
SOURING LA DOLCE VITA? HAS EUROPEAN UNION REGULATION RUINED ITALIAN CUISINE OR IS THERE HOPE YET FOR TRADITIONAL PRODUCTS?

I. INTRODUCTION	373
II. THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY	375
III. <i>CRIMINAL PROCEEDINGS AGAINST HERBERT GILLI</i>	376
IV. <i>3 GLOCKEN V. USL CENTRO-SUD</i>	380
V. <i>KINGDOM OF BELGIUM V. KINGDOM OF SPAIN</i>	387
VI. <i>GLOCKEN, GILLI, AND TRADITIONAL PRODUCT PROTECTION IN 2003</i>	394
VII. CONCLUSION	397

I. INTRODUCTION

Who was the one that made us enter the European Union? Who the hell had the bright idea of estranging us from our individualism, of alienating us from our egocentrism to fall into the arms of a homogenized continent? . . . That Europe prohibits smoking Gauloises cigarettes, frankly, doesn't concern me . . . but pizza no, don't touch my pizza, don't touch my genteel tondo of the palate, the savory delicacy created upon the most humble dough which, even, perhaps, has in Aeneas its first taster who, when escaping from Troy with his father on his shoulders and his little boy by the hand, had only a disk of dough to eat. . . .¹

When Milanese journalist Eduardo Raspelli wrote these words, he was reacting to rumors that the European Union ("EU") was about to ban, in the name of hygiene, the wood-burning ovens used to prepare traditional

¹ Edoardo Raspelli, *Le Ricette dei Burocrati di Bruxelles Europizza? No, Grazie [Recipes for "Europizza" From Brussels Bureaucrats? No, Thank You]*, LA STAMPA, Dec. 16, 1999, at 24, LEXIS, News Library, La Stampa File (author translation). The original Italian reads:

Ma chi ce l'ha fatto fare di entrare in Europa? Ma chi diavolo ha avuto la bella pensata di estraniarci dal nostro individualismo, di esimerci dal nostro egocentrismo per cadere nelle braccia di un continente omogeneizzato? . . . Che L'Europa vieti di fumare le Gauloises, francamente, mi tocca poco . . . ma la pizza no, non toccatemi la pizza, non toccatemi il tondo gentile della gola, la saporosa leccornia creata sull'umile pane che, addirittura, forse, ha in Enea il suo primo consumatore quando, scappando da Troia con il padre in spalla e il figlioletto per la mano, per mangiare ebbe solo il disco di pasta

Id.

Italian pizza.² In a few short words Raspelli encapsulates two essential points that must be grasped to understand the conflict between European regulation and Italian cuisine. First, Italians are very serious about their food; many consider it an art form. Few Americans would use a word like “tondo” when describing their food, comparing it to a circular relief sculpture of fine marble.³ Second, Italian food is rich in history and, for many Italians, part of their cultural identity. Pizza is not merely fast food; it is a meal first consumed by Aeneas, traditional founder of Rome and the modern world.⁴ This is not to suggest that all modern Italians consider traditional pizza their birthright as the sons and daughters of Aeneas; they may not go so far. But then again, as Raspelli’s article suggests, they might. In short, pizza, pasta, wine, cheese, vinegar, and many other traditional products are not merely things eaten by Italians (and others too); they are part of what it means to be Italian.

With so much at stake, it is easy to understand why the debate is often heated. Raspelli acknowledged that his worst fear, the death of the brick oven pizza, would not come to fruition after a spokesman for the European Commission declared: “[T]he European Commission has no intention of banning or limiting the use of wood-burning ovens and therefore the use of pizza ovens. In short, pizza is saved.”⁵

Though Italian pizza and the brick oven were spared, Raspelli had good reason to fear. Since the 1970s, the European Community, in its efforts to abolish all obstacles to the free movement of goods within the Community, has slowly chipped away at Italy’s right to protect traditional foods through national legislation. Dry pasta could only be made from durum wheat until the European Court of Justice (“ECJ”) decided pasta could also be made from the poorer quality “common wheat.”⁶ Vinegar used to be made only from wine grapes until the ECJ decided apples would work just as well.⁷ The certainty Italians enjoyed that their pasta would always be *al dente* vanished as dry pasta from common wheat (which cooks to the consistency of typical glue) entered the Italian market. No longer would all vinegar have the deep, rich color of red wine; rather, it would now also be the pale color of green apples and smell just as sour. Italian cuisine, even Italian culture, has been under attack.

² *Id.*

³ See 18 OXFORD ENGLISH DICTIONARY 217 (2nd ed. 1989) (entry “tondo”).

⁴ See Virgil, THE AENEID, Book I, Lines 1-7 (H. Rushton Fairclough trans., Harvard University Press 1998) (Aeneas was “the man who first from the coasts of Troy, exiled by fate, came to Italy . . . and much enduring in war . . . till he should build a city . . . whence came the Latin race, the lords of Alba, and the walls of lofty Rome.”).

⁵ Stefano Mancini, *Il forno a legna da pizza non sparirà* [Wood-Burning Pizza Ovens Will Not Disappear], LA STAMPA, Dec. 16, 1999, at 14. See also Raspelli, *supra* note 1.

⁶ Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. 4233, 4282, ¶ 27.

⁷ Case 788/79, Criminal Proceedings Against Gilli, 1980 E.C.R. 2071, 2079, ¶ 12.

This note will examine several cases decided by the ECJ, alongside various European regulations and Italian laws, in an effort to determine the current state of the battle to protect traditional foods on the one side, and to create a totally free market on the other side. The analysis will focus on the arguments, both commercial and cultural, made by each side. The goal of this note is not to argue against a free market, but to argue that preservation of culture and of the quality and diversity of foods in the European Community is desirable and is dependent on the protection of culinary tradition.⁸

Before beginning, however, the “protectionism” argument must be mentioned. Critics of laws protecting traditional products often claim that the chief motivation behind these laws is to give national products an unfair advantage in the marketplace. The only reason Italy wants to protect names like “Chianti,” critics say, is to prevent foreign competition and thereby pile more money into Italian coffers.⁹ The response to this argument, in the words of the EU Agriculture Commissioner, is: “This is not about protectionism . . . [i]t is about fairness.”¹⁰ In contemporary society, we protect products all the time because we believe, *inter alia*, that it is unfair for someone to take advantage of a product’s good name—and the marketing dollars that helped create it—by making an imitation product. Should Chianti be denied the protection afforded Pepsi simply because Chianti has a longer history? Answering this question, and others touching the protectionism debate, could easily fill the body of this note. Rather than focus on the protectionism arguments, this note will describe the evolving legal status of traditional products in the European system and how it relates to Italian foods, to their traditions, and to all of us as consumers.

II. THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Like most foundational documents, the Treaty Establishing the European Community (“TEC”) is very broad in scope. Yet perhaps the principal and most sweeping goal of the TEC can be distilled into four words:

⁸ See Hans-Christoph von Heydebrand u.d. Lasa, *Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got It Wrong?*, 16 EUR. L. REV. 391, 413 (1991) (“[D]iverse food standards are also a mirror of the diverse cultures, traditions, values and consumer habits in Europe. A legal premise which tends to isolate itself from those factors can hardly be regarded as good law.”).

⁹ Daniel Schwammenthal & William Echikson, *Europe Asserts Right to Names of 41 Products: On Eve of Crucial Talks, Move Complicates Efforts to Liberalize World Trade* WALL ST. J., Aug. 29, 2003, at A6, available at 2003 WL-WSJ 3978283.

¹⁰ *Id.* See also Damian Chalmers, *Repackaging the Internal Market – The Ramifications of the Keck Judgment*, 19 EUR. L. REV. 385, 393-94 (1994) (arguing that the rationale behind protectionism arguments is inconsistent).

free movement of goods.¹¹ The first activity of the Community listed in article 3 of the TEC is “the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect.”¹² This provision is followed closely by the goal of establishing “an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods. . . .”¹³ These goals are meant to benefit all the Member States. The danger, though, is possible conflicts with other goals enumerated in the same article. In particular the Community is to “contribute to . . . the flowering of the cultures of the Member States” and make “a contribution to the strengthening of consumer protection.”¹⁴ As we will see, protection of the consumer and of culture is sometimes inconsistent with the abolition of all obstacles to free trade.

III. CRIMINAL PROCEEDINGS AGAINST HERBERT GILLI

The earliest case to come before the ECJ to settle a conflict between the European Community and Italian food laws was *Criminal Proceedings against Herbert Gilli* (“*Gilli*”)¹⁵. The Italian law in question¹⁶ prohibited the selling or marketing of vinegar derived from the acetic fermentation of anything but wine. The Italian government brought criminal charges against Herbert Gilli and his associate Paul Andres for marketing and holding with intent to sell German vinegar made from apples.

The accused men argued the Italian law was a measure equivalent to a quantitative restriction on imports prohibited by article 28 TEC (ex article 30).¹⁷ By allowing only vinegar made from wine, argued the accused, the Italian government was impermissibly restricting the importation and sale of other legally produced foreign vinegars.

Traditional Italian vinegar, or *aceto*, is world renowned for its quality.¹⁸ In particular, *aceto balsamico* from Modena has a tradition that stretches back hundreds of years. Though real *aceto balsamico* is made only from

¹¹ GEORGE A. BERMAN ET AL., EUROPEAN UNION LAW 452 (2d ed. 2002). See also *Gilli*, 1980 E.C.R. at 2078, ¶ 9.

¹² The Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33 (2002), art. 3(a) [hereinafter EC Treaty].

¹³ *Id.* at art. 3(c).

¹⁴ *Id.* at arts. 3(q), 3(t).

¹⁵ *Gilli*, 1980 E.C.R. at 2071.

¹⁶ Art. 51 of Decree No. 162 of the President of the Italian Republic of 12 Feb. 1965 (Gazz. Uff. No. 73 of 22 Mar. 1965).

¹⁷ *Gilli*, 1980 E.C.R. at 2077, ¶ 3; EC Treaty, *supra* note 12, art. 28 (“Quantitative restrictions on imports and all measures having equivalent effect, shall be prohibited between the Member States”).

¹⁸ Giles MacDonogh, *Bologna – Sauce of All Good Eating*, WEEKEND FIN. TIMES, January 8/9, 2000 at XII.

cooked must and distilled into a sweet, very expensive, liquid,¹⁹ Modena also has a tradition of producing fine wine vinegars. The Italian government *could* have argued that their law was intended to protect and promote their traditional product and thus their “flowering culture.”

Alas, the Italian government did not advance this argument; rather, they simply claimed the law was justified to protect public health and to defend the consumer.²⁰ Their argument was grounded in article 30 TEC (ex article 36), which allows quantitative restrictions to protect certain interests, public health and public policy among them.²¹

The ECJ dismissed these arguments, noting simply that there is no harmful substance in apple vinegar and a sufficiently clear label could protect the consumer from being tricked into purchasing apple vinegar in the place of wine vinegar.²² Having found the Italian law unjustifiable under article 30 (ex article 36), the ECJ held the law was an impermissible obstacle to trade under article 28 (ex article 30).²³

The ECJ specifically noted the protectionism argument, saying that the effect of the law was to favor domestic products by prohibiting products from other Member States that do not measure up.²⁴ In fact, the Italian government later conceded that the sole purpose of a law requiring vinegar to be made from wine was to diminish the over-full national wine stocks.²⁵ It may be for this reason the Italian government did not raise more compelling arguments to support their law—particularly the argument that the law was needed to protect traditional vinegar. The health protection argument was clearly unfounded since apple vinegar, while not considered especially tasty, is certainly not poison.²⁶ More importantly,

¹⁹ *Id.*

²⁰ *Gilli*, 1980 E.C.R. at 2078, ¶ 6.

²¹ EC Treaty, *supra* note 12, art. 30. This article provides:

[T]he provisions of Article 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

²² *Gilli*, 1980 E.C.R. at 2078, ¶ 7.

²³ *Id.* at 2079, ¶ 11.

²⁴ *Id.* at 2079, ¶ 10.

²⁵ Derrick Wyatt, *Quantitative Restrictions and Measures Having Equivalent Effect*, 6 EUR. L. REV. 185, 190 (1981).

²⁶ See Stephen Weatherhill, *Consumer Safety Legislation in the United Kingdom and Article 30 EEC*, 13 EUR. L. REV. 87, 95 (1988) (“[N]o genuine threat to public health from [vinegar not derived from wine] could be shown to justify restriction on that ground.”). See also Peter Oliver, *Measures of Equivalent Effect: A Reappraisal*, 19 COMMON MKT. L. REV. 217, 228 (1982).

the Italian government's consumer protection argument was not well developed and probably should have been buttressed by stronger arguments. Had the Italians tried a bit harder, they might have avoided losing the case on the strength of the "labeling argument" alone. This argument—that consumers are protected as long as there is a clear label on the product describing its ingredients—would come back to haunt defenders of traditional Italian cuisine.

The Italian government should have developed the consumer protection argument further by claiming the Italian for vinegar, *aceto*, actually means wine vinegar. An older edition of a well-known and well-used Italian dictionary called *lo Zingarelli* (roughly comparable to *Webster's*) actually notes in the definition of *aceto* that "the vinegar most suitable for culinary uses is wine vinegar, which besides acetic acid contains malic acid, . . . traces of alcohol, coloring particles and fragrances."²⁷ Italians would have come to expect, if wine vinegar had reached the level of defining the word, that the vinegar in their supermarkets was made from wine.²⁸ Placing apple vinegar on the shelf, at a cost significantly lower than wine vinegar, will only lead to confusion among a population that expects all cooking vinegar to be wine vinegar. Moreover, should consumers be deceived, producers of the higher quality vinegar may be forced to lower their quality in an effort to lower their prices. The product suffers, food suffers, even the word is degraded.²⁹ Add to all this the effect on the cultural heritage and reputation of the Modena vinegar industry and it becomes clear that a simple label on the vinegar cannot be the answer.

In a later case concerning the name "vinegar," *Commission v. Italy*,³⁰ the Italian government tried this line of argumentation, claiming: "[restricting the term 'vinegar' to wine-vinegars] is necessary to protect consumers who in Italy 'by time-honoured tradition' treat all 'vinegars' as wine-vinegar owing to the semantic value of the word 'aceto' (vinegar)."³¹ The ECJ rejected this argument, saying that the term "vinegar," as used in the European Community *as a whole*, was not limited to wine

²⁷ VOCABOLARIO DELLA LINGUA ITALIANA 15 (Nicola Zingarelli ed., 8th ed. 1959) ("l'aceto più adatto per gli usi di cucina è quello di vino, che oltre l'acido acetico contiene acido malico . . . tracce di alcool, materia colorante e profumi") (author translation).

²⁸ See von Heydebrand u.d. Lasa, *supra* note 8, at 412.

²⁹ *Contra* Onno Brouwer, *Free Movement of Foodstuffs and Quality Requirements: Has the Commission Got it Wrong?* 25 COMMON MKT. L. REV., 237, 251 (1988); Charles Lister, *The Naming of Foods: The European Community's Rules for Non-brand Food Product Names*, 18 EUR. L. REV. 179, 197 (1993) (dismissing as "ill-defined and speculative" claims that the quality of foods will diminish as a result of the Court's rulings).

³⁰ Case 193/80, *Commission v. Italy*, 1981 E.C.R. 3019, 3035-36, ¶¶ 24-28.

³¹ *Id.* at 3035, ¶ 25.

vinegar alone.³² The flaw in the Court's conclusion is that, although Europeans generally may have a particular idea of what constitutes vinegar, Italians may have a different view.³³ Commentators have observed that by taking a general view of what vinegar means, the ECJ sacrificed the traditions of a minority (Italians) for a majority that does not share those traditions (Europeans).³⁴

Based on the ECJ's reasoning, the European Commission issued a Communication stating its understanding of articles 28 and 30 TEC (ex articles 30 and 36).³⁵ The Commission said the ECJ's ruling in *Gilli* required any product lawfully produced and marketed in one Member State to be admitted to the market of any other Member State.³⁶ This principle—the “principle of mutual recognition”³⁷—allowed apple vinegar to be sold alongside wine vinegar, ending Italian consumers' certainty that all cooking vinegar would be made from wine. But the worst was yet to come; the battle began in earnest when this free market principle was applied to that most original and cherished Italian invention, pasta.

³² *Id.* at 3035-36, ¶ 26.

³³ See *Lister*, *supra* note 29, at 195 (“Names which do not conform to consumer expectations send misleading signals regarding the product to which they are affixed.”).

³⁴ Miguel Poiarés Maduro, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 72-73 (1998). See also von Heydebrand u.d. Lasa, *supra* note 8, at 413 (“The attitude of the Court of Justice towards food standards makes it de facto impossible for the people of a Member State to enforce requirements about the quality, composition, designation and presentation of their food when their views are not shared by the people in the Member State of export.”).

³⁵ 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 O.J. (C 256) 2.

³⁶ See *Wyatt*, *supra* note 25, at 192.

³⁷ This principle, according to which a product legally produced and sold in one Member State cannot be excluded from another Member State provided the product is properly labeled and poses no risk to consumer health, was first established in Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649. See von Heydebrand u.d. Lasa, *supra* note 8, at 407 (arguing that “by accepting the principle of mutual recognition the choice of the European consumer will, in the long run, not be wider but narrower.”). See also Tim Dickson, *Legal Ruling On Pasta Gives EC Food For Thought*, *FIN. TIMES*, July 20, 1988, at § 1 p. 2; Nicholas Forwood & Mark Clough, *The Single European Act and Free Movement: Legal Implications of the Provisions for the Completion of the Internal Market*, 11 *EUR. L. REV.*, 383, 385-86 (1986) (discussing the principle of mutual recognition and referring to it also as “the principle of mutual acceptance of goods”).

IV. 3 GLOCKEN v. USL CENTRO-SUD

Six years after *Gilli*, another Italian food law came under ECJ scrutiny in *3 Glocken v. USL Centro-Sud* (“*Glocken*”).³⁸ The law in question prohibited the sale in Italy of dry pasta (as opposed to fresh) made from anything other than 100% durum wheat.³⁹ *3 Glocken*, a German pasta manufacturer, and an Italian retailer brought suit against the Italian government for imposing a fine on *3 Glocken* and the retailer for exporting to Italy and selling pasta made from a mixture of durum wheat and common wheat.

The *Oxford English Dictionary* defines durum wheat as “characterized by hard seeds rich in gluten and yielding a flour used in the manufacture of spaghetti, etc.”⁴⁰ Unlike common wheat, which is used to make countless products, durum wheat has essentially only one use: pasta.⁴¹ Though common wheat can also be used in pasta, to eat dry pasta made from common wheat is to understand the impetus for the law against it. Pasta made with common wheat does not hold its form well in boiling water and when removed from the water takes on a consistency Italians sometimes refer to as *colla*—glue.⁴² One of the Italian government’s principal justifications for the law was, therefore, to protect the consumer by guaranteeing the quality of pasta.⁴³

Italy also argued it was essential to require only durum wheat in pasta to support producers of durum wheat who have no other market outlet for their product besides pasta.⁴⁴ This argument was made as forcefully as possible. Italy claimed the loss of a market outlet would cause durum wheat growers to abandon their land in central Italy because their land does not allow for other kinds of crops. This exodus from the land, Italy argued, would be followed by emigration and grave social and environmental consequences.⁴⁵ In short, pasta not only feeds the country, it supports an entire cultural and social infrastructure.

Unlike in *Gilli*, in *Glocken* the Italian government used every possible argument it could muster. In fact, Italy was persuasive enough to convince the European Advocate General that the Italian law was compliant

³⁸ *Glocken*, 1988 E.C.R. at 4233.

³⁹ Article 29 of Law No. 580 of 4 July 1967 (Gazz. Uff. No. 189 of 29 July 1967).

⁴⁰ 4 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 1135 (entry “durum”).

⁴¹ See Opinion of Advocate General Mancini in Case 407/85, *3 Glocken GmbH v. USL Centro-Sud*, 1988 E.C.R. at 4253, § 4, ¶ 7 [hereinafter Mancini Opinion] (noting that “durum wheat cannot be used for animal feedingstuffs and, apart from a very small amount used for couscous, it is only used for the pasta industry”).

⁴² See *id.* at 4249, § 3, ¶ 3 (noting “the varieties of durum wheat known at present enable . . . [p]asta to be produced whose technical and organoleptic properties are recognized as superior. . .”).

⁴³ *Glocken*, 1988 E.C.R. at 4277, ¶ 5.

⁴⁴ *Id.*

⁴⁵ *Id.* at 4282, ¶ 24.

with the TEC.⁴⁶ In a carefully reasoned opinion, Advocate General Mancini urged the ECJ to uphold the Italian law for the protection of the consumer. Yet despite Italy's arguments and Mancini's opinion, the ECJ made headlines by taking the unusual step of deciding against the advice of the Advocate General and invalidating the law.⁴⁷

The ECJ began its analysis by first noting that the Italian law was clearly a restriction article 28 TEC (ex article 30) was designed to prohibit and, thus, the only question was whether the law could be justified under one of the exceptions contained in article 30 (ex article 36).⁴⁸ The Court then proceeded to consider and reject seriatim all of Italy's arguments.

The first argument was the most easily refuted. Italy claimed the law was justified as a protection of public health because the large quantities of chemical additives and colorants used in common wheat pasta to make it appear like durum pasta can have harmful effects on human health.⁴⁹ After observing that Italy could provide no findings to support this conclusion, the ECJ went further (taking a page from the U.S. Supreme Court's strict scrutiny jurisprudence) to say a general prohibition on all pasta containing any amount of common wheat was too broad (i.e., not narrowly tailored) and could not be justified under article 30 TEC (ex article 36).⁵⁰

Next, the ECJ considered the Italian government's arguments that the law was required as a means to protect consumers from inferior products. Having been through the *Gilli* case, Italy was prepared to meet the inevitable "labeling argument"—the ECJ's assertion that all consumers can be protected from inferior products by fine print telling them what they are buying. Italy's response was that people who eat in restaurants will not be presented with a label and the only way to protect them is to require that pasta contain only durum wheat.⁵¹ The ECJ essentially dismissed this argument without comment, saying "it is possible to establish a system for informing the consumer of the nature of the pasta which is offered him,"⁵² but failing to indicate what such a system might be.⁵³

⁴⁶ It should be noted that the Advocate General himself was Italian and thus may have been partly swayed by a love of durum pasta and a distaste for "colla." Mancini Opinion 1988 E.C.R. 4233. See also René Barents, 26 *COMMON MKT. L. REV.* 103, 104 (1989).

⁴⁷ See Dickson, *supra* note 37 ("[T]he major significance of [the *Glocken*] judgment is that it overturned [Advocate General Mancini's] opinion—a rare, if far from unprecedented action by the Court. . . .").

⁴⁸ *Glocken*, 1988 E.C.R. at 4279, ¶ 11.

⁴⁹ *Id.* at 4279, ¶ 12.

⁵⁰ *Id.* at 4279, ¶¶ 13-14.

⁵¹ *Id.* at 4280, ¶ 18.

⁵² *Id.* See also Brouwer, *supra* note 29, at 260-62 (arguing that the weakness of the "restaurant argument" is that consumers can be given information with menus or special labeling boards).

The ECJ then went on to reject Italy's argument that "pasta" means "pasta made from durum wheat." Italy's own prior actions undermined this argument since the Italian legislature allowed pasta made from common wheat to be used as fresh pasta in Italy and to be exported as dry pasta.⁵⁴

Italy then argued that the consumer could not be protected by labels alone if all pasta were not made from durum wheat because there is no way to check the accuracy of the labels to ensure the consumer is getting the amount of durum wheat claimed on the package. The ECJ rejected this as well, saying the Italian government could restrict the use of the term "pasta made from durum wheat meal" to that pasta which is made exclusively from durum wheat.⁵⁵ Name and labeling restrictions are permitted, importation restrictions are not.

Finally came Italy's argument that the very life, culture, and social structure of the Italian durum wheat growers depended on this law. The ECJ, summarily dismissing this argument, said only that "it is for the Community and not for the Member State to seek a solution to the problem described above."⁵⁶ The Court also noted that the Italian government was still at liberty to require pasta made within its borders to contain only durum wheat (presumably giving their local producers some protection), but Italy would be required to accept lesser pasta from abroad.

Arguably, this decision was wrongly decided. Several arguments, carefully and persuasively developed by Advocate General Mancini, were not responded to by the ECJ in any satisfactory way. The ECJ essentially sacrificed a quality traditional product, foundational to Italian cuisine, at the altar of the open market.

The first misstep taken by the ECJ was to assume a simple label describing the contents of the pasta could suffice to protect the consumer.⁵⁷ As the Advocate General observed, the Council Directive governing the labeling of foodstuffs⁵⁸ did not require specific labeling of ingredients when the product (in this case pasta) consists only of a single ingredient (in this case wheat).⁵⁹ Thus, the only required label would be the name of the product, for example, "spaghetti." But since the whole

⁵³ By this reasoning, the ECJ reaffirmed its so-called "principle of mutual recognition." See Dickson, *supra* note 37. See also Wouter P.J. Wills, *The Search for the Rule in Article 30 EEC: Much Ado About Nothing?*, 18 EUR. L. REV. 475, 484 (1993) (noting that the Court's holding that recipe regulations violate article 28 (ex article 30), while labeling requirements do not, became a rule which the Court regularly applied after this case).

⁵⁴ *Glocken*, 1988 E.C.R. at 4281, ¶ 20.

⁵⁵ *Id.* at 4281, ¶ 22.

⁵⁶ *Id.* at 4282, ¶ 26.

⁵⁷ *Id.* at 4280-81, ¶¶ 16-22.

⁵⁸ Council Directive 79/112, 1979 O.J. (L 33) 1.

⁵⁹ See Mancini Opinion 1988 E.C.R. at 4260, § 8, ¶ 3.

issue is what kind of wheat, common or durum, is being used in the spaghetti, the consumer would be misled by a label which simply says “spaghetti.”⁶⁰

Mancini argued that the most appropriate solution would have been to treat pasta like another famous traditional product, French Champagne.⁶¹ Like the term “spaghetti,” which currently signifies “pasta” in many languages,⁶² the term *méthode champenoise* (the champagne method) came to be used by almost every producer of sparkling wine in Europe as shorthand for “sparkling wine.”⁶³ The problem this created for sparkling wines actually produced in the Champagne region of France was twofold. First, consumers wanting to buy sparkling wine actually made in Champagne were faced with countless wines made in other places bearing labels claiming to use the champagne method. The opportunity for consumer confusion was great. Second, the French producers of real champagne were losing market share unfairly to other producers of sparkling wine who were wrongfully describing their wines as having been produced using the champagne method—wrongfully, that is, because the other producers were benefiting from the fame and reputation of champagne by putting *méthode champenoise* on their bottles.

The European Community, through Council Regulation 3309/85,⁶⁴ protected Champagne and its consumers by limiting the term *méthode champenoise* to those wines actually produced in the region of Champagne. Thus, even though *méthode champenoise* is the name of a process used to create wine and is not a designation of origin, the term is restricted to wines made in Champagne to safeguard consumers from deception and to protect the wine producers of the Champagne region of France.⁶⁵

This being so, why could not the term “spaghetti,” as shorthand for “dry pasta,” also be restricted to those products made wholly from durum wheat? Such a restriction would protect the consumer from being tricked into buying so-called “spaghetti” made from common wheat and would

⁶⁰ See von Heydebrand u.d. Lasa, *supra* note 8, at 402 (arguing that “[c]onsumers have . . . certain expectations as to the quality of a foodstuff and they want the government to ensure their expectations are not frustrated.” For example, consumers do not want just any kind of “meat” (eyes, lips, etc.) in hamburger.).

⁶¹ Mancini Opinion 1988 E.C.R. at 4260, § 8, ¶ 5 to § 9.

⁶² *Id.* at 4262, § 9, ¶ 6.

⁶³ The process described as *méthode champenoise* is a traditional method of making sparkling wine that is a complex ten to twelve step procedure sometimes taking as long as several years. The “champagne method” governs the type of grapes used, the way they are pressed, the blending of the grapes, and the fermentation process. See KEVIN ZRALY, *WINDOWS ON THE WORLD COMPLETE WINE COURSE* 2003 EDITION 151-52 (2002), for an excellent summary of the specifics of the *méthode champenoise*.

⁶⁴ Council Regulation 3309/85, 1985 O.J. (L 320) 9.

⁶⁵ Mancini Opinion 1988 E.C.R. at 4261, § 9, ¶ 3.

ensure a market outlet for durum wheat, thereby protecting the Italian producers.

Opponents might respond that *méthode champenoise* references a place, while “spaghetti” is a general term that can refer to a product made anywhere, with various kinds of wheat. This response is without merit, though, for the reason mentioned above. The regulation that protects champagne explicitly states that *méthode champenoise* is not a designation of origin, but only a term which refers to the procedure used in making a particular sparkling wine.⁶⁶ If the European Community is willing to protect a certain way of making wine to protect its producers and consumers, there is no reason similar protection should not be afforded the term “spaghetti” when its producers and consumers are equally threatened.

Still, opponents might further respond that “spaghetti” has entered into common usage in many languages beyond Italian and therefore is no longer simply an Italian word referring to an Italian food produced according to certain criteria.⁶⁷ Instead, it could be contended, “spaghetti” is a general term referring to pasta products produced in many different ways the world over. This response is refuted by recognizing that “spaghetti” has entered the modern parlance of many countries because it refers to something, like champagne, which cannot be translated with an English, a German, or a Spanish word. That “spaghetti” has been adopted by people beyond Italy does not mean the word itself ceases to describe something specific, namely pasta made from durum wheat.

The ECJ sought to avoid this result with its assertion that Italy could restrict the term “pasta made from durum wheat” to pasta which contains only 100% durum wheat.⁶⁸ This protection, however, falls short. Italian pasta would suffer abroad particularly when, as was mentioned above, the only label the European Community would require would be “spaghetti.” Moreover, the Italian consumer will not be protected when he or she sees two packages with differing prices marked “spaghetti.” Even if one package explains the pasta is made from durum wheat, while the other says nothing, the consumer is unlikely to read the fine print on the quality durum wheat pasta and would simply choose the less expensive common wheat pasta. Even if some consumers will carefully read each package, it is clear that many will not and consumers will be deceived.

In short, the ECJ’s conclusion that pasta consumers and producers can be protected by careful labeling is not only inconsistent with Community policy with respect to other products, such as champagne, it is contrary to

⁶⁶ See *id.* (citing Council Regulation 3309/85, 1985 O.J. (L 320) 9).

⁶⁷ *Id.* at 4262, § 9, ¶ 6.

⁶⁸ Case 407/85, 3 *Glocken GmbH v. USL Centro-Sud*, 1988 E.C.R. 4233, 4281, ¶ 22.

what can be expected to happen in practice.⁶⁹ And both consumers and producers must suffer the consequences.

A second mistake made by the ECJ, related to the labeling issue, was to attach great significance to the fact that “pasta” does not mean “pasta made from durum wheat.”⁷⁰ While it may be true that the Italian legislature used the term “pasta” to refer to some products made with egg or fresh pasta made with some common wheat,⁷¹ this fact obscures the larger issue. The purpose of a law requiring all dry pasta be made from durum wheat is to protect the quality of pasta generally, particularly for those who enjoy “spaghetti” without knowing the technical definition of “pasta.” Advocate General Mancini observed that in the world outside of Italy the terms “spaghetti” and possibly “macaroni” do not, to most people, specify a particular form of pasta, but rather have come to signify pasta generally.⁷² Thus, to strike down a law protecting the purity of pasta because it *can* be made of something besides durum wheat leaves consumer protection by the wayside. Consumers accustomed to buying “spaghetti” will not bother with a label which describes the pasta therein; they will simply be disappointed when they discover the quality of their “spaghetti” is not what it was. Consumers will thus be duped into purchasing a poorer product and the business of durum wheat growers will suffer for it.

While one might think those consumers who are less discerning when it comes to pasta are most likely to mistakenly purchase an inferior product, it is actually in the countries in which pasta has always been made of durum wheat, Italy, France, and Greece, where the problem could be most acute.⁷³ Pasta made in Belgium or Germany with common wheat may be imported into Italy, France, and Greece with the name “spaghetti” emblazoned on the package and sold alongside durum wheat products with the same label. Thus, whether pasta is theoretically defined as made from durum wheat or common wheat becomes irrelevant; in practice the consumer will be faced with similar looking products and will likely choose the less expensive version because it is unclear that the difference in price stems from lower quality—after all, each is called “spaghetti.” Italian consumers in particular would be the most easily tricked,

⁶⁹ See von Heydebrand u.d. Lasa, *supra* note 8, at 399 n.29, 408.

⁷⁰ *Glocken*, 1988 E.C.R. at 4281, ¶ 20.

⁷¹ *Id.*

⁷² Mancini Opinion 1988 E.C.R. at 4268, § 13, ¶ 10.

⁷³ See *id.* at 4270, § 15, ¶ 2 (observing, with respect to Italian consumers: “Once again, the difficulty lies in the use of the designation “spaghetti”. For those who have purchased and consumed for years (or, in the mezzogiorno, forever) only durum wheat spaghetti, the term “pasta di grano tenero” [common wheat pasta] cannot be considered sufficiently informative where there appears above them, in very large letters, the word spaghetti.”). See von Heydebrand u.d. Lasa, *supra* note 8, at 412 (“[T]he preference of the Court for labeling is not sufficiently responsive to the local needs of the people of the importing Member State to define and classify the food they eat according to their conceptions, expectations and habits.”).

having never been presented with dry spaghetti made from anything other than durum wheat.

Finally, there is the issue of the social consequences that could result from this decision. Mancini observed that the land used by certain Italian producers of durum wheat is such that it can only support durum wheat; no other crop will grow there.⁷⁴ Further, if these producers lose market share, they will accumulate surpluses which will have to be purchased by the Community.⁷⁵ Despite these problems, Mancini conceded that the Italian purity law cannot be justified under article 36 TEC (ex article 30) solely because it helps support a particular group of farmers.⁷⁶ The ECJ confirmed as much in its opinion, saying the Member States cannot unilaterally support their farmers by restricting intra-Community trade.⁷⁷

But even accepting that the Italian law cannot be justified purely as protection for durum wheat producers, the ECJ decision is still questionable. The law was struck down in the name of liberalizing trade in the pasta industry. Yet, as has been shown above, labeling requirements and public perception put durum wheat producers at a great disadvantage in a so-called liberalized market. With common wheat and durum wheat pasta both called "spaghetti," it is the more expensive durum wheat that will suffer as a result of any confusion. Like a sparkling wine that wrongly benefits from the renown of Champagne by claiming to be a *méthode champenoise* wine, less expensive common wheat spaghetti benefits from the name higher quality durum wheat spaghetti has established.⁷⁸ Thus, in the name of liberal trade, the ECJ put durum wheat producers in a disadvantaged position vis-à-vis their competition.⁷⁹ For "free trade," the traditional, quality product is the one which suffers.

⁷⁴ Mancini Opinion, 1988 E.C.R. at 4253, § 4, ¶ 7.

⁷⁵ *Id.* at 4266, § 12, ¶ 6.

⁷⁶ *Id.* at 4266, § 12, ¶ 7.

⁷⁷ Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. 4233, 4282, ¶ 26.

⁷⁸ See von Heydebrand u.d. Lasa, *supra* note 8, at 409 ("[B]ecause of the association with a better quality [product] the consumer may knowingly show a higher preference for the [lesser quality] product than he would do otherwise.").

⁷⁹ This effect, known as "reverse discrimination," is discussed by Maduro:

[W]hen a non-discriminatory national measure is struck down by the Court because it is capable of restricting free trade, it is normally so only with respect to imported products, thus creating discrimination against national products . . . Italian pasta will still have to be made from durum wheat though Italian consumers can buy pasta not made from durum wheat imported into Italy from other Member States . . .

Maduro, *supra* note 34, at 154 n.7. See Brouwer, *supra* note 29, at 254-55; von Heydebrand u.d. Lasa, *supra* note 8, at 409, 411. *But cf.* Lister, *supra* note 29, at 197 (arguing that consumers are still likely to prefer the higher quality product).

V. KINGDOM OF BELGIUM *v.* KINGDOM OF SPAIN

In March of 1999, the ECJ finally ruled in *Belgium v. Spain*⁸⁰ (“*Rioja Wine*”) that a traditional product, in this case wine, required protection and that the protection could go so far as to inhibit free trade. The law at issue in *Rioja Wine* involved a quantitative restriction on exports under article 29 TEC (ex article 34), but one that was upheld as a permissible restriction pursuant to article 30 TEC (ex article 36). Italy was not an original party in this case, but intervened on behalf of Spain to argue that wine produced in specific regions, in order to remain a quality product, cannot be transported out of the region to be bottled in another Member State. This case is particularly significant, not only because the ECJ finally agreed with the State seeking to limit trade to preserve a traditional product, but because the ECJ actually overturned one of its prior opinions to do it.⁸¹ This is an important victory for traditional products and may signal the emergence of new thinking in the ECJ.

The background of this case is complex and must be explained before moving to the judgment itself.

With Belgium, Denmark, the Netherlands, Finland, and the United Kingdom as complainants (“wine importing states” or “complainants”) against Spain, Italy, and Portugal as respondents⁸² (“wine producing states” or “respondents”), this case pitted wine importing nations against wine producing nations. The complainant countries were fighting for their right to import wine from producing nations to bottle it in their own countries and thereby take some share of the profits when it is eventually sold. The responding countries were defending their “controlled designations of origin.” These “designations of origin,” and how much control a wine producing nation has over them, were at the heart of the case.⁸³

A “designation of origin”⁸⁴ is a name from a wine producing region given to wines produced therein which conform to minimum criteria set forth by the local governing body in charge of overseeing the designation.⁸⁵ The designation of origin at issue in the *Rioja Wine* case was Rioja,

⁸⁰ Case C-388/95, Kingdom of Belgium v. Kingdom of Spain, 2000 E.C.R. I-3123.

⁸¹ Case C-47/90, Delhaize v. Promalvin, 1992 E.C.R. I-3669.

⁸² The respondent wine producing states were also joined in support by the European Commission. See *Belgium v. Spain*, 2000 E.C.R. at I-3160, ¶ 31.

⁸³ For a thorough discussion of the case and its background, see Eleanor Spaventa, *Case C-388/95, Belgium v. Spain, Full Court, Judgment of 16 May 2000*, nyr., 38 COMMON MKT. L. REV. 211, (2001).

⁸⁴ “Designations of origin” are called “*Denominazione di origine controllata*” in Italy, “*Denominación de origen*” in Spain, and “*Denominação de origem*” in Portugal. See Council Regulation (EEC) 823/87 of 16 Mar. 1987 Laying down Special Provisions Relating to Quality Wines Produced in Specified Regions, art. 15, 1987 O.J. (L 84) 59 [hereinafter Council Regulation 823/87].

⁸⁵ See ZRALY *supra* note 63, at 14.

a red wine producing region of northern Spain.⁸⁶ Though Italy's own wine designations were not explicitly on trial, Italy intervened to protect its own famous designations (Chianti, Barolo, Brunello di Montalcino, etc.)⁸⁷ from a damaging precedent. Wine producers from regions with a designation of origin have a strong interest in preserving the designation by protecting the quality of the wine, as it is the designation which enjoys a reputation among wine buyers. The good name of a region's designation can literally be the cornerstone of a regional economy.

The *Rioja Wine* case had its genesis in Royal Decree No 157/88, promulgated by the Spanish government to codify the rules governing Spanish designations of origin and their protection.⁸⁸ Article 19(1)(b) of Royal Decree No 157/88 required that a wine bearing a designation of origin be bottled in its region of origin,⁸⁹ thus, if a wine was to bear the name "Rioja" it must have been bottled in Rioja.⁹⁰

Wanting to import Rioja wine into their countries for bottling, the complainants objected to the requirements of Royal Decree No 157/88. They claimed that the Decree was a quantitative restriction on exports in violation of article 29 TEC (ex article 34).⁹¹

In support of this claim, the wine importing states cited *Delhaize v. Promalvin*⁹² ("Delhaize"). The *Delhaize* case had been brought before the ECJ in 1992 by the Commercial Court of Belgium. The issue in *Delhaize* was essentially identical to the issue in *Rioja Wine*: whether Spain's Royal Decree No 157/88 constituted an impermissible quantitative restriction on exports. The only difference in the two cases is that *Delhaize* was brought to the ECJ by a Member State court in search of an advisory opinion, while *Rioja Wine* was litigation between Member States.

⁸⁶ See *id.* at 133-137.

⁸⁷ See *id.* at 124 for a list of the major designations of origin in Italy.

⁸⁸ Royal Decree No 157/88 Laying Down the Rules Governing Designations of Origin and Controlled Designations of Origin for Wines and Regulations Implementing It, (B.O.E. 1988, 47) [hereinafter Royal Decree No 157/88].

⁸⁹ Pursuant to this Decree, the Spanish Minister for Agriculture, Fisheries and Food promulgated more specific rules governing the Rioja designation of origin, article 32(1) of which provides: "Wine protected by the "denominación de origen calificada" Rioja shall be bottled exclusively in the registered cellars authorised by the Governing Council, failing which the wine may not bear that designation." (B.O.E. 1991, 85). See also Case C-388/95, Kingdom of Belgium v. Kingdom of Spain, 2000 E.C.R. I-3123, I-3151-52, ¶¶ 7-10.

⁹⁰ *Belgium v. Spain*, 2000 E.C.R. at I-3151, ¶ 5.

⁹¹ See *id.* at I-3150, ¶ 1. See also EC Treaty, *supra* note 12, art. 29 ("Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."). Article 29 is the counterpart to the article 28 prohibition on quantitative restrictions on imports considered above in *Gilli* and *Glocken*.

⁹² Case C-47/90, *Delhaize v. Promalvin*, 1992 E.C.R. I-3669. See also Case C-388/95, Kingdom of Belgium v. Kingdom of Spain, 2000 E.C.R. I-3123, I-3160, ¶ 32.

In *Delhaize*, the ECJ found that Royal Decree No 157/88 was indeed a quantitative restriction on exports, incompatible with article 29 TEC (ex article 34).⁹³ This was so, the Court reasoned, because the Royal Decree placed no quantitative restrictions on wine that was moved within the region of Rioja; rather, the Decree only restricted movement of the wine to importing states.⁹⁴

Spain defended Royal Decree No 157/88 in *Delhaize* by claiming the Decree, despite being a quantitative restriction within the meaning of article 29 (ex article 34), was authorized as a permissible protection of industrial and commercial property under article 30 TEC (ex article 36).⁹⁵ Spain's essential claim was that designations of origin are commercial property and that Spain should be allowed to safeguard that property by protecting the quality and reputation of the wine through regional bottling requirements.⁹⁶

To further support this claim, Spain referred to Council Regulation No 823/87,⁹⁷ which outlines the Community rules with respect to quality wines, their designations, and the rights of producing states to protect them. In particular, Spain cited article 18 of the Council Regulation which provides in pertinent part:

In addition to the provisions laid down in this Regulation, producer Member States may, taking into account fair and traditional practices, lay down any additional or more stringent characteristics or conditions of production *and movement* in respect of the quality wines produced in specified regions within their territory. . . .⁹⁸

Spain claimed that this provision, along with article 30 TEC (ex article 36), allows wine producing states to determine the conditions governing the use of their designations of origin—even, when necessary, by placing quantitative restrictions on exports.⁹⁹

The ECJ in *Delhaize* agreed that wine producing states were given the power under Council Regulation No 823/87 to control the use and requirements of their designations of origin.¹⁰⁰ However, the ECJ has-

⁹³ *Delhaize*, 1992 E.C.R. at I-3708-09, ¶¶ 12-14.

⁹⁴ *Id.*

⁹⁵ EC Treaty, *supra* note 12, art. 30. The article provides in relevant part:

The provisions of Articles 28 and 29 shall not preclude prohibitions or restriction on imports, exports or goods in transit justified on grounds of . . . the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

⁹⁶ *Delhaize*, 1992 E.C.R. at I-3709, ¶ 15.

⁹⁷ Council Regulation 823/87, 1987 O.J. (L 84) 59.

⁹⁸ *Id.* at art. 18; *See also Belgium v. Spain*, 2000 E.C.R. at I-3163, ¶ 43 (emphasis added).

⁹⁹ *Delhaize*, 1992 E.C.R. at I-3709, ¶ 15.

¹⁰⁰ *Id.* at I-3709, ¶ 16.

tened to add that if wine producing states sought to protect their designations with measures incompatible with article 29 (ex article 34), those measures could not constitute permissible protections of industrial or commercial property under article 30 (ex article 36) *unless* the protections were required for the designation to fulfill its function.¹⁰¹ The function of a designation, the ECJ reasoned, was to guarantee that products bearing the designation of a region in fact came from that region, were endowed with the characteristics of the region, and met the standards of production therein.¹⁰²

Having established this rule, the ECJ decided in *Delhaize* that Spain's Royal Decree No 157/88 could not be a permissible restriction under article 30 TEC (ex article 36). The ECJ reached this conclusion by finding Spain had failed to show either that bottling a wine in the region of production endowed the wine with any particular regional characteristics or that regional bottling was required to preserve a wine's regional characteristics.¹⁰³

Finally, the ECJ held in *Delhaize* that even though Council Regulation No 823/87 authorized wine producing states to protect their designations of origin, it did not authorize Member States to take actions contrary to the TEC.¹⁰⁴ Put another way, the free movement of goods required by article 29 TEC (ex article 34) trumps the power to regulate a designation of origin—unless, of course, the restriction can be justified under article 30 TEC (ex article 36).

Armed with the ruling in *Delhaize*, the complainants in *Rioja Wine* came to the ECJ looking to enforce the judgment against Spain.¹⁰⁵ In the complainants' view, *Delhaize* had settled that wine producing states cannot, by legislating a regional bottling requirement, restrict wine exports to protect their designations of origin. The complainants therefore demanded that Spain's Royal Decree No 157/88 be invalidated and that Spain be ordered to begin shipping Rioja to Belgium for bottling.¹⁰⁶

The ECJ began its analysis in *Rioja Wine* by looking first to article 29 (ex article 34) and again asking whether Royal Decree No 157/88 was an incompatible quantitative restriction within the meaning of that article. The wine producing states argued that the Spanish legislation does not actually limit the quantity of Rioja wine which may be exported from Spain, rather the legislation seeks only to protect the designation of origin by preventing its improper and unchecked use.¹⁰⁷ The ECJ quickly

¹⁰¹ *Id.* at I-3709, ¶¶ 16-18.

¹⁰² *Id.*

¹⁰³ *Id.* at I-3710, ¶ 19.

¹⁰⁴ *Id.* at I-3711, ¶¶ 25-26.

¹⁰⁵ Case C-388/95, Kingdom of Belgium v. Kingdom of Spain, 2000 E.C.R. I-3123, I-3160, ¶ 32.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at I-3161, ¶ 37.

rejected this argument, observing that “protecting” the Rioja designation by prohibiting its use on wine that has been bottled outside of the region has the effect of specifically restricting exports of Rioja wine.¹⁰⁸ The ECJ therefore concluded that the Spanish rules were incompatible with article 29 TEC (ex article 34).¹⁰⁹

The wine producing states resisted this conclusion by recalling article 18 of Regulation No 823/87, according to which “producer Member States may . . . lay down any additional or more stringent” rules to govern the production of their wines.¹¹⁰ The producing states further emphasized that article 18 of Regulation No 823/87 specifically mentions the power of producing states to control the “movement” of their wines.¹¹¹ This article, argued the wine producing states, empowered the Spanish government to enact Royal Decree No 157/88.

Citing *Delhaize*, the ECJ reiterated that article 18 of Regulation No 823/87 is subordinate to the TEC and thus could not, by itself, justify a national law like Royal Decree No 157/88 that has been found to be inconsistent with article 29 TEC (ex article 34).¹¹² The producing States could not escape the conclusion that Spanish law was incompatible with article 29 TEC (ex article 34).¹¹³ But this conclusion alone was not sufficient to decide the case.

The ECJ next turned to its analysis of the Royal Decree under article 30 TEC (ex article 36) to determine whether the Decree could be justified as a prohibition protecting industrial or commercial property.

The wine producing states argued that the bottling stage is an integral part of the wine making process.¹¹⁴ The respondents further maintained (using the language of the *Delhaize* case) that the regional bottling requirement is necessary for the denomination of origin to fulfill its function, namely, to guarantee the origin of the wine.¹¹⁵ Protections are particularly important, the respondents continued, given the fragile nature of fine wines and the compelling commercial need to protect the reputation of wines bearing a designation of origin.¹¹⁶ Thus, the respondents argued, to protect their commercial property (their designations), regional bottling is required and is therefore permissible under article 30 TEC (ex article 36).

¹⁰⁸ *Id.* at I-3162, ¶ 41.

¹⁰⁹ *Id.* at I-3162, ¶ 42.

¹¹⁰ *Id.* at I-3163, ¶ 43; *See also* Council Regulation 823/87, art. 18, 1987 O.J. (L 84) 59.

¹¹¹ Council Regulation 823/87, art. 18, 1987 O.J. (L 84) 59.

¹¹² *Belgium v. Spain*, 2000 E.C.R. at I-3163, ¶ 45.

¹¹³ *Id.*

¹¹⁴ *Id.* at I-3164, ¶ 47.

¹¹⁵ *Id.* at I-3164, ¶ 48.

¹¹⁶ *Id.* at I-3165, ¶ 50.

Although the ECJ found insufficient evidence in *Delhaize* to show regional bottling was required to preserve a wine's particular characteristics, the Court in *Rioja Wine* reached a different conclusion, essentially reversing itself.¹¹⁷ Supplied with "new information" by the wine producing states, the ECJ agreed that a regional bottling requirement is essential to the preservation of designations of origin and to the commercial and industrial rights they represent.¹¹⁸ Thus, the ECJ held that designations of origin fall within the meaning of "industrial and commercial property" contained in article 30 TEC (ex article 36) and that the Spanish law was therefore compliant with the TEC.¹¹⁹

The rationale behind the ECJ decision turned on the fact that many intangible factors go into creating a quality wine—everything from soil and weather to human factors like winemaking techniques and, of course, bottling. The ECJ emphasized that bottling is not merely a process of "filling empty containers," rather it is a delicate procedure requiring complex oenological operations throughout the process, such as filtering, cooling, and clarifying.¹²⁰ Moreover, those who have the strongest incentive to ensure the winemaking is done with the utmost care are those whose reputations and commercial livelihoods are linked to the finished product: the wine producers themselves.¹²¹ These factors all lead to one conclusion: the quality of a wine bearing a designation of origin is inextricably linked to the region in which it is created. The ECJ concluded that "vigilance must be exercised" to ensure that the link between a wine and its region of origin is preserved and protected.¹²²

The complainant countries responded that, even if this rationale were accepted, wine is routinely transported between regional producers within Rioja.¹²³ They argued the wine is no more at risk when being transported to Brussels than it is already while being transported around Rioja. Moreover, if the wine were somehow compromised in transport or during bottling, Community rules would still ensure the quality of any wine that ultimately bears the Rioja name.¹²⁴

¹¹⁷ See BERMANN, *supra* note 11, at 752 (observing: "[The *Rioja Wine* case] is . . . rare in that the Court effectively overruled a prior judgement, [*Delhaize*], which had held that regional bottling of Rioja wine was not essential to preserve its characteristics."). *But see* Spaventa, *supra* note 83, at 216-17 (arguing that *Delhaize* was not actually overruled because the difference in the outcomes was based on a greater showing of evidence in *Rioja Wine*).

¹¹⁸ *Belgium v. Spain*, 2000 E.C.R. at I-3165-66, ¶¶ 52-54.

¹¹⁹ *Id.*

¹²⁰ *Id.* at I-3167, ¶ 61.

¹²¹ *Id.* at I-3167, ¶ 60.

¹²² *Id.* at I-3166, ¶ 57.

¹²³ *Id.* at I-3168, ¶ 63.

¹²⁴ *Id.*

The ECJ conceded that it is possible to transport wine in a manner which ensures its quality.¹²⁵ However, the ECJ reemphasized several factors which militate against allowing wine to be transported outside its region of origin. First, the producers of wine have specialized experience, stemming from long practice and tradition, that is not available to those outside the region who would only bottle the wine.¹²⁶ Second, if the wine is damaged in transport by oxidation or some other misfortune, the producers of the wine are best equipped with the skills to restore the wine to its original quality.¹²⁷ Third, as observed by Advocate General Saggio in this case, there are fewer quality controls and fewer guarantees outside the region of production to ensure the wine will truly meet the standards of the designation.¹²⁸ Finally, it is the producers themselves who have the most compelling and fundamental self-interest in preserving the quality of the wine and its long-term reputation.¹²⁹

Having carefully rejected each of the complainants' arguments, the ECJ held that the regional bottling requirement contained in Spanish Royal Decree No 157/88 was a permissible restriction on exports for the protection of industrial and commercial property under article 30 TEC (ex article 36).¹³⁰ In reaching this conclusion, though, the ECJ was careful to emphasize that there was no less restrictive means of protecting the designation of origin than an outright prohibition of extra-regional bottling.¹³¹ In particular, the ECJ noted that the ubiquitous labeling solution could not be effective here.¹³² The ECJ reasoned that any deterioration in the quality of some Rioja wines would adversely affect all Rioja wines.¹³³ To damage the reputation of the designation is to damage the commercial viability of the wine. Moreover, the very fact that Rioja wine was bottled outside of Rioja, even without adverse effects, could reduce consumer confidence in the designation.¹³⁴ Therefore, without the labeling option, Royal Decree No 157/88 was held to be the least restrictive means of preserving the designation.

In *Rioja Wine*, the ECJ finally defended a traditional product. The unhappy result of Chianti from Frankfurt or Rioja from Brussels was averted—narrowly perhaps, but nevertheless wine escaped unscathed. Consumers can be sure that wine from quality producers, bearing a designation of origin, is exactly what it claims to be. Wine producers need not

¹²⁵ *Id.* at I-3168, ¶ 64.

¹²⁶ *Id.* at I-3168, ¶ 65.

¹²⁷ *Id.* at I-3168, ¶ 66.

¹²⁸ *Id.* at I-3168-69, ¶ 67.

¹²⁹ *Id.* at I-3170, ¶ 73.

¹³⁰ *Id.* at I-3171, ¶ 75.

¹³¹ *Id.* at I-3171, ¶ 76.

¹³² *Id.* at I-3171, ¶ 77.

¹³³ *Id.*

¹³⁴ *Id.*

fear the bumbling of inexperienced wine bottlers will damage their products or their reputations. In short, consumers won, producers won, and a traditional product retained its quality without compromise.

But what does this mean for other products? Does the *Rioja Wine* case signal a new attitude in the ECJ with respect to traditional products? What about vinegar and pasta?

VI. *GLOCKEN, GILLI* AND TRADITIONAL PRODUCT PROTECTION IN 2003

A crucial rationale that supported the holding in *Rioja Wine* was the idea of a traditional product's reputation and the paramount importance of that reputation to the survival of the product itself. This reasoning might well extend to pasta created with durum wheat. After all, if those who eat pasta are tricked into buying a lesser product, and buy less pasta as a result, the entire industry suffers.

Rioja Wine's rejection of the labeling solution as insufficient to protect the product's reputation could also be seen as helping traditional pasta. Although the *Glocken* court ultimately decided a label was enough to inform the consumer and to protect durum wheat producers, *Rioja Wine* may be a shift toward Advocate General Mancini's reasoning: simply informing "spaghetti" consumers of the kind of wheat contained therein is not enough.

Yet despite the promising advancements made by traditional products in *Rioja Wine*, a crucial difference between pasta and designations of origin means common wheat pasta is here to stay. Pasta, unlike Rioja or Chianti, is not a designation of origin, but rather a general term. Even the more specific "spaghetti," mentioned above, has become generic. Thus the crucial step in *Rioja Wine*, finding designations of origin within the scope of industrial and commercial property rights in article 30 TEC (ex article 36),¹³⁵ will not be possible with pasta or spaghetti. These generic terms are, by now, so widely used across so many nations that it would be absurd to refer to them as the property of any single producer.

But lovers of traditional products need not despair. The new-found respect and willingness to protect traditional products displayed by the ECJ in *Rioja Wine* is not an isolated Community act. On the contrary, the change of heart in the ECJ between *Delhaize* and *Rioja Wine* might be traceable directly to a Council Regulation passed before *Rioja Wine*, but one month after *Delhaize*. Council Regulation No 2081/92 of 14 July 1992 "on the protection of geographical indications and designations of origin for agricultural products and foodstuffs" is the Community's legislative protection for traditional products.¹³⁶ This regulation created, for food-

¹³⁵ *Id.* at I-3166, ¶ 54.

¹³⁶ Council Regulation 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208) 1 [hereinafter Council Regulation 2081/92].

stuffs and agricultural products of all kinds, the categories of “protected designation of origin” (“PDO”) and protected geographical indication (“PGI”).¹³⁷ Pursuant to article 2(a) of this regulation:

[D]esignation of origin [PDO]: 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
- 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.¹³⁸

And pursuant to article 2(b) of this regulation:

[G]eographical indication [PGI]: 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 geographic origin and the production and/or processing and/or preparation of which take place in the defined geographical area.¹³⁹

These provisions provide regulatory support to producers hoping to protect the name and reputation of their products. Once a producer is fortunate enough to have its product listed as PDO or PGI, the protections provided by the regulation are extensive.¹⁴⁰ With its rich culinary tradition, Italy was quick to register many of its traditional products. Today, Italy boasts more than twenty percent of all PDO and PGI regis-

¹³⁷ *Id.* at art. 1.

¹³⁸ *Id.* at art. 2(a).

¹³⁹ *Id.* at art. 2(b).

¹⁴⁰ *Id.* at art. 13. This article provides in pertinent part:

(1) Registered names shall be protected against:

- (a) any direct or indirect commercial use of a name registered 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 insofar as using the name exploits the reputation of the protected name;
- (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 false impression as to its origin;
- (d) any other practice liable to mislead the public as to the true origin of the product.

Id.

tered products in Europe.¹⁴¹ That number represents 111 Italian traditional products thoroughly protected by Community law.¹⁴²

But the protections are not unlimited. Article 3(1) specifically admonishes that names which have become generic cannot be protected.¹⁴³ Thus, durum wheat pasta and spaghetti are traditional products that will, in all likelihood, have to compete with lesser products for the foreseeable future. *Glocken* will stand.

The *Gilli* decision, however, is not so secure. The part of *Gilli* which says Italy cannot ban outright all non-wine vinegar will not be changed, as “vinegar” is certainly a generic term. But the traditional vinegar products, specifically the must-derived vinegars known as *Aceto balsamico tradizionale di Modena* and *Aceto balsamico tradizionale di Reggio Emilia* were granted PDO status in April of 2000¹⁴⁴ and currently enjoy all the protections of Council Regulation No 2081/92. Wine-based vinegars from Modena, or *Aceto balsamico di Modena*, have not yet been given PDO status, but the designation has been submitted to the Community for consideration.¹⁴⁵ If traditional wine-based vinegars are given PDO status, the possibility, left over from *Gilli*, that inferior vinegars will damage the reputations of traditional vinegars will be largely a thing of the past.

Still, threats to traditional Italian products have not disappeared yet. In fact, past disputes are still very much alive. When the Regulatory Committee on Geographical Indications voted to give *Aceto balsamico tradizionale di Modena* and *Aceto balsamico tradizionale di Reggio Emilia* PDO status, the single dissenting vote came from Germany, Italy’s old vinegar nemesis from the *Gilli* case.¹⁴⁶ The reason for Germany’s dissent was fear that producers of German vinegar, bearing the misnomer *Aceto balsamico di Modena* (a German imitation), would suffer a loss in sales.¹⁴⁷ The Commission responded by observing the whole point of PDO status is to stop such imitations, and therefore recommended *Aceto balsamico tradizionale di Modena* and *Aceto balsamico tradizionale di*

¹⁴¹ See Commission Regulation 1107/96, 1996 O.J. (L 148) 1, available at http://www.europa.eu.int/eur-lex/en/consleg/pdf/1996/en_1996R1107_do_001.pdf. See also Annamaria Capparelli, *L’Italia rappresenta il 20% delle denominazioni protette in Europa—I formaggi in pole position [Italy Represents 20% of the Protected Designations in Europe—Cheeses in pole position]*, IL SOLE 24 ORE, Mar. 10, 2001, at 12.

¹⁴² *Id.*

¹⁴³ Council Regulation 2081/92, *supra* note 136, at art. 3(1).

¹⁴⁴ See Commission Regulation 1107/96, 1996 O.J. (L 148) 1 (amended by Council Regulation 813/2000, 2000 O.J. (L 100) 5).

¹⁴⁵ See Explanatory Memorandum for the Commission Proposal for a Council Regulation Supplementing the Annex to Commission Regulation No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in article 17 of Regulation No 2081/92, COM(2000) 89 final, ¶ 6.

¹⁴⁶ *Id.* at ¶ 11.

¹⁴⁷ *Id.* at ¶ 14.

Reggio Emilia be added to the list.¹⁴⁸ The *Gilli* case may be nearly superceded, but the struggle between Italian and German vinegar producers, apparently, continues.

While Germany was the only dissenter in the *aceto* vote, there were also a few abstentions. Not surprisingly, Belgium and the United Kingdom, Italy's old foes from the *Rioja Wine* case, abstained because they questioned the legitimacy of the regional bottling requirement for both *Aceto balsamico tradizionale di Modena* and *Aceto balsamico tradizionale di Reggio Emilia*.¹⁴⁹ Reminding Belgium and the United Kingdom of *Rioja Wine*, the Commission stated that ". . . the bottling of balsamic vinegar . . . can be regarded as forming part of the preparation."¹⁵⁰ Thus, the regional bottling requirement posed no obstacle to giving the *aceti* PDO status.

Though the specific names of the traditional products at issue change, the disputes surrounding them, it seems, stay the same.

VII. CONCLUSION

Italian traditional products have undoubtedly suffered a few setbacks in the name of a European Union without trade barriers. The Italian consumer must now be on guard when buying vinegar to be certain that what ends up on the table was not made from apples. Durum wheat pasta, once as trustworthy and unshakable as the walls of lofty Rome, must now compete against common wheat pasta. Consumers must read the fine print and restaurant-goers must beware.

Yet the European Union's effect on Italian cuisine is far from a horror story. The ECJ saved Chianti, and all Italian wines bearing a designation of origin, from having to take a long journey from the sunny Italic peninsula to the colder climes of the north. Most importantly, traditional products of all kinds—provided they have a designation which has not become generic—can now rely on the protection and trading power of the entire European Union.¹⁵¹ Thus, while a few products have suffered, many are more secure than ever before. And though Community protections are not as broad as could be wished, the defenders of culturally diverse, quality foods are certainly making headway.

So, those who savor *la dolce vita*, take heart. Even in a unified Europe, there is hope yet for our traditional products.

MICHAEL RYAN BENEDICT

¹⁴⁸ *Id.* at ¶¶ 18-20.

¹⁴⁹ *Id.* at ¶ 15.

¹⁵⁰ *Id.* at ¶¶ 21-23.

¹⁵¹ The European Union is even attempting to use its influence with the World Trade Organization to get *international* protection for some of its traditional products—among them: Chianti, Parmigiano Reggiano cheese, and Prosciutto di Parma. See Schwammenthal & Echikson, *supra* note 9, at A6.

