

Conorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd. & Hygrade Foods Ltd.: Classic Protectionism—Thin Ham Provides Thick Protection for Member State Domestic Goods at the Expense of the European Common Market

I. OVERVIEW	545
II. BACKGROUND.....	548
A. <i>PDO Legislation</i>	548
B. <i>European Economic Community Treaty Articles</i>	550
C. <i>Belgium v. Spain</i>	551
III. THE COURT’S DECISION	552
IV. ANALYSIS	558
V. CONCLUSION	563

I. OVERVIEW

The desire of the European Court of Justice (ECJ) to protect certain European products has reached staggering new levels. In 1992, the European Union (EU) adopted Council Regulation 2081/92, which established both the protection of geographical indications (PGI) and the protection of designations of origin (PDO) for certain agricultural products and foods.¹ The regulation allows Community protection of products that originate from a specific region if the product complies with certain specifications.² The specifications include, among other things, evidence that a product originates from a particular area, the original or local methods of producing the product, and details of the link between the product and the geographic region.³ Once a group meets the specifications and has a PDO approved and registered by the Commission, Regulation 2081/92 protects PDOs against commercial use of the registered name by others.⁴

1. Council Regulation 2081/92 of 14 July 1992 On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, art. 1, 1992 O.J. (L 208) 1, 2 [hereinafter Regulation 2081/92].

2. *Id.* arts. 2, 4, 1992 O.J. (L 208) 2, 3.

3. *Id.* art. 4, 1992 O.J. (L 208) 3.

4. *Id.* art. 13, 1992 O.J. (L 208) 6.

The Consorzio del Prosciutto di Parma (Consorzio) is a group of 200 ham producers in Italy.⁵ Italy first registered Parma ham as a PDO in its national law in 1990.⁶ Italian law set out the characteristics and specifications for Parma ham, and in 1993, the Italian legislature issued a decree stating that all Parma ham must be sliced and packaged within Parma at plants approved by the Consorzio.⁷ Italian law also requires slicing and packaging to be performed in the presence of Consorzio representatives.⁸ After Italy applied to the Commission for a PDO, the Commission granted the petition in Regulation 1107/96, and in 1996, Parma ham became a Community PDO under Regulation 2081/92.⁹

Asda Stores Limited (Asda) is a chain of supermarkets in the United Kingdom that sells ham labeled "Parma ham."¹⁰ Asda buys the ham from a company called Hygrade Foods Limited (Hygrade), which purchases the ham from an Italian producer belonging to the Consorzio.¹¹ Hygrade buys deboned but not sliced ham, and Hygrade slices and packages the ham in the United Kingdom.¹² Asda sells the ham packaged by Hygrade in its stores under the label "ASDA, A taste of Italy, PARMA HAM, Genuine Italian Parma Ham."¹³ The back of the package states that Asda packs the ham in the United Kingdom.¹⁴ Due to the specification that Parma ham be sliced and packaged in Parma, in 1997 the Consorzio brought an action in the United Kingdom against Asda and Hygrade seeking an injunction to cease their activities.¹⁵ The Consorzio claimed that Asda and Hygrade violated Regulations 2081/92 and

5. Consorzio del Prosciutto di Parma Press File, *available at* <http://www.prosciuttodiparma.it/inglese/cartellastampa.pdf> (last visited Jan. 23, 2004). For more basic information on the Consorzio, see http://www.prosciuttodiparma.it/inglese/prosciutto_di_parma.htm (last visited Feb. 15, 2004).

6. Case C-108/01, Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA. v. Asda Stores Ltd. & Hygrade Foods Ltd., [2003] 2 C.M.L.R. 639, 677, ¶ 3 (2003) (citing *Legge 26, art. 1, tutela della denominazione di origine "Prosciutto di Parma" 13 febbraio 1990*) (the law of Feb. 13, 1990), *available at* <http://www.fiicamcom.it/informazioni/visinf.asp?IDiNFL=851> (last visited Jan. 22, 2004).

7. *Id.* at 678, ¶ 7; *see also* Decreto 253, art. 25, *regolamento di esecuzione della legge febbraio 13, 1990*, Law 26 of February 13, 1993, *available at* <http://www.ismea.it> [hereinafter Decreto 253].

8. *Prosciutto di Parma*, 2 C.M.L.R. at 678, ¶ 8.

9. Commission Regulation 1107/96 of 12 June 1996 On the Registration of Geographical Indications and Designations of Origin Under the Procedure Laid Down in Article 17 of Council Regulation 2081/92, 1996 O.J. (L 148) 1 [hereinafter Regulation 1107/96].

10. *Prosciutto di Parma*, 2 C.M.L.R. at 680, ¶ 22.

11. *Id.*

12. *Id.*

13. *Id.* at 650, ¶ AG21.

14. *Id.*

15. *Id.* at 680-81, ¶¶ 25-26.

1107/96, which establish protection of the PDO Parma ham, because they sliced and packaged the ham in the United Kingdom, rather than in Italy.¹⁶

Both the Court of Appeals for England and Wales and the lower court that initially heard the complaint dismissed the Consorzio's claims.¹⁷ The Consorzio then appealed to the House of Lords, which referred the matter to the ECJ for a preliminary ruling on questions of Community law.¹⁸ The House of Lords inquired whether Regulations 2081/92 and 1107/96 created a valid Community right to restrain the sale of Parma ham that is not sliced, packaged, and labeled in the region of Parma under the supervision of the Consorzio.¹⁹

The ECJ considered four issues: 1) whether Regulation 2081/92 precludes the use of a PDO being conditioned on certain after-production operations such as slicing and packaging; 2) whether imposing the condition that Parma ham can only be sliced and packaged by the Consorzio constitutes a measure having an equivalent effect to a quantitative restriction (MEQR) on exports under article 29 EC; 3) if so, whether article 30 EC justifies the condition; and 4) whether the condition may be imposed on economic operators when the Italian law specification has not been brought to their attention.²⁰

The ECJ *held*: (1) Under Regulation 2081/92, where a condition involving slicing and packaging is in the specification for the PDO, it may not be precluded from use; (2) the condition placed on use of Parma ham is a measure that has an equivalent effect to a quantitative restriction (MEQR) within the meaning of article 29 EC; (3) article 30 EC does justify the condition; and (4) the condition cannot be imposed against operators who do not have notice of the condition through proper Community legislation.²¹ C-108-01, *Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd. & Hygrade Foods Ltd.*, [2003] 2 C.M.L.R. 639 (2003).

16. *See id.* at 681, ¶¶ 25, 27.

17. *Id.* at 681, ¶¶ 28, 29.

18. *Id.* at 681, ¶¶ 30, 31.

19. *Id.*

20. *Id.* at 681-82, ¶¶ 35-39.

21. *Id.* at 682-91, ¶¶ 50, 59, 81, 99. The companion case to *Parma* is *Ravil SARL v. Bellon Import SARL and Biraghi SpA*, where the ECJ similarly ruled that a condition that cheese be grated and packaged inside the region of production was valid if the specification lays out the condition. Although the condition was a MEQR, article 30 justified it and therefore it was compatible with article 29. Case C-469/00, *Ravil SARL v. Bellon Imp. SARL, Biraghi SpA*, 2003 O.J. (C 171) 4.

II. BACKGROUND

A. PDO Legislation

A council regulation is a piece of Community legislation passed by the European Commission that is immediately and directly applicable to all EU Member States.²² As soon as the Commission passes a regulation, it becomes binding law throughout the Community.²³ The Commission recognized that certain products should be protected by nature of their history of production, geography, reputation, and quality; and in 1992, it enacted Council Regulation 2081/92 which established Community-wide protection of PDOs.²⁴

Protection of a PDO arises out of a Community desire to protect consumers against the misleading use of a protected indication, as well as to protect producers against dilution of their product name.²⁵ Among the many justifications listed in the Preamble of the Regulation are: (1) production, manufacture, and distribution of certain products that are important for the Community economy; (2) diversification of agricultural production to achieve a balance between supply and demand; (3) protection of rural areas by improving the rural economy; (4) improvement of the quality of Community products; and (5) fairness of competition between producers.²⁶

Regulation 2081/92 states that the Community will protect certain designations of origin and geographical indications of agricultural products and foodstuffs.²⁷ A designation of origin is

the name of a region . . . used to describe an agricultural product or a foodstuff—originating in that region . . . 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

22. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) art. 278 (1997) [hereinafter EC TREATY]; Case C-34/73, *Variola v. Amministrazione dell Finanze*, 1973 E.C.R. 981, ¶¶ 10-11 [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8226 (1974).

23. See EC TREATY, *supra* note 22, art. 249.

24. See DR. DWIJEN RANGNEKAR, THE SOCIO-ECONOMICS OF GEOGRAPHICAL INDICATIONS: A REVIEW OF EMPIRICAL EVIDENCE FROM EUROPE, REPORT TO UNCTAD/ICTSD CAPACITY BUILDING PROJECT ON INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT 12 (2003), available at http://www.iprsonline.org/unctadictsd/docs/GIS_Economics_Oct03.pdf (last visited Jan. 16, 2004); Regulation 2081/92, *supra* note 1, pmb., 1992 O.J. (L 208) 1.

25. Regulation 2081/92, *supra* note 1, pmb., 1992 O.J. (L 208) 1.

26. *Id.*

27. *Id.* art. 2, 1992 O.J. (L 208) 2.

production, processing and preparation of which take place in the defined geographical area. . . .²⁸

The Regulation also gives a nonexhaustive list of specifications that must be present in order to claim a PDO.²⁹ The specifications include, among other things, the description of the product, definition of the geographical origin, evidence that the product originates from the designated region, description of the authentic methods used to obtain the product, and details of the link between the product and the geographical region.³⁰

For a PDO to be registered, it must first be introduced to the Commission by a Member State.³¹ A party begins the registration process by making an application to the Member State of the geographical region in question.³² The Member State then decides whether the application satisfies the requirements of a PDO.³³ If it does, the Member State sends the application to the Commission for a decision on whether the PDO will become recognized throughout the European Community.³⁴

The Commission has a duty to investigate suggested PDOs to see if they conform to the requirements defined in the Regulation.³⁵ Any Member State can challenge the PDO by submitting a complaint to the country allegedly in breach.³⁶ Upon receiving the complaint, the country will conduct an internal investigation and report its findings to the sister Member State that filed the complaint.³⁷ If there is no agreement after this process, the Commission will conduct an investigation into the alleged breach.³⁸

Once registered, the PDO will be protected against commercial use of the name, misuse or imitation of the name, addition of words such as “style” or “type” to the end of the name, and any other indications designed to mislead consumers as to the origin of the product.³⁹

28. *Id.* art. 2(2)(a), 1992 O.J. (L 208) 2.

29. *Id.* art. 4, 1992 O.J. (L 208) 3.

30. *Id.*

31. *Id.* art. 5, 1992 O.J. (L 208) 4.

32. *Id.* art. 5(4), 1992 O.J. (L 208) 4.

33. *Id.* art. 5(5), 1992 O.J. (L 208) 4.

34. *Id.*

35. *Id.* art. 10(1), 1992 O.J. (L 208) 5.

36. *Id.* art. 11(1), 1992 O.J. (L 208) 5.

37. *Id.* art. 11(2), 1992 O.J. (L 208) 5.

38. *Id.* art. 11(3), 1992 O.J. (L 208) 5.

39. *Id.* art. 13(1), 1992 O.J. (L 208) 6. An example would be calling a product “Parma-style ham.”

B. European Economic Community Treaty Articles

One of the primary goals in the establishment of the European Union was to create a common market unencumbered by restrictions on the movement of goods between Member States.⁴⁰ Article 3 of the Treaty Establishing the European Community (EC Treaty) prohibits Member States from imposing on one another customs duties, quantitative restrictions on the import or export of goods, and any other measures having the equivalent effect of quantitative restrictions.⁴¹

EC Treaty article 29 restates this primary purpose by declaring that “[q]uantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.”⁴² Specifically, article 29 prohibits all measures that create a disparity in the treatment of goods in trade between Member States, especially if that disparity results in the competitive advantage of a Member State’s own domestic product.⁴³ The European Commission implemented EC Treaty article 29 into Community Law through Directive 70/50.⁴⁴ The Directive defined MEQR broadly as anything that merely hinders trade.⁴⁵ Thus, any measure that hinders trade is a violation of article 29 under the language set out in the Directive.⁴⁶

Even if a measure hinders trade and is therefore impermissible under article 29, article 30 permits exceptions for restrictive measures that Member States can justify on certain grounds.⁴⁷ Under article 30, the protection of commercial and industrial property justifies restrictive measures,⁴⁸ and the ECJ has previously held PDOs to be property within

40. See EC TREATY, *supra* note 22, art. 3.

41. *Id.*

42. *Id.* art. 29. EC Treaty articles 34 and 36 were renumbered by the Treaty of Amsterdam to articles 29 and 30, respectively. TREATY OF AMSTERDAM AMENDING THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1, 86 [hereinafter TREATY OF AMSTERDAM].

43. Case C-209/98, Entreprenorforeningens Affalds/Miljosektion (FFAD), acting for Sydhavnens Sten & Grus ApS v. Kobenhavns Kommune, 2000 E.C.R. I-3743, 2 C.M.L.R. 39, ¶ 34 (2000).

44. See Commission Directive 70/50 of 22 December 1969, 1969 O.J. (L 013) 29-31.

45. *Id.* art. 2, 1969 O.J. (L 013) 29.

46. *Id.*

47. See EC TREATY, *supra* note 22, art. 30. The article allows for restrictions on movement of goods if they are “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.” *Id.*

48. *Id.*; Case C-388/95, Belgium v. Spain, 2000 E.C.R. I-3123.

the meaning of article 30.⁴⁹ However, under article 30 such restrictions are not valid exceptions if they constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.⁵⁰ Once the ECJ determines that a measure falls within the justifications listed in article 30, the ECJ inquires whether the measure taken is calculated to achieve the desired result in the least restrictive way.⁵¹ If there is a less restrictive manner to achieve the desired legitimate goal, under this proportionality test the courts will strike down prohibitive measures that may otherwise fall within the article 30 exceptions.⁵² According to case law, the court should construe article 30 narrowly and should strictly scrutinize the exceptions to article 29 prohibitions.⁵³

C. Belgium v. Spain

In *Belgium v. Spain*, Spain enacted a national law granting a PDO to Rioja wine producers in 1991.⁵⁴ One specification for the PDO was that all wine produced in the Rioja region must also be bottled in that region in order to carry the region's name on the label.⁵⁵ Belgium claimed that this specification constituted a quantitative restriction on the export of Rioja wine and was therefore a violation of EC Treaty article 29.⁵⁶ Spain argued that the restriction did not limit the quantity of wine exported; it only prevented the misuse of the Rioja PDO.⁵⁷

The ECJ found that the restriction created a difference in treatment of goods between Spain and other Member States, which created a restriction on export trade within the meaning of article 29.⁵⁸ Spain

49. Case C-3/91, *Exportu S.A. v. Lor S.A. & Confisorie du Tech*, 1992 E.C.R. II-5529, 5533-4, ¶¶ 16-22.

50. *Id.*

51. *E.g.*, Case C-72/83, *Campus Oil Ltd. v. Minister for Industry & Energy*, 1984 E.C.R. 2727, ¶ 37 (stating that with an article 30 exception, the scope must not be extended further than that necessary to protect the interests which it is intended to secure—exceptions are justified if they do not restrict trade more than is absolutely necessary); Case C-174/82, *Officer van Justile v. Sandoz BV*, 1983 E.C.R. 2445, ¶ 18 (stating that the principle of proportionality contained within article 30 requires that measures to prohibit trade should be restricted to what is necessary to attain the legitimate aim); *see* Case C-121/85, *Conegate Ltd. v. Commissioners of Customs & Excise*, 1986 E.C.R. 1007 (deciding whether a prohibition on imports could be justified under article 30).

52. *See generally* *Campus Oil*, 1984 E.C.R. 2727; *Officer van Justile*, 1983 E.C.R. 2445; *Conegate*, 1986 E.C.R. 1007.

53. Case C-205/89, *Comm'r v. Greece*, 1991 E.C.R. I-1361, 2 C.M.L.R. 213, ¶ 9 (1994).

54. Case C-388/95, *Belgium v. Spain*, 2000 E.C.R. I-3123, ¶¶ 2-3, 6-7.

55. *Id.* ¶¶ 5-11.

56. *Id.* ¶ 36. The *Belgium* decision refers to old article 34 instead of article 29. *Id.* ¶ 13.

57. *Id.* ¶ 37.

58. *Id.* ¶¶ 41-42.

justified the restriction, claiming that bottling is an important part of the wine making process.⁵⁹ Spain further claimed the necessity of the restriction to protect industrial and commercial property, as stated in article 30, by preserving the quality of the wine.⁶⁰

The ECJ determined that the trend in Community legislation was moving toward the enhancement of the quality of certain products within the Community,⁶¹ and PDOs are a way to promote the reputation of some products.⁶² PDOs are within the scope of industrial and commercial property rights as stated in article 30 because they guarantee that certain products derive from specific areas and possess particular characteristics.⁶³ The ECJ observed that wine is a very specific product closely connected to the region of origin and method of production.⁶⁴ Spain designed the laws regarding Rioja wine to protect the quality and characteristics of the wine.⁶⁵ The court found the condition compatible with Community law even though it restricted the free movement of goods.⁶⁶ Transportation would put the quality of wine at risk because the process of bottling contains many delicate operations.⁶⁷ The court stated that under the best conditions, the quality of wine would not diminish from bulk transport or bottling outside the region; however, since Rioja has specialized experience in bottling and in the particular characteristics of the wine, the best conditions are more likely to occur within the region than in a another Member State.⁶⁸ Because there were no less restrictive means of assuring the quality of the wine in this case, the ECJ found that the language of article 30 justified the breach of article 29.⁶⁹

III. THE COURT'S DECISION

In the noted case, the House of Lords referred to the ECJ for a preliminary ruling on four issues.⁷⁰ The first issue for the court to decide was whether Regulation 2081/92 precluded the use of a PDO from being

59. *Id.* ¶ 47.

60. *See id.* ¶¶ 48, 50. The *Belgium* decision refers to old article 36 instead of article 30.
Id. ¶ 13.

61. *Id.* ¶ 53.

62. *Id.* ¶¶ 53-54.

63. *Id.* ¶ 54.

64. *Id.* ¶ 57.

65. *See id.* ¶ 58.

66. *Id.* ¶ 59.

67. *Id.* ¶¶ 60-61.

68. *Id.* ¶¶ 64-65.

69. *See id.* ¶ 76.

70. Case C-108/01, *Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd. & Hygrade Foods Ltd.*, [2003] 2 C.M.L.R. 639, 681-82, ¶ 31 (2003).

conditioned upon certain operations taking place in the region of production.⁷¹ Briefs from Spain, France, and Italy clearly showed that those countries agreed with the Consorzio that Regulation 2081/92 allows for a Member State to condition a PDO upon the slicing and packaging taking place within the region of production.⁷² The United Kingdom, on the other hand, agreed with Asda and Hygrade that the Regulation does not confer the right to attach such restrictions.⁷³

The ECJ examined the language of Regulation 2081/92 to determine whether a Member State can condition use of a PDO on compliance with a specification.⁷⁴ Two purposes of a PDO are to establish an identifiable quality of product and to identify a specific geographic region of origin.⁷⁵ Article 4(2) of Regulation 2081/92 contains a non-exhaustive list of specifications that must be present in order to be considered eligible for a PDO.⁷⁶ The language in the Regulation is not exclusive, and the ECJ concluded that the language in article 4(2) does not prevent the application of special technical rules to the use of a PDO.⁷⁷ Therefore, the ECJ found that nothing in the language of article 4(2) precludes a Member State from conditioning the use of a PDO upon the slicing and packaging taking place in the region of production when the specification contains those conditions.⁷⁸

The second issue facing the court was whether the condition that Parma ham be packaged and sliced in the region of production constituted a MEQR under article 29.⁷⁹ Asda, Hygrade, and the United Kingdom claimed that the conditions on the slicing and packaging of Parma ham were restrictions on free trade under article 29 because ham sold in Italy is not subject to the same restrictions as ham sold in other Member States.⁸⁰ The specification, they argued, hindered trade and should therefore be found impermissible.⁸¹

The court found that the slicing and packaging conditions created a difference in treatment between ham transported within Italy and ham exported to Member States.⁸² Domestic ham could be sliced and

71. *See id.* at 681, ¶ 36.

72. *See id.* at 682, ¶ 40.

73. *Id.* at 682, ¶ 41.

74. *See id.* at 682, ¶ 43.

75. *See id.* at 683.

76. *Id.* at 682-83, ¶ 44.

77. *Id.* at 683, ¶ 48.

78. *Id.* at 683, ¶ 50.

79. *Id.* at 683, ¶ 37.

80. *Id.* at 683, ¶¶ 51-52.

81. *See id.*

82. *See id.* at 684, ¶¶ 56-58.

packaged in the region where it was bought, while export ham could not.⁸³ The condition restricted exported Parma ham differently from Parma ham transported within the region, and because the difference between domestic and export trade was more favorable to the domestic product, the ECJ ruled that the condition created a quantitative restriction on exports within the language of article 29.⁸⁴

The third issue for the court to decide was whether article 30 justified the restrictions on the Parma ham PDO.⁸⁵ The ECJ relied almost exclusively on the decision in *Belgium* to reach its conclusion.⁸⁶ The court found that the restriction in *Belgium* was justified on the grounds that it helped preserve the reputation of the PDO by guaranteeing authenticity and quality of the product, and it constituted protection of industrial or commercial property under the language of article 30.⁸⁷ In the noted case, the ECJ similarly found the Member State's restriction that Parma ham be sliced and packaged in the region of production was justified.⁸⁸

Asda and Hygrade claimed that the slicing and packaging are post-production operations that do not affect the quality or authenticity of Parma ham, and the United Kingdom argued that application of the facts of the noted case to the approach adopted in *Belgium* would lead to a different result.⁸⁹ The *Belgium* court justified the restrictions on the bottling of wine outside the region of production on the grounds that bottling is an integral part of the production process.⁹⁰ In the noted case, the United Kingdom and Asda argued that slicing ham does not hold the same importance as bottling does in wine-making.⁹¹

The ECJ disagreed with the United Kingdom and Asda and reasoned that placing conditions on the slicing and packaging of Parma ham controls how the product appears on the market.⁹² The conditions, according to the ECJ, serve to protect the quality and authenticity of the product which, in turn, preserves the reputation of the PDO.⁹³ Parma ham is usually consumed in slices, and it is sliced in such a way as to

83. *Id.*

84. *See id.* at 684, ¶¶ 58-59.

85. *See id.* at 684, ¶ 38.

86. *See id.* at 684-85, ¶ 60.

87. *Id.*

88. *See id.* at 685-88, ¶¶ 60-78.

89. *Id.* at 685, ¶ 61.

90. *See* Case C-388/95, *Belgium v. Spain*, 2000 E.C.R. I-3123, ¶¶ 61, 76.

91. *Prosciutto di Parma*, 2 C.M.L.R. at 685, ¶ 61.

92. *Id.* at 686, ¶ 65.

93. *Id.*

enhance the flavor, color, and texture of the product.⁹⁴ The specifications for the Parma ham PDO outline three stages of production, and the second and third stages refer to the slicing and packaging of the ham.⁹⁵ Specifically, only ham that satisfies certain conditions may be sliced, packaged, and labeled as Parma ham.⁹⁶ Certain defects in the ham are only apparent during the slicing process, and the Consorzio will not package ham that does not meet their standards.⁹⁷ The specification states that all operators wishing to slice and package the ham must be approved, and at all stages of production there must be inspectors present.⁹⁸ Furthermore, at each stage there are checks relating to authenticity, quality, hygiene, and labeling that require specialist assessments as well.⁹⁹ Slicing and packaging the ham, according to the ECJ, is an important part of the operations that affects consumer perceptions of the product.¹⁰⁰

The ECJ further found that a failure in the slicing and packaging stage could compromise the authenticity and quality of the product.¹⁰¹ As in *Belgium*, the court believed that allowing checks to be performed outside the region would not guarantee the same quality as checks performed within the region.¹⁰² Supervisors in Parma have specialized knowledge of the characteristics of Parma ham, and, according to the court, one could not expect them to effectively introduce their methods to inspectors in other Member States.¹⁰³

The Advocate General, in his opinion against this rationale, argued that the Consorzio offered no evidence that slicing outside the region of production would impair the universally recognized quality of Parma ham.¹⁰⁴ Specifically, Parma ham is regularly sold to customers and restaurants either whole or in blocks for people not yet approved by the Consorzio or trained as inspectors in Parma to slice.¹⁰⁵ The ham sold in this condition does not receive the scrutiny of inspectors in Parma during the slicing process, yet the Consorzio has no issue with calling it Parma

94. *Id.* at 686, ¶¶ 67-68.

95. *Id.* at 686, ¶ 69.

96. *See id.* at 686-87, ¶ 71. The mentioned conditions relate to weight, length of aging, water content, internal humidity, and lack of visible faults. *Id.*

97. *See id.*

98. *Id.* at 687, ¶¶ 72-73.

99. *Id.* at 687, ¶ 74.

100. *See id.*

101. *See id.*

102. *Id.* at 687, ¶ 75 (citing Case C-388/95, *Belgium v. Spain*, 2000 E.C.R. I-3123, ¶ 67).

103. *Id.*

104. *Id.* at 662, ¶ AG82 (Opinion of Advocate General Alber).

105. *Id.*

ham when sold in this fashion.¹⁰⁶ The Advocate General distinguished the noted case from *Belgium* by noting that bottling wine outside of its region is much more likely to diminish the quality of the product.¹⁰⁷ The bottling of wine is an intricate procedure closely tied to the wine-making process.¹⁰⁸ Slicing of ham does not have a comparable significance.¹⁰⁹ It is a post-production operation that has little to do with the quality gained in the curing of ham.¹¹⁰

In addition, the Advocate General argued that the court should not justify this restriction under article 30.¹¹¹ Labeling would be a less restrictive means to preserve the quality and reputation of the PDO.¹¹² If deterioration in quality concerns the Consorzio, because the ham is not being sliced under its supervision, labeling would provide an adequate way to inform consumers of the difference.¹¹³ Even if this restriction could fall under an article 30 exception for the protection of industrial or commercial property, the ECJ should not allow it.¹¹⁴ Restrictive conditions are compatible with Community law if they are necessary and proportionate for upholding the reputation of Parma ham, or, to put it another way, if there is not a less restrictive method of protecting the quality and authenticity of the PDO.¹¹⁵ In this case, however, less restrictive means existed to accomplish the desired goal, and therefore the conditions set out in the Parma ham PDO were, according to the Advocate General, disproportionate and incompatible with Community law.¹¹⁶

The ECJ responded to this claim by stating that, in theory, someone performs the slicing of Parma ham in a restaurant in front of the customer or in a place where the customer can verify its authenticity.¹¹⁷ The ECJ stated that due to the quantities involved, Parma ham's reputation is not at great risk from mishandling in restaurants because the majority of sales come from ham that is packaged in Italy.¹¹⁸ There is a

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 663, ¶ AG85.

110. *See id.*

111. *See id.* at 667-68, ¶¶ AG102-5.

112. *See id.* at 670, ¶ AG115.

113. *Id.*

114. *See id.*

115. *Id.* at 686, ¶ 66 (citing Case C-388/95, *Belgium v. Spain*, 2000 E.C.R. I-3123, ¶¶ 58-59).

116. *See id.* at 670, ¶ AG115 (Opinion of Advocate General Alber).

117. *Id.* at 687, ¶ 77.

118. *Id.*

far greater risk that inadequate slicing and packaging procedures upstream will harm the reputation of the PDO if the Member State does not regulate them.¹¹⁹ Labeling is not an option because there is still the risk of a drop in quality and “[a]ny deterioration in the quality or authenticity . . . might harm the reputation of all ham marketed under the PDO ‘Prosciutto di Parma.’”¹²⁰ The ECJ found that there were no less restrictive means of attaining the desired goal and held that because the conditions of slicing and packaging preserve the reputation of Parma ham by controlling its quality, EC Treaty article 30 justified the measures of trade restrictions.¹²¹

The final issue the court addressed was whether the condition of slicing and packaging could be relied on against economic operators.¹²² The issue arose from the fact that Italian law Decreto 253 contains the specification for slicing and packaging ham.¹²³ Commission Regulation 1107/96, however, is the legislation that created the Community-wide PDO.¹²⁴ The Community law only lists Parma ham as a PDO; it does not list the specifications contained in Decreto 253.¹²⁵

The *Official Journal of the European Communities (Official Journal)* publishes Community legislation, and Regulation 1107/96 did not contain the specifications for slicing and packaging as it appeared in the *Official Journal*.¹²⁶ Asda and Hygrade argued that legislation not published in the *Official Journal* cannot be enforced against economic operators in the Community.¹²⁷ A Community measure can only create individual rights if it is sufficiently clear, precise, and unconditional.¹²⁸ Furthermore, the principles of legal certainty and transparency are breached unless the scope of the legislation is clear and foreseeable.¹²⁹

The ECJ ruled that Regulation 1107/96 did not contain the specifications that would allow an economic operator to foresee the scope of the regulation.¹³⁰ The condition that the product must be sliced and packaged in the region of production could not be relied on against

119. *Id.*

120. *Id.* at 688, ¶ 80.

121. *Id.* at 687-88, ¶ 78.

122. *Id.* at 688, ¶ 81.

123. *See id.* at 678, ¶¶ 7-8 (citing Decreto 253, *supra* note 7, art. 25).

124. *See* Regulation 1107/96, *supra* note 9, pmb., 1996 O.J. (L 148) 1.

125. *See id.* art. 1, 1996 O.J. (L 148) 1-2.

126. *Id.*

127. *See Prosciutto di Parma*, 2 C.M.L.R. at 689, ¶ 85.

128. *Id.*

129. *Id.*

130. *See id.* at 691, ¶ 98.

economic operators because it was not brought to their attention by adequate publication in Community legislation.¹³¹

IV. ANALYSIS

Parma ham is one of over 500 products currently registered as a PDO under Regulation 2081/92.¹³² The noted case marks a continuing trend in the ECJ to protect PDOs even when it appears EC Treaty articles 29 and 30, which govern the free movement of goods within Member States, do not justify them.¹³³

Advocate General Alber seemed ready to stop the *carte blanche* freedom that Member States now have to restrict trade through PDOs.¹³⁴ The ECJ and Alber agreed that while specifications on PDOs are valid if contained in the legislation, the specifications of slicing and packaging still create a measure equivalent to a quantitative restriction on exports.¹³⁵ Alber, however, found that EC article 30 did not justify the restrictions on Parma ham because, among other things, there are less restrictive means to protect the Parma ham PDO.¹³⁶ The ECJ disregarded the opinion of Advocate General Alber in reaching its ruling and, in fact, failed to respond to many of his arguments.¹³⁷

The great importance of the noted case is found where the Advocate General and the ECJ disagree. The noted case addresses how the ECJ chooses to reconcile Regulation 2081/92, which permits restrictions on trade, with EC Treaty article 29, which directly prohibits national measures that create such restrictions.¹³⁸ Even though the ECJ previously ruled that Community law measures must be compatible with treaty provisions that establish the free movement of goods, the ECJ, in disagreeing with the Advocate General, seems to allow a Community law

131. *Id.* at 691, ¶99.

132. *See* EUROPEAN UNION, EUROPA, QUALITY PRODUCTS CATCH THE EYE: PDO, PGI, AND TSG, at http://europa.eu.int/comm/agriculture/foodqual/quali1_en.htm (last visited Jan. 16, 2004).

133. *See* Case C-388/95, *Belgium v. Spain*, 2000 E.C.R. I-3123; Case C-469/00, *Ravil SARL v. Bellon Import SARL*, 2003 O.J. (C-171) 4; Case C-66/00, *Re Criminal Proceedings Against Bigi (Consorzio del Formaggio Parmigiano Reggiano, intervening)*, 2002 E.C.R. I-5917, 3 C.M.L.R. 69 (2002).

134. *See Prosciutto di Parma*, 2 C.M.L.R. 645-77, ¶¶ AG1-AG147 (Opinion of Advocate General Alber).

135. *Id.* at 660, ¶AG75.

136. *Id.* at 670, ¶AG115.

137. *Id.* at 644-45, ¶H22-23. This point is strengthened by the number of cases the Advocate General cites to support his point; Alber cites forty cases while the ECJ cites five. *Id.*

138. *See id.* at 659, ¶AG70.

measure to undermine this free movement, as stated in EC Treaty article 29.¹³⁹

In examining Community law measures, it is often helpful to look at the rationales for Community legislation. One of the primary justifications for allowing PDOs is to protect the legitimate interests of producers against dilution of the indication.¹⁴⁰ Article 4 of Regulation 2081/92 lists characteristics that a product must have to qualify for a PDO.¹⁴¹ The characteristics required tie, almost exclusively, to the geographic area of production for the product.¹⁴² However, there is more required than just a link between the product and the area; there must be a quality about the product that it derives from the local methods, the physical nature of the area, or the human element of the area of production.¹⁴³ Under established case law, article 30 justifies an article 29 restriction when the specifications listed are necessary to give a product a certain regional characteristic or to preserve a characteristic or quality acquired during its production.¹⁴⁴ Therefore, in order to find a specification valid and worthy of protection, there should be a finding that the specification is necessary to associate the product with the area.¹⁴⁵ If the specification is not tied to the region, there will be little danger that misuse of the specification will cause dilution of the indication.¹⁴⁶

The Consorzio argues that slicing demands special knowledge that is available only in the region of production, and that this is the only means of guaranteeing the quality of Parma ham.¹⁴⁷ The Consorzio has not advanced a convincing argument that the slicing of ham in the region of production is essential to preserving a special characteristic of the ham.¹⁴⁸ Nor has the Consorzio put forth an argument that explains why this special knowledge is available only in the region of production.¹⁴⁹ The ability to slice ham is a human influence that exists independent of

139. See Case C-51/93, *Meyhui NV v. Schott Zweisel Glaswerke AG*, 1994 E.C.R. I-3879, 3898, ¶ 11.

140. RANGNEKAR, *supra* note 24, at 13.

141. Regulation 2081/92, *supra* note 1, art. 4(2), 1992 O.J. (L 208) 3.

142. See *id.*

143. See *id.*

144. See *id.*; EC TREATY, *supra* note 22, art. 30; Case C-321-324/94, *Criminal Proceedings Against Jacques Pistre*, 1997 E.C.R. I-2343, ¶ 31.

145. See *Jacques Pistre*, E.C.R. I-2343, ¶ 31.

146. See *id.*

147. Case C-108/01, *Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asada Stores Ltd. & Hygrade Foods Ltd.*, [2003] 2 C.M.L.R. 639, 661 ¶¶ AG78-79 (2003).

148. *Id.* at 661, ¶ AG80.

149. *Id.*

the region.¹⁵⁰ A person with the special knowledge of how to slice Parma ham could easily move to another Member State and perform the task there just as well.¹⁵¹ In this case, ham sliced by Consorzio standards outside of Parma would be indistinguishable from ham sliced within the area of production.

Furthermore, the restriction on slicing and packaging Parma ham outside of the region of production does not extend to individuals, restaurants, or delicatessens.¹⁵² The Consorzio has not explained how slicing ham outside the region impairs the quality of Parma ham, especially since the ham is sold in blocks to be sliced by the consumer or by retailers who most likely have no training in slicing ham.¹⁵³ This is the weakness of the ECJ decision. It is unlikely that the Consorzio would allow others to slice ham, in any fashion, outside of the region of production if it was integral to the quality and reputation of their product. The Consorzio now claims that some ham can only be sliced and packaged in the region of production, while other ham can be sliced outside the region, yet the distinction is not clear. The decision still allows Asda to slice Parma ham outside Italy, as long as it is sliced in front of customers rather than in a factory.¹⁵⁴ Asda can sell Parma ham that it slices in its deli, but it cannot sell ham that it slices and puts on its shelves.¹⁵⁵ The distinction is meaningless, and the fact that the Consorzio allows this disparity further strengthens the point that slicing is not, in fact, an essential element of production.

The Consorzio tries to counter this argument by claiming that consumers can see the mark of origin when someone slices the ham in front of them.¹⁵⁶ This argument doesn't seem to justify the difference as consumers rarely see the ham when it is sliced and the mark is often not visible when the ham is sliced past a certain point.¹⁵⁷ In restaurants, this point is even more clear. Customers can only assume the ham served to them is Parma ham. It is unreasonable to assume that customers are going to ask to see the mark of origin of the ham they are about to consume.¹⁵⁸ Following this logic, consumers could just as easily ask the manager of Asda about the origin and methods of pre-packaged Parma

150. *See id.*

151. *Id.*

152. *Id.* at 681, ¶¶ 33-34.

153. *Id.* at 662, ¶ AG82.

154. *Id.* at 681, ¶¶ 33-34.

155. *See id.*

156. *See id.* at 662, ¶ AG83.

157. *Id.* at 682, ¶ AG84.

158. *See id.*

ham that Asda sells on the shelf. Again, there is no reason for this disparity, other than to point out the small part slicing plays in the overall production, quality, and reputation of Parma ham.

A second justification for allowing PDOs is to protect the consumer against misleading use of the indication.¹⁵⁹ The Consorzio tries to justify the PDO as a protective measure for consumers who desire high quality and might otherwise be fooled into buying a product that is not true Parma ham.¹⁶⁰ If this is a serious concern of the ECJ, it should examine the extent to which the specification actually serves to reduce consumer confusion. The ECJ does not engage in this sort of analysis, and instead bases its opinion almost entirely on the effect on producers.¹⁶¹ The ECJ states there is a danger that consumers will not receive the same quality of ham if someone slices and packages it outside of Parma.¹⁶² The problem with the ECJ's reasoning is that it fails to address the alternatives introduced by Advocate General Alber. To the extent that there would be consumer confusion about the location of the slicing of the ham, labeling would be an easy solution against the misleading use of the PDO.

Labeling would also solve the concern raised by the Consorzio that the PDO guards against the risk of decreased quality of ham.¹⁶³ If consumers detected a difference in the slicing and packaging of Parma ham inside the region, proper labeling would allow the consumer the opportunity to buy the ham they preferred. Now, instead of buying ham off the shelves, consumers will be forced to stand in line at a counter to get Parma ham or buy Parma ham that is packaged solely by the Consorzio.¹⁶⁴ The PDO creates an obvious monopoly for the Consorzio, and in addition to the added inconvenience to consumers, there will be little regulation in pricing because the monopoly destroys the benefits of a free market.¹⁶⁵ The Consorzio has no competition, and in this sense, the specification clearly protects the domestic product of a Member State at the expense of sister countries in the European Union. In addition, only workers in Italy can be employed in packaging Parma ham. In this case, Italy has succeeded in securing protection not only for Italian employees, but also for Parma ham producers who can now charge whatever they

159. See RANGNEKAR, *supra* note 24, at 12.

160. See *Prosciutto di Parma*, 2 C.M.L.R. at 651, ¶ AG31; Regulation 2081/92, *supra* note 1, pmb1., 1992 O.J. (L 208) 1.

161. See *Prosciutto di Parma*, 2 C.M.L.R. at 686-88, ¶¶ 68, 75, 78, 80.

162. See *id.* at 687, ¶ 76.

163. *Id.* at 669-70, ¶¶ AG112-14.

164. See *id.* at 681, ¶¶ 33-34.

165. See EC TREATY, *supra* note 22, art. 3.

want for their product.¹⁶⁶ This is something the European Union originally sought to avoid.

Regarding the applicable case law on this topic, the ECJ chooses to follow the reasoning in *Belgium* to justify the restriction on trade present in the noted case.¹⁶⁷ The problem, however, is that the slicing of ham does not have the same significance to production as does the bottling of wine.¹⁶⁸ The bottling of wine contains many operations that are integral to the wine making process while there is little evidence of the same significance of slicing in the production of ham.¹⁶⁹ The comparison would make more sense if the ECJ upheld a postproduction specification for *Belgium*, such as a condition that all wine had to be poured under the supervision of Rioja officials. This obviously was not the case. Furthermore, wine and spirits are afforded a greater level of protection than agricultural products and foodstuffs.¹⁷⁰ The comparison between the operations of slicing and bottling, which have different levels of Community protection and substantially different effects on the quality of the product, is a tenuous one.¹⁷¹

Finally, and perhaps the most troubling aspect of the decision, is that the ECJ states that there are no less restrictive means to accomplish the goal of protecting the Parma ham PDO and cites *Belgium* again to support this claim.¹⁷² The court chooses not to address the alternative of training personnel who could leave the region.¹⁷³ Regarding labeling, the court states simply, without discussion, that it would not achieve comparable protection.¹⁷⁴ The court states that *any* deterioration in the quality of ham would be unacceptable.¹⁷⁵ Offering this unyielding protection of a PDO undermines the goal of the European Community to establish a common market.¹⁷⁶ One of the most important tenets of the EC Treaty, which breaks down all barriers to trade at the borders of the Member States, goes unexamined by the ECJ. The ECJ is not willing to engage in any balancing test to see if they can serve the broader

166. See *Prosciutto di Parma*, 2 C.M.L.R. at 688, ¶ 81.

167. See *id.* at 688, ¶ 80.

168. *Id.* at 663, ¶ AG85.

169. *Id.*

170. See Regulation 2081/92, *supra* note 1, pmb., 1992 O.J. (L 208) 1 (“Whereas the planned rules should take account of existing Community legislation on wines and spirit drinks, which provide for a higher level of protection.”).

171. See *Prosciutto di Parma*, 2 C.M.L.R. at 663, ¶ AG85.

172. See *id.* at 688, ¶ 79.

173. See *id.* at 688, ¶ 80.

174. *Id.*

175. *Id.*

176. See EC TREATY, *supra* note 22, art. 3.

Community goals.¹⁷⁷ It seems that the protection of PDOs at all costs is now more important than maintaining a free market.¹⁷⁸

This fact is particularly distressing in light of the ease with which countries can create PDOs. PDOs arise out of a Member State's national legislation.¹⁷⁹ Companies who may have significant influence in the law-making body of the Member State can petition for the creation of a PDO for their product. The Member State checks to see if the minimum specifications for establishment of a PDO are present.¹⁸⁰ After determining the correct conditions are present, the Member State forwards the application to the governing body of the European Union that performs a formal examination of the PDO.¹⁸¹ The goal of the examination is to ensure that the findings of the Member State do not contain obvious mistakes.¹⁸² This is a very low standard and allows Member States to easily register an enormous variety of products as PDOs.

Member States have a natural interest in protecting their domestic products, and the negative consequences of this expansion of PDO protection are clear. Prior to the establishment of the European Union, countries were free to protect domestic products by a variety of tariffs, import/export restrictions, quotas, and inspections. The EC Treaty sought to open the Member State borders to free trade unrestricted by protectionist measures. Countries now have a way around the EC Treaty and are free to protect domestic goods as they see fit. The ECJ's decision to expand the rights regarding PDOs combined with the reluctance of the ECJ to engage in any sort of proportionality test is alarming. The monopolies created by PDOs provide mechanisms for countries to establish barriers at their borders; these measures taken by the Member States and endorsed by the ECJ threaten to destroy the free trade principles established by the creation of the European Union.

V. CONCLUSION

Questions of law and policy are often about where the court chooses to draw the line. The ECJ has an obligation to balance the interests of maintaining an open market with the desire to protect regional products.

177. See *Prosciutto di Parma*, 2 C.M.L.R. at 688, ¶ 81.

178. See *id.*

179. See Regulation 2081/92, *supra* note 1, art. 5, 1992 O.J. (L 208) 3-4.

180. *Id.*

181. *Id.* art. 6(1).

182. See Case C-269/99, *Carl Kuhne GmbH & Co. KG v. Jutro Konservenfabrik GmbH & Co. KG*, 2001 E.C.R. I-9517, ¶ 54.

The problem with this ruling is where the ECJ chooses to draw the line. In following earlier precedent, the ECJ seems to indicate that it will protect all PDOs, regardless of how little the specifications attached to them actually affect the quality or regional nature of the product. The ECJ draws the line at a point where all PDOs seem to be valid restrictions under Community law. This is especially troubling considering Member States have the largest role in approving their own PDOs. Member States are now able to protect jobs and domestic products as they did before integration into the European Union – merely by creating a PDO in their national legislation. Countries have been quick to register an assortment of products to protect them from the free market. Member States have found a way once again to protect domestic goods, and they are exploiting it. This is an enormous step backwards for trade in the European Union, and the European Court of Justice seems content simply to acquiesce.

Britton Seal*

* J.D. candidate 2005, Tulane University School of Law; B.S. Biology, Washington & Lee University.