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The protection of food quality in Spain^(*)

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JEL: Q13, Q17, M31

ABSTRACT *The foundation of the legal system of food quality protection in Spain lies in the protection of the quality of wine and its subsequent extension to other food products. Today, DOs (Denominaciones de Origen), IGs (Indicaciones Geográficas), traditional specialities, organic products and integrated agriculture are all regulated by European legislation. Additionally, the figure of the collective quality-brands has been extensively used as a means to indirectly promote the consumption of local products. Some notable cases in which the Courts have dealt with quality protection are: the Rioja/Delhaize case and the extent to which food packing must be controlled in order to protect a DO; the case of Manzanilla wine and protected DOs that make no reference to a geographical name; the case of Iberian pork meat and whether protection of food quality should be achieved by standards or by regulations. Finally the article discusses the question of health claims as an attribute of quality and the problems posed to some traditional Mediterranean products by the concept of nutrient profiles.*

1. INTRODUCTION

I would like to start by pointing out the similarities and differences between the Spanish experience and the French and Italian cases.

^(*) Speech pronounced in the workshop La Tutela Comunitaria dei Prodotti Agroalimentari Europei, held in the European Parliament on the 27 November 2007.

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Of course, all cases are similar and different but what I mean is that, unfortunately, the number of Spanish food products recognised or famous in the world is not as extensive as those from Italy or France and, therefore, the question relating to their protection are, in some way, different. Many Spanish food products are only known locally, nationally or exported as a commodity, as much as anything else.

On the other hand Spain, Italy and France share – broadly speaking – similar geographic and climatic conditions and produce very similar foods. Above all, they share a very similar cultural view of food in the sense that eating has more to do with a sensual experience than simply something you need in order to live and work. Eating is a pleasure to be enjoyed and not necessarily the manifestation of an ordered life (Rabelais, Montagne, Boccaccio or Cervantes, all write about food in a very carnal way that would be considered even grotesque by some in our days).

This implies, in my opinion, that our concept of quality in food is more inclined towards sensuality, tradition and the land than towards a perfect, well-controlled, way of producing. We are talking about quality and I would like to say that – although I'm not intending to start a discussion on the definition of quality nor will I devote any time to this matter –, I will use the expression "quality" with a very loose meaning. In my view, quality means not what an expert decides but what the consumer understands by quality, which includes aspects such as health claims and organic production.

Quality in food, in my opinion, means the perception of quality. I will try to describe, very briefly, the present Spanish legislation on the matter and then elaborate further some specific cases which, in my opinion, illustrate the legal problems that the protection of food quality has posed in Spain, and the solutions offered by the Courts. These problems are:

- Must the entire production process of a food product be carried out in the particular region?
- The conflict existing between protected and generic names;
- It is the word "origin" a protected term?
- Standards or Regulations of quality?
- Are health claims an attribute of quality?

2. CURRENT SPANISH LEGAL SITUATION

2.1 Statute of vineyards, wine and alcohol

It all started with wine. In Spain the promotion and protection of quality in food started – like in many places – with the protection of quality of wine. The first regulations, in

the XIX century, were aimed at preventing fraud more than anything else. The first statute on wine was passed in the 30's, but is not until the 70's that protection of quality adopts the form of Designation of Origins, created under the first Act made in Spain for this purpose, the *Ley 25 of 1970 del estatuto de la viña, del vino y de los alcoholes* - Statute on Vineyards, Wine and Alcohols. This Act was extended – by means of its fifth additional disposition – to products other than wines, and is the foundation of the legal system of food quality protection in Spain. This Act was replaced by the *Ley 24/2003, de 10 de Julio de la viña y el alcohol*, the new Statute on Vineyards, Wine and Alcohols.

2.2 European legislation

In the year 1986 Spain joined the European Community and, since then, the protection of quality in food in Spain has been closely linked with the Common Agricultural Policy. In this respect, Regulation 2081 and 2082 of 1992, and the subsequent Regulations 509 and 510 of 2006, as well as those Regulations on wine and alcohol products, are the legislation in force in Spain. Under these Regulations an increasing number of products are protected by Designation of Origin, Geographical Indications and Traditional Specialities.

I must say that some of these designations are hardly known outside their geographical area, and one might question what real reputation they offer to the products covered by them, or whether they are sometimes motivated by local political interest or whether, irrespectively of their reputation, the control they exert on production – and the possibility of using the label DO, IG – are really promoting and protecting the quality of the food.

What I can say is that consumers are sometimes completely unaware of some of these Designations, up to the point that I have been told that – in the face of the proliferation of designations of origin for olive oil – the government conducted research to work out which of these designations were best known by consumers, to find that it was “aceite de Jaen” (olive oil of Jaen). Jaen is a province of Spain known for the cultivation of olive trees and for the production of olive oil, but is not a designation of origin (although within the province of Jaen there are several designations of origin for olive oil).

2.3 Vertical legislation

Apart from this general legal framework, a number of specific regulations for specific products and sectors are in force in Spain, reflecting special concern on the part of the authorities for these sectors. Many of these Regulations deal not only with quality but also with food safety, most of them are a mix of European Regulations (particularly in the case of products included in the Common Agricultural Policy, such as milk and edible oils) and

what remains in force of the Spanish Food Code (a Regulation from 1967, intended as the comprehensive regulation of food production in Spain). In other cases they are new specific legislation, like the case of Iberian Pork Meat, which was the subject of a recent Royal Decree 1469 of 2 November 2007.

There are specific regulations on quality for the following products: fish, seafood and canned fish; Iberian pork meat; meats, cured meats and ham; edible oils and table olives; wines; sprits (rum, whisky, brandy, anisette liquor, gin etc.), beers and ciders; milk and dairy products.

2.4 Horizontal legislation. Organic products and integrated agriculture

I should also mention that organic food production has been regulated in Spain since 1989. The legislation now in force is European Regulation 2091/91 (updated by Regulation 1804/99 on organic farming) complemented by Royal Decree 1852/1993. Regional Governments have competence over control and certification in this matter. Some regions have passed on their certification competences to authorised private companies.

Another form of quality through environmentally friendly production is Integrated Agriculture, regulated in Spain by Royal Decree 1201 of 20th November 2002. Food products obtained by means of integrated agriculture are entitled to use this label.

2.5 Regional legislation; promoting local quality

The legal system in Spain is completed by local Regulations. Many of these regulations develop the system and procedures for access to protected designations, indications or traditional specialities. But other Local Regulations aim to create regional trade marks of guarantee. Under the Trade Mark Act of December 2001 it is possible to create collective trade marks and trade marks of guarantee. Using these tools, Regional Governments have created a whole network of regulations aimed at promoting local food quality, while formally respecting the requirements of European Law on the matter. That is; trade marks must be open to any company irrespectively of their location and the quality the trade mark guarantee must be certified by an independent organisation. At the end of the day, these trade marks are a way a promoting the consumption of local products, more than anything else.

Finally, I would like to say that the infringement of food quality in Spain can be prosecuted under Royal Decree 1945 of 1983 (which allows authorities to impose fines of up to 3 million € and to close down businesses). Furthermore, infringement of quality in Spain can be a crime of fraud or even a crime against intellectual property if committed against protected designations.

3. SPECIFIC CASES

Following this brief overview of the general legislative system for the protection of food quality in Spain, I would now like to elaborate on some specific situations, some cases that, in my opinion, have served to point out –and sometimes to set limits to– different issues affecting the protection of food quality.

3.1 The case of Rioja and Delhaize; quality and control of production. Banalisation of the content of the Designation of Origin

The question at stake was the extent to which the production process should be performed in the region of origin, under the supervision of the authorities of the Designation of Origin. In other words:

- can the final steps in the process of food production, that part of the process which does not really alter the composition of the foodstuff itself but only affects the way the product is presented to the public, be done outside the protected geographical area without negatively affecting the quality of the product?
- Is it strictly necessary in order to guarantee the quality of a product protected by a Designation of Origin, that the entire process – even the bottling – be carried out in the region?

Rioja is a reputed Spanish wine, protected by a DO. In this case, the Belgian retailer, Delhaize, intended to buy Rioja wine in bulk and bottle it outside Rioja. This was forbidden by the rules of the Designation of Origin of Rioja. The question was whether this prohibition was necessary to preserve the quality of the product. In its judgment of 16 May 2000 (the second on the matter) the European Court of Justice dealt with this question that has been repeatedly brought before the Court, (and recently again in the case of Parma Ham). Namely the matter of to what extent the whole process of food production needs to be carried out in a specific location in order to guarantee the quality of a product protected by a Designation of Origin.

To answer this question, the Court closely examines the role of bottling in the production of wine and the intention of the rules made to control the local bottling of a reputed wine. For the Court:

- 1) The local control of the whole process makes sense since it is entrusted to those who have the necessary experience in this process and a fundamental interest in preserving the reputation of the wine, that is, the local producers. In the words of the Court: “The requirement at issue contributes decisively to safeguarding the particular characteristics and the quality of the product in that its effect is to

entrust the producers and the Rioja Governing Council, that is to say those who have the necessary knowledge and know-how and a fundamental interest in preserving the reputation acquired, with the implementation of, and monitoring of compliance with, all the rules concerning transport and bottling”.

- 2) Bottling forms an integral part of the process of wine production which, if not carried out in accordance with strict requirements, may seriously impair the quality of the product. It is a stage within the production process and therefore only a wine bottled in the region can truly be regarded as having originated in that region. Moreover, bulk transport of wine may seriously affect its quality if not undertaken under optimum conditions. In the words of the Court: “In the present case, it is undisputed that the bottling of wine is an important operation which, if not carried out in accordance with strict requirements, may seriously impair the quality of the product. Bottling does not involve merely filling empty containers but normally entails, before filling, a series of complex oenological operations (filtering, clarifying, cooling, and so on) which, if not carried out in accordance with the prescribed rules of the trade, may adversely affect the quality and alter the characteristics of the wine”.
- 3) The reputation of designations of origin depends on the image in the minds of consumers. Its particular qualities and characteristics are the result of a combination of natural and human factors and are linked to the geographical area of origin and vigilance must be exercised and efforts made in order for them to be maintained.
- 4) The rules governing the Rioja Denominación de Origen Calificada are designed to uphold those qualities and characteristics. By ensuring that operators in the wine-growing sector of the Rioja region control bottling as well, they pursue the aim of better safeguarding the quality of the product and, consequently, the reputation of the designation, for which producers assume collective responsibility
- 5) Furthermore, controls undertaken outside the region of production in accordance with the Community rules provide fewer guarantees as to the quality and authenticity of the wine than those carried out in the region. In the words of the Court: “It thus appears that, for Rioja wines transported and bottled in the region of production, the controls are far-reaching and systematic and are the responsibility of the totality of the producers themselves, who have a fundamental interest in preserving the reputation acquired, and that only consignments which have been subjected to those controls may bear the ‘denominación de origen calificada’”.
- 6) The risk to which the quality of the product is exposed is greater when it has been transported and bottled outside the region of production. This risk would not be avoided by a label informing consumers that the wine had been bottled outside

the region. Any deterioration in the quality of the wine, due to the risks associated with transport in bulk, or subsequent bottling, might harm the reputation of all wines marketed under the Designation of Origin. Furthermore the very coexistence of two different bottling processes, could reduce the degree of consumer confidence in the designation, based on the conviction that the production of quality wines must at every stage be under the control and responsibility of the relevant group of producers.

- 7) Therefore, the requirement of total control in the production process of Rioja Wine Designation of Origin is completely justified in order to protect the reputation of the product.

3.2 The case Sherry wine; designation of origin versus the concept of generic product

Sherry wine is one of the most famous Spanish wines. Sherry is a fortified wine, produced in the Andalusian city of Jerez- from local grapes- and is a wine that has been well known and traded for centuries. For this reason, Jerez's wine has been copied and faked, and for many years was considered a generic in many countries. In fact, it is still a semi-generic term in the United States under the recent wine accord. At the present moment, a Californian sherry is produced and sold in the United States.

The Sherry designation of origin includes not only the wines known as sherry wine, but also *manzanilla*, a kind of dry sherry produced in the area and more popular locally that abroad (it is mentioned in Bizet's opera Carmen. Manzanilla is the wine that Carmen drinks "chez Lillas Pastia"). In fact, there are two Designations of Origin under the authority of the same Governing Council, one is "Denominación de Origen Jerez-Xéres-Sherry" and the other, "Manzanilla-Sanlúcar de Barrameda"

The manzanilla designation has been challenged in the Spanish Court, and settled by a judgment of the Spanish Supreme Court. However, the decision of the Supreme Court was not unanimous and there was a dissenting opinion of one of the Judges. The question was to what extent the existence of the designation of origin "Manzanilla-Sanlúcar de Barrameda" prevented the registration of a brand including the word *manzanilla*, and whether a brand of wines including the word *manzanilla* could mislead the consumer and make him believe that he was drinking a wine protected by a designation of origin, namely *Manzanilla de Sanlúcar de Barrameda*.

Is there a risk of confusion if we only use one of the words of a protected designation of origin, and not the word which refers to a location? I must say that this question is not an unusual one. Although the background facts of the case are different, there are strong similarities in the debate at stake between this case and the one now pending the decision

of the European Court of Justice on the use of the name Parmesan and the Designation of Origin Parmigiano Reggiano.

In the opinion of the plaintiff, the word Manzanilla is a generic term applicable to a type of dry white wine and does not designate any geographical origin. This opinion is rejected by the Supreme Court.

The decision of the Supreme Court takes into consideration the protection and function of the designation of origin, the fact that the word Manzanilla is included in the Regulation of the Common Market Organisation of Wine as a geographical designation, and concludes that the term *Manzanilla* is the name of the region referred to by Designation of Origin *Manzanilla de Sanlúcar de Barrameda*.

However, a dissenting opinion of one of the Judges considers that manzanilla is in reality a generic name, given to a type of wine and that this expression can not be protected by a designation of origin, because these designations apply only to geographical names, which is the case of *Manzanilla de Sanlúcar de Barrameda*, but not of *Manzanilla*. Protecting the name manzanilla goes clearly beyond what is needed to protect the Designation of Origin. The fact that the European Regulation attributes to the word manzanilla the consideration of geographical name does not impede said opinion, since the European legislation remits in this respect to the national one.

The arguments in this case and the non-unanimous opinion of the Court can be seen as an example of how the extraordinary reputation of some food products- in this case sherry wine – implies a continuous risk: that people or companies one way or another, try to copy them to take advantage of their reputation. In this sense, the delimitation of the concept of generic names is extremely important.

3.3 The case of Jamón de Huelva; protecting the concept of designation of origin

This is another curious example in Spain of a third party trying to take advantage of the reputation of a Designation of Origin. But in this case the party does not copy the geographical name protected by the Designation of Origin, but the concept of a Designation of Origin itself.

The facts of the case are as follows: Jamón de Huelva is a Designation of Origin created to protect the reputation of a cured ham produced in the mountains of this part of southern Spain. We must say that Huelva is not a very accurate name, since it is the name of an entire province, made up by much more than just the mountain region where the cured ham is produced, mountains that, moreover, go beyond the limits of province of Huelva. In any case, this area is known in Spain for producing one of the finest Iberian cured hams, produced from Iberian pork, made from pigs fed on acorns and living free-range in the

woodlands. The curing method of this ham is totally natural and environmentally friendly. It takes a long time to produce an Iberian cured ham, longer than a normal one. Within these mountains, Jabugo is a small town particularly and traditionally known for the quality of its hams.

In this context, a group of business concerns of Jabugo (clearly supported by the Town Hall) created a company called "*Origen Jabugo, SL*" – Origin Jabugo –. This name was not a trade mark, only the name of the company but it was clearly used in a brand like manner on the company's products. The company Origen Jabugo was producing many cured meat products, not only cured ham, and there was little risk of confusion in the name with the designation Jamón de Huelva, because both expressions clearly mentioned different locations.

Nevertheless, the Governing Council of *Jamón de Huelva* challenged the name of the company and accused it of unfair competition. In the opinion of the Council of Jamón de Huelva, Origen Jabugo by using the word "Origin" is giving the impression that their products are protected by a designation of origin and implying that they have the quality and reputation of products protected by a designation of origin, a reputation which, in the opinion of Jamón de Huelva, is due to the strict controls carried out by the Governing Councils of Designation of Origin. The matter is arguable and, as matter of in fact, the Court of First instance rejected the pretension of Jamón de Huelva that calling a company "Origen Jabugo" was misleading the consumer and was, therefore, unfair competition. But the *Audiencia Provincial* – the Superior Court – adjudicating on the case on appeal, reversed the opinion of the lower Court and considered that the use of the word "origin" was an unfair practice, and banned it. The case is pending the decision by the Supreme Court, but it is, in my opinion, a curious example of the faking and *banalisation* of the Designations of Origin, not against the protected name of the product but by faking the concept of Designation of Origin, and the guarantee that this concept offers to the consumer.

3.4 The case of the term "bio" and organic products

Another example of trivialisation of food quality rules was the use of the term "bio" to designate products that were not the product of organic agriculture. In fact, the use of the term *Bio* was widespread in Spain and sometimes bio was a trade mark. This was the case of dairy products made by the company Danone in Spain. But bio did not refer to organic products in Spain, where the legal word for organic products is "ecológico" and its derivative "eco". However, bio is derivative term of *biologique* in French, or biologico in Portuguese, Greek and Italian.

Although Spanish authorities and Courts –including the Supreme Court– defended that the term bio was generic in Spanish language and did not imply organic characteristics

in the products, the use of the term bio in Spain was denounced and referred to the European Court of Justice, that decided that the use of the term bio in labelling, advertising and promotion of products in Spain for non organic products was contrary to the European Regulation. This way the concept of generic term applied to foodstuff acquires a European dimension, which goes beyond the strict meaning in a sole country.

3.5 The case of the Iberian pork meat regulation; should rules applying to quality in food be compulsory or voluntary?

This was the question posed by AENOR, the Spanish Standards Agency, to the Spanish Supreme Court when challenging Spanish Royal Decree 1083 of 2001 on Quality Regulations for Cured Iberian Pork Products.

I have to explain, first of all, that a Spanish Royal Decree is a compulsory form of legislation passed by the Government and AENOR is a private entity, a Non Governmental Organisation devoted to establishing and certifying voluntary industrial standards. According to AENOR, and under the Spanish Industry Act, what the Royal Decree 1083 of 2001 was doing was to lay down industrial quality standards for the preparation of meat and these kind of rules were, by their own nature, voluntary standards, as opposed to safety rules that were compulsory. Since the content of this Royal Decree intended to lay down quality standards for foodstuffs, the State was invading the competence of the Non Governmental Organisation, which was the only body who could create quality – and therefore non compulsory – standards for foodstuff.

The State opposed this argument. Some organisations adhered to the position of the State and some to the position of AENOR. First of all, it was questioned whether AENOR had any standing to bring action challenging a General Regulation, by which it was not directly concerned. The Court gave an affirmative answer to this question, by saying that AENOR had a legal interest as a certification body in the case, since it would be affected if the Royal Decree were to be declared illegal. The Court analysed the Spanish Industry Act. This act distinguishes standards, as non-compulsory technical specifications, from regulation, the compulsory technical specification. The binding force of Standards derives from a contract, entered into by private parties, and from the prestige of the standard. Regulation is made by the government and not only its author but also its content makes it different from the Standard.

The Government is entitled to rule directly on technical specifications of products in view of the social values that the Administration has to protect. In the case of Regulations, they are not only different to Standards by their origin – Government or Private Entities- and by their effects- compulsory or voluntary- but also by their “ basic structure”, because Regulations rule upon aspects related to the product that go beyond the

mere technical process (although they can include it). Even if Standards and Regulations are different by Law, there is no matter which is reserved to Standards and excluded from Regulations.

In this case, Spanish Royal Decree 1083 of 2001 was regulating more than just on technical specifications for the manufacturing of a product, it was also regulating other aspects such as the bodies entitled to control the production, and more importantly, was including rules for the protection of the interests of consumers, laying down the prohibition of the use of the words "ibérico, ibérico puro, montanera, recebo, bellota, retinto, pata negra" (all terms related with the tradition of Iberian pork meat) to products that did not comply with these conditions.

Therefore, this Spanish Royal Decree was aimed at regulating not only technical specifications for Iberian pork meat but also traditional and environmentally friendly production methods. The farming of pigs living free in the woods protects the Mediterranean forest by using woodlands that would otherwise serve no economic purpose, helping to preserve a breed of pigs and a traditional food, ensuring fair competition and protecting the interests of consumers.

Therefore, under Spanish Law, quality food discipline covers aspects that go well beyond the technical rules that can be laid down in standards. Regulation of Quality in Food is not a mere technical standard, but has a distinctive different legal nature.

3.6 Health claims as an attribute of quality

My view of quality is that, more than a characteristic of the product itself (that could be, hypothetically, only accessible to experts), it is a perception of the consumer. In this respect, it is essential for a quality food product to be able to communicate that quality: as far as I am concerned – in my position as a Lawyer – quality in food only exists if I can communicate it.

In my opinion, the quality of a food product is the result of a number of factors and characteristics and within these characteristics one is that the product is healthy. It can't be denied that for the consumer a healthy product is better in quality than an unhealthy one. What I mean is that, if not all quality food has to present itself as particularly healthy, good effects on health can be considered one of the attributes of food quality. If the quality of the product is only important to the extent that it is known and to the extent that we can communicate it, and if health is an attribute of quality, then the Health Claims Regulation deals with and affects the quality of food. This Regulation establishes what we can and cannot say about the health qualities of a product.

The Health Claims Regulation includes the concept of nutrient profiles, which are characteristics that a foodstuff must have before we can say that it is healthy, and these

characteristics are related to- among others-the content of fat and sugar of the products. In a way, products with high content in sugar and fat are devalued by this Regulation.

This consideration, that may make some sense in the case of highly processed foodstuffs is very unfair when it comes to the case of basic products, products which are the result of the primary transformation of an agricultural product, such as olive oil- particularly extra virgin- or honey. In this case, these products are nothing but fat or different sugars, but are full of natural qualities, with generally accepted positive effect on human health. These products are natural so their nutritional profile cannot be altered and this could devalue them, as far as the advertising and presentation of their health qualities, or even prevent them from making any health claim at all. In my opinion, Regulation 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, could have negative effects on the promotion of quality of some basic agricultural products, like olive oil, so important to Spanish and Mediterranean agriculture, particularly if other more processed products can obtain the right to make a health allegation, leaving olive oil in an unfairly disadvantaged position on the food market. You can make Coca Cola without sugar, but not honey. You can produce a snack with reduced fat, but not olive oil.