation of food naming. This chapter focuses on clarifying what latitude remains in EU law for national authorities to regulate food naming, according to traditional and long-existing national practices, and on examining to what extent food naming is harmonised.⁴

Chapters 2–8 of this thesis contain analyses of secondary law on food names. However, only on rather few occasions has the Court of Justice of the European Union (CJEU) interpreted EU labelling rules; consequently, case law on food names based on judgments concerning the free movement of goods has paved the way for European food policy to a much larger degree. As an example, the principle of mutual recognition is established in case law concerning the interpretation of primary law,⁵ and is today also articulated in secondary law in the FIR. Primary EU law, the Treaties and general principles,⁶ provide the general settings for EU law by establishing aims, principles and general rules like the free movement of goods rules (Articles 34 and 35 TFEU).

³ In *Sánchez*, Case 183/00, Judgment of the Court of 25 April 2002, *María Victoria González Sánchez v Medicina Asturiana SA*, the CJEU underlined that the competence conferred to the Member States according to Article 169(4) TFEU (previously Article 153(5) TEC) is not extended to the measures adopted pursuant to Article 114 TFEU (previously Article 95 TEC).

⁴ To cite the Opinion of the European Economic and Social Committee on Consumer Information, 2011, OJ C 44, pp. 62–67, para. 6.3: “*In spite of the advantages recognised in some cases of standardising pre-contractual information for comparing offers, it is crucial that some margin be left to adapt to the specific characteristics of consumers in each Member State. Since many markets remain largely national in nature, the amount of information to be provided for purposes of comparison could generate high costs for transactions, which would not be offset by growth of the cross-border market, and this could be damaging to SMEs.*” The focus here is not on the amount of information but rather what information should entail, including a focus on possible discretion left at the Member State level to require information on, for example, specific characteristics.

⁵ The judgment in *Cassis de Dijon*, Case 120/78, Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* was delivered just two weeks after the publication in the Official Journal of the First Labelling Directive.

⁶ See Chapter 1, Section 4.1.

Primary EU law obviously constitutes *lex superior* to secondary law,⁷ whereas the latter constitutes *lex specialis* by providing for example rules on consumer protection to justify restrictions on free trade. The scope of primary law sets limits on secondary law, but secondary law also provides obligations that cannot be drawn from primary law, most clearly in cases of full harmonisation.⁸

A central principle in both primary and secondary law is the principle of mutual recognition, which obliges Member States to accept names legally used in other Member States. From the conclusions on *de lege lata* in Chapters 4–8, it is evident that “fairness” is another general principle established in secondary law, including the prohibition against misleading names. Legal uncertainty surrounds the prohibition because case-by-case evaluations must be used to determine whether a certain name *causes or is likely to cause the average consumer to take a transactional decision that (s)he would not have taken otherwise*. Individuals, consumers or firms have no European judicial route to questions on unfairness and misleading labelling. Individuals can complain about particular cases only through actions before national courts (or administrative authorities).⁹ However, the ability and latitude to establish actual national food names in national case law based on enforcement of the prohibition on misleading consumers has not been clarified.¹⁰

Section 2 of this chapter clarifies how primary and secondary law interact and set limits in relation to naming imported products. First, a short analysis is made of the principle of mutual recognition, the possible justifications for restricting imports and the principle of proportionality derived from primary law. Second, an analysis is provided of the FIR obligation to mutually recognise names from other Member States and how this interacts with the prohibition against misleading names.

⁷ See Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 108–113.

⁸ See Chapter 1, Section 4.1, for more on the interaction between primary and secondary law.

⁹ For an analysis of national authorities’ duties to apply Community law, see Temple Lang, J. (1998). The Duties of National Authorities under Community Constitutional Law.

¹⁰ In this regard, it is interesting to note that the Commission in general has found it problematic that Member States issue guidelines for the interpretation of EU legislation; see Commission of the European Communities, “The General Principles of Food Law in the European Union, Commission Green Paper”, Com(97) 176 Final, p. 51.

Primary law on free movement prohibits restrictions on imports and (discriminatory) restrictions¹¹ on exports, unless justified.¹² For this reason, Member States appear to have greater room for regulating domestically produced food; in line with the fact that the rules in the Member State of production initially apply and with the conclusion reached in Chapter 8. Further, the definition of a “legal name” in the FIR, includes names provided for in national laws, regulation or administrative provisions.¹³ However, within general commercial practices law, according to the Unfair Commercial Practices Directive (UCPD) and the CJEU case law, Member States are obliged to make case-by-case evaluations of potentially misleading practices. No room is left for establishing specific rules, neither for practices containing a cross-border element nor for purely internal situations.¹⁴ Section 3 analyses to what degree the same goes for food law, that is, to what degree Member States can establish rules for food naming of domestically produced food. This is interesting because standards for what constitute a misleading name already exist within national legal systems.¹⁵ Composition rules also exist at the national level, applicable to production (and sale) within the national borders.¹⁶ Many different reasons lie behind such national rules. Section 3 analyses whether and how primary and secondary food law limit Member States’ abilities to regulate domestic production and to set national standards for food naming, either based on enforcement of the prohibition against misleading names or through actual legislation. The focus is

¹¹ Restrictions on imports are defined as impediments to imports, for example, by placing a greater burden on imported products. Discriminatory restrictions are defined as the application of different rules to products crossing borders than to products which do not. This definition is not in line with the Gysbrecht judgment, Gysbrecht, Case 205/07, Judgment of the Court of 16 December 2008, Lodewijk Gysbrechts and Santurel Inter BVBA, see Section 3.3. For more on the different terms used and the theoretical discussions concerning the scope of primary EU law on free movement, see Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 640–667; Davies, G. (2010). *Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law*; Snell, J. (2010). *The Notion of Market Access: A Concept or a Slogan?*; Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*; and Weatherill, S. (2009). *Measures of Consumer Protection as Impediments to Export of Goods*.

¹² The difference between Articles 34 and 35 TFEU follows from Groenveld, Case 15/79, Judgment of the Court of 8 November 1979, P.B. Groenveld BV v Produktschap voor Vee en Vlees, para. 7. The conclusion seems to have been modified in Gysbrecht (see Section 3).

¹³ Paradoxically reference is made to the laws in the Member State of sale!

¹⁴ For discussion on purely internal situations contra situation containing a cross-border element, see Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*.

¹⁵ For example, see guidelines from the Danish Food Authorities on essential characteristic of marzipan, where the quantity of almonds is defined as characterising this product; see Mærkningsvejledning, Januar 2012, section 9.2.4 at http://www.foedevarestyrelsen.dk/Foedevarer/Maerkning/Faerdigpakkede_foedevarer/Sider/forside.aspx (only a Danish version is available).

¹⁶ Examples are the Danish definition of “alcohol-free” and the Italian rules on the use of durum wheat in pasta (see Chapter 1, Section 4.1.2). Both set of rules apply only to products produced and sold within the Member State, whether such rules can be applied to products intended for export is analysed in Section 3.

on the extent of harmonisation achieved in the three different sets of rules (the labelling rules, the Eurofoods rules and the Quality Schemes), and the interaction with primary law.

2 Naming of imported products

Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. The Dassonville judgment,¹⁷ para. 5, established that “*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*” Therefore, Article 34 has a very wide scope that potentially might encompass a variety of national measures.¹⁸

For example, national measures regulating food naming by compositional standards can take, and have taken, different forms. Examples from case law are:

1. Total ban on import of certain types of products (e.g. the Milk Substitute judgment¹⁹)
2. Prohibition against the use of certain names for imported products (e.g. the Sekt²⁰ and the Pistre²¹ judgment)
3. Prohibition against the use of a name unless in compliance with national composition standards (e.g. the Cassis de Dijon²² judgment, the Vinegar cases²³ and the Bier²⁴, the Smanor²⁵ and the Darbo judgments²⁶)

¹⁷ Dassonville, Case 8/74, Judgment of the Court of 11 July 1974, Procureur de Roi v Benoît and Gustave Dassonville.

¹⁸ See Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, p. 651, and Davies, G. (2010). *Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law*.

¹⁹ Milk Substitute, Case 216/84, Judgment of the Court of 23 February 1988, Commission of the European Communities v French Republic.

²⁰ Sekt, Case 12/74, Judgment of the Court of 20 February 1975, Commission of the European Communities v the Federal Republic of Germany.

²¹ Pistre, Joined cases 321/94, 322/94, 323/94 and 324/94, Judgment of the Court of 7 May 1997, Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94). For discussions concerning the case, see Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, pp. 80–83.

²² Cassis de Dijon, Case 120/78, Judgment of the Court of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.

²³ Gilli, Case 788/79, Judgment of the Court of 26 June 1980, Criminal proceedings against Herbert Gilli and Paul Andres, Commission v Italy (vinegar I), Case 193/80, Judgment of the Court of 9 December 1981, Commission of the

4. Prohibition against on the use of a name unless in compliance with international standards (e.g. the Deserbais judgment²⁷)
5. Obligation to use a certain name when certain characteristics are present (e.g. the Fietje judgment²⁸)
6. Obligation to indicate in close proximity to the name when certain traditional ingredients are not present, such as the use of ; i.e. to use a descriptive name (e.g. the Sauce Béarnaise judgment²⁹)

The first two types of national measures can be termed discriminating product requirements. The third, fourth and fifth are restrictive product requirements related to production, and the sixth is a restrictive product requirement concerning marketing.³⁰ Note that the different forms of product requirements have varying effects on the market and on cross-border trade.

On one hand, the CJEU has accepted that in the absence of harmonisation, primary law does not prevent Member States from setting composition standards and requiring a certain level of quality.³¹ However, based on free movement case law, such standards can restrict/impede imports because they place a burden on imported products already complying with one set of rules.³² Further, as

European Communities v Italian Republic and Commission v Italy (vinegar II), Case 281/83, Judgment of the Court of 15 October 1985, Commission of the European Communities v Italian Republic.

²⁴ Bier, Case 178/84, Judgment of the Court of 12 March 1987, Commission of the European Communities v Federal Republic of Germany.

²⁵ Smanor, Case 298/87, Judgment of the Court of 14 July 1988, proceedings for compulsory reconstruction against Smanor SA.

²⁶ Darbo, Case 465/98, Judgment of the Court 4 April 2000, Verein geen Unwesen in Handelund Gewerbe Köln eV V Adolf Darbo AG.

²⁷ Deserbais, Case 286/82, Judgment of the Court of 22 September 1988, Ministère public v Gérard Deserbais.

²⁸ Fietje, Case 27/80, Judgment of the Court of 16 December 1980, Criminal proceedings against Anton Adriaan Fietje.

²⁹ Sauce Béarnaise, Case 51/94, Judgment of the Court of 26 October 1995, Commission of the European Communities v Federal Republic of Germany.

³⁰ For a similar terminology and categorisation of national measures, see Snell, J. (2010). The Notion of Market Access: A Concept or a Slogan? and Maduro, M. P. (1999). *We, The Court*.

³¹ See the Gilli judgment, para. 5. See also Section 3.4.2.2.

³² This follows from the Cassis de Dijon judgment. See also Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (“Cassis de Dijon”), 1980, OJ C 256, p. 2. However, the idea of mutual recognition as illustrated by the Directive on measures with equivalent effect as quantitative restrictions, originates from before the judgment. For theories on dual and equal burdens, see Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, p. 651, and Davies, G. (2010).

noted in the Bier judgment, such rules can be said to favour domestic producers who are already producing in compliance with the rules and to prevent dynamics in consumer perceptions of food names, thereby crystallising consumer habits. Throughout the case law, the CJEU has consistently confirmed its conclusion that national rules forbidding, restricting or demanding the use of certain food names are capable of restricting cross-border trade.³³ Further, there seems to be no doubt in the legal literature that national rules imposing product requirements for production and marketing of specific foods, including naming, impose greater burdens on imported products.³⁴ To address this, the CJEU established the principle of mutual recognition, whereby food producers had to comply only with the rules in the Member State of production.

2.1 *Mutual recognition*

In 1969, the Commission realised that national rules on trade names, including food names, could hinder cross-border trade. In Article 3 of its Directive on measures with equivalent effect as quantitative restrictions,³⁵ the Commission declared that its objective was to abolish measures governing product marketing that could restrict free movement and that are equally applicable to domestic and imported products. In particular, such measures concerned the shape, size, weight, composition, presentation, identification or putting up of these products. The aim was consistent with that of the principle of mutual recognition.³⁶

Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law, p. 676, which notes, “...no rule produces an equal burden if one examines its effects finely enough”.

³³ For an overview of this case law, see Holland, D., and Pope, H. (2004). *EU Food Law and Policy*, MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market* and O'Rourke, R., (2005). *European Food Law*.

³⁴ See Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, p. 667; Davies, G. (2010). Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law, p. 675 and Snell, J. (2010). The Notion of Market Access: A Concept or a Slogan?, p. 456. The formalistic approach categorising national measures as concerning products requirements or selling arrangement introduced by the Court in the Keck judgment, Joint cases C-267 and 268/91, Judgment of the Court of 24 November 1993, Criminal proceedings against Bernard Keck and Daniel Mithouard) has been highly criticised. See also Weatherill, S. (1996). After Keck: Some Thoughts on How to Clarify the Clarification. However, the term “product requirements” is used in this thesis.

³⁵ Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures that have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

³⁶ For theories on legal problem solving by reference to principles, see Harbo, T. (2010). The Function of the Proportionality Principle in EU Law.

The principle of mutual recognition secures free movement without the need to harmonise Member States' national legislation, thereby avoiding the costs of creating EU rules.³⁷ The principle obliges Member States to recognise food products legally produced/marketed in other Member States, unless a justification exists for not doing so.³⁸ The basic idea behind mutual recognition implies an obligation to accept controls that already have been imposed on the imported product in the Member State of production.³⁹ The Commission noted that mutual recognition, whereby the rules of the Member State of production prevail, ensures greater observance of national tradition and diversification.⁴⁰ The conclusion clearly contradicts what others have held would be the consequences of mutual recognition.⁴¹

In its 1989 Communication, the Commission summed up case law concerning mutual recognition of food names (emphasis highlighted):⁴²

“The Court of justice has ruled that a Member State may not reserve a generic trade description for:

- *Products manufactured on its territory (judgment in the Sekt case),*

³⁷ Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament, mutual recognition in the context of the follow-up to the Action Plan for the Single Market”, Com (1999) 299. See also

http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/121001b_en.htm.

³⁸ Recall that *legally* is initially *not illegal*. See footnote 47, Chapter 1. The rules in the FIR of course apply to all Member States and lay down harmonised requirements for naming. However, since the rules, analysed in Chapter 4-8, can be applied very differently due to the flexibility in the rules, *legally*, probably, varies among the Member States.

³⁹ For more on the principle of mutual recognition, see Armstrong, K. A. (2002). Mutual Recognition, which discusses the procedural as well as substantial outcomes of the principle.

⁴⁰ Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament, mutual recognition in the context of the follow-up to the Action Plan for the Single Market”, Com (1999) 299, p. 5.

⁴¹ Several authors warn against a “race-to-the-bottom” following the principle of mutual recognition; for example, see Emmert, F. (2012). The Draft Common Frame of Reference (DCFR) - The Most Interesting Development in Contract Law since The Code Civil and the BGB and MacMaoláin, C. (2001). Free Movement of Foodstuffs, Quality Requirements and Consumer Protection: Have the Court and the Commission Both got it Wrong? For an opposite point of view see Gray, P. S. (1991). The Perspective to 1992, p. 13, which argues that EU law on food has been mistakenly interpreted “as applying the ‘lowest common standards’ which will in turn lead to a downward spiral of food quality.” The exact consequences are not the focus in this thesis; rather the focus is on the principle only as it has been interpreted within food law, but note that there seems to be no reason why national traditions cannot be observed by application of Member State of sale rules.

⁴² European Commission, “Communication on the free movement of foodstuffs within the Community”, 1989 OJ No. C 271/3, p. 8.

- *Products manufactured from specific raw materials (judgments in Vinegar, Beer, Pasta and Meat product⁴³ cases)*
 - *Products containing a given concentration of one of their characteristic ingredients (judgment in Miro and Deserbais cases)*
 - *Fresh produce, to the exclusion of products that have undergone specific treatment, where the characteristics of the latter do not differ substantially from those of the fresh produce (judgment in the Smanor case)*
- in order to deprive products imported from another Member State where they are lawfully marketed under the disputed description of that description.”*

The Commission clearly stated that mutual recognition applies to generic trade descriptions. However, it is unclear how to assess the generic nature of a name. The obligation to mutually recognise products from other Member States also applies to products that have been legally marketed under the disputed description. However, because of language differences, a food product will seldom have been marketed in the Member State of production with the labels and packaging used in the Member State of marketing. Therefore, it can be argued that it is difficult for the Member State of production to control the marketing of foods intended for export.⁴⁴

Further, as noted in Chapter 7, it is unclear how to evaluate whether a name in one language, in which it is legal, corresponds to a name in a different language. For this reason, it seems difficult to determine whether a product has been legally marketed under the disputed name in the Member State of production. Case law from the CJEU does not seem to provide any clarification.

The Court has given different interpretations of the obligation to mutually recognise imported products. The wording of the principle in the Cassis de Dijon judgment focuses on the fact that the products have been both legally produced and legally marketed in the Member State of production. The CJEU stated, in para. 14: “...there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not

⁴³ Meat products, Case 274/87, Judgment of the Court of 2 February 1989, Commission of the European Communities v Federal Republic of Germany.

⁴⁴ The development in primary law concerning export restriction actually also seems to indicate that Member States are limited in what they can require for products intended for exports; see Section 3.

be introduced into any other Member State...” The focus is on the mere fact that unequal burdens apply, thereby not excluding that for example language differences could provide valid reasons for not recognising a name legally used in another Member State. However, the judgment clearly suggests that it is the law in the Member State of production which determine whether the product has been legally marketed, regardless of language difficulties.

It makes sense for the Member State of production to control whether a product is legally produced. However, taking language and culture differences into consideration, it makes much more sense for the Member State of sale to control whether the product can be legally marketed.⁴⁵ Such is in line with the how the prohibition against the use of misleading names is applied. Further, it can be discussed whether it is perhaps more optimal in terms of costs and benefits to let the Member State of sale control marketing.⁴⁶ The Commission noted in a 1999 Communication:⁴⁷ *“There are difficulties in implementing the rules designed, inter alia, to protect the consumer and this is often linked to a perception that the consumer can only be fully protected by checks in the country of destination.”*⁴⁸

If the single most important benefit of mutual recognition is the avoidance of dual burdens (double costs), shifting to control in the Member State of sale initially does not result in extra costs, but could be of benefit because such control would eliminate language (and cultural) difficulties. It makes no sense that the Danish Food Authorities should control the labelling and naming of food intended for the German market. Further, for this reason, it can be argued that there is no need for an assessment of whether the imported product has been legally marketed in the Member State of production. If marketing is controlled in the Member State of sale, some costs can be avoided and some benefits can be gained. However, rules on production and rules on marketing are clearly connected; all rules on marketing and naming are connected in some way to how a product is produced, for example, which ingredients have been used. For this reason, control in two different Member States seems to raise costs, perhaps even above the benefits of the division of control. If this is the case, all control must be placed in one country. The costs and

⁴⁵ For a similar opinion, see Lillholt Nielsen, K. (2012). *Misleading? To whom?*

⁴⁶ For a similar opinion, see Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, p. 79, footnote 53.

⁴⁷ Commission of the European Communities, “Communication from the Commission to the Council and the European Parliament, Mutual mutual recognition in the context of the follow-up to the Action Plan for the Single Market”, Com (1999) 299, p. 5.

⁴⁸ A partially opposite conclusion was reached in European Commission, Consumer Policy Strategy, 2002–2006, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM (2002) 208 final, p. 15: “... *The simple application of mutual recognition, without harmonisation, is not likely to be appropriate for such consumer protection issues [commercial practices and the other consumer protection directives]. However, provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions.*”

benefits of control in either the Member State of production or the Member State of marketing must be balanced against each other.

Mutual recognition is not a matter of uniformity; rather, the obligation to mutually recognise names from other Member States indicates an acceptance of the diversity within EU. However, mutual recognition entails a clear choice of facilitating cross-border trade rather than consumer protection. For this reason, the principle of mutual recognition and the ensuing lack of Member States' abilities to regulate food quality of imported products have been heavily criticised.⁴⁹ However, Members States are not fully prohibited from setting standards for composition and quality of imported products, when setting standards can be justified.

2.2 Justifications and proportionality

In its 1985 communication on the principle of mutual recognition,⁵⁰ the Commission concluded:

“In the many judgments it has given on the free movement of goods, the Court of Justice has never accepted that a Member State authority can prohibit the sale of a product which does not conform to its own compositional rules, but which has been lawfully manufactured and marketed in another Member State in accordance with that state's own rules.”

This suggests that the mere existence of an unequal burden favouring imported products is contrary to primary law. However, a rule of reason also follows from the Cassis de Dijon judgment, whereby Member States can, at least in principle, refer to valid reasons and mandatory requirements as justifications for impeding cross-border trade.

⁴⁹ Some even argued that the scope of the concept of mutual recognition leads to less respect for variations in conceptions, expectations and habits across borders than is the case in the United States, despite the greater varieties in culture, languages and traditions in the EU. See Von Heydebrand, H. (1991). Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice got it Wrong?.

⁵⁰ European Commission, “Commission Communication of 8 November 1985 on the Completion of the Internal Market: Community legislation on foodstuff”, Com (85) 603 Final, p.11.

Generally, Member States have tried to justify national rules regulating food naming on the grounds of consumer protection, fair competition and protection of health.⁵¹ These are all requirements that have been recognised as imperative.⁵² Health protection has been accepted as a justification for restricting trade,⁵³ whereas justifications based on consumer protection and fair competition generally have not been accepted, unless fair competition is a matter of protecting intellectual property.⁵⁴ As health and protection of intellectual property are positively recognised as justifications for restriction of free trade in Article 36 TFEU, this initially makes sense.⁵⁵

The Champagne bottle judgment⁵⁶ clearly, in para. 11–12, describes how the CJEU considers consumer protection and fair trade as justifications for restrictive measures (paras.):

“...the justification for adopting legislation designed to prevent customers from confusing wines and products of different quality and origin cannot in principle be denied. That concern is particularly worthy where traditions and special characteristics play an important role. Nevertheless, it must be observed that in a common market system, consumer protection and fair trading as regards the presentation of wines and products governed by the common organization of the market in wine must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States...As regards the argument of consumer protection put forward by the federal German government, it must be pointed out that the

⁵¹ Protection of the environment also has been used to justify national measures indirectly regulating food naming; see Bluhme, Case 67/97, Judgment of the Court of 3 December 1998, Criminal proceedings against Ditlev Bluhme and Chapter 4, section 1. But the restrictive effect on food naming does not seem to have been an issue in environmental cases, and therefore, protection of the environment is not addressed further here.

⁵² See Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 678–681.

⁵³ To a large degree, these justifications have been based on the precautionary principle; see Weatherill, S. (2011). Consumer Policy, p. 841, and Andersen, L. B.. (2007). Markedsføring af genmodificerede fødevarer: Den EU-retlige regulering og samspillet med WTO.

⁵⁴ Generally, more proportional means exist. Further, there is actually no case law in which the CJEU has accepted protection of fairness in commercial transactions as a sole justification for a restrictive measure; see Stuyck, J. (2007). The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotion and the Law of Unfair Competition, p. 163. See also Chapter 8, Section 2.1.

⁵⁵ Generally, the Treaty-based justifications must be considered stronger; see the Gilli judgment, para. 6. For more on the relationship between Article 36 TFEU and mandatory requirements, see Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 677–678, and Micklitz, H. W., Reich, N., and Rott, P. (2009). *Understanding EU Consumer Law*, p. 14. See also Section 2.2.2.

⁵⁶ Champagne bottle, Case 179/85, Judgment of the Court of 4 December 1986, Commission of the European Communities v Federal Republic of Germany. A similar conclusion is found in Prantl, Case 16/83, Judgment of the Court of 13 March 1984, Criminal proceedings against Karl Prantl.

provisions of Community law on the labelling of wines [...] are exceptionally detailed and thus should prevent the confusion that is feared.”

Concerning the use of the Champagne bottle in other Member States and the time period of its use, the CJEU concluded that the fair trading argument could not be used. The CJEU also highlighted that despite the fact that the national rules restricting the use of the Champagne bottle aimed to prevent consumer confusion, labelling rules already addressed this issue, thereby indicating that restrictive national measures must pursue objectives not already pursued. This is in line with the principle of proportionality, but it also indirectly highlights why it potentially leads to less consumer protection when more specific rules on naming are introduced, such as in the FIR; EU rules do pursue certain objectives and harmonises Member States’ laws on food naming, which means that these objectives cannot be pursued at Member State level. Clearly, this is paradoxical

The importance of the principle of proportionality can be illustrated by case law on national measures aiming at protection of health. Despite a claim that protection of health is a stronger justification than protection of consumers, the CJEU generally has taken the approach that labelling and naming requirements should not be subject to *per se* rules. In the Sterbenz and Haug judgment,⁵⁷ concerning use of health and nutrition claims, the CJEU stated in para. 37: “... *the protection of public health, assuming that risks relating thereto are nevertheless conceivable in a particular situation, cannot justify a system as restrictive of the free movement of goods as that which results from a procedure of prior authorisation for all health-related information on the labelling of foodstuffs, including those which are manufactured lawfully in other Member States and are in free circulation.*” This clearly indicates that any *per se* rule restricting free trade of goods legally marketed in another Member State is not proportional.⁵⁸ The Court also stated, in para. 38, that (emphasis highlighted): “*Less restrictive measures exist for the prevention of such residual risks to health, such as, for example, an obligation on the manufacturer or distributor of the product in question, in the event of any uncertainty, to furnish evidence of the accuracy of the facts mentioned on the labelling.*”

Therefore, Austria could not require prior authorization for all health-related information, but could require evidence of the accuracy of such information in the event of uncertainty. Member States are

⁵⁷ Sterbenz and Haug, Joined cases 421/00, 426/00 and 16/06, Judgment of the Court of 23 January 2003, Renate Sterbenz (C-421/00) and Paul Dieter Haug (C-426/00 and C-16/01)

⁵⁸ A similar conclusion is found in Egberts, Case 239/02, Judgment of the Court of 15 July 2004, Douwe Egberts NV v Westrom Pharma NV and Christophe Souranis, carrying on business under the commercial name of “Etablissements FICS” and Douwe Egberts NV v FICS-World BVBA.

clearly limited in issuing *per se* rules capable of restricting trade, even if justified on health grounds. However, in the case of uncertainty (although without any further elaboration on how to decide when such uncertainty exists), Member States can apply a rule identical to the initial *per se* rule. No doubt, the predictability of national law is thereby watered down. This is parallel to the tendency within EU consumer law (see Chapter 8).

2.2.1 The principle of proportionality

A proportionality test is required to justify an unequal national⁵⁹ burden placed on an imported product, whether applying Article 36 TFEU or mandatory requirements in the general interest. The CJEU has applied the proportionality test differently, according to the areas in which it is utilised. Therefore, for example, a difference can be detected between the use of the test in relation to consumer protection and to health.⁶⁰

In the Cassis de Dijon judgment, the CJEU held that fixing of alcoholic content did “*not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods*” (para. 14). This decision subjected national measures that place unequal burdens on imported products to a balancing test, whereby the justifications must take precedence over the requirements of free movement.

In the Gebhard judgment⁶¹ (para. 37), the CJEU introduced a more formalised proportionality test: The restrictive national measure must be suitable to achieve the objective pursued and it must not go beyond what is necessary to achieve that objective. This is the traditional understanding of the principle of proportionality. Proportionality *strictu sensu* also entails an inquiry into whether the national measure imposes an excessive burden on individuals.⁶² This part of the proportionality principle does not seem to have been relevant in relation to EU law on food names. Rather, the test

⁵⁹ Community regulation is also subject to a proportionality test; see Harbo, T. (2010). The Function of the Proportionality Principle in EU Law, p. 172. However, this is not the focus here.

⁶⁰ See Harbo, T. (2010). The Function of the Proportionality Principle in EU Law, p. 172. The specific differences between consumer protection and health protection are not addressed further in this thesis.

⁶¹ Gebhard, Case 55/94, Judgment of the Court of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.

⁶² See Harbo, T. (2010). The Function of the Proportionality Principle in EU Law, pp. 165–167 and Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, p. 526.

that primarily has been applied in food naming cases is the “less restrictive alternative” test.⁶³ Consequently, the general conclusion is that information is a more proportional means of consumer protection than product requirements such as composition rules related to the use of a specific name.⁶⁴

In some cases, the CJEU performed the proportionality test itself, including suggestions for reaching the objectives in a more proportional way. In other (preliminary reference) cases, the Court concludes that the national courts must determine whether national measures are proportional. Of course, this approach can lead to uncertainty and lack of coherent application of the proportionality principle. Further, in some cases, the CJEU seems to have applied a slightly modified balancing/proportionality test.

For instance, the proportionality test applied in the Sauce Béarnaise judgment stands out.⁶⁵ In these cases, not even labelling, the normally “less restrictive alternative,” was considered proportional. In the Sauce Béarnaise judgment, the CJEU held, in para. 37, that the obligation to state that the traditional ingredients in béarnaise sauce (egg and butter) had been replaced with vegetable fats was “*not necessary in order to ensure consumer protection and fair trading*”; the list of ingredients already ensured consumer protection. However, as noted in Chapter 5, the new rules on product identity seem to have modified the conclusion in the Sauce Béarnaise judgment; although the rules on product identity etc. are still based on what consumers expect.⁶⁶

⁶³ For a definition of the test, see Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, p. 13.

⁶⁴ For example, see Foie Gras, Case 184/96, Judgment of the Court of 22 October 1998, Commission of the European Communities v French Republic, para. 22. Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, p. 24, concludes that the CJEU’s application of the principle of proportionality to national consumer protection waters down Member States’ abilities to attain consumer protection. The consequence is a *de facto* devaluation of Members States’ abilities to protect consumers, which is perhaps problematic but which nevertheless seems in line with the general objectives in relation to food naming. See Chapter 3.

⁶⁵ A similar conclusion can be found in the Darbo judgment analysed in Section 2.3.1. The inconsistent use of free movement provisions versus labelling rules is addressed in Section 3.4.2.2.

⁶⁶ See Section 2.4 for an analysis of the interaction between the labelling rules related to naming and fairness (the rules are analysed in Chapter 4–8) and the principle of mutual recognition.

In the Fietje judgment, the CJEU also seemed to have a different focus on the principle of mutual recognition and the idea behind the principle. The Court stated, in para. 15, emphasis highlighted:

“...the extension by a Member State of a provision which prohibits the sale of certain alcoholic beverages under a description other than that prescribed by national law to beverages imported from other member states, thereby making it necessary to alter the label under which the imported beverage is lawfully marketed in the exporting Member State, is to be considered a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty, in so far as the details given on the original label supply the consumer with information on the nature of the product in question which is equivalent to that in the description prescribed by law. It is for the national court to make the findings of fact necessary in order to establish whether or not there is such equivalence.”

This statement verifies that mutual recognition aims to prevent the unequal burden arising in relation to cross-border trade. However, it can be argued that the burden arising from the need to alter the label will not be un-proportional if an alteration is necessary for other reasons, such as language differences.⁶⁷ The facts of the case differed from the majority of case law because it concerned a national measure obliging the use of a specific name, when certain product characteristics were apparent, without prohibiting the name legally used on another Member State. For this reason, the judgment also seems to turn the proportionality test, and the control rules, upside down. Rather than concluding that the measure in the Fietje case was restrictive, followed by a test to determine if the justification (protecting consumers through providing information) were necessary and suitable, the Court simply stated that the measure contradicted primary law unless the information on the imported product did not provide consumers with equivalent information. This is not a classical proportionality test of the national measure, but rather implies the need for a case-by-case evaluation of imported products, which could potentially carry many different names. The national court in the Member State of marketing must make this evaluation.

⁶⁷ See Chapter 7 for more on language difficulties.

In the Fietje judgment, the CJEU further seemed to define mutual recognition under primary law in line with the later wording of the principle of mutual recognition in secondary law (in the FIR).⁶⁸ This use indicates that despite differences between the wording of mutual recognition in secondary and primary law, these principles are consistent.⁶⁹

A third example of a different sort of balancing test can be found in the Smanor case in which France had forbidden the use of a name while proposing an “invented” alternative name.⁷⁰ In the Smanor judgment, the CJEU found that French government’s substitute name “deep-frozen fermented milk” for “deep-frozen yoghurt” was less familiar to consumers than “deep-frozen yoghurt” (para. 13). Therefore, the Court determined that the French prohibition made marketing deep-frozen yoghurt more difficult and impeded trade, at least indirectly, between Member States. The CJEU seemed to link consumers’ expectations and knowledge with the potential restrictive effect of the national measure, rather than connecting consumers experience with the potential justification and the traditional proportionality test. The reasoning does not appear illogical;⁷¹ however, under the specific circumstances of the case, it is a paradox. The name “deep-frozen yoghurt” actually could never be used (and for that reason had probably never been used in France) because French law prohibited use of the compound name. Thus, French consumers had never bought “deep-frozen yoghurt” within France and, therefore, could not be said to be familiar with the name. For French consumers, “deep-frozen yoghurt” might even have constituted a fancy name. The CJEU also concluded that the restrictive measure could not be justified because more proportional means existed, such as requiring additional information. That additional information could in principle, and paradoxically, be a description such as “deep-frozen fermented milk”.

2.2.2 Discussions on justifications and proportionality

As mentioned, some justifications, such as protection of health, are generally considered a stronger than informing consumers, and it is less complicated to satisfy the proportionality test.

⁶⁸ Mutual recognition was first included in the legislation by amendment to the First Labelling Directive; see Directive 97/4 of the European Parliament and of the Council of 27 January 1997.

⁶⁹ See Section 2.3 for mutual recognition in secondary law.

⁷⁰ For a similar case, see *Commission v Italy (vinegar II)*, which, however, did not concern a total ban on the use of a specific name, but instead prohibited the use of the name “*aceto*” for non-wine based vinegars. See Chapter 7, Section 3.

⁷¹ Consumers’ familiarity with names is also addressed in the *Sekt* and the *Miro* judgments.

However, whether this difference should prevail is a matter of discussion. Health matters are more uniform than consumer expectations and therefore, national authorities seem better equipped to handle matters of consumer information that concern specific national habits and traditions.⁷² A high level of consumer protection is a Treaty-based EU objective, and the FIR also introduces a number of new rules indicating a stronger focus on consumer protection, for example, the new rules on product identity analysed in Chapter 5. As discussed in Chapters 2 and 3, both the adjustment of asymmetric information (the correction of the market failure of asymmetric information) and securing of quality and cultural issues (the removal of market-related risk and correction of asymmetric information problems) are attached to the objective of consumer protection.⁷³ The latter is partly attached to health issues. It can be questioned whether these underlying and more specific aims are accepted as justifications for restricting free movement.

⁷² Von Heydebrand, H. (1991). Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice got it Wrong?, p. 413, notes, “... *There is little reason to believe that judges [at the CJEU] are better in understanding consumer protection than health protection*”. In this article, procedural aspects for the establishment of a system of national food standards are also addressed.

⁷³ Potential social justifications are not addressed here because they do not appear to have been relevant for Member State. In the *Glocken* judgment, Case 407/85, Judgment of the Court of 14 July 1988, 3 *Glocken GmbH* and *Gertraud Kritzinger v USL Centro-Sud* and *Provincia autonoma di Bolzano*, para. 23-26, the CJEU clearly concluded that parallels to the social objectives attached to the PGI/PDO rules cannot justify to the same degree Member States’ regulation of names, where such restrict free movement.

2.2.2.1 *Adjusting asymmetric information problems*

Acquiring additional information can solve problems of asymmetric information in food naming, as the CJEU has verified in various cases. For example, in the Bier judgment, the Court stated, in para. 35, (emphasis added):

“...that possibility [enabling consumers to make informed choices] may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, ‘by the compulsory affixing of suitable labels giving the nature of the product sold’ ...”⁷⁴

Only the Sauce Béarnaise and Darbo judgments – which prevented Member States from requiring additional information – are exceptions. . Therefore, the conclusion must be that, in principle, additional information can be required.

Informing consumers about the quality or cultural history attached to a product is also an asymmetric information problem.⁷⁵ But as noted in Chapter 3, in some cases providing additional information and adjusting asymmetric information cannot solve the market-related risks of low quality products.⁷⁶

2.2.2.2 *Protection of quality and culture as justification*

Some have argued that the concept of mutual recognition and the CJEU’s continuous application of this principle combined with little chance of justifying national compositional rules, will result in

⁷⁴ A similar conclusion was repeated in the Geffroy-judgment, para. 21, and in Rau, Case 261/81, Judgment of the Court of 10 November 1982, Walter Rau Lebensmittelwerke v De Smedt PVBA. para 17. The paragraph illustrates how the principle of mutual recognition is linked to proportionality and the suitability of national measures. This principle is analysed in Section 2.2.1.

⁷⁵ In Council Resolution of 9 November 1989 on future priorities for re-launching consumer protection policy, 1989 OJ C 294, p. 1, the Council expressed an aim to promote better information on the quality of products. This has occurred partially with the Quality Schemes; however, the objectives behind the Quality Schemes are in no way directly related to informing consumers.

⁷⁶ See Commission of the European Communities, “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007–2013”, Com (2007) 99 Final, p. 6, which mentions that consumers must be protected from risks that they cannot cope with individually.

very low quality food in Europe, a race-to-the-bottom. Numerous cases involving national composition standards seem to indicate that it is not in Member States' interests to remove minimum quality requirements. There seems to be, or at least has been, an interest in preserving and protecting food quality for whatever reason.⁷⁷ From a Member State perspective, quality protection seems to involve both economic aspects related to market-related risks and cultural aspects.⁷⁸ Therefore, quality protection overlaps with both health and cultural concerns.

Protection and promotion of quality is a clear aim of the EU, signalled by the adoption of EU Quality Schemes. FIR Article 3(2) on the general objectives states (emphasis highlighted), “*Food information law shall aim to achieve in the Union the free 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.*”⁷⁹ However, protection or promotion of food quality has not been accepted as the sole justification for national restrictive measures,⁸⁰ despite the fact that health is a relatively strong argument for restrictive measures⁸¹ and that cultural policy is an area in which the EU has limited abilities to adopt measures (see Article 167 TFEU). From Article 167 it is clear that the EU shall act only to encourage, support and supplement Member States' actions in relation to safeguarding of cultural heritage, for example.⁸²

⁷⁷ Recall that quality standards can be attached to different objectives related to protection of health, consumer protection, protectionism or a wish to brand national production.

⁷⁸ Because food consumption is not only a biological necessity but also of cultural and social importance, protection of culture in relation to food is also important. See Coff, C. (2005). *Smag for etik. På sporet efter fødevareretikken*. Therefore, culture and quality in food seem attached.

⁷⁹ Culture, that is, varying traditions, is also positively recognised in general EU food law. The General Food Regulation, Article 1 provides: “*This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market.*”

⁸⁰ Protection of national geographical names as an intellectual property protection is accepted (see Chapter 6), but the economic rationales behind protection of geographical names underlines that intellectual property protection in this regard is not solely about protection of quality.

⁸¹ See Section 2.2.

⁸² See de Witte, B. (2006). Non-market Values in Internal Market Legislation, p. 70, which argues that Article 167 (previously Article 151) does not clearly prevent harmonisation of national laws that regulate culture. He notes, “*...the general point to be noted is that the prohibition of cultural harmonization contained in Article 151 has not prevented the occasional use of European law-making powers to harmonise national cultural policy rules 'through the backdoor'.*”

In the *Commission v Italy (vinegar I)* judgment, the Commission challenged Italian measures regulating the name “vinegar”. The Italian government argued that the regulation of the name was grounded on a time-honoured tradition and established proper trade customs in Italy (p. 3025):

“Certain values of a social nature which are the inalienable heritage of the civilization of Member States must prevail over strictly commercial interests... Those needs, which reflect different traditions, customs and morals, are not necessarily the same in each region of the EEC and they form ‘incontrovertible historical facts which, moreover, the process of European integration is not meant to ignore or eliminate’.”

To this the CJEU simply replied that it would be incompatible with fundamental EU law if Member States could restrict generic terms. The Court did not address quality and culture as means to justify such restriction nor the proportionality of such. Where the protection of quality has been discriminatory, a similar approach has been followed.

For example, in the *Buy Irish* judgment,⁸³ the CJEU held that measures and campaigns designed to promote Irish products and the establishment of a “Guaranteed Irish” symbol constituted a restriction to cross-border trade and were thus contrary to Article 34 TFEU (Article 28 TEC). In the *Eggers* judgment,⁸⁴ in para. 25, the Court had already stressed that although Member States are “empowered to lay down quality standards for products marketed on the territory and may make the use of designations of quality subject to compliance with such standards” the right to use designations of quality cannot be linked to a requirement that the products in question are produced within the relevant Member State.

However, the CJEU also accepted in the *Eggers* judgment that the right to use designations of quality may be made “dependent solely on the existence of the intrinsic objective characteristics which give the products the quality required by law” (para. 25). It was not clarified how “intrinsic

⁸³ *Buy Irish*, Case 249/81, Judgment of the Court of 24 November 1982, *Commission of the European Communities v Ireland*.

⁸⁴ *Eggers*, Case 13/78, Judgment of the Court of 12 October 1978, *Joh. Eggers Sohn & Co. v Freie Hansestadt Bremen*.

objective characteristics” should be defined. A similar decision was given in the CMA judgment,⁸⁵ in which the Court considered the establishment of a German quality mark, which was awarded to products satisfying certain quality requirements, whether they were made from raw materials produced in Germany or imported raw materials. The mark, in use since the beginning of the 1970s, could be awarded only to products produced in Germany. Otherwise the requirement appeared objective. The Court further noted, in para. 25, that the fact that the contested scheme pursued a quality policy did not remove it from the scope of primary law. Since the awarding was discriminatory, the German rules had to be justified based on Article 36 TFEU (Article 36 TEEC).⁸⁶

If this had not been the case, awarding a quality mark based on objective quality requirements would not seem to contradict primary law. Nothing seems to exclude quality requirements that have traditionally formed domestic production from being used as the basis of such a mark. However, the wide scope of primary law founded in the Dassonville judgment also could be interpreted as forbidding the awarding of such a mark because competition would be affected.⁸⁷

⁸⁵ CMA, Case 325/00, Judgment of the Court of 5 November 2002, Commission of the European Communities v Federal Republic of Germany.

⁸⁶ See Chapter 6, Section 4.1 for more about the judgment.

⁸⁷ See Snell, J. (2010). The Notion of Market Access: A Concept or a Slogan?

The Milk Substitute case concerned a French ban on importation and sale of substitutes for milk powder and concentrated milk under any name. The French government argued that such legislation was justified on the grounds of consumer protection based on (1) the need to inform consumers concerning the substitutes, (2) the risk of consumer confusion concerning the characteristics of the product, and (3) the risk that cheaper substitutes would gradually supplant milk products and deprive consumers of choices. These points seem indirectly to involve a concern about protecting consumers from the market-related risk of buying a low quality product. The CJEU acknowledged that ensuring proper quality information to consumers could justify restrictive measures, but the Court also stated, in para. 10, *“However, in this case such information may be provided in particular in the form of adequate labelling detailing the nature, the ingredients and the characteristics of the product on offer.”* Regarding the French argument that lower-priced and lower-quality substitutes would supplant higher quality product, the Court stated, in para. 12:

“As to the risk of milk products being supplanted by substitutes because they are lower priced, it is sufficient to observe that a Member State may not plead a mandatory requirement, such as consumer protection, in order to shield a product from the effects of price competition on the pretext of economic difficulties brought about by the elimination of barriers to intra-community trade. Neither can it be said that by prohibiting the marketing of milk substitutes the provision in question safeguards the consumer’s freedom of choice. On the contrary, only the possibility of importing milk substitutes will give consumers a genuine choice between whiteners and milk products.”

The Court’s conclusion seems to assume that consumers are rational market agents who do not need protection, but rather, information.⁸⁸

Where protection of quality and culture is based on objective characteristics, it appears possible to justify the potential restrictions to trade following such protection. However, only in relation to

⁸⁸ See Chapter 8. See also MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, pp. 36–37, which notes that the problem of substitution in catering or processed food cannot be solved by simply providing information because it is *“highly unlikely that consumers in catering establishments will ever be informed by this substitution.”*

protection of intellectual property (where quality and culture are attached to origin or a geographical place) has the CJEU specifically accepted national regulation of food names. In the Budvar judgment, the Court found that it was possible to protect the name “Bud”, if it could be shown to designate a certain place or region.⁸⁹ However, if the name did not refer to a specific geographical origin, the Treaty rules on free movement would prevail (para. 111).

The Vassilopoulos judgment⁹⁰ concerned whether Greek rules regarding bakeries restricted free trade when the rules were applied to shops selling bake-off products. The Court found that requiring vendors of bake-off products to comply with the same requirements as traditional bakeries constituted a barrier to imports (para. 19). Interestingly, the application of bakery quality requirements to bake-off products was the issue. The restrictive effect on trade arose from the nature of bake-off products, which suggests they are intended for transportation, even across borders.⁹¹ The CJEU did not accept that quality objectives alone could justify such requirements, concluding, in para. 23, that “...a national measure which restricts the free movement of goods may not be justified solely on the grounds that it aims to promote quality foodstuff [...] such an objective may be taken into account only in relation to other requirements...” The CJEU also rejected consumer protection as a justification of requirements because it considered the objective achievable with less restrictive means, such as appropriate information and labelling. The Court reached the same conclusion regarding health protection.

In the cases concerning the Italian regulation on the use of durum wheat in pasta, the Advocate General made some interesting observations.⁹² The Italian rules undoubtedly guaranteed quality in the interest of consumers: “It is well known that only pasta made with durum wheat does not become sticky during

⁸⁹ Budvar I, Case 216/01, Judgment of the Court of 18 November 2003, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH, para. 101. See Chapter 6.

⁹⁰ Vassilopoulos, Joined Cases C-158/04 and 159/04, Judgment of the Court of 14 September 2006, Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon (C-158/04), Carrefour Marinopoulos AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon (159/04).

⁹¹ See Opinion of Mr Advocate General Poiares Maduro delivered on 30 March 2006, Vassilopoulos, Joined Cases C-158/04 and 159/04, Judgment of the Court of 14 September 2006, Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon (C-158/04), Carrefour Marinopoulos AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon (159/04), para. 21.

⁹² Joined opinion of Mr Advocate General Mancini delivered on 26 April 1988, Glocken, Case 407/85, Judgment of the Court of 14 July 1988, 3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano and Zoni, Case 90/86, Judgment of the Court of 14 July 1988, Criminal proceedings against Zoni.

cooking and arrives on the plate as the Italians like it to be: ‘al dente’” (para. 4). The AG evaluated the Italian pasta rules in relation to the provision for free movement of goods and concluded, in para. 18: “Until such time as the Community has issued rules on the production and/or designation of pasta products, which take account in particular of the requirement of consumer protection, Article 30 of the EEC Treaty will not prevent the application of a law of a Member State which imposes the obligation to use exclusively durum wheat for the manufacture of pasta products intended to be marketed within that State”. However, the CJEU did not follow the AG’s opinion and made an entirely different assessment (see Section 3.4.2.2).

The conclusion must be drawn that various assessments can be made regarding the justifications for food naming rules and their proportionality, based on the rules’ specific aims and effects. Clearly, different assessments can be made of general and flexible principles, like proportionality, based on the specific circumstances to which they apply.⁹³ In food naming, primary law generally has sought to secure free movement with little justification for national compositional standards. Mutual recognition to prevent unequal burdens has been fundamental to the establishment of a guiding principle: Member States cannot interfere with the naming of imported products. However, mutual recognition has another legal source: secondary law, which initially seems to be subject to a different assessment than mutual recognition under primary law.

2.3 Mutual recognition within secondary law

The exact obligation to recognise names used on imported products follows from the FIR, Article 17(2)–(3).⁹⁴ The introduction of the principle of mutual recognition within secondary law entails an important institutional consequence;⁹⁵ whereas only the CJEU can interpret the limits of primary law, including general EU principles such as mutual recognition, Member States can express their policy views when adopting secondary law. Further, primary law will be applied only if there is no

⁹³ See Harbo, T. (2010). The Function of the Proportionality Principle in EU Law, pp. 159–164.

⁹⁴ Mutual recognition in general follows from Article 38(2). See Section 2.4.1.

⁹⁵ As mentioned, mutual recognition was included in the legislation by amendment to the First Labelling Directive; see Directive 97/4 of the European Parliament and of the Council of 27 January 1997.

secondary law,⁹⁶ and therefore, the scope and boundaries of mutual recognition within secondary law is *lex specialis*.⁹⁷ Therefore, the wording of the obligation in Article 17(2)–(3) seems important:

“The use in the Member State of marketing of the name of the food under which the product is legally manufactured and marketed in the Member State of production shall be allowed. However, where the application of the other provisions of this Regulation, in particular those set out in Article 9, would not enable consumers in the Member State of marketing to know the true nature of the food and to distinguish it from foods with which they could confuse it, the name of the food shall be accompanied by other descriptive information which shall appear in proximity to the name of the food.

In exceptional cases, the name of the food in the Member State of production shall not be used in the Member State of marketing when the food which it designates in the Member State of production is so different, as regards its composition or manufacture, from the food known under that name in the Member State of marketing that paragraph 2 is not sufficient to ensure, in the Member State of marketing, correct information for consumers.”

According to the two first lines of Article 17(2), the rules in the Member State of production determines food naming; this is the main obligation to recognise names used in other Member States. Country of origin control is positively articulated in the Regulation on official control⁹⁸ and is connected hereto.⁹⁹ The limits on the principle of mutual recognition follow from the remainder of Article 17(2), requiring in all cases that consumers be presented with *information about the true nature* of the product. If this information is insufficient, Article 17(3) limits the obligation to

⁹⁶ This follows from the Ratti, Case 148/78, Judgment of the Court of 5 April 1979, Criminal proceedings against Tullio Ratti, para. 36.

⁹⁷ Despite this, there are examples in which the CJEU has used the principle of mutual recognition as developed in primary law in cases concerning food naming and labelling. See Section 3.4.2.2 for a discussion concerning the inconsistent and mixed use primary and secondary law in relation to food naming. See also Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, p. 8, which notes that the CJEU has not made any convincing argument concerning the precise relationship between primary and secondary law.

⁹⁸ See Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. According to Article 2, official controls in the country of origin shall verify compliance with general rules on fairness and labelling.

⁹⁹ Note that applicable law and control principles are complex issues, see Chapter 1 for explanations and delimitations.

recognise the name of an imported product that is *so different* from foods known under that name in the Member State of marketing.

2.3.1 (Sufficient) information about true nature

A product name presented on a food package or label must describe the product's true nature;¹⁰⁰ if not, additional information may be required to accompany the name even though this information is not necessary in the Member State of production.¹⁰¹ The CJEU verified this policy in the Fietje judgment (para. 11):

“If national rules relating to a given product include the obligation to use a description that is sufficiently precise to inform the purchaser of the nature of the product and to enable it to be distinguished from products with it might be confused, it may well be necessary,¹⁰² in order to give consumers effective protection, to extend this obligation to imported products also, even in such a way as to make necessary the alteration of the original labels of some of these products.”

Providing sufficient information is not difficult (see Chapter 4). Although problems of information overload are addressed in the FIR, the substantive importance of the rules addressing these problems is considered limited. What is important, but also unclear, is whether the quality of the information is sufficient to provide consumer with information about the *true nature* of the product.

The nature of a product is related to its identity, properties, composition, origin, and so on (see Article 7(1)(a) of the FIR); however, the FIR offers no guidance concerning how to determine the “true nature”.¹⁰³

¹⁰⁰ Paradoxically this only applies in cross-border situations. In general food information, including the name, must be “accurate, clear and easy to understand for the consumer” (see Article 7(2) of the FIR). The previous rules were different, see Chapter 2, Section 2.5, and the Fietje judgment.

¹⁰¹ Since the adoption of the First Labelling Directive, the wording “sufficiently precise to inform the purchaser of its true nature” has been a part of the rules governing the food name. For this reason, case law prior to the introduction of the obligation to mutually recognise also can indicate how to understand what “(sufficient) information about true nature” means.

¹⁰² The inclusion of “may well be necessary” is unfortunate.

¹⁰³ In relation to labelling of country of origin, it is only mandatory to state such, where failure to indicate the origin might mislead consumers regarding the *true* origin. The task of determining the true origin might be difficult in cases of

For some products, such as Eurofoods and foods with PGI/PDO, the nature of the products is determined by law. CMO and Common Custom Tariff rules also classify products. In the Böllmann judgment¹⁰⁴ concerning the definition of “turkey rumps”, the Court established the characteristics of EU regulation of food names, termed “description of goods”, in paras. 8-9, (emphasis highlighted):

“As the description of the goods referred to in the regulations establishing a common organization of a market is part of Community law its interpretation can only be settled in accordance with Community procedures. Moreover the common organizations of the markets in agriculture, such as the one which it is the aim of Regulation No 22/62 to establish progressively, can only achieve their objectives if the provisions adopted for their realization are applied in a uniform manner in all Member States. The descriptions of goods covered by these organizations must therefore have exactly the same range in all Member States...Although it is true that in the event of any difficulty in the classification of any goods the national administration may be led to take implementing measures and clarify in the particular case the doubts raised by the description of the goods, it can only do so if it complies with the provisions of Community law and subject to the reservation that the national authorities cannot issue binding rules of interpretation.”¹⁰⁵

For products other than Eurofoods and Quality Schemes foods, how to determine “true nature” must be considered.

products composed of ingredients originating from different countries, but compared to determining the *true nature* of a product, it seems much more straightforward.

¹⁰⁴ Böllmann, Case 40/69, Judgment of the Court of 18 February 1970, Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann.

¹⁰⁵ See also Krohn, Case 74/69, Judgment of the Court of 18 June 1970, Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co, in which the Court stated, in para. 9, “An unofficial interpretation of a regulation by an informal document of the Commission is not enough to confer on that interpretation an authentic Community character. Such documents, which no doubt have their value for the purpose of applying certain regulations, have, however, no binding effect, and thus cannot ensure that the descriptions of the goods to which they refer have the same scope in all the Member States. The uniform application of Community law is only guaranteed if it is the subject of formal measures taken in the context of the Treaty.”

The CJEU gave the most precise indications on how to determine “true nature” in the Darbo judgment, despite the fact that the true nature of “naturally pure” was approached only indirectly. In addressing the definition of “naturally pure”, the Court noted that pollution resulted in lead and cadmium to be present in the natural environment, “*evidenced by several legislative instruments*” (see para. 27). The Darbo judgment indicated that when determining the true nature of a product carrying a certain name, legislative instruments, including soft law, must be considered. A similar conclusion seems to follow from the reference to Codex Alimentarius in the Smanor and Deserbais judgments.¹⁰⁶ Further, “true nature” apparently is a matter of determining what is commonly accepted. Whether the assessment parallels establishing “common names” (generic names) is not clear, but seems likely based on the Court’s conclusions in the Commission v Italy (vinegar II) judgment¹⁰⁷ and by the Commission in its 1989 Communication.¹⁰⁸ Therefore, it could be argued that the “true nature” of a product is based on a majoritarian approach.¹⁰⁹ The parallels to the prohibition against misleading names and the concept of the “average consumer” as a European consumer are also apparent.

In a number of judgments, the CJEU has been asked whether national compositional standards could be justified on the basis of fair trade and a desire to avoid unfair competition from low-quality imported products. In these cases, the Court has stated that the characteristics of a product must be determined based on what characterises this product in various Member States.¹¹⁰ It is not clear whether a similar approach can be taken when determining “true nature” in relation to sufficient consumer information; however, it would appear incoherent if the characteristics of a product should be determined differently. For this reason, the conclusions in these cases do not exclude a majoritarian approach when determining true nature.¹¹¹

¹⁰⁶ See Chapter 8, Section 4.3.

¹⁰⁷ See Section 2.2.2.2.

¹⁰⁸ See Section 2.1.

¹⁰⁹ See Chapter 2, Section 4.3.2.

¹¹⁰ See for example Prantl and Miro, Case 182/84, Judgment of the Court of 26 November 1985, Criminal proceedings against Miro BV. See also Chapter 8, Section 4.3.

¹¹¹ It could be argued that the “standardisation” which follows such an approach, bypassing normal legislative procedure, is problematic. This issue needs further investigation, but is beyond the scope of this thesis. See Maduro, M. P. (1999). *We, The Court*.

If the “true nature” of a product is determined by reference to the true nature in various Member States, national authorities have a difficult task to determine whether the name and the other mandatory particulars enable consumers in the Member State of marketing to know the true nature.

2.3.2 So different

Despite a broad approach to what constitutes “true nature”, a name cannot be used for a food product if the product is *so different* in composition or by manufacture from the food known under that name in the Member State of sale that the other mandatory particulars – especially the list of ingredients – do not ensure correct consumer information. Only in a few cases has the CJEU provided interpretations on this exception to the obligation to mutually recognise names of imported products.

The Commission v Italy (vinegar II) judgment was decided prior to the 1997 amendment, which first introduced the rules similar to Article 17(3) in the FIR. However, the Court made a comparison between food (vinegar) known under a specific name (“*aceto*”) in Italy and the imported products. The Court held, in para. 12, (emphasis highlighted), “*The effect of the amended legislation is still that the traditional designation ‘aceto’[...] may lawfully be applied only to a category of products which are produced in substantial quantities in Italy, to the detriment of other categories of comparable products originating in other Member States.*” If this evaluation had been made after the amendment, the Court would most likely have held that these comparable products (vinegar versus wine vinegar) do not “differ so much” that the name “*aceto*” cannot be used for non-wine based vinegar. The conclusion was reached despite the fact that Italian consumers “by ‘time-honoured tradition’ treat all ‘vinegars’ as wine vinegar owing to the semantic value of the word ‘aceto’ (vinegar)” (para. 25), which suggests that the evaluation was made without attention to national consumer perceptions, and therefore is coherent with how to determine “true nature”.

The Guimont judgment,¹¹² decided after the 1997 amendment, concerned a French decree prohibiting the use of the name Emmenthal for cheeses with no rind. In interpreting Article 5 of the First Labelling Directive (parallel to Article 17 of the FIR), the CJEU concluded, in paras. 30-31, (emphasis highlighted):

“It is true that, according to the case-law of the Court, Member States may, for the purpose of ensuring fair trading and the protection of consumers, require the persons concerned to alter the description of a foodstuff where a product offered for sale under a particular name is so different, in terms of its composition or production, from the products generally understood as falling within that description within the Community that it cannot be regarded as falling within the same category. However, where the difference is of minor importance, appropriate labelling should be sufficient to provide the purchaser or consumer with the necessary information.”

The underlined language confirms the conclusion drawn from the Commission v Italy (vinegar II) judgment, that is, consumer perceptions in the Member State of sale (alone) do not determine whether two products are “so different”. This statement clearly makes assessment more complicated, and also raises a very important concern: Do the exceptions to the principle of mutual recognition have any substantive importance? For example, a Member State can prohibit the use of a certain name on an imported product only if this name differs largely from the product’s true nature. Only in situations in which there are large differences between the EU products carrying these names will the exception be relevant. But since EU-wide perceptions determine true nature, the characteristics of true nature will be an EU “average”, thereby reducing the potential differences.¹¹³

¹¹² Guimont, Case 448/98, Judgment of the Court of 5 December 2000, Criminal proceedings against Jean-Pierre Guimont.

¹¹³ Parallels can again be drawn to the prohibition against misleading names. The conflict also resembles the conflict between the principle of mutual recognition and the general principle of fairness, including the prohibition against misleading names. See Section 2.4.

However, in the Foie Gras judgment, the CJEU seemed to approach the exception to the principle of mutual recognition in a slightly different way. In paras. 24–25, the Court held (emphasis highlighted):

“...the mere fact that a product does not wholly conform to the requirements laid down in national legislation on the composition of certain foodstuffs with a particular denomination does not mean that its marketing can be prohibited. The competent national authorities are, admittedly, entitled to monitor preparations in order to establish whether the raw materials used and the production methods are in accordance with the information on the labels and in order to bring proceedings against those responsible for selling foodstuffs which bear descriptions identical to those provided for by national legislation, but which are so different in content as to give rise to suspicion of deceit. However, that possibility applies only to situations in which a foodstuff coming from a Member State and complying with the rules enacted by that state departs markedly from the requirements imposed by the legislation of the state concerned.”

This statement seems to imply a focus more on differences between individual Member States than between national perceptions and an EU average.

Although, the FIR does not provide any guidance on how to determine whether two products are “so different”, the rules on product identity seem to indirectly provide some guidance.¹¹⁴ As an example, the “primary ingredient” is defined in Article 2(2)(q) as one that represents more than 50 percent of that food or which the consumer usually associated with the name of the food and for which a quantitative indication is required in most cases. Substituting another substance for the primary ingredient in a food product could indicate that the new product is “so different” that the same name cannot be used.

¹¹⁴ For more on the rules on product identity, see Chapter 5, especially Section 2.1.

2.4 The prohibition against misleading names and mutual recognition

The FIR contains two very important principles: the principle of fairness, including a prohibition against misleading names, and the principle of mutual recognition. The principles define norms that must be realised, but which cannot necessarily be realised simultaneously. The principle of mutual recognition applies only where a cross-border element exists, and therefore, only in these situations do potential conflicts arise between the two principles.

Chapter 4–8 analysed fairness, focussing on the prohibition against misleading names and the specific rules in the FIR that address the more practical application of this principle. From these analyses, it is clear that Member States have a certain degree of discretion in applying these rules, which is bound to lead to some differences in interpretation based on cultural and other differences, although consideration must be paid to other Member States' interpretations.¹¹⁵

However, different interpretations of what is fair or misleading create barriers to cross-border trade, and a balance between internal market objectives and fairness is necessary. By using the “average EU consumer” as the benchmark for fairness some of this is of course avoided.

Application of the principle of mutual recognition creates a balance in favour of internal market reasoning. In addition, the rules on language requirements are an example of such a balance; according to Article 15 of the FIR, Member States may stipulate the use of a specific language. However, such stipulation must be in accordance with Treaty rules; therefore, if concern for consumers does not necessitate a change of language, then requiring a specific language contradicts primary EU law.¹¹⁶

Clearly the principle of mutual recognition prevails over the principle of fairness in cross-border situations. Therefore, paradoxically, the rules analysed in Chapters 4–8 in principle are irrelevant for evaluating names of imported products; mutual recognition takes precedence. It is rather absurd that the FIR introduces a new set of very detailed, harmonised rules, which on one hand is dependent on

¹¹⁵ See Chapter 8, Section 3.1.1.

¹¹⁶ See Chapter 7, Section 2.

national interpretations (that differ) and on the other is limited by a general principle initially developed in a primary law case. Therefore, the detailed rules in secondary law appear important only in purely domestic situations, as far as the name is concerned. In addition, the substantive importance of the exceptions to the general principle of mutual recognition is questionable. Securing and facilitating free movement becomes pivotal.

However, secondary law still limits how domestically produced goods can be named, and therefore, also indirectly provides a minimum set of standards for how foods are and can be named in the EU.¹¹⁷

3 Naming of domestically produced food

EU law limits Member States' abilities to regulate and control food naming for domestically produced food, where such is harmonised. This is the case where Eurofoods are established and where a PGI/PDO is registered. However, even though these sets of rules fully harmonise the regulated food, some room appears to be left for Member States to regulate and control parallel food names. The exact borderlines of the Eurofoods and Quality Schemes rules are analysed in Section 3.1 and 3.2. Section 3.3 examines whether primary law also limits Member States' abilities to regulate naming of domestic produce, and Section 3.4 analyses the boundaries established by the labelling rules.

3.1 The boundaries established by the Eurofoods rules

Clearly, the Eurofoods laws provide for a total harmonisation of the exact names defined in the Directives (see for example, recital 11 of the Fruit Juice Directive and recital 17 of the Cocoa Directive). The CJEU also has confirmed this on different occasions, for example in the Apples and Pears judgment.¹¹⁸ In this case, a number of questions were posed to the CJEU concerning the

¹¹⁷ See the discussion in Section 2.2.

¹¹⁸ Apple and Pear, Case 222/82, Judgment of the Court of 13 December 1983, Apple and Pear Development Council v K.J. Lewis Ltd and others.

promoting of British fruit products. In paras. 23-24, the Court presented (in an *obiter dictum*¹¹⁹) a detailed description of the characteristics of the Eurofoods regulated in the CMO and the boundaries of this system (emphasis highlighted):

“...it should be emphasized that the rules on the common organization of the market in fruit and vegetables provide for an exhaustive system of quality standards applicable to the products in question. Unless those rules provide otherwise, Member States and, a fortiori, bodies such as the development council are therefore prevented from imposing unilateral provisions concerning the quality of the fruit marketed by growers...the Community rules certainly do not prevent competition regarding the quality of the produce between growers in a Member State or between those growers and importers. Nor do they prevent growers from concerning themselves with the reputation of national produce or a body such as the development council from giving advice to growers in that connection in the form of simple recommendations concerning the quality and presentation of the fruit marketed. On the other hand, any attempt by such a body to impose compliance with those recommendations by applying any sort of penalties or by using the authority vested in it by its constitution to bring pressure to bear on growers or on traders would be unlawful in view of the exhaustive nature of the Community rules.”

For the Member States to regulate products falling under these schemes would seem to contradict the objectives behind the Eurofoods rules, as verified here. However, varying national definitions of “Eurofoods” names exist, which EU law authorises or does not prohibit. A few examples of derogations from the full harmonisation are presented here.

In some instances, Community law actually positively allows national food names derogating from the harmonised ones, for example, in the Chocolate Directive, Recital 13. This rule allows the United Kingdom and Ireland to authorise the use of the name “milk chocolate” on their territory to designate what the directive terms “milk chocolate with high milk content”. Elsewhere, the English name for “milk chocolate” instead would be “family milk chocolate”.

¹¹⁹ The CJEU was not asked to provide interpretation on the CMO regulation, and it was not mentioned by any of the parties that the British rules contradicted the CMO regulation. The *obiter dictum* is of a rather general nature and confirms in a more precise way what already had been determined; therefore, the conclusion is considered valid.

Derogations also exist due to the choice of words/names used in each of the official languages. The name “juice”, which is harmonised in the English version of the Fruit Juice Directive, has a distinct Danish definition, because the parallel to the English “juice” is “saft” in the Danish version of the Fruit Juice Directive. For this reason, “juice” as a Danish food name is not harmonised. As a consequence of practical language and translation difficulties, room is left for establishing rules on national names contrary to harmonised names.¹²⁰ This possibility clearly frustrates some of the (secondary) aims of the Eurofoods rules, such as equal competition and prevention of consumer confusion. However, as the Danish definition of “juice” may not restrict cross-border trade, the name can apply only to Danish producers, and the primary objective of the Eurofoods rules – the free movement of goods – is still safeguarded.¹²¹ The Eurofoods rules do not establish boundaries for Member States’ authorisation of the use of a trademark containing a claim.¹²²

In the Egberts judgment, concerning the scope of the Coffee and Chicory Extract Directive, the CJEU held that despite the full harmonisation provided in the Directive, inclusion of a fancy name or a trade name was not precluded alongside the compulsory name under which the product is sold. The inclusion of a trade name (a trademark) could facilitate individualisation of the otherwise harmonised Eurofoods and for this reason would not be contradictory to the Eurofoods rules. In addition, the CJEU noted that a prohibition against such inclusion would be contrary to the labelling rules (para. 28). Contrary to the Egberts case, the CJEU concluded in the *Commission v Italy* (pure chocolate) judgment,¹²³ that the full harmonisation provided in the Cocoa/Chocolate Directive¹²⁴ and the prohibition against misleading consumers in the horizontal labelling rules prevent Member States from authorising the use of a claim like “pure” for chocolate products.¹²⁵

¹²⁰ See Chapter 7, for more on practical language difficulties.

¹²¹ For more on the Danish regulation of the name “juice”, see Ohm Søndergaard, M., and Selsø Sørensen, H. (2008). *Frugtsaft – Beskyttede varebetegnelser – et instrument til at undgå vildledning?*

¹²² However, this follows from other rules; see Chapter 8.

¹²³ *Commission v Italy* (pure chocolate), Case 47/09, Judgment of the Court of 25 November 2010, European Commission v Italian Republic.

¹²⁴ Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption.

¹²⁵ See Chapter 8, Section 4.1 for more about this judgment.

The extent of harmonisation afforded by the Eurofoods rules clearly limits Member States' latitude to regulate food naming, sometimes complemented by the limits of the horizontal rules. Member States cannot regulate the generic Eurofoods names, either through legislation or by enforcement of the prohibition against misleading names. However, some derogations exist and some room for regulating domestically produced food follows, especially due to language issues, which definitely does not strengthen the law's predictability.

3.2 The boundaries established by the Quality Schemes

Despite the fact that the PGI/PDO Regulation introduces full harmonisation of EU geographical names, the Quality Schemes rules do not prevent adoption of national rules to protect geographical names. This conclusion follows from case law rather than positively from the wording of the regulation.¹²⁶ Further, Member States' ability to regulate geographical names is attached to their sovereignty within property rights, safeguarded under Article 345 TFEU.¹²⁷ Chapter 6 analysed when and under what circumstances Member States could protect geographical names, including national geographical names. This section analyses the additional boundaries established by the Quality Schemes.

Member States have an interest in protecting national geographical names,¹²⁸ for example, as a preliminary step to registering a PGI/PDO under the EU Quality Scheme. In this way, Member States can establish a link between quality and origin through national legislation. Further, based on the prohibition against misleading names and Article 26 of the FIR on indication of origin,¹²⁹ Member States must be able to prevent the use of national geographical names for products not linked to the geographical place, if the name will be misleading.

¹²⁶ See Chapter 2, Section 4.3.1 and Chapter 6, Section 4.2.

¹²⁷ According to Article 118 TFEU, a high degree of protection of intellectual property rights is an aim of the EU. According to Article 36 TFEU, Member States can justify restrictions to the free movement of goods based on the protection of intellectual property rights.

¹²⁸ For an overview of geographical names in certain Member States, see O'Connor, B. (2004). *The Law of Geographical Indications*, Chapter VII.

¹²⁹ See Chapter 6, for more on geographical names and the obligation to provide information on origin.

Uniform protection of intellectual property and geographical names, enhances free movement.¹³⁰ For this reason, the Community has an interest in enhancing the EU Quality Schemes system, rather than promoting national schemes. Therefore, the CJEU has clearly established that national names cannot be parallel to PGI/PDOs.

The Chiciak and Fol judgment¹³¹ concerned a French law that protected the name “Époisses”. The name “Époisses de Bourgogne” was protected under the First PGI/PDO Regulation, and the case questioned whether a Member State could protect “Époisses” or whether “Époisses” was protected as part of “Époisses the Bourgogne”. The CJEU stated in para. 33:

“...the 1992 regulation must be interpreted as meaning that, since its entry into force, a Member State may not, by adopting provisions of national law, alter a designation of origin for which it has requested registration in accordance with Article 17 and protect that designation at national level.”¹³²

In the Budvar II judgment,¹³³ the CJEU determined that the exhaustive nature of the PGI/PDO Regulation implies national protection of a geographical name cannot be extended to other Member States.¹³⁴ Only if a name is protected according to the Community Quality Schemes rules can the name be restricted outside the Member State of origin. Of course, the logic behind this determination is based in the balance between protecting geographical names and their link to quality and internal market benefits. If a name cannot be protected under the Community system, national producers using this name in accordance with national product requirements cannot widen this protection beyond national borders. However, if a Member State seeks to strengthen the link

¹³⁰ See also Chapter 2, Section 4.2.

¹³¹ Chiciak and Fol, Joined cases 129/97 and 130/97, Judgment of the Court of 9 June 1998, Criminal proceedings against Yvon Chiciak and Fromagerie Chiciak (C-129/97) and Jean-Pierre Fol (C-130/97).

¹³² See Gragnani, M. (2012). The Law of Geographical Indications in the EU, p. 280, which notes: “*In the ECJ’s view, if the Member States were permitted to allow their producers to use one of the indications or symbols which are reserved for GIs registered under Regulation 510/2006, on the basis of a national right which could meet less strict requirements than those established by that Regulation, there might be negative consequences: the risk of removing the assurance of quality and the risk of jeopardizing the aim of fair competition between producers of products bearing those indications to be reserved for those who have made a genuine effort to improve quality.*”

¹³³ Budvar II, Case 478/07, Judgment of the Court (Grand Chamber) of 8 September 2009, Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH.

¹³⁴ See Chapter 6

between quality and a geographical name through regulating and protecting it within the Member State's territory (perhaps with an aim at later PGI/PDO registration), the inability to restrict the name beyond national borders entails the risk that the name will become generic, from a majoritarian point of view.

In the *Carl Kühne* judgment,¹³⁵ the CJEU provided some clarification on exactly how the preregistration situation can influence whether a geographical name can later be registered as a PGI/PDO. German producers contested the registration of “*Spreewälder Gurken*” as a PGI, which led the German *Landgericht Hamburg* to seek a CJEU's judgment. The German court was concerned because “*Spreewälder Gurken*” had not previously been legally protected nor was the name established by usage. The CJEU clearly stated that a system of division of powers applied to the registration of quality names. Under this system, the Member State applying for a registration must decide on the details of the product specification based on matters particular to its own area (para. 53). However, in cases of objection against the registration, national law or usage can be relevant. In the *Feta I*¹³⁶ and *Feta II*¹³⁷ judgments, the CJEU placed great emphasis on the Greek regulation of “*Feta*” as a proof of the non-generic character.

In conclusion, the Quality Schemes rules, like the Eurofoods rules, do not prevent Member States from regulating food names at the national level. Protection of national geographical names is actually positively acknowledged in case law. However, the protection is clearly attached to the principle of territoriality, and therefore, the rules on free movement, based on the principles analysed in Section 2, limit how Member States can restrict the names of imported products. However, the Quality Schemes rules limit Member States' abilities to regulate domestic production in only one way: Registered and reserved names cannot be used for such domestic production, that is, product requirements can be placed on Danish producers of “white cheese in brine”, but logically the product requirements cannot be attached to “*Feta*”.

¹³⁵ *Carl Kühne*, Case 269/99, Judgment of the Court of 6 December 2001, *Carl Kühne GmbH & Co. KG and Others v Jütro Konservenfabrik GmbH & Co. KG*.

¹³⁶ *Feta I*, Joined cases 289/96, 293/96 and 299/96, Judgment of the Court of 16 March 1999, *Kingdom of Denmark, Federal Republic of Germany and French Republic v Commission of the European Communities*.

¹³⁷ *Feta II*, Joined cases 465/02 and 466/02, judgment of the Court of 25 October 2005, *Federal Republic of Germany (C-465/02) and Kingdom of Denmark (C-466/02) v Commission of the European Communities*.

3.3 *The boundaries established by primary law*

As a general rule, equal burdens must apply to domestically produced and imported foods, according to primary law on free movement of goods and the principle of mutual recognition; that is, only one set of rules must apply, the rules in the Member State of production.¹³⁸ Equal burdens do not mean equal treatment and reverse discrimination against domestic produced food can (indirectly) be the result when applying primary law and mutual recognition. Primary law does not require domestically produced food to not be subject to more stringent requirements than imported goods.¹³⁹ This follows from the Mathot¹⁴⁰ judgment, in which the Court considered whether free movement provisions apply to a purely internal situation. In the case, Belgian law prescribed an obligation for domestic producers to state on food packages the business name and address in Belgium. The obligation was not imposed on imported products. In para. 9, the CJEU stated:

“...according to the case-law of the Court, treatment which works to the detriment of national products as compared with imported products and which is put into effect by a Member State in a sector which is not subject to Community rules or in relation to which there has been no harmonization of national laws does not come within the scope of Community law.”

This conclusion was confirmed in the Guimont judgment.¹⁴¹

The CJEU does not seem to look differently at national rules that, because of strict requirements give a competitive advantage to these food products compared with imported foods, for example,

¹³⁸ Member State of production/country of origin control also follows from Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. According to Article 2, official controls in the country of origin shall verify compliance with general rules on fairness and labelling.

¹³⁹ Note that the general prohibition against discrimination appears only to relate to individual rights, in purely internal situations; see Bell, M. (2011). *The Principle of Equal Treatment: Widening and Deepening*, p. 612.

¹⁴⁰ Mathot, Case 98/86, Judgment of the Court of 18 February 1987, Criminal proceedings against Arthur Mathot. See also Tryfonidou, A. (2009). *Reverse Discrimination in EC Law* and Weatherill, S. (1996). *After Keck: Some Thoughts on How to Clarify the Clarification*, pp. 901–904, for discussions on case law following Mathot and regulation on notification of technical standards as indications of a shift in the EU towards more focus of the problems related to reverse discrimination.

¹⁴¹ It also follows from this judgment that reverse discrimination might be contrary to national constitutions (para. 23). See also Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, pp. 121–122.

Italian rules on the use of durum wheat in pasta.¹⁴² This follows from the Jongeneel Kaas judgment,¹⁴³ which concerned Dutch rules regulating the quality of domestically produced cheese, while leaving imported products unaffected. The CJEU held, in para. 20, “*Article 30 [current Article 34 TFEU] does not prevent the adoption of national rules which, whilst leaving imported products unaffected, have as their purpose to improve the quality of domestic production so as to make it more attractive to consumers.*” A similar conclusion follows from the Apple and Pear judgment, in which the Court clearly accepted that primary law does not prevent Member States from drawing attention to the high quality of specific domestically produced food. However, if a Member State were to establish specific marks to promote domestically produced goods in general or to discourage purchase of imported products, then that would constitute a barrier to trade and a breach of Article 34 TFEU.¹⁴⁴

Domestic production requirement clearly can violate primary law if such national measure regulating domestic production discriminates against products intended for export (see the Groenveld judgment). According to the Groenveld judgment, only national measures that *de jure* and *de facto* applied more stringent requirements to products intended for export violated Article 35 TFEU.¹⁴⁵ But in the Gysbrecht judgment, the CJEU seemed to approach export restrictions differently. In that judgment, the CJEU held that a Belgian measure forbidding Internet providers from requesting credit card numbers from consumers before expiry of the withdrawal period was contrary to Article 35 TFEU and went beyond the necessary consumer protection. The CJEU concluded that the Belgian rules had a greater *effect* on goods leaving the market of the exporting Member State (para. 43). The reason was that the rules generally deprived traders of an efficient tool to mitigate the risk of non-payment, a risk considered greater for cross-border trade. The logic

¹⁴² See Section 2.2.2 and 3.4.2 for more on Italian pasta regulation.

¹⁴³ Jongeneel Kaas, Case 237/82, Judgment of the Court of 7 February 1984, Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole.

¹⁴⁴ See CMA, Case 325/00, Judgment of the Court of 5 November 2002, Commission of the European Communities v Federal Republic of Germany and Buy Irish, Case 249/81, Judgment of the Court of 24 November 1982, Commission of the European Communities v Ireland. See also Chapter 6, Section 4.1.

¹⁴⁵ The conclusion from the Groenveld judgment has been repeated in following cases, for example in Exportur, Case 3/91, Judgment of the Court of 10 November 1992, Exportur SA v LOR SA and Confiserie du Tech SA, para. 21, and Jersey Potato judgment, Case 293/02, Judgment of the Court of 8 November 2005, Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board, para. 73.

behind this argument is attached to the deterring effect on exports,¹⁴⁶ and the Court concluded that the Belgian rules resulted in different treatment of products intended for the internal market and those for export.

The CJEU's conclusion that the Belgian rules resulted in a different treatment for exports has been criticised.¹⁴⁷ Generally, critics have argued that the Belgian rules were not discriminatory, and therefore, that the CJEU modified the previous conclusion in *Groenveld* by changing the scope of Article 35. In addition, the judgment highlighted the conflicts between the *lex superior* primary law and the *lex specialis* secondary law. The Distance Contracts Directive¹⁴⁸ harmonising Member States' laws on distance contracts provided minimum harmonisation and contained a so-called market access clause, which permitted Member States to adopt more stringent rules in order to protect consumers, as long as the free movement is not hindered.¹⁴⁹ Bringing national measures that are applicable only to national producers and do not discriminate, *in law*, between purely internal and cross-border situations within the scope of primary law clearly limits Member States' abilities to regulate domestic firms, their production, marketing and so on.¹⁵⁰ The *Gysbrecht* judgment and the broad interpretation of the scope of Article 35 TFEU seem to indicate that primary law can be used to prevent regulation of domestic production intended for export, even where it does not discriminate *de jure*.

¹⁴⁶ Santurel also put forward this argument. See also Weatherill, S. (2009). Measures of Consumer Protection as Impediments to Export of Goods, p. 149.

¹⁴⁷ Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, p. 4, notes that the *Gysbrecht* judgment signals a tendency to apply Article 35 in line with Article 34 TFEU to non-discriminatory restrictions on trade. See also the Opinion of Advocate General Trstenjak delivered on 17 July 2008, *Gysbrecht*, Case 205/07, Judgment of the Court of 16 December 2008, Lodewijk Gysbrechts and Santurel Inter BVBA, advocating for a different review of Article 35 TFEU.

¹⁴⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, hereafter the "Distance Contract Directive".

¹⁴⁹ Market access clauses are found in other minimum harmonising Directives, but also in UCPD; see Trzaskowski, J. (2010). Towards a Common European Marketing Law.

¹⁵⁰ Some consider *Gysbrecht* to be a step away from accepting minimum harmonization. See Micklitz, H. W. (2010). Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law, p. 47: "...*Gysbrecht* impose the minimum EU standard of protection on Member States which supersedes higher national standards. The ECJ is still activist, but it brings to bear the policy enshrined in the Lisbon Conclusions and hammered down in the Consumer Strategy paper 2002."

As a result of the Gysbrecht judgment, it is questionable whether Member States can uphold national product requirements for exports. Only purely internal situations seem to be able to escape the domain of primary EU law.¹⁵¹ Therefore, the only requirement for a product to fall within the scope of primary law is that it has crossed or is intended to cross interstate borders.¹⁵² However, secondary law potentially sets limits for national regulation of products and product names in purely internal situations.

Purely internal situations are perhaps difficult to define; in many cases, a cross-border element can potentially emerge from reference to use of imported ingredients. For example, under a broad market access principle, it could have been argued in the Groenveld case that the Dutch prohibition on the use of horsemeat in sausages constituted a restriction on the import of horsemeat to the Netherlands. A total ban on horsemeat in sausage limits the possibility of importing horsemeat.¹⁵³ These thoughts illustrate the complexities surrounding the broad application of primary law to food products, including product requirements and naming.

3.4 *The boundaries established in the labelling rules*

Secondary law can potentially set limits for Member States' "regulation" of food naming in two ways, either setting limits for how to evaluate fairness¹⁵⁴ and potentially misleading names or setting limits for the adoption of product requirements. If the fairness evaluation is applied on a case-by-case basis by application of relevant benchmarks such as "the average consumer" in accordance with what EU prescribes, then there are no further *de jure* boundaries for Member States'

¹⁵¹ See Reich, N. (2011). How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ, for example pp. 37–39.

¹⁵² This follows from the Delhaize judgment, Case 47/90, Judgment of the Court of 9 June 1992, *Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA*. Even domestic products that have first been exported and later re-imported are protected under primary EU law. Whether, such food products can escape product requirements in the Member State of production is as mentioned questionable. For a case on re-exportation, see the Jersey Potato judgment.

¹⁵³ See Davies, G. (2010). Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law. This would widen the CJEU's conclusion in *PreussenElektra*, Case 379/98, Judgment of the Court of 13 March 2001, *PreussenElektra AG v Schleswig AG*, in the presence of *Windpark Reußenköge III GmbH* and *Land Schleswig-Holstein* (see para. 70), but no judgments seem to contradict that primary law could be applied in this way.

¹⁵⁴ See Chapter 8 for more on fairness and the limits set for the evaluation of fairness in general EU commercial practices law.

“regulation”. However, boundaries might be established for the adoption or maintenance of national product requirements, in purely internal situations.

The labelling rules found in the Food Information Regulation “*establish the general principles, requirements and responsibilities governing food information, and in particular food labelling*” (Article 1(2)). Food Information is defined as information concerning a food and made available to the final consumer (Article 2(2)(a)), which suggests that the scope of the Regulation is very wide ranging. Further, Regulations are binding in their entirety (see Article 288 TFEU), and therefore, harmonisation by means of a Regulation constitutes full harmonisation; within the scope of the Regulation.

Therefore, the scope of the Regulation is important when considering the boundaries established for Member States’ abilities to regulate domestic food production and food information, including the name.

3.4.1 The scope of the labelling rules

According to the First and the Second Labelling Directives, Member States were prohibited from using non-harmonised national provisions concerning the manner in which mandatory particulars are provided. Further, Member States could not use national rules to forbid trade in foodstuffs that comply with the Directives, unless such national rules were justified on certain grounds, such as prevention of unfair competition. Consumer protection was not specifically mentioned in Article 15/18, but possibly can be considered part of “prevention of unfair competition”.¹⁵⁵ However, not until the adoption of the FIR, was it absolutely possible to justify national rules concerning food naming on grounds of consumer protection without referring to internal market reasons, the rule of

¹⁵⁵ For a view on the relationship between competition law and consumer law, see Gomez, F. (2004). EC Consumer Protection Law and EC Competition Law: How Related are They? A Law and Economics Perspective, p. 203. Consumer protection is now specifically mentioned in Article 39 of the FIR. See Chapter 8 for an analysis of “fair”, “fairness” and “fair competition” and the relationship between fairness and consumer protection.

reason or Article 36 TFEU.¹⁵⁶ This might partially explain why the rules in primary and secondary law have been used in a parallel manner.¹⁵⁷

Now, Article 38 of the FIR prohibits Member States from adopting national measures regarding matters specifically harmonised by the FIR; however, adoption of such measures concerning matters outside the scope of the Regulation are allowed, provided that these do not constitute obstacles to cross-border trade. Article 39 widens Member States' abilities to adopt additional mandatory particulars, other than those required by the FIR. However, such rules must be justified.¹⁵⁸ The wording of previous and current rules are as follows (emphasis highlighted):

¹⁵⁶ See Wilhelmsson, T. (2004). The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law, p. 319.

¹⁵⁷ Whether it also partly explains the limited ability to justify application of non-harmonised measures is unclear. Note that the CJEU held that Article 15/18 exhaustively lists the grounds on which the application of non-harmonized national provisions prohibiting trade in foodstuffs may be justified. See SARPP, Case 241/89, Judgment of the Court of 12 December 1990, SARPP – Société d'application et de recherches en pharmacologie et phytothérapie SARL v Chambre syndicale des raffineurs et conditionneurs de sucre de France and others, para. 15.

¹⁵⁸ The rules provided for in the former Directives has been seen as an authorisation for Member States to impose stricter requirements to domestic products; see Maduro, M. P. (1999). *We, The Court*, p. 135, as a parallel to the *New Approach* to harmonisation of technical and quality standards introduced in the 1980s. See Chalmer, D., Davies, G., and Monti, G. (2010). *European Union Law*, Chapter 16, especially p. 697, and Chapter 2, Sections 2.5 and 3.

First and Second Labelling Directive	The FIR proposal ¹⁵⁹	FIR
Article 14(1)/17 (no headlines)	Article 37 – principle	Article 38 - National measures
Member States <u>shall refrain from laying down requirements</u> more detailed than those already contained in articles 3 to 11 <u>concerning the manner in which the particulars provided</u> for in article 3 and article 4 (2) are to be shown .	“Member States <u>may only adopt provisions</u> in the field of food information <u>where this is provided for</u> by this Regulation”	1. As regards the <u>matters specifically harmonised</u> by this Regulation, Member States <u>may not adopt nor maintain national measures</u> unless authorised by Union law. Those national measures shall <u>not give rise to obstacles to free movement</u> of goods, including discrimination as regards foods from other Member States. 2. Without prejudice to Article 39, Member States <u>may adopt national measures</u> concerning matters not specifically harmonised by this Regulation provided that they <u>do not prohibit, impede or restrict the free movement</u> of goods that are in conformity with this Regulation.
Article 15/18 (no headlines)	Article 38 - National provisions on additional mandatory particulars	Article 39 - National measures on additional mandatory particulars
Member States <u>may not forbid trade in foodstuffs</u> which comply with the rules laid down in this Directive by the application of non-harmonized national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general. 2. Paragraph 1 <u>shall not apply to non-harmonized national provisions justified on grounds of</u> :	1. In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States <u>may, in accordance with the procedure laid down in Article 42, require additional mandatory particulars</u> for specific types or categories of foods, justified on grounds of: (a) the protection of public health; (b) the protection of consumers;	1. In addition to the mandatory particulars referred to in Article 9(1) and in Article 10, Member States <u>may, in accordance with the procedure laid down in Article 45,¹⁶⁰ adopt measures requiring additional mandatory particulars</u> for specific types or categories of foods, justified on grounds of at least one of the following: (a) the protection of public health;

¹⁵⁹ Commission Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers (Com (2008) 40 final).

¹⁶⁰ No further elaboration on this procedural rule is provided here.

<ul style="list-style-type: none"> - protection of public health , - prevention of fraud , unless such provisions are liable to impede the application of the definitions and rules laid down by this directive , - protection of industrial and commercial property rights , indications of provenance , registered designations of origin and <u>prevention of unfair competition</u>. 	<ul style="list-style-type: none"> (c) the prevention of fraud; (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the <u>prevention of unfair competition</u>. 	<ul style="list-style-type: none"> (b) the protection of consumers; (c) the prevention of fraud; (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the <u>prevention of unfair competition</u>.
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From the rules, it is clear that Member States clearly are not and were not entirely prevented from adopting or maintaining national provisions different from the harmonised rules. However, it is not clear to what degree Member States can regulate food naming or under what circumstances.

In the following, an analysis is provided of the implications of the different rules in the Food Information Regulation. Case law and other legal texts concerning the previous rules¹⁶¹ are included to more precisely conclude on *de lege lata*, since it is the conclusion that the current food naming rules do not materialise important changes to the previous ones.¹⁶² The wording of the Proposal to the FIR is also included in the analysis in the hope that it might contribute to understanding of the FIR, because it is different from the wording in the adopted rules.

3.4.2 National measures

According to Article 38, Member States may adopt measures related to “matters not specifically harmonised” in the FIR, provided that free movement is not restricted. Member States can adopt measures concerning “matters specifically harmonised” only when authorisation is provided in EU law. This implies that primary EU law limits Member States’ actions only in relation to “matters not

¹⁶¹ The rules in the First and Second Labelling Directives are identical and for this reason no differentiation is made between them.

¹⁶² See Chapter 2, Section 1.

specifically harmonised”, and only “matters specifically harmonised” set boundaries for regulation of domestic production (and purely internal situations).

According to Article 14(1)/17 of the First/Second Labelling Directive, Member States may not establish requirements concerning the manner in which particulars are shown, such as requirements to place the name on the front of the package. The rule is not completely parallel to the current Article 38, but it is the provision from the previous Directives that most resembles Article 38. The wording of Article 14(1)/17 does not seem to prevent Member States from regulating the naming of domestically produced goods.

Article 39 clearly limits Member States’ abilities to regulate food labelling by preventing Member States’ from requiring more information than specified in the FIR. There is no difference between what can be required of imported products and of domestically produced products. Thus, the amount of information that can be required from food businesses is fully harmonised; however, additional informational requirements may be allowed if justified.¹⁶³ In this sense, Article 39 constitutes an important change, as is clear from the wording of Article 15/18 of the First and Second Labelling Directive that the aim was only to prevent national measures’ imposing restrictions on (cross-border) trade.

“May not forbid trade” does not clearly indicate that Article 15/18 concerned only cross-border trade. Article 15/18 could either oblige Member States to recognise all food names in accordance with the present rules, or could imply that Member States may set more stringent naming requirements for domestic production. If Article 15/18 is not restricted to cross-border trade, then such a reading can influence how Article 38 must be interpreted because both provisions relate to Member States’ abilities to adopt and maintain national measures. Based on other rules in the FIR and mutual recognition, the provision appears to be related only to cross-border trade. Member States must be able to regulate domestic production, either by establishing quality standards for the

¹⁶³ There is a new tendency to fully harmonise areas of consumer protection; see Chapter 8. Other initiatives in the FIR suggest a wish for more full harmonisation, for example, a new initiative, inviting the Commission to analyse consumers’ needs for certain types of information on ingredients and nutrition of alcoholic beverages (recital 40) as well as origin labelling of certain food products (recital 32).

use of certain names or by requiring the use of a specific name, where certain characteristics are present.¹⁶⁴ However, considering the wording of Article 5 of the First Labelling Directive, doubts could be raised as to the initial meaning of Article 15/18. The previous Article 5 read (emphasis highlighted):

“The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.”

It could be argued that a producer, in accordance with this rule, could choose to name a product in accordance with the laws of another state, or simply use a descriptive name, and thus comply with the EU labelling rules. If “may not forbid trade” does not apply only to cross-border trade, this producer could escape product requirements established in laws of the Member State of production. The Commission put forward a similar argument in the Sauce Béarnaise case, arguing that Article 5 of the First Labelling Directive does not allow Member States to require additional information, thereby “*precluding the marketing of domestic or imported products which, like the products at issue, do not differ in any essential respect from the products generally known in the Community under the same trade description*” (para. 38, emphasis highlighted). On the other hand, the German government argued that the prohibition against the use of misleading names permits Member States to take into account how consumers of that state perceive a trade description, to ensure sufficient information (para. 39). Unfortunately, the Court did not address this conflict.¹⁶⁵

In 1997, an amending Directive¹⁶⁶ was added to Article 5 and hereafter the wording was almost identical to the current wording. Accordingly, producers must comply with use of the name provided for in the laws, regulations and administrative provisions applicable in the Member State in

¹⁶⁴ Maduro also clearly interpreted the wording “may not forbid trade” as limited to cross-border trade. See Maduro, M. P. (1999). *We, The Court*, p. 135, where the author characterises Article 15 of the First Labelling Directive as an “*authorization to impose stricter requirements to domestic products only*”.

¹⁶⁵ See Chapter 5, for more about the conclusion in the Sauce Béarnaise judgment.

¹⁶⁶ Directive 97/4 of the European Parliament and of the Council of 27 January 1997.

which the product is sold to the final consumer or to mass caterers, with exceptions for imported products (for cross-border trade). Therefore, in purely internal situations, Member States can regulate naming.

In the *Commission v Austria* judgment¹⁶⁷ concerning an Austrian requirement of prior authorisation regarding use of health-related information, the CJEU concluded, in para. 48 (emphasis highlighted): “...*the protection of public health [listed in Article 15(2) as a means to justify non-harmonised provisions on labelling] ...cannot justify a system as restrictive of the free movement of goods...*”¹⁶⁸ The Advocate General was less clear as to the scope of the rules,¹⁶⁹ Suggesting, in para. 60: “*A general prohibition on misleading health-related information cannot be justified on the basis of Article 15(2) of Directive 79/112 since the interest in question – consumer protection – is already covered by Article 2(1)(a) of Directive 79/112.*”¹⁷⁰ This AG reading of different labelling provisions could suggest that Member States cannot provide *per se* rules on labelling information, including food names, not even for domestically produced food.

In the *Müller* judgment,¹⁷¹ which concerned an obligation set in Austrian law to clearly indicate when the period of minimum durability had expired, the CJEU found that such an obligation could be justified according to Article 18 of the Second Labelling Directive. However, the court reached its conclusion without considering whether or how the Austrian rule did “forbid trade.”

The previous Directives initially appear not to prevent national measures regulating the naming of domestically produced food; this hypothesis is tested in Section 3.4.2.2 in an analysis of the CJEU’s

¹⁶⁷ *Commission v Austria*, Case 221/00, Judgment of the Court of 23 January 2003, *Commission of the European Communities v Republic of Austria*.

¹⁶⁸ Similar conclusions were made in *SARPP*, Case 241/89, Judgment of the Court of 12 December 1990, *SARPP – Société d’application et de recherches en pharmacologie et phytothérapie SARL v Chambre syndicale des raffineurs et conditionneurs de sucre de France and others* and the *Egberts* judgment are similar cases. However, the conclusion in the *Commission v Austria* case most clearly explains the scope of Article 15 of the First Labelling Directive. The AG’s opinion verifies the ambiguity of these cases.

¹⁶⁹ Joined opinion of Mr Advocate General Geelhoed delivered on 4 July 2002, *Commission v Austria*, Case 221/00, Judgment of the Court of 23 January 2003, *Commission of the European Communities v Republic of Austria*.

¹⁷⁰ Note that consumer protection was not mentioned in Article 15(2) of the First Labelling Directive as a ground for justifying restrictions to trade, which may explain why the AG interpreted the rules differently.

¹⁷¹ *Müller*, Case 229/01, Judgment of the Court of 13 March 2003, *Susanne Müller*, Reference for a preliminary ruling: *Unabhängiger Verwaltungssenat im Land Niederösterreich – Austria*

application of the rules in the former Directives. If the hypothesis cannot be verified, it will affect how Article 38 of the FIR must be interpreted.

Article 39 of the FIR does not seem relevant for food naming; the rules on product identity clearly regulate how and when additional information in close proximity to the name can be required. The scope of Article 38 is not completely clear-cut; is food naming a “matter specifically harmonised”?

3.4.2.1 *Matters specifically harmonised*

Despite the definitions in Article 2 and Article 17 that provide a harmonised understanding of “food name”, the idea of horizontal rules is to provide a framework, rather than to specifically harmonise.¹⁷² For this reason, the idea behind horizontal labelling rules is not to limit Member States’ abilities to control domestic production and marketing within their borders.

However, considering the wording of Article 37 of the Proposal to the FIR, and the general tendencies within EU commercial practices law, the Commission’s idea appears to have been to fully harmonise EU food information law. According to Article 37 of the Proposal to the FIR, Member States would be prohibited from establishing rules on food naming, including for example potentially misleading names, since such permission is not part of the “Regulation”, neither the Proposal to the FIR or the FIR. Since food information is defined rather broadly as information concerning a food and made available to the final consumer by means of a label, and so on, the initial intention in the Proposal to the FIR clearly seems to leave little room for Member States to adopt national measures on for example food names and their potential to mislead.

Such a rule contradicts the entire set up in EU food law in which Member States of production controls food production under their own rules, or relevant and superior EU rules (Eurofoods and Quality Schemes). It even contradicts the labelling rules, such as Article 2(2)(n) of the FIR (and the Proposal to the FIR, Article 2[2][1]), by defining a legal name as “*in the absence of such Union provisions, the name provided for in the laws, regulations and administrative provisions applicable*

¹⁷² See Chapter 2, Section 1.2 for the different definitions of food names.

in the Member State in which the food is sold to the final consumer or to mass caterers.” The change of wording confirms that the rule was contradictory¹⁷³ and seems to verify that food naming is not one of the “matters specifically harmonised” in the FIR.

3.4.2.2 Case law on the scope of the labelling rules

On several occasions when interpreting primary law, the CJEU has held that in the absence of Community rules, Member States may regulate all matters relating to production, distribution and consumption on their own territories, while not restricting cross-border trade.¹⁷⁴ In the Fietje judgment concerning Dutch rules on the use of the names “likeur”, “liqueur” or “licorette”, the Court stated, in para. 8 (emphasis highlighted):

“At the present stage in the development of Community law the factors to which the national court need have regard in its interpretation do not relate therefore to the compatibility with Community law of the obligation to use a particular description in marketing certain alcoholic beverages. As the national court has itself indicated in the wording of the question to the Court of Justice for a preliminary ruling, the issue is whether the extension of such an obligation to beverages imported from the other Member States in such a way as to make it impossible to market the imported product without altering the label under which the beverage is lawfully marketed in the exporting Member State is to be regarded as a measure having an effect equivalent to a quantitative restriction which is prohibited by Article 30 of the Treaty.”

It is a bit contradictory to conclude that no Community rules exist in relation to naming and labelling of food. These statements actually have been given in cases that, at least for some, could have as easily been solved by interpretation of the *lex specialis* labelling rules. For example, the Fietje case could have been solved by application of Article 15/18 of the previous Directives. *Lex specialis* must generally be applied were such exist, and only in cases where interpretation of *lex superior* (primary law) would lead to a different result should this be applied. The incoherent and

¹⁷³ However, the reason for the change in wording of Article 37/38 is not evident from any of the legislative documents.

¹⁷⁴ This follows from for example Gilli, para. 5, and Commission v Italy-judgment (vinegar I), both concerning the Italian prohibition against the use of the name “*aceto*” for non-wine based vinegar.

inconsistent¹⁷⁵ use of secondary and primary law in food naming cases confuses the boundaries established by secondary law, the labelling rules.¹⁷⁶ For preliminary rulings, questions referred to the CJEU certainly determine what answer can be provided, at least to some degree. However, the CJEU has expanded its approach in the sense that questions have been reformulated and direct answers have been given regarding national laws' compatibility with EU law.¹⁷⁷ Further, recall that the Court is not obliged to answer all the questions referred to it.¹⁷⁸

Despite the intermingling interpretations of secondary and primary law, the CJEU also has provided some clarification regarding the scope of the labelling rules. In a number of cases, the Court has verified that Member States can regulate food naming of domestically produced food, for example in the *Glocken* case (paras. 16 and 25).

In the *Glocken* judgment, Italian rules prescribing the use of durum wheat in pasta were contested, and the Court noted, in para. 17 (emphasis highlighted):

“It should further be noted that the Italian legislature is not only permitted to require the listing of the ingredients in accordance with the provisions of the Council directive on the labelling and presentation of foodstuffs (Official Journal 1979, L 33, p. 1) but also entirely at liberty to restrict

¹⁷⁵ Note that the Joined opinion of Mr Advocate General Geelhoed delivered on 4 July 2002, Sterbenz and Haug, Joined cases 421/00, 426/00 and 16/06, Judgment of the Court of 23 January 2003, Renate Sterbenz (C-421/00) and Paul Dieter Haug (C-426/00 and C-16/01), in para. 44, stated: “...it is clear to me that the case-law concerning the relationship between Article 15 of Directive 79/112, the remaining provisions of the Directive, and Articles 28 and 30 EC is not notable for its high degree of consistency. In a number of judgments, alleged infringements of specific provisions of the Directive are assessed solely in the light of the relevant provisions of the Directive, without reference to primary Community law on the free movement of goods. In another part of the case-law, the Court takes as its basis both the Directive and Articles 28 and 30 EC. On no occasion does the Court state any clear criteria on the basis of which it makes such a distinction.”

¹⁷⁶ Note again that the lack of reference to consumer protection in Article 15/18 of the previous labelling Directives might partially explain the inconsistent use of primary and secondary law; see Section 2.4.1.

¹⁷⁷ See De la Mere, T., and Donnelly, C. (2011). Preliminary Rulings and EU Legal Integration: Evolution and Stasis. For more on the CJEU's approach to preliminary rulings on free movement provisions, see Tryfonidou, A. (2009). *Reverse Discrimination in EC Law*, pp. 119–126, which notes at pp. 120–121: “...the Court has accepted to give a reply to a question as to the interpretation of EC law, even though the facts of the main proceedings presented no cross-border element.” Note that the Court's expansive approach has been taken into consideration in analysing the inconsistent use of the labelling rules (versus the rules on free movement).

¹⁷⁸ See Chapter 1, Section 5.2.1. See also Craig, P., and De Búrca, G. (2011). *EU Law, Text, Cases and Materials*, pp. 448–449.

the description “pasta made from durum wheatmeal” to pasta products made **exclusively** from durum wheat.”

Taking literally, this decision suggests that according to labelling rules, Italy was not prohibited from setting standards for the amount of durum wheat in “pasta made from durum wheatmeal” (even for imported products). The name “pasta”, being a generic name,¹⁷⁹ could not be regulated,¹⁸⁰ but the descriptive name “pasta made from durum wheatmeal” (which in principle could as easily be “durum pasta”) could be regulated nationally. A teleological interpretation, including the principle of mutual recognition and case law in general, would alter the literal interpretation regarding imported products.¹⁸¹ However, Member States are not limited when it comes to regulating naming of domestically produced food.

Nevertheless, in the Smanor judgment, the CJEU limited Members States’ abilities to regulate food naming. In that case, the French company Smanor was prohibited from selling its deep-frozen yoghurt under the name of “yoghurt” because a French decree limited the use of the name to products that should be refrigerated. The situation was purely internal. In relation to Article 5 of the First Labelling Directive, defining the name under which a food product is sold, the Court stated, in para. 36 (emphasis highlighted):

“...Directive 79/112/EEC, and in particular Article 5 thereof, must be interpreted as precluding the application of national rules which refuse to allow imported or domestic products which have been deep-frozen to bear the name ‘yoghurt’ where those products, for the rest, comply with the requirements laid down by the national rules for fresh products to bear that name.”

The CJEU emphasised that deep-freezing is a method of preservation that is specifically mentioned in the labelling rules. For this reason, a Member State cannot prohibit the use of such a treatment for

¹⁷⁹ For more on the classification as generic, see Chapter 4.

¹⁸⁰ According to para. 25, the effect on imported products was the issue, and Community law did not require the legislature to repeal the law as far as pasta producers established on Italian territory were concerned. A completely similar statement was made in another judgment concerning the Italian pasta regulation; see the Zoni judgment.

¹⁸¹ MacMaoláin, C. (2007). *EU Food Law, Protecting Consumers and Health in a Common Market*, p. 35, footnote 66, seems to indicate the same.

certain products and therefore, Member States are limited in their ability to establish requirements for naming products that have undergone deep-freezing. Thus, France could not prohibit the use of the compound name “deep-frozen yoghurt”, even for domestic products because deep-frozen was an accepted treatment in EU law, provided that the characteristics of fresh yoghurt were fulfilled. For domestic produced yoghurt, the characteristics could follow from national law, but for imported products, Codex Alimentarius guidelines applied.¹⁸² In this sense, the judgment is unique.

The Commission has also provided interpretations of how it conceives the scope of the labelling rules. In its 1989 Communication, the Commission stated that (emphasis highlighted): “*In the absence of harmonized Community rules the Member States have the power to lay down, in respect of their own production, rules governing the manufacture, composition, packaging and presentation of foodstuffs.*”¹⁸³ This obviously implies that domestic production can be regulated, including how to name domestically produced food.

In its 1997 Green Paper, the Commission verified this (emphasis highlighted): “*The Community rules on food labeling, on contaminants and on food hygiene permit a Member State to adopt more strict rules than those adopted at Community level.*”¹⁸⁴

In conclusion, labelling rules restrict Member States’ ability to regulate naming of domestically produced food only to a limited extent.

4 Concluding remarks

Secondary community law regulates the use of specific food names such as the Eurofoods and food protected under the Quality Schemes. However, no general horizontal rules directly regulate how to

¹⁸² See Chapter 8, Section 4.3. Maduro, M. P. (1999). *We, The Court*, p. 73, notes that the Smanor judgment is a clear sign of the CJEU’s majoritarian approach.

¹⁸³ European Commission, “Communication on the free movement of foodstuffs within the Community”, 1989 OJ No. C 271/3, p. 3.

¹⁸⁴ Commission of the European Communities, “The general principles of food law in the European Union, Commission Green Paper”, Com (97) 176 Final, p. 19

name a food product, and labelling rules found in the Food Information Regulation only indirectly affect food naming.

Clearly, the labelling rules prevent Member States from restricting free movement of food by requiring, like primary law, mutual recognition of names. The obligations following from the principle of mutual recognition *de facto* appear unlimited, despite articulated exceptions. The principle even seems to take precedence over the general principle of fairness. Therefore, the Member States of production control all aspects of law related to food naming, despite the acknowledged negative effects on consumer protection.

According to EU law, products that cross borders have a wider possibility of escaping requirements in national legislation, but it is unclear what the effect of this is in export cases. Secondary law does not prevent Member States from regulating food naming for domestically produced goods, except where *lex specialis* EU rules apply (Eurofoods and Quality Schemes).

However, in some cases, due to the degree of details provided in the FIR, some limits are established in Member States' abilities to regulate names for domestically produced food. These limits are discussed in Chapters 4–8 and the Smanor judgment.

PART 5: CONCLUSION

“The Community was a new entrant in the area of food legislation in the 1960s, but the pages on which it began writing have never been empty.”¹

CHAPTER 10: CONCLUSION

1 Introduction

This thesis aims at structuring, clarifying and discussing EU law on food naming by answering the following research question:

How is food naming regulated in the EU and to what degree are Member States free to regulate the naming of food, by way of legislation and/or by enforcement of the prohibition against misleading names?

This topic has involved analyses of many different sets of rules found in primary and secondary EU law with different objectives and rationales. In some cases, the rules are complementary and apply simultaneously, while in other cases they are substitutes and simultaneous application is precluded.

2 How is food naming regulated?

Food naming is subject to many different EU rules aiming at different objectives and based on different rationales. Internal market objectives have *de jure* and *de facto* been the most important objectives. Focus has been on harmonising naming either through composition rules (Eurofoods) or through majoritarian approaches to fairness and consumer protection, while still, to some degree, accepting divergences and traditions (mostly when using geographical names).

¹ Lister, C. (1992). *Regulation of Food Products by the European Community*, p. 18.

Despite the existence of important vertical rules the EU law on food naming is primarily based on general and horizontal principles like fairness and mutual recognition. In order for the principles to be predictable and to be enforced in a uniform manner avoiding legal uncertainty, terms and benchmarks have been introduced. Very important are the different definitions of food names which can be grouped in the following way:

- Legal names
 - European legal names
 - Eurofoods, PGI/PDO etc.
 - National legal names
 - Composition standards and attached rules (defined in law or by administrative authorities such as guidelines on when a name is misleading)
 - Geographical names
- Customary names
 - National customary names
- Descriptive names
 - National descriptive names

The question of which names fall into the category of “European legal names” is relatively straightforward. Naming under these rules is also straightforward, because the general conflicts are not apparent here, such as whether a name is misleading and/or whether a name of an imported product can be prohibited. The rigid rules secure legal certainty, but it can be argued that the legal certainty primarily benefits businesses.

National legal, customary and descriptive names have more complex definitions and are, of course, based on national laws and customs and cover a variety of products. In the definitions of these names, the name is connected to the laws and customs in the Member State of sale, which is why naming is initially a matter of what the targeted consumers expect. In cross-border cases, however,

food businesses follow the production rules in the Member State of production² and name their products according to these rules. A similar situation exists for national customary and descriptive names. It follows from the principle of mutual recognition that the Member State of production controls production, and only names which can be legally used in this state can be used in other states. Furthermore, because naming and production are closely related the Member State of production will also control food naming to a large degree. In cross-border cases when the Member State of production regulates and controls food naming it removes focus from the targeted consumers. It is uncertain to what degree businesses can choose to follow the rules in the Member State of sale because the scope of Article 35 TFEU does not seem to exclude this (see Chapter 9, Section 3). In addition secondary law seems to positively allow naming in accordance with rules in the Member State of production by following the naming rules in the Member State of sale. This clearly leaves a great margin of discretion for businesses and it appears contradictory to general principles on control. The potential problem arising from this is a race-to-the-bottom and not in the classical sense as regulatory competition.

The definitions of the descriptive name/description as a *sufficiently clear* name and the customary name as an *accepted* name also creates more confusion than clarity in terms of how to name a food product (see Chapter 2 and 4).

In addition to these rather complex definitions (EU) “generic names” has been introduced as a term that can also be used to characterise names, thereby overlapping with the different types of names described above. For example, Eurofoods are all considered to be generic. Generic names are defined within the Quality Schemes as common European names, and in case law on PGI/PDOs the CJEU has provided criteria for determining whether a name is generic. These criteria have not been applied in relation to other types of names but it has often been concluded without further elaboration that a name is generic which limits the Member States’ ability to regulate the use of such names (see for example Chapter 7, Section 3 and Chapter 9, Section 2.1). For this reason, it is

² Note, of course, that in purely domestic situations, the Member State of sale and the Member State of production is the same.

decisive whether or not a name is considered to be generic; unfortunately, EU law on food naming does not provide any clear answers as to the exact scope of the term.

Naming clearly takes place mostly within national borders and is influenced by factors such as history, culture and language. This implies certain difficulties in cross-border situations due to the potential differences between the Member State of sale and the Member State of production. However, detailed rules on naming found in secondary law should provide some sort of harmonisation and common standards for naming. These standards can help food businesses dealing with practical difficulties in relation to naming. The difficulties arise partly because of the unclear definitions and partly because of the general and flexible obligation to provide fair information.

The horizontal labelling rules were recently updated with the adoption of the Food Information Regulation (FIR) which introduced a number of new rules that can initially guide businesses when naming food. When addressing these practical difficulties, however, it becomes apparent that the rules on food naming (apart from EU legal names, of course) are still very flexible and based on considerations about consumers' expectations (see especially Chapter 5). Since these rules differ, due to the differences between the EU Member States, as a result of tradition, history, and previous level of consumer protection, it can be argued that for example the harmonised rules on product identity do not solve any issues that could not already be solved under a general prohibition against misleading consumers. The ability for businesses to name products in accordance with either the rules in the Member State of production or potentially in the Member State of sale, only adds to this dilemma.

When businesses consider using geographical names this general prohibition against misleading consumers also applies. Further, geographical names can be protected under national law if consumers in the state attach a certain reputation to the geographical name albeit with respect for the traditions and fair practices of other Member States (see Chapter 6). With regard to practical language difficulties it is also a matter of considering, on a case-by-case basis, whether consumers will understand what is stated (see Chapter 7). Naming is closely attached to consumers'

expectations and understanding and to fairness. However, there is significant legal uncertainty following this issue.

The term “fair” is important to food naming both as part of a general obligation to provide “fair information” and in relation to geographical names where restrictions to free movement can be upheld if a geographical name used on an imported product has not been used in accordance with “fair” marketing practices (see Chapter 6). However, the term is poorly defined in law and it is connected to consumer expectations. Basing naming on consumers’ expectations and understanding is closely connected to considering whether deception has occurred; that is, whether the name is misleading with the uncertainty attached thereto. The prohibition against misleading names is initially based on an assessment of how the targeted consumer group experiences a certain practice or name. In cross-border situations this seems to contradict the ability to name food in accordance with the rules in the Member State of production, thereby adding to the confusion. The consumer is defined as a rational EU market participant although consumer protection is initially a matter of protecting a weaker party and although consumption of food seems to take place primarily within national borders (see Chapter 8).

Further, if naming is primarily a matter of avoiding consumer confusion it is not certain whether these case-by-case evaluations must be based on the benchmarks defined in EU law where the average consumer is the average European consumer. However, most likely these benchmarks must be applied even in purely domestic situations (see Chapters 8 and 9). Consequentially the flexibility of “fairness” is reduced. It is a paradox that the central prohibition against the use of misleading names is to be defined at the EU level despite the fact that the prohibition is used to control naming at Member State level. Primary law has in this regard been central.

In sum, EU law on food naming provides a number of legal names defined in EU law – Eurofoods and PGI/PDO – which either must be or can be used when naming food. Further, EU law on food naming defines a number of different types of names and rules that relate to food naming, but these do not seem to differ from what could fall within a general obligation to provide fair information; to avoid consumer confusion. EU law also defines criteria for evaluating whether consumers are

properly informed and whether the “average EU consumer” has been misled. These rules do not appear to provide many opportunities for Member States to take account of national historical, traditional, and cultural issues when enforcing the general EU naming rules even in purely internal situations. However, some room is left when Member States regulate naming by way of legislation.

3 To what degree are Member States free to regulate naming?

EU law on food naming as an internal market matter is limited by the framework established by primary law on free movement when a cross-border situation exists. Secondary and primary law clearly overlap because secondary law must also comply with the framework of the Treaties. For this reason many of the central principles and rules have initially been developed within primary law and in relation to cross-border situations.

The principle of mutual recognition prevents dual burdens being placed on food businesses by providing that they only need to comply with the rules in the Member State of production. There are exceptions to the principle. The exceptions developed in primary law (rule of reason and Article 36 TFEU) relate to matters such as consumer protection and fairness. When fairness concerns the protection of intellectual property Member States are able to restrict free movement to a larger degree and reject recognising the naming of imported products. The exceptions are parallel to the exceptions in secondary law; however, it is further specified here that the Member State of sale can prevent the use of a name where it differs greatly from the true nature of the product. The true nature of a food product carrying a certain name appears to be based on an average EU understanding of this name thereby confirming that national history and culture are not given a high priority. The rules on true nature appear parallel to the prohibition against misleading names.

Although the EU law on food naming found in secondary law provides rules on how to name a food product these rules do not prevent Member States from adopting and enforcing national legal names; that is national composition standards.³ Yet, secondary law limits how Member States can regulate

³ Recall that EU law limits how the prohibition against the use of misleading names can be enforced.

naming of food; for example, by setting boundaries for the use of EU legal names but also by prohibiting Member States from forbidding certain compound names and referring to EU accepted methods of treatment.

EU law on food naming provides many boundaries for how food must and can be named but it also leaves a great deal of discretion and room for food businesses to be creative when naming food. It appears that the only way Member States can regulate food naming – and take account of specific national food traditions – is through legislation, for instance in combination with information campaigns and so forth to enhance the knowledge about this legislation. However, food businesses can only be forced to comply with the rules in purely domestic situations; in relation to exports the CJEU seems to have kept open the possibility for businesses to complain about reverse discrimination. This is a paradox because it conflicts with the general rules on naming which state that the rules in the Member State of production apply in cross-border situations and this Member State also controls production (and naming).

The legal challenges in EU law on food naming are not that different from other general conflicts arising in the EU *sui generis* system. Harmonisation by general and flexible legal rules and principles does not initially lead to full unification and leaves room for Member States to be *united in diversity*. However, judge-made benchmarks and principles based on internal market rationales changes this with the consequence that EU law on food naming appears inconsistent and incoherent.

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Regulation (EEC) No 2081/1992 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code

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Regulation (EC) no 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

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Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption

Council Directive 74/409/EEC of 22 July 1974 on the harmonisation of the laws of the Member States relating to honey

Council Directive 75/726/EEC of 17 November 1975 on the approximation of the laws of the Member States concerning fruit juices and certain similar products

Council Directive 77/436/EEC of 27 June 1977 on the approximation of the laws of the Member States relating to coffee extracts and chicory extracts

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer

Council Directive 79/693/EEC of 24 July 1979 on the approximation of the laws of the Member States relating to fruit jams, jellies and marmalades and chestnut purée

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ABSTRACTS

ENGLISH ABSTRACT

This thesis investigates how food naming is regulated in the European Union with the aim to structure and explain the different rules regulating food naming and the interactions between the different rules, thereby clarifying *de lege lata*. Further, the thesis sets out to determine to what degree the Member States within the EU are free to regulate the naming of imported as well as domestically produced food, by way of legislation and/or by enforcement of the prohibition against misleading names. The interaction between the prohibition against misleading names and the obligation to mutually recognise names which have been legally used in other Member States are central in this thesis.

The first part of the thesis introduces the thesis subject and provides an explanation to the approaches taken. The empirical data used for identifying practical real-life cases concerning potentially misleading names is presented.

The second part of the thesis elaborates on the various EU rules in secondary law, their scope and objectives, including an examination of the rationales behind the rules based on application of economic theory. The borderlines between the rules are clarified.

Part three of the thesis contains legal dogmatic analyses and discussions of the different EU rules regulating food naming. The analyses of the rules are based on practical real-life cases in which food naming has shown to be a challenging task. The difficulties addressed relate to: precision of names (the task of finding a name precise enough to provide adequate information to consumers without narrowing the product's competitive field); product identity (difficulties in naming products that refer to specific ingredients and in which traditional ingredients have been replaced); the use of geographical names (which potentially mislead consumers) and language difficulties. In the last chapter of part three an analysis is provided of the concept of fairness and general prohibition

against misleading consumers in order to clarify the criteria for applying these in real-life cases. Despite the existence of rather detailed rules on naming and labelling of food, which provides clarity in relation to food naming, the application of these rules is dependent on consumers' expectation and potentially deception which must be assessed on a case-by-case basis, whereby the predictability of the rules is weakened.

Part four of the thesis focuses on the borderlines between primary and secondary EU law and on answering the second part of the research question. Primary EU law defines the fundamental borderlines for EU law on food names and limits how food legislation can and must be applied. First part of this analysis focuses on the naming of imported food products, while the second part focuses on the naming of domestically produced food. The relevant sources of law are analysed and discussions are provided. It is concluded that the principle of mutual recognition takes precedence over the prohibition against misleading names, which prevents Member States from regulating the naming of imported food, by way of legislation and by enforcement of the prohibition against misleading names. Secondary EU law also limits how Member States can regulate the naming of domestically produced food.

Part five provides the conclusion to the research question.

DANISH ABSTRACT

Denne afhandling undersøger, hvordan navngivning af fødevarer er reguleret i EU med det formål at strukturere og forklare de forskellige regler, der regulerer navngivning samt samspillet mellem disse for dermed klarlægge *de lege lata*. Endvidere er det en målsætning med afhandlingen at afklare, i hvilket omfang medlemsstaterne i EU kan regulere navngivning af importerede og indenlandsk producerede fødevarer enten gennem lovgivning og/eller gennem håndhævelsen af forbuddet mod vildledende navne. Samspillet mellem forbuddet mod vildledende navne og princippet om gensidig anerkendelse er centralt i denne afhandling.

Den første del af afhandlingen indeholder en introduktion til afhandlingens emne og en forklaring af de metodiske tilgange. De empiriske data, der anvendes til at identificere faktisk forekommende sager om oplevet vildledning, introduceres.

Den anden del af afhandlingen introducerer de forskellige EU-regler i sekundær ret, deres anvendelsesområde og formål, herunder en analyse baseret på anvendelse af økonomisk teori af rationalerne bag reglerne. Grænserne mellem reglerne afklares i denne del.

Tredje del af afhandlingen indeholder en juridisk dogmatisk analyse af de forskellige EU-regler, der regulerer navngivning af fødevarer. Analyserne tager udgangspunkt i de faktisk forekommende sager om oplevet vildledning for at adressere praktiske udfordringer ved fødevarenavngivning. Udfordringerne vedrører: præcision af navne (opgaven med at finde et navn som er præcist nok til at give tilstrækkelig information til forbrugerne uden at indsnævre området af potentielle konkurrerende produkter), produkt identitet (vanskeligheder med at navngive produkter, der henviser til specifikke ingredienser, og vanskeligheder hvor traditionelle ingredienser udskiftes), brug af geografiske navne (som potentielt vildleder forbrugerne) og sprogvanskeligheder. I det sidste kapitel i del tre analyseres begrebet fairness og det generelle forbud mod at vildlede forbrugerne med henblik på at præcisere kriterierne for at anvende disse. Selvom der findes detaljerede regler om navngivning og mærkning af fødevarer, der giver klagør hvordan fødevarer kan navngives, er anvendelsen af disse regler baseret på forbrugernes forventninger og potentiel vildledning, som skal vurderes fra sag til sag, hvorved forudsigeligheden svækkes.

Fjerde del af afhandlingen fokuserer på grænser mellem primær og sekundær EU-ret og på at besvare den anden del af problemformuleringen. Primær EU-ret definerer de grundlæggende grænser for lovgivningen om fødevarer og begrænser hvordan fødevarerlovgivning kan og skal anvendes. Første del af analysen fokuserer på navngivning af importerede fødevarer, mens anden del fokuserer på navngivning af indenlandsk produceret mad. Relevante retskilder analyseres og det diskuteres om der er sammenhæng i reguleringen. Det konkluderes, at princippet om gensidig anerkendelse har forrang for forbuddet mod vildledende navne, hvilket forhindrer medlemsstaterne i at regulere navngivningen af importerede fødevarer, hvad enten dette sker gennem lovgivning eller gennem håndhævelse af forbuddet mod vildledende navne. Sekundær ret sætter grænser for, hvordan medlemsstaterne kan regulere navngivning af indenlandsk produceret mad.

Femte del indeholder konklusionen på problemformuleringen.

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