

You Are What You Ate: Food Heritage and the EU's Internal Market

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When people are asked what they associate most positively with Europe – whether they themselves are European or not – the most typical answer relates to Europe's heritage: its historical legacy, its towns, cultural heritage, and its culinary traditions.¹ Food looms large in these answers: whether it's a Guinness or a Chianti; a Camembert or Halloumi; Gulash or Smørrebrød. This paper analyses the way in which EU law, and in particular its internal market, deals with heritage and traditions related to food – whether in its cultivation, marketing, or consumption.

At first sight, the internal market and food heritage make for an odd mix. While many of the most important free movement cases have dealt with food and drinks – from *Cassis de Dijon* to *Scotch Whisky* – approaching it from the perspective of the *heritage* or tradition that is inextricably linked with many food products in Europe complicates things. Heritage, conceptually, is best understood as a claim made in space and in time. Tasting Parmigiano Reggiano is a physical manifestation of 'how things are done' in a specific place (even when we eat it in Amsterdam we 'are' in Parma) and a rooted in time (someone tasting it in 1254, 1712 or 2003 will have had a similar taste perception). This reference to space and time are what rends the narrative of heritage authentic and, thereby, legitimate. This legitimacy is increasingly projected onto claims of national identity in a process that has become known as 'gastro-nationalism'. On this account, gastronomy (in its widest term) is increasingly used throughout Europe and indeed the world to celebrate and cultivate national identities or national 'way of doing things'.

This in itself, among other things, indicates that the claims that heritage makes are neither exclusively local nor consigned to 'the past' – it is something that is constantly reassembled, recast and reified. This makes for tricky terrain for internal market law, used as it is to focus on uniformity, free competition across Member States, and market rationality, alternatively expressed in the need for empirical verification of claims or their scientific underpinnings. Internal market law appears, almost constitutively, allergic to the emotive register that terms such as identity, locality, tradition or authenticity are inevitably loaded with. Equally, it struggles to understand how the spatial, temporal and representative dimensions of heritage can be conceptualised within the context of free movement. This makes the interaction between the internal market and food heritage fractured (section 1).

Difficult as it may be, EU law has not escaped having to think about food heritage. This paper looks at three different instances where EU law and food heritage meet, in an attempt to gauge how EU law engages with the claims that heritage makes. In a first range of cases, it has faced national rules that protect a specific 'traditional' fashion of cultivating or producing food products. In these cases, dealing with beer, pasta and foie gras, the CJEU has hardly engaged with the argument of heritage beyond highlighting that consumers can be trusted to differentiate what is authentic and what is not, and by implication, to decide whether to *care* about heritage or not (section 2). In a second instance, EU law has had to deal with resistance by some Member States against the cultivation of GMO crops and the marketisation of food products (partially) composed of GMOs. In dealing with these challenges, both

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¹ S. Anholt, 'Places: Identity, Image and Reputation' (Palgrave 2010), chapter 8 on 'Brand Europe'.

the EU legislator and the Court offer a surprising degree of latitude to domestic resistance. Such resistance, however, must explicitly be articulated in non-scientific yet geographically specific terms, creating an incentive for Member States to 'invent' food heritage, understood as a commitment to the maintenance of a specific type of agricultural ecology that comprises of farmers, landscapes, land use, and both socio-cultural and bio-physical environmental factors (section 3). The third example focuses on the EU's rules on the protection of certain geographical indications (PGI) and protected designations of origin (PDO). These rules are meant to protect food heritage by, in essence, projecting *local* heritage throughout Europe: anyone buying feta in the EU will know that it has been entirely produced in certain specific regions in Greece. In essence, the EU here takes heritage out of competition: it is considered something sufficiently important that the basic rules of EU free movement law are explicitly and permanently suspended. Research indicates that this type of designation is seen as elevating the status of a product, safeguarding income for traditional producers while at the same time imposing a regimented management structure that risks artificially freezing heritage in time (section 4).

All this tells us a number of things. On the one hand, it suggests that EU law doesn't dispose of a vocabulary or conceptual framework to make sense of food heritage in a way that is unrelated to its potential marketization. In deciding whether to expose heritage to or protect it from the processes of the internal market, EU law understands heritage in a partial and incomplete fashion. It remains insensitive to the way in which heritage is a process that is inherently dynamic – constantly being reassembled by the many participants that engage with it in numerous fashions, in highly specific sites throughout Europe. In its most recent incarnation, EU law forecloses this level of dynamism by focusing on the codification, professionalisation and commodification of food heritage. This raises, substantively, the question whether the legal protection of heritage is suitable at a time where food heritage is increasingly employed as a symbol of exceptionalism rather than localism, and, procedurally, brings into focus the disconnect between the tools of internal market law and the lived experience of EU citizens, which is firmly rooted in time and space in a way that EU law struggles to appreciate or reproduce (section 5).

1. Heritage and the Internal Market

The concept of heritage is versatile. On the one hand it is versatile because it attaches to so many different contexts – both tangible and intangible – that treating it as a coherent conceptual category might lead to unsatisfactory analytical findings. Heritage, for example, engages with languages and landscapes, with religions and buildings, with clothing, sporting teams, music, myths and towns. This contribution will focus on food heritage, that is, the way in which the production or consumption of food is intimately connected with claims of authenticity rooted in a particular place and a particular time.

On the other hand, the concept of heritage is versatile not because of the many different contexts in which it has popped up, but because of its internal structuring. It comes with certain characteristics that make it a challenging analytical category, as it requires us to be sensitive to temporal, spatial and representative dynamics simultaneously. Heritage is, in the simplest of terms, not something *of* or even *about* the past. It consists of the selective and deliberate use of the past in order to create a particular image and vision of the present or the future.² It is a term that is inherently disputed,

² R. Harrison, 'Heritage: Critical Approaches' (Routledge, 2013); L. Smith, 'Uses of Heritage' (Routledge, 2006); R. Harrison, 'Heritage as future-making practices' in: R. Harrison, C. DeSilvey, C. Holtorf, S. Macdonald, N.

wherein its authority is inextricably linked with ‘truth claims’ towards authenticity of the past but wherein, simultaneously, those truth claims are continuously reconstructed and reconfigured in order to ‘fit’ with the present.³

Four distinct characteristics of heritage must be highlighted. First, and perhaps most obviously, heritage comes with both temporal and spatial connotations, rooting its authority and claims to authenticity in both particular histories and specific sites. In the area of food, for example, references to ‘grandmother’s cooking’, ‘traditional’, ‘inter-generational’, ‘bygone era’ are replete and used to imbue a certain product or production process with a flavour of authenticity, in doing so attempting to render it immune to demands of change or evolution.⁴ What matters, on this view, is the production of collective knowledge about the cultivation or production of food, passed on from generation to generation.⁵ There is more than a hint of nostalgia in these narratives, offsetting the psychological challenge of dealing with a rapidly changing world and society by holding on to the uncomplicated (often rural and manual) rites of food production, preparation, and consumption of the past ‘when things were simpler’.⁶ While the temporal dimension in food heritage is, then, very prominent, so is its spatial dimension (which is perhaps easier to grasp for law). Claims to food heritage are invariably rooted in a particular region, town, or (less frequently) nation. Usually, this is explained as an environmental condition: the local staples of food production, the sediments left by conquering and conquered cultures, the geography and climate, and so on all contribute to create a particular local *taste*, a local flavour. The French term ‘*terroir*’ captures this interaction between the physical properties of the land and the food it has spawned very nicely.⁷ *Terroir* denotes at once a memory of place as well as an allegiance to its conditions. But, of course, as with all memories, they tend to be selective and incomplete, creating narratives connecting food with regions or places that omit external influences or contributions.⁸

Secondly, and relatedly, heritage is also a normative claim closely linked to collective and individual identity. It is, in a way, a claim about what life looks like in a particular place: a claim about *how* to live.⁹ Partially, this is a claim that derives from the intimate psychological and cultural connection between food and the self – whether as sustenance, as part in family life, in cultural or religious celebrations, or as memory.¹⁰ Nothing tastes as good as the food of one’s youth, which, by inference,

Bartolini, E. Breithoff, H. Fredheim, A. Lyons, S. May, J. Morgan & S. Penrose, ‘Heritage Futures: Comparative Approaches to Natural and Cultural Heritage Practices’ (2020, UCL Press).

³ S. Macdonald, ‘Memorylands: Heritage and Identity in Europe Today’ (Routledge, 2013).

⁴ See for an overview A. Gezen, ‘Food Studies and the Heritage Turn: A Conceptual Repertoire’ (2014) 12 *Food & History* 67; and L. Biennassis, ‘Les chemins du patrimoine: de Notre-Dame au camembert’, in: A. Campanini, P. Scholliers & J-P. Williot (eds.), ‘Manger en Europe’ (Lang, 2011) 86.

⁵ L. Di Fiore, ‘Heritage and Food History’, in: I. Porciani (ed.), ‘Food Heritage and Nationalism in Europe’ (Routledge 2019) 35; M. Fonte, ‘Knowledge, Food and Place: A Way of Producing, a Way of Knowing’ (2008) *Sociologia Ruralis* 200.

⁶ A. Trubek, ‘Radical Taste: What is our future?’ (2011) 110 *Radical History Review* 194; S. Macdonald, ‘Memorylands: Heritage and Identity in Europe Today’ (Routledge, 2013).

⁷ A. Trubek, ‘The Taste of Place: A Cultural Journey into Terroir’ (UCP, 2008); E. Barham, ‘Translating Terroir: the global challenge of French AOC labelling’ (2003) 19 *Journal of Rural Studies* 127.

⁸ On hybridisation and transculturation see D. Bell & G. Valentine, ‘Consuming Geographies: we are what we eat’ (Routledge, 1997) and I. Cook & P. Crang, ‘The World on a Plate: Culinary Culture, Displacement and Geographical Knowledges’ (1996) 1 *Journal of Material Culture* 131.

⁹ J. Bessières, ‘Local Development and Heritage: Traditional Food and Cuisine as Tourist Attractions in Rural Areas’ (1998) 38 *Sociologia Ruralis* 21.

¹⁰ D. Sutton, ‘Remembrance of Repasts: An Anthropology of Food and Memory’ (Bloomsbury 2006); S. Macdonald, ‘Memorylands: Heritage and Identity in Europe Today’ (Routledge, 2013).

firmly roots it in space as well.¹¹ Food is linked to our subjectivity (and not just in its clichéd version of ‘you are what you eat’): it alludes to powerful emotions, memories, differentiates societies from others but also stratifies them internally.¹² It plays an increasingly important role in situating the individual’s political stance and cultural identity, has always played a crucial role in collective rituals, celebrations, and myths.¹³ As Jean Althelme Brillat-Savarin, one of the fathers of the science of gastronomy, wrote in 1825: ‘tell me what you eat, and I shall tell you what you are’.¹⁴ Importantly, however, many of these narratives of belonging and collective identity related to food are *invented*. As Hobsbawm argues, many of these traditions have been invented to strengthen the nation state and collective affinities in the late 1800s and early 1900s at a time where the rapid changes in society required and suited re-anchoring.¹⁵ Partially this reconstruction of time and space and the way they hold together collective identities can be seen a deliberate strategy in state building, but partially it was also a psychological need in the subjects themselves. More recently, Michaela DeSoucey’s influential work on gastro-nationalism has connected the ‘invention of tradition’ to food heritage, suggesting deliberate strategies by a range of political, economic and social actors such as the government, producers, tourist boards, city councils and activists to explicitly appropriate specific foods as reflection of the identity of a certain place or people, often recasting regional heritage as national one.¹⁶ Such strategies of gastro-nationalism, often cast as a response to the homogenising tendencies of globalisation, thread the fine (and confusing) line between the projection of localism and the claims of exceptionalism.

Thirdly, heritage must be understood not only as *substance* (whether tangible or intangible) but also as a *process*. It is a dynamic instrument for the constant reconstruction and problematisation of how we live. It is a discursive strategy for making claims not about the past but about the future: about which specific parts of the past matter for, and should frame, that future. This open-ended and dynamic process of reconstruction is a reflection of the fact that heritage is always embedded in daily life. It is, in a way, practical as much as it is imagined. Think of this simple example: if due to a collapse in biodiversity or climate change a certain ingredient no longer grows in a certain region but is replaced by a newcomer, better adapted to the climatic conditions of that region, a ‘traditional’ dish of that region might be slightly altered in composition to account for the availability of ingredients. Heritage is, in other words, something that is ‘lived’ or ‘acted out’.¹⁷ Subjects relate to it in infinitely different ways: as an economic product or site, as a social space or habit, or as cultural praxis or memory. Whether we think of heritage as the centre of Amsterdam, Parmigiano Reggiano, Benfica football club, Irish traditional music or the forest of Białowieża, they cannot be understood as only economic products, social spaces or cultural practices: they are all of these, and they mean different things for

¹¹ A. Trubek, ‘The Taste of Place: A Cultural Journey into Terroir’ (UCP, 2008).

¹² D. Chalmers, ‘Food for Thought’: Reconciling European Risks and Traditional Ways of Life’ (2003) 66 *Modern Law Review* 546, A. Geyzen, ‘Food Studies and the Heritage Turn: A Conceptual Repertoire’ (2014) 12 *Food & History* 69-71, P. Capuzzo, ‘Food and Locality: Heritagization and commercial use of the past’, in: I. Porciani (ed.), ‘Food Heritage and Nationalism in Europe’ (Routledge 2019).

¹³ On symbolism and food see P. Scholliers, ‘Meals, food narratives, and sentiments of belonging in past and present’ in: P. Scholliers (ed), ‘Food, Drink and Identity: Cooking, Eating and Drinking in Europe since the Middle Ages’ (Bloombury 2001).

¹⁴ S. Stano, ‘Lost in Translation: Food, Identity and otherness’ (2016) 211 *Semiotica* 81.

¹⁵ E. Hobsbawm, ‘Mass-Producing Traditions: Europe, 1870-1914’ in: E. Hobsbawm & T. Ranger, ‘The Invention of Tradition’ (CUP, 1992). See in relation to food: L. Di Fiore, ‘Heritage and Food History’, in: I. Porciani (ed.), ‘Food Heritage and Nationalism in Europe’ (Routledge 2019).

¹⁶ M. DeSoucey, ‘Gastronationalism: Food Traditions and Authenticity Politics in the European Union’ (2010) 75 *American Sociological Review* 432; L. Biennassis, ‘Les chemins du patrimoine: de Notre-Dame au camembert’, in: A. Campanini, P. Scholliers & J-P. Williot (eds.), ‘Manger en Europe’ (Lang, 2011) 88.

¹⁷ L. Smith, ‘Uses of Heritage’ (Routledge, 2006).

different people. Heritage, then, becomes at once the conceptual language used to *advocate for* particular appropriations of these sites, products or customs, and to *mediate between* these different claims.¹⁸ Protecting or commodifying, making accessible, celebrating, codifying, resisting or replacing heritage are all strategies that serve to reconstruct what the past means today. This open-ended and dynamic process of meaning-making is as central to heritage as the substance that it relates to.

The fourth and final characteristic of heritage lies in its management. The process of advocacy and mediation around claims of heritage, described in the section above, has intensified in the past decades. Heritage has become a commodity – whether as a landscape, music, food or buildings. This ‘Disneyfication’ of heritage, and its packaging as a draw for tourism, inward investment and brand, has been noted throughout the world.¹⁹ It seems that legal frameworks and structures that protect heritage – whether under the auspices of UNESCO, the European Union, or its Member States - play an instrumental role in this process. They create, at once, an incentive for economic exploitation (in so far as formal classification as ‘heritage’ comes with a status boost)²⁰ and simultaneously delineate and structure the types of subjects and agents that are central to the application for and management of heritage sites, products and customs. This is the problematic duality of the codification of heritage: it ‘mummifies’ heritage, removing it from its daily reconstruction and casting it as a finished product that can be packaged and sold. The ensuing commodification, moreover, leads to the professionalisation of its management, the marginalisation of subjects that relate to heritage in *different ways*, and a loss of the dynamism that is central to heritage as a process and leading to the emergence of ‘museums of production’.²¹ This process prioritises professional, bureaucratic and scientific expertise to the detriment of the local and lay knowledge that keeps heritage ‘alive’ by constantly adapting it to the economic, socio-cultural and bio-physical environment. Law, and its ability to codify heritage, is deliberately employed as a strategy in this process.²²

The versatility of heritage – its focus on space and time, its contested and dynamic nature, its link to the emotive and identarian register – makes it an awkward concept for EU law and the internal market. It is also a largely unexplored concept in EU law. Almost all literature and research on EU food law deals with food safety, consumer protection, human health, food quality standards and their institutionalisation through EFSA.²³ These are lenses that EU law can work with and is used to: focusing on the management of risk, on scientific data, uniformity, market rationality, proportionality and mutual recognition. The lens of heritage, however, offers a different view. It brings into focus elements of the daily life of Europeans – their intimate connection to time and space, their claims of identity,

¹⁸ J. Bessières, ‘Local Development and Heritage: Traditional Food and Cuisine as Tourist Attractions in Rural Areas’ (1998) 38 *Sociologia Ruralis* 21.

¹⁹ S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 73; E. Barham, ‘Translating Terroir: the global challenge of French AOC labelling’ (2003) 19 *Journal of Rural Studies* 127.

²⁰ Ikbery B. Ilbery & M. Kneafsey, ‘Niche Markets and regional speciality food products in Europe: towards a research agenda’ (1999) 31 *Environment and Planning* 2207.

²¹ S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 73

²² See in relation to UNESCO: C. Bortolotto & B. Ubertazzi, ‘Foodways as Intangible Cultural Heritage’ (2018) 25 *International Journal of Cultural Property* 409; and in relation to the EU: A. Ichijo, ‘Food and Nationalism: Gastronationalism Revisited’ (2020) 48 *Nationalities Papers* 215.

²³ C. MacMaolain, ‘EU Food Law: Protecting Consumers and Health in a Common Market’ (Hart 2007) for a good overview of the literature.

their reconstruction of meaning – that EU law is usually blind to (as the recent emergence of critique is highlighting).²⁴

The lens of heritage shows a few immediate tensions in the interaction with the internal market. We can trace a tension between different temporalities (on the one hand the prospective claims of a unified Europe (an market) and on the other hand the retrospective claims of heritage), between two different conceptual registers (on the one hand the physical and objective claims of the internal market and on the other hand the metaphysical and subjective claims of heritage)²⁵ and between two different spatialities (between, on the one hand, the unbounded nature of the internal market and on the other hand the deeply situated claims of heritage). As we saw above, moreover, we can trace a tension between different regulatory strategies: while heritage is an open-ended and dynamic process of reconstruction, its legal codification tends to ossify or mummify it, rendering it stable and immune to change. To be sure, this is a problem for all legal regulation of heritage, not only on the European level. Yet, the particularly ‘sticky’ nature of EU law, meaning that legislation or rulings are impossible to amend short of consensus between all of the EU’s institutional actors, make this point more acute. This has made, turning the argument upside down, EU law an interesting instrument for those who *want* heritage to be codified – whether in an attempt to monetise, protect or recast it. EU law – and most importantly the rules governing the internal market – can be seen as a strategy for the cultivation of claims of heritage.

EU law has, then, not been able to escape thinking about heritage, and particularly when it comes to food heritage. In a number of different settings, which will be discussed in the following sections, the Court has had to deal with claims of heritage – usually in an attempt to limit the application of the rules of free movement in order to account for its particularities. We will distinguish between cases dealing with composition rules meant to protect ‘traditional’ methods of production (section 2), cases dealing with GMOs and their effect on ‘traditional’ methods of agricultural production (section 3), and the procedure for geographical indications through which EU law protects certain culinary products and their heritage within the internal market (section 4). What is interesting about these cases is not just the varying degree to which the Court has been willing to accommodate the particularly local claims made in the name of heritage, but also *how* it has gone about trying to make sense of the clash between space, time, the conflicting accounts of heritage and the demands of the internal market.

2. Heritage as taste: Composition regulation

In a number of cases in the 80s and 90s, the compatibility of EU law with national rules protecting a particular and traditional fashion of food production were tested. These cases focused on German rules regarding the production of beer (the famous *Reinheitsgebot* adopted in 1516,²⁶ which only allows for four ingredients to be used in the production of beer), Italian rules regarding the type of wheat (durum wheat) to be used in the production of pasta, and French rules regarding the

²⁴ Chalmers is prescient in identifying these tensions in 2003 already: D. Chalmers, ‘Food for Thought’: Reconciling European Risks and Traditional Ways of Life’ (2003) 66 *Modern Law Review* 546-549. More recently see A. Vauchez, ‘The Map and the Territory: Re-assessing EU Law’s embeddedness in European societies’ (2020) 27 *Maastricht Journal of European and Comparative Law* 134-5, and L. Azoulai, ‘Living with EU Law’ (2022) 1 *European Law Open* xx.

²⁵ D. Chalmers, ‘Food for Thought’: Reconciling European Risks and Traditional Ways of Life’ (2003) 66 *Modern Law Review* 532.

²⁶ D. Brandauer, ‘Food Quality in History: the Genesis of the Bavarian Purity Law from 1516 until today’ in: I. Hartel & R. Budzinowski (eds.) ‘Food Security, Food Safety, Food Quality: Current Developments and Challenges in the European Union’ (Nomos, 2016).

composition and presentation of foie gras. The national legislation at issue codified the rules that had emerged historically in the locations of production. To the extent that they violated free movement rules (in so far as they stopped beer, pasta and foie gras produced according to other rules in other Member States from being sold) and in doing so offered an advantage to domestic producers, this seemed as a by-product of the primary objective of protecting 'heritage'. In these three cases, the Court held a consistent line. It argued that composition rules – whether they protect food heritage or not – are in principle violations of the rules on free movement of goods in so far as they create an obstacle for, say, Swedish pasta to enter the Italian market, Irish beer to enter the German market, and Hungarian foie gras to enter the French market. The Member States attempted to justify these restrictions with reference to consumer protection: their citizens have become used to pasta, beer, or foie gras having certain properties and qualities, and would be confused if these terms could be used to denote products with a different composition. The Court held that the composition rules could, however, not be justified with reference to consumer protection, which could also be achieved by the adoption of adequate labelling requirements so that Italian, German and French consumers could decide, for themselves, which type of pasta, beer and foie gras they preferred to purchase.

It is remarkable that the Court, in deciding these cases, does not mention the heritage context to these disputes. It is as if it were mechanically deciding an 'ordinary' case relating to the free movement of goods and consumer protection. Only where the Court dismisses the arguments by the Member States that suggest that composition rules protect consumers who are used to a 'traditional' version of the food does the Court – in passing – touch on the fact that pasta is "an Italian product with a long tradition",²⁷ and that German consumers might be "led to belief that a beverage called 'bier' complies with the *Reinheitsgebot*".²⁸ The claims of heritage are absent in the Court's understanding of these cases.

This is in stark contrast with the Opinions of AG Mancini in *Zoni* and AG La Pergola in *Commission v France*, where they at length engage with the heritage context to the dispute, suggesting that this context must be taken into account, partially to understand consumer behaviour but also partially as a matter of taking heritage – and its social, relational, economic, cultural aspects – seriously. As such, AG Mancini, in what is surely one of the very few examples of a high-profile case being attributed to an AG from the referring Member State, from the start of his Opinion stresses the importance of the context of the case, alluding to the fallout of the Court's ruling on the *Reinheitsgebot*: "the media are full of protests from German brewers and consumers reacting against the 'challenge' which the Commission had dared to issue against the superior quality of German beer by attacking before this Court rules on purity dating back to the time of Martin Luther (...) A process of de-trivialization (...) is necessary [since] as far as the interests involved and the collective imaginations of the two nations are concerned beer has the status in Germany that spaghetti has in Italy; so much so that the protests with which the Italians received the [preliminary reference] appear to echo those of the Germans".²⁹ Throughout the Opinion this engagement with the context of the case comes back, whether in explaining legislative exceptions with historical and everyday stories "within the family, in country trattorias and even in city restaurants, pasta – to be eaten the same day – was predominantly 'home made'; and for the household and small-scale production of this kind use was made of the flour available on the market which, particularly in the north, was not always made from durum wheat";³⁰ in offering culinary tips based on the type of wheat used in pasta: "it is well known that only pasta

²⁷ Case 90/86, *Zoni* [1988] ECR 4285, para. 16.

²⁸ Case 178/84, *Commission v Germany ('Beer')* [1987] ECR I-1227, para. 26.

²⁹ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 2.

³⁰ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 4.

made with durum wheat does not become sticky during cooking and arrives at the plate as the Italians like it: *al dente*”;³¹ in highlighting the social dimension that the production of durum wheat sustains large parts of the economy in the Mezzogiorno;³² even making a Freudian slip in calling the Italian legislation a ‘purity law’;³³ in highlighting that “in Naples or Milan the man in the street would reel off at least a dozen [types of pasta]”,³⁴ and in even sending (presumably a *référéndaire*) to the local supermarket in Luxembourg to photograph and compare the different pasta types on offer.³⁵

AG La Pergola, in *Commission v France* offers a similarly passionate defence of the heritage aspects of foie gras and the need for their insulation from the forces of the internal market, starting off by highlighting that “the parties to these proceedings agree that since the 16th century the image of foie gras has been inseparably linked to French gastronomic tradition” wherein “to this day the production, processing and marketing of foie gras are still organised, even in the other producer countries, according to the professional practices and rules which gradually took hold in France and were subsequently codified by the French legislature”.³⁶ The need for protection on the European level derives, in La Pergola’s view, from the fact that consumers cannot be trusted to know what good foie gras is: “preparations with foie gras as a base are traditional products which cannot be placed on the same footing as modern food products (..) the trade descriptions in dispute, inherited from very old customs common to the majority of the French people, constitute the best means of supplying consumers with correct information.”³⁷

The reference to consumer protection as a defence of heritage in the opinions of Mancini and La Pergola is somewhat circular: the composition rules codified certain consumer habits, which then become the very reason why those rules must remain in place. But more important than the focus on consumer protection is, of course, the context of heritage, which remains visible throughout their opinions. This view of heritage is, however, a disputed one. Codification, which can be seen as protecting heritage from external and internal challenges, including competition, technological advances, demand-side pressures, ecological claims, or regulatory intervention is, in their view something that *makes heritage possible*. Composition rules, in other words, allows food heritage to survive the regulatory realignment with new rules, new consumers, and new competitors that the European internal market demands. Arguably, it is exactly this codification that mummifies heritage and makes it static: heritage *requires* the dynamic interplay between actors, spaces, environmental and regulatory pressures. The Court, without any acknowledgement of this being deliberate, takes this second view. As in so many other cases, it reverts to its settled case law and suggests that adequate labelling is a more proportionate way to protect consumers than composition rules. Choice of food, in this way, is reduced to taste, and exposed to the dynamics of the internal market.

Interestingly, for all the Court’s blindness to the *national* heritage context implicit in these cases, it is much more nuanced in its assessment of how heritage and the internal market might intersect. In *Commission v Germany*, it makes reference to the fact that “consumer’ conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of the common market is, it should be added, one of the factors that may play a

³¹ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 4.

³² Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 6.

³³ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 6.

³⁴ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 13.

³⁵ Opinion of AG Mancini in Joined Cases 407/85, *Drei Glocken* and 90/86, *Zoni* [1988] ECR 4233, para. 14.

³⁶ Opinion of AG La Pergola in Case C-184/96, *Commission v France* (‘Foie Gras’) [1998] ECR I-6197, para 2.

³⁷ Opinion of AG La Pergola in Case C-184/96, *Commission v France* (‘Foie Gras’) [1998] ECR I-6197, para 17.

major contributory role in that development. [Composition rules] prevent it from taking place”.³⁸ The Court, here, does seem to take temporal and spatial aspects of heritage seriously, recasting domestic heritage as European heritage, to be distilled, recasted and reiterated in a new space, with new actors, new relationships and new influences inflicted upon it.³⁹ In a previous case, the Court had already highlighted that in thinking about the logic of the internal market “it is impossible to restrict oneself to consumer habits in a member state or a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule”.⁴⁰ The CJEU, here, exposes culinary heritage to the ‘normal’ functioning of the internal market, suggesting that their existence, stability and evolution must be opened up to a wider range of actors.

This destabilisation of the spatial context within which heritage traditionally operates can be criticised as offering too transactional or one-dimensional a perspective, in focusing exclusively on consumer behaviour and ignoring that heritage construction and maintenance is a relational process that engages a plethora of other aspects – be it producers, local inhabitants, more-than-human entities, landscapes – and that its dynamic evolution is also inextricably and inevitably dependent on its historic rootedness: both the future *and* the past matter, and both the spatial re-orientation of the internal market *and* its local rootedness matter. The Court, in these cases, reduces food heritage to taste a while ignoring that taste reflects *something else* as well. At the same time, and perhaps counterintuitively, the rulings of the Court have allowed for the European-wide cultivation of the heritage products that were discussed in the cases. If anything, the functioning of the internal market has *benefitted* the domestic producers of durum wheat pasta, ‘pure’ beer, and foie gras, who have not just consolidated their domestic market share but gained large new ones across Europe.⁴¹ This suggests, at the very least, that composition rules protecting traditional products, or products produced in accordance with a particular heritage, do not thrive *because* of their legal codification. Instead, what the Court here argues is that the market forces are part of the web of relations and interactions that structure heritage – even if it remains largely blind to all the other forces that operate to sustain heritage.

3. Heritage as ecology: GMO regulation

The interaction between the EU’s internal market and GMOs has been particularly protracted. In the wake of astonishing technological breakthroughs, crops and seeds have emerged that, thanks to genetic engineering and synthetic biology, are better able to fit the conditions in which they grow, for example by enhancing their resistance to diseases or extreme weather. While the cultivation of GMO crops has taken off rapidly across the world, resistance throughout Europe remains prominent. This resistance reflects all sorts of different concerns, ranging from a perceived threat to the livelihood of small-scale and traditional farmers, ethical concerns about the manipulation of organisms, the danger of cross-pollination and its effect on non-GMO crops, and the risks to human health, animal life, food sovereignty and wider environmental factors such as soil quality, water quality and biodiversity.

³⁸ Case 178/84, *Commission v Germany* (‘Beer’) [1987] ECR I-1227, para. 32.

³⁹ S. Stano, ‘Con-Fusion Cuisines: Melting Foods and Hybrid Identities’ in: ‘New Semiotics: Between Tradition and Innovation’ (NBU Publishing 2014).

⁴⁰ Case 170/78, *Commission v United Kingdom* (‘Beer/Wine’) [1980] ECR 417, para. 14.

⁴¹ As suggested by the Court in Case 90/86, *Zoni* [1988] ECR 4285, para. 27.

The EU's regulation of GMOs – governing their authorisation, use, release, marketing, labelling and export – is relatively straightforward.⁴² Authorisation for a GMO can be requested from the Commission, which decides on the basis of expert opinions by the European Food Safety Authority (EFSA) identifying (the absence of) risk for human health or the environment. This regulation has been extensively scrutinised by scholars, focusing their critique on the Commission's overreliance on EFSA for its epistemic legitimacy, fearing that the introduction of non-scientific elements might undermine its authority,⁴³ and the ensuing side-lining of 'lay knowledge' and non-scientific factors in both risk assessment and risk management.⁴⁴ According to Kritikos, for example, the process "creates a significant imbalance between scientific and non-scientific factors and transforms the space provided for a broader evaluation and debate about what constitutes acceptable risk and adverse effect for the society into a forum where an 'expert' reading of the GMO issue is perpetuated."⁴⁵ Despite the Commission's best efforts, however, Member States remained sceptical about the authorization process. As such, a number of Member States (unsuccessfully) relied on safeguard clauses in Article 114 (5) TFEU and the different pieces of legislation to block the release of approved GMOs.⁴⁶ Other Member States simply refused to comply with the Commission decisions and subsequent Court rulings.⁴⁷

Faced with this level of resistance, the Commission suggested an amendment of the GMO legislation. Directive 2015/412 introduces a remarkable level of national autonomy in deciding on (limits to) the cultivation of GMO crops. As such, the new Article 26b of the Directive explicitly allows a Member State to either exclude a certain geographical region (a valley, a region, the whole country) from the authorisation decision, or, alternatively, to block the cultivation of GMO crop on the basis of reasons such as environmental policy objectives; town and country planning; land use; socioeconomic impacts; avoidance of GMO presence in other products; agricultural policy objectives or public policy.⁴⁸ Any decision to ban the cultivation of GMOs on these grounds must highlight the "particular circumstances of the Member State, region or area", must be proportionate and may *not* be based on the scientific evidence already taken into account by EFSA in its authorisation decision.⁴⁹

This amendment is remarkable for a number of institutional, constitutional and doctrinal reasons, which are extensively highlighted in the literature.⁵⁰ When approached from the perspective of heritage, however, a number of other implications become visible.

⁴² Directive 2001/18 on deliberate release [2001] OJ L106/1; Regulation 1829/2003 on genetically modified food and feed [2003] OJ L268/; Regulation 1830/2003 on traceability and labelling [2003] OJ L268/24.

⁴³ M. Weimer, 'Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and Its Reform' (2015) 2 *European Law Journal* 622; D. Chalmers, "Food for Thought": Reconciling European Risks and Traditional Ways of Life' (2003) 66 *Modern Law Review* 532.

⁴⁴ M. Kritikos, 'Traditional Risk Analysis and Release of GMOs into the European Union' (2009) 34 *European Law Review* 405; M. Geelhoed, 'Divided in Diversity: Reforming the EU's GMO Regulation' 18 (2016) *Cambridge Yearbook of European Legal Studies* 20.

⁴⁵ M. Kritikos, 'Traditional Risk Analysis and Release of GMOs into the European Union' (2009) 34 *European Law Review* 416.

⁴⁶ Case C-165/08, *Commission v Poland* [2009] ECLI:EU:C:2009:473; Case C-439/05 and C-454/04, *P Land Oberösterreich and Austria v Commission* [2007] ECLI:EU:C:2007:510.

⁴⁷ M. Weimer, 'Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology' (OUP 2019), 167-8.

⁴⁸ Article 26b (3), Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁴⁹ Article 26b (3), Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁵⁰ M. Lee, 'GMOs in the Internal Market: New Legislation on National Flexibility' (2016) 79 *Modern Law Review* 317; M. Weimer, 'Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and Its Reform' (2015) 2 *European Law Journal* 622; M. Geelhoed, 'Divided in Diversity: Reforming the EU's GMO

The explicit renunciation of a science-based approach to decide on the cultivation of GMOs is perhaps the most obvious. Prior to the 2015 reform, the Commission and Court had repeatedly highlighted that only novel scientific findings could possibly form the basis for the adoption of safeguard measures by Member States. All requests by Member States on this basis had been rejected, essentially insulating EFSA's scientific findings, and the authorisation decision made on its basis, from contestation. The 2015 reform turns this upside down: the *only* argument that Member States are *not* allowed to use for their decision to block the cultivation of GMO crops is a science-based one, including the evidence already taken into account by EFSA in its decision that GMOs do not harm human health or the environment. Instead, Member States are explicitly invited to refer to non-scientific policy reasons "individually or in combination" to support their decision to ban the cultivation of GMOs in light of the "particular circumstances of the region" in question.⁵¹

This turn away from expert knowledge towards local knowledge, as well as away from science and towards context, feels almost deliberately tailored to suit a heritage approach. As Maria Fonte's pathbreaking work highlights, food heritage is deeply rooted in different forms of local knowledge (lay, tacit, traditional, contextual) about the local territory, tradition and practices.⁵² The transmission and valorisation of this type of knowledge engages a range of different actors as well as reflecting a range of different concerns and pressures, including economic, social, cultural, interpersonal and environmental ones. What Fonte's work highlights, in a way, is that forms of local knowledge often *already* internalise the different and competing pressures that structure the production and valorisation of food.⁵³ Even if Fonte doesn't use the conceptual register of heritage, her work, focusing on the transmission of knowledge in food products that have existed "since the 16th century or earlier", "date from prehistoric times" and on "the shepherding tradition with a history going back to the XV century",⁵⁴ understands heritage (in my view correctly) as an infinitely regressive web of interactions between actors, their economic, socio-cultural, and biophysical environment, competing demands, and regulation, all contained in specific spatial and temporal registers.

This relational perspective understands food heritage as ecology: as a complex ecosystem consisting of different actors with different interests, of particular landscapes and environmental conditions and constraints, of socio-economic and regulatory objectives and held together by the constant transmission of knowledge and mediation in conflicts between the actors and pressures involved. The GMO Reform – no doubt without intending to – embraces this understanding of heritage: it focuses attention to how different objectives intersect in a specific place, explicitly side-lining and delegitimising the scientific register that often obscures such ecological perspectives. In its preamble, for example, Directive 2015/412 highlights that cultivation of GMOs "is an issue with strong national, regional and local dimensions, given its use to land use, to local agricultural structures and the protection or maintenance of habitats, ecosystems and landscapes"⁵⁵ and that Member States can take account of "the maintenance and development of agricultural practices which offer a better potential to reconcile production with ecosystem sustainability, or maintenance of local biodiversity, including certain habitats and ecosystems, or certain types of natural and landscape features, as well

Regulation' 18 (2016) *Cambridge Yearbook of European Legal Studies* 20; M. Weimer, 'Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology' (OUP 2019); N. De Sadeleer, 'Marketing and Cultivation of GMOs in the EU: An Uncertain Balance between Centrifugal and Centripetal Forces' (2015) 4 *European Journal of Risk Regulation* 532.

⁵¹ Article 26b (3), Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁵² M. Fonte, 'Knowledge, Food and Place: A Way of Producing, a Way of Knowing' (2008) *Sociologia Ruralis* 200.

⁵³ M. Fonte, 'Knowledge, Food and Place: A Way of Producing, a Way of Knowing' (2008) *Sociologia Ruralis* 200.

⁵⁴ M. Fonte, 'Knowledge, Food and Place: A Way of Producing, a Way of Knowing' (2008) *Sociologia Ruralis* 200.

⁵⁵ Recital 6, Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

as specific ecosystem functions and services”.⁵⁶ Additionally, “Member States should be allowed to base their measures on other grounds that may include land use, town and country planning, or other legitimate factors including those relating to cultural traditions”.⁵⁷ This orientation towards a place-specific, ecological and relational understanding of food heritage also implicitly follows from the references to subsidiarity (leading to a focus on claims that relate to competences retained on the national level) and proportionality (the more fragile, specific, and complex a relational ecology is, the more unlikely less restrictive alternatives exist).⁵⁸ The Directive, in other words, explicitly *invites* Member States to come up with non-scientific reasons that are specific to a particular local setting in order to block GMOs.

It is unsurprising, then, that Member States have readily made use of these reforms. As of 2022, eighteen Member States have excluded some or all GMOs from cultivation on some or all of their territory.⁵⁹ Several Member States have, likewise, highlighted that their resistance to GMOs can only be appreciated taking account of a range of different pressures, again coming close to understanding the protection of food heritage as the protection of the entire ecology surrounding it. Hungary, for example, focuses on the protection of “organic or traditional farming practices”, and on the need to ensure employment (and population) in rural areas,⁶⁰ while Austria focuses on the need for “sustainable and multi-functional agriculture (landscape management, tourism, biodiversity, rural development, socio-economic aspects) that strongly promotes ecological measures, organic farming and organic food, regional food supply, local and regional farmer-business initiatives” and the protection of the small-scale farms that typify certain regions in Austria.⁶¹

The GMO saga suggests a second understanding of food heritage that is implicit in EU law: food heritage as ecology. On this view, the protection of a ‘traditional’ way of cultivating food is not necessarily about protecting the food product itself but about protecting the ecology that surrounds it and allows for it to be cultivated. It is a view of heritage that is sensitive to the relational commitments, conditions and pressures that make the production of food *in a particular place* possible. What is striking, however, is that Member States *had not been making* these arguments prior to the adoption of Directive 2015/412. The Directive nudges them to focus on local and lay knowledge by explicitly excluding reliance on scientific arguments. EFSA’s over-reliance on scientific proof for its findings that GMOs are safe for use has forced the opposite reaction in the Member States, allowing them to ‘invent’ narratives of heritage ecology.⁶²

The focus on local context, predictably, has also led to an increase in activism by regions in resisting GMO crops. The European GMO-free regions network currently comprises of 64 regions that explicitly

⁵⁶ Recital 14, Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁵⁷ Recital 15, Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁵⁸ Recitals 6 and 8, as well as Article 26b (3), Directive 2015/412 on GMO cultivation [2015] OJ L68/1.

⁵⁹ Full list available at https://ec.europa.eu/food/plants/genetically-modified-organisms/gmo-authorisation/gmo-authorisations-cultivation/restrictions-geographical-scope-gmo-applicationsauthorisations-eu-countries-demands-and-outcomes_en

⁶⁰ Hungarian contribution on socio-economic impact of GMO (2010), available from https://ec.europa.eu/food/plants/genetically-modified-organisms/socio-economic-considerations/reports-and-studies-contributions_en

⁶¹ Bundesministerium für Gesundheit, ‘Assessing socio-economic impacts of GMOs: Issues to consider for Policy Development’ (2010), available from https://ec.europa.eu/food/plants/genetically-modified-organisms/socio-economic-considerations/reports-and-studies-contributions_en

⁶² This might have unintended repercussions for other non-traditional forms of agriculture, such as organic farming. See H. Schmidt, ‘Regulation 2018/848 – The New EU Organic Food Law: War in the Villages or a New Kind of Coexistence’ (2019) 14 *European Food and Feed Law Review* 15.

look to defend their cultural, agricultural and food heritage, understanding this task to comprise a wide range of different objectives.⁶³ In line with Michaela DeSoucey's work on gastro-nationalism, it is unsurprising to see regions actively constructing their identities around their food and heritage ecology. The local focus that is implicit in thinking of heritage as ecology is, however, at odds with the way in which EU law structures both its internal market and the exceptions allowed for in Directive 2015/412, all of which rely on the central Member State (rather than its regions, towns or valleys) to articulate and support their heritage claims.

4. Heritage as instrument: Geographical indication regulation

The most explicit engagement with, and protection of, food heritage in EU law takes the form of geographical indications. Regulation 1151/2012 lays down the conditions under which a food product can obtain the label of 'protected designation of origin' (PDO), 'protected geographical indication' (PGI), or 'traditional specialities guaranteed' (TSG). These labels protect – to different degrees – producers of traditional food distinctly linked to a specific region (and often making reference to that region in its name) from competition by producers *outside* that region. Well-known examples of PDOs are Champagne, Feta, Prosciutto di Parma, or Port. PDOs offer the most protection against competitors, demanding that all parts of the production process take place within a clearly defined region. PDOs are available for a product where its name identifies products “originating in a specific place, region or, in exceptional cases, a country; whose quality of characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and the production steps of which all take place in the defined geographical area”.⁶⁴ PGIs are similar, but only requires “at least one of the production steps to take place in the defined geographical area”.⁶⁵ PGIs include Irish Grass Fed Beef, Aceto Balsamico di Modena, Jamon Serrano, Gouda Holland, or Oktoberfestbier. TSGs, finally, are not linked to a particular geographical area but prescribe a traditional production process that must be followed before a certain product name can be used.⁶⁶ TSGs include Mozzarella, Pizza Napoletana, and Gueuze beer. As of 2022, 1922 PDOs have been registered, 1469 PGIs, and 66 TSGs.⁶⁷

At first glance, the EU's geographical protection legislation appears to take heritage very seriously.⁶⁸ The legislation, for example, explicitly roots the demands for registration in space and time, showing a sensitivity to the contextual character of heritage. All PDO and PGI requests are required to establish a clear link to the specific geographical character of the region,⁶⁹ highlighting what makes it *unique* in terms of ecology, landscapes, human-animal-earth interaction, indigenous plants and trees, and so on.⁷⁰ Applications sometimes read like travel books, highlighting the herbs that grow and wild goats

⁶³ See the Rennes and Berlin Declarations of the <https://www.gmo-free-regions.org/>

⁶⁴ Article 5(1), Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁶⁵ Article 5(2), Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁶⁶ Article 18, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁶⁷ See for a full list: <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/>

⁶⁸ T. Lähdesmäki, S. Kaasik-Krogerus, K. Mäkinen, 'Genealogy of the Concept of Heritage in the European Commission's Policy Discourse' (2019) 14 *Contributions to the History of Concepts* 128.

⁶⁹ Article 5, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁷⁰ See also Case 12/74, *Commission v Germany [Sekt]*, para 8.

eat; the interplay between shade and sun; and properties of the soil and traditional farming techniques; the colour and organoleptic characteristics of the product that are directly linked to the region's environment (so we learn, for example, that the particular landscape of Sicily allows its oil to have the unique organoleptic attributes of "grass, tomato and artichoke").⁷¹ All applications require to indicate a history of production, with the term 'traditional', for example, "meaning proven usage on the domestic market for a period that allows transmission between generations; this period is to be at least 30 years".⁷² Almost all PDOs, PGIs, and TSGs spectacularly exceed this threshold, often referencing century-old production or cultivation processes.

The EU's legislation also explicitly mentions the maintenance of heritage as an objective. The preamble highlights that "the quality and diversity of the Union's agricultural, fisheries, and aquaculture production is one of its important strengths (..) making a major contribution to its living cultural and gastronomic heritage. This is due to the skills and determination of Union farmers and producers who have kept traditions alive".⁷³ Regulation 1151/2012 tries to protect this heritage by "securing a fair return for farmers and producers for the qualities and characteristics of a given product, or of its mode of production",⁷⁴ and, in doing so, helps to support rural economies "in less favoured areas, in mountain areas and in the most remote regions, where the farming sector accounts for a significant part of the economy and production costs are high"⁷⁵ by ringfencing their produce from competition from within and beyond the internal market.

By most accounts, the geographical indications are successful in securing income for the producers.⁷⁶ Research suggests a 100% mark-up for products labelled as PDO or PGI,⁷⁷ while collectively the GI products represent a yearly sales value of around €77 billion.⁷⁸ Many empirical studies highlight a drastic increase in market share for products labelled as GI, and have highlighted that the economic success of the GI labelling has alleviated economic pressures on local farmers, allowing for more expensive and time-consuming 'traditional' fashions of cultivation to be maintained, and has stabilised migration away from rural areas to urban centres.⁷⁹ In fact, the economic success of GIs is particularly visible in the vehement opposition of producers and regions that risk being excluded,⁸⁰ and in the

⁷¹ OJ 2016 C186/15, see A. Hilton, 'Selling or Saving Cultural Heritage? Sicilian Protected Geographical Indication Extra-Virgin Olive Oil' (PhD thesis, 2020, School of Anthropology, University of Arizona).

⁷² Article 3(3), Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁷³ Recital 1, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁷⁴ Recital 18, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁷⁵ Recital 4, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁷⁶ R. Bendix, 'In Search of Authenticity: The Formation of Folklore Studies' (UWisconsin Press 1997) on the process of turning the authentic into luxury.

⁷⁷ T. Chever, C. Renault, S. Renault & V. Romieu, 'Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication' (2012) International Final Report to the Commission (AGRI-2011-EVAL).

⁷⁸ European Commission, DG Agriculture and Rural Development, Evaluation support study on geographical indications and traditional specialities guaranteed protected in the EU [2021], <https://data.europa.eu/doi/10.2762/708630>.

⁷⁹ B. Ilbery & M. Kneafsey, 'Niche Markets and regional speciality food products in Europe: towards a research agenda' (1999) 31 *Environment and Planning* 2207.

⁸⁰ As an example of the tension between Slovenia and Italy on the name balsamic vinegar, see: **Error! Hyperlink reference not valid.**[section/agriculture-food/news/italy-slovenia-await-commission-to-settle-balsamic-vinegar-dispute/](https://www.ec.europa.eu/section/agriculture-food/news/italy-slovenia-await-commission-to-settle-balsamic-vinegar-dispute/)

prominent role that the protection of European GIs take in trade talks between the EU and its international partners.⁸¹

While the GI Regulation seems to successfully codify and protect heritage, such codification – especially to the level of detail required by the GI Regulation – always comes with risk of *ossifying* heritage, of freezing a dynamic century-long process in an entirely artificial moment. Regulation 1151/2012 (unlike the original GI Regulation 2081/1992) makes an allusion to this ever-evolving nature of heritage by highlighting that “farmers and producers have kept traditions alive while taking into account the development of new production methods and material”.⁸² In the registration process for GIs, however, the Regulation demands an incredible level of detail on all aspects of the production process, including for example the nutrients in the earth, modes of farming, availability of indigenous plants, ripening processes, physical, chemical microbiological or organoleptic characteristics of the product, and, more generally, a specific interaction between human and technological actions in the process.⁸³ This search for an artificial and codified ‘authentic truth’⁸⁴ is problematic for a number of reasons.

First, it leads to the creation of a static notion of heritage, wherein the continuous reassessment of ‘what matters’ from the past, and how it ought to influence the present and future, is prevented. This reassessment, however, is central to heritage, as it allows for it to be kept ‘alive’ and internalise new technology, new environmental factors, and mediate in the conflicts between different subjects that relate to heritage in different ways. As Bowen and De Master have argued, while “the local cultures and production methods that have created these unique products are constantly adapting to changing market, social and biophysical conditions, regulatory mechanisms fix production techniques in time and space”.⁸⁵ Standardisation and replicability are central to both the GI Regulation and the expectation of the market, leading to an artificial understanding of food heritage.

Secondly, it has led to the homogenisation of food heritage and food production within regions protected by a GI. On the one hand, the GI registration requirements demand such a level of specificity regarding the properties of the product that *already existing variation* between producers of the same GI product required standardisation.⁸⁶ This has led, in practice, to a degree of internal discontent, forcing producers of the same product to agree on a specific production process, where internal differentiation might have existed beforehand.⁸⁷ It has also led to the exclusion of producers who are unable to meet the newly-established standardised rules.⁸⁸ The process of standardisation also prevents producers from experimenting with novel techniques that might be better suited to the

⁸¹ M. Huysmans, ‘Exporting Protection: EU trade agreements, geographical indications, and gastronationalism (2020) *Review of International Political Economy* xx

⁸² Recital 1, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs (‘GI Regulation’), [2012] OJ L343.

⁸³ Article 7, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs (‘GI Regulation’), [2012] OJ L343.

⁸⁴ G. Welz, ‘Contested Origins: Food Heritage and the European Union’s Quality Label Program’ (2013) 16 *Food, Culture & Society* 265.

⁸⁵ S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 77.

⁸⁶ M. Fonte, ‘Knowledge, Food and Place: A Way of Producing, a Way of Knowing’ (2008) *Sociologia Ruralis* 209.

⁸⁷ D. Dentoni, D. Menozzi & M. Capelli, ‘Group Heterogeneity and cooperation on the geographical indication regulation: the case of the ‘Prosciutto di Parma’ Consortium’ (2012) 37 *Food Policy* 207; using the example of Corsican cheese: S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 78.

⁸⁸ With reference to Barrancos ham, Mesenikola wine and Oscypek cheese see M. Fonte, ‘Knowledge, Food and Place: A Way of Producing, a Way of Knowing’ (2008) *Sociologia Ruralis* 210.

changing environmental conditions of the production or cultivation of the GI product. On the other hand, we can trace a homogenisation of production *within* regions, wherein the surplus value of GI products creates an incentive for producers of other products to switch to the GI product,⁸⁹ depriving regions of the food diversity that might have existed for centuries.

Thirdly, the GI labels have attracted predatory behaviour by (mostly) international conglomerates who, interested in the surplus value that GI products create, purchase production houses in the GI region, putting significant economic pressure on smaller producers while lobbying for changes to the GI registration to allow for either cheaper production processes or a product better suited to the taste of global consumers while maintaining of the GI label.⁹⁰ This behaviour suggests that the economic benefits of GI are such as to put pressure on the socio-cultural and bio-physical dimensions of food heritage.

Fourthly, the codification of food heritage in the GI Regulation create onerous management structures, which come with certain implications for our understanding and use of food heritage. The GI Regulations incentivise the creation of a management structure internal to the GI producers, which writes the application (often involving detailed engagement by historians, scientists and experts), mediates in the process of internal standardisation, inspects the production process, develops the GI brand, enforces the GI in the global market, and so in).⁹¹ These management structures often develop sophisticated regulatory, brand, and legal strategies, but are a relatively easy target for capture, and, more crucially, entail the side-lining of the traditional producers, including the local and lay knowledge that they possess.⁹² This professionalisation of heritage management, in other words, further exacerbates the ossification of heritage, starving it from the knowledge that keeps it alive and excluding actors central to the heritage process from its continuous reproduction.⁹³

Finally, the Regulation offers an important place to the Member State, who serve a gatekeeping function in assessing whether or not a local GI should be submitted for approval to the Commission.⁹⁴ This feeds into the strategy of gastro-nationalism,⁹⁵ which flattens domestic diversity, re-appropriates regional products as national ones, transforms domestic heritage into economic opportunity,⁹⁶ and makes them central not just to the local diet but its identity, as becomes clear in the veto-power that

⁸⁹ G. Welz, 'Contested Origins: Food Heritage and the European Union's Quality Label Program' (2013) 16 *Food, Culture & Society* 272.

⁹⁰ D. Dentoni, D. Menozzi & M. Capelli, 'Group Heterogeneity and cooperation on the geographical indication regulation: the case of the 'Prosciutto di Parma' Consortium' (2012) 37 *Food Policy* 208; S. Bowen & K. De Master, 'New rural livelihoods or museums of production? Quality food initiatives in practice' (2011) 27 *Journal of Rural Studies* 78.

⁹¹ D. Dentoni, D. Menozzi & M. Capelli, 'Group Heterogeneity and cooperation on the geographical indication regulation: the case of the 'Prosciutto di Parma' Consortium' (2012) 37 *Food Policy* 208.

⁹² For a wonderful account of this process using the example of PGI Olio di Sicilia see A. Hilton, 'Selling or Saving Cultural Heritage? Sicilian Protected Geographical Indication Extra-Virgin Olive Oil' (PhD thesis, 2020, School of Anthropology, University of Arizona).

⁹³ M. Fonte, 'Knowledge, Food and Place: A Way of Producing, a Way of Knowing' (2008) *Sociologia Ruralis* 200.

⁹⁴ Article 8 (2)(c) and Article 9, Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs ('GI Regulation'), [2012] OJ L343.

⁹⁵ G. Welz, 'Contested Origins: Food Heritage and the European Union's Quality Label Program' (2013) 16 *Food, Culture & Society* 270, using the example of Cyprus.

⁹⁶ G. Welz, 'Contested Origins: Food Heritage and the European Union's Quality Label Program' (2013) 16 *Food, Culture & Society* 265.

Member States with many GIs, such as Greece, Italy, Spain, France and Portugal are willing to leverage in protecting GIs in international trade deals.⁹⁷

Through its GI Regulation, EU law takes heritage out of competition: it is considered something sufficiently important that the basic rules of EU free movement law are explicitly and permanently suspended. While this has had the intended effect of protecting income streams for local communities, it has also led to many unintended consequences that are problematic from the perspective of heritage. It seems that EU law must become more sensitive to the relational commitments that underpin the evolution and dynamism of food heritage and the heterogeneity and close interaction and mutual interdependence between producers in a certain region. Bowen and De Master, in their research, for example, found that the management of the Comté PDO explicitly limits the potential for extra-local actors to enter the lucrative market and creates incentives for local actors to cooperate in the production process.⁹⁸ UNESCO, likewise, in its application process for intangible cultural heritage (of which food can be part) demands wide consultation and participation of a large number of local groups, individuals and communities and explicitly highlights that “overly technical descriptions should be avoided”.⁹⁹ The EU’s instrumental view on food heritage – wherein its codification serves to protect its economic viability – can and must be better linked to such strategies that protect the socio-cultural and bio-physical elements of heritage. The alternative is the emergence of ‘museums of production’ throughout Europe; a sanitised, standardised, and carefully crafted and managed ‘experience’ of food heritage to be consumed by outsiders.¹⁰⁰

5. Bringing the ‘local’ back in

This paper has explored the interaction between the EU’s internal market and food heritage. It is an area that has been covered extensively from the perspectives of the internal market, regulatory theory, and intellectual property rights. Looking at these questions from the perspective of heritage, however, allows us to explore another dimension: one that problematises the role of law and sheds light on how EU law impacts the lived experience of its citizens.

Part of the claim that heritage makes is that its value exists in terms incommensurate to, and independent from, those of their economic potential. In fact, the narrative of heritage is often employed, both deliberately and unconsciously, to shift attention away from what can be measured, explained or understood.¹⁰¹ Heritage is as much a feeling, a fleeting sensation, or intuition as it is a product. It is not surprising, however, that in its interaction with the EU’s internal market attention has focused on the economic potential of heritage ‘products’. EU law, and in particular its internal market, has a limited vocabulary and conceptual register. The EU’s regulatory strategy regarding food focuses almost exclusively on ascertaining its risks: whether it is healthy for consumption, cultivation or marketisation. The legal instruments used in this process focus on scientific evidence, risk assessment and limiting the introduction of non-scientific elements in the process of risk

⁹⁷ M. Huysmans, ‘Exporting Protection: EU trade agreements, geographical indications, and gastronationalism (2020) *Review of International Political Economy* xx.

⁹⁸ S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 80.

⁹⁹ L. Di Fiore, ‘Heritage and Food History’, in: I. Porciani (ed.), ‘Food Heritage and Nationalism in Europe’ (Routledge 2019) 37.

¹⁰⁰ S. Bowen & K. De Master, ‘New rural livelihoods or museums of production? Quality food initiatives in practice’ (2011) 27 *Journal of Rural Studies* 73.

¹⁰¹ S. Macdonald, ‘Memorylands: Heritage and Identity in Europe Today’ (Routledge, 2013).

management. The EU's regulatory strategy regarding the internal market, likewise, focuses on empirical data, market rationality, public policy consistency, free market access and standardisation. Neither of these registers are sufficiently malleable and sophisticated to make sense of claims – such as those of food heritage – that prioritises identarian values, affective and emotional ties, that grounds authority in place and time, and that embraces diversity. As Chalmers had already highlighted when EFSA was founded, there is a risk of intractable conflict where different regulatory strategies are simultaneously employed on a certain product.¹⁰²

To some extent, this is a problem of the use of law *as such*.¹⁰³ To some extent, however, it speaks to the specific properties of the EU's legal system. It is revealing, for example, that EU law's most ambitious attempt to be sensitive to the special nature of food heritage – through the GI Regulation – simply *suspends* all rules of the internal market. The EU's legal system – as has become clear in all examples discussed in this paper – is not able to simultaneously engage with the claims of the internal market *and* the claims of food heritage: it is one or the other. As such, in the composition cases, the Court applies the normal rules of the internal market on food heritage. When it comes to GMO regulation, the internal market rules apply as they normally would, bar an explicit exemption where they don't apply at all. The same is true for the GI Regulation, where a claim of food heritage can lead to global protection for a specific food product. This either/or strategy feels like a defeat: it indicates the lack of sophistication of the EU's legal system, wherein the only meaningful question is the extent to which a non-economic value is exposed (or not) to the market. Heritage is preserved or challenged – but in either case it is done *through* marketisation.

EU law's focus on marketisation suggests that claims to heritage that are articulated in other terms – such as in terms of inclusion, presence, access, or community – struggle to find space in EU law. It has also led to the commodification, codification and professionalisation of the management of heritage, with the ensuing marginalisation of actors that relate to food heritage in other fashions. Ultimately, one wonders to what extent the notion of heritage can continue to offer a meaningful narrative where its content is understood and legally reproduced in such a particular idiom that cannot replicate the duality of its dependence and constant reconfiguration of space and time. The dynamic nature that is indispensable in heritage creation and maintenance – the constant reification, reproduction and reconstruction of what it means – is foreclosed in some instances, such as the GI Regulation. In such instances heritage becomes static – a process called Disneyfication in heritage studies – and it stops being an instrument for the iteration of meaning in a community. Instead its economic potential becomes the sole prism that matters.

Another dynamic in EU law that is problematic from the perspective of keeping heritage 'alive' is the gatekeeping function of the central Member State. It is only the Member State, for example, that is allowed to defend heritage before the Court in free movement or infringement cases, that can formally apply for an exemption of the GMO Regulation, or that can forward an application for GI to the Commission. In all aspects of the European regulation of food heritage, the Member State plays a decisive role, giving it tremendous power in how food heritage is understood, presented and regulated. With very few exceptions, however, food heritage is not a national affair: it is much more specifically local or regional, sometimes spanning just a few acres or valleys. This means that EU law has become an important lever in the strategy of gastronationalism, wherein local food heritage is re-appropriated on the national level and simultaneously employed as a sign of national exceptionalism

¹⁰² D. Chalmers, "Food for Thought": Reconciling European Risks and Traditional Ways of Life' (2003) 66 *Modern Law Review* 532.

¹⁰³ R. Grossi, 'Understanding Law and Emotion' (2014) 7 *Emotion Review* 55; T. Maroney, 'A Field Evolves: Introduction to the Special Section on Law and Emotion (2015) 8 *Emotion Review* 3.

and instrumentalised for domestic economic growth – whether in attracting tourists, opening new international markets for its products or in the process of nation branding.¹⁰⁴

How can EU law become more sensitive to the disparate actors, interests, and representations of heritage that all play a part in keeping food heritage alive in Europe? The simple answer is that the *local* needs to be ‘brought back in’. This means a number of things. First, EU law needs to become more sensitive to the relational dynamics that underlie food heritage *in a specific place*. Each of these places will be based on a complex network of interactions between numerous actors that relate to food heritage in different ways: as an economic product, as a social relation, as a cultural praxis. The local knowledge about heritage; the local methods of mediating in conflicts about, and recasting the meaning of, heritage; and the local economic, socio-cultural and bio-physical environment all play a crucial role in this process.

Secondly, a focus on the local allows for a reconceptualization of heritage. While the national level often understands heritage in terms of identity, and the European in terms of its marketisation, it is clearly more than that.¹⁰⁵ Focusing on the local as the site through which we make sense of heritage offers space for a new conceptual and legal vocabulary – one that resists the lures of gastronationalism and commodification and can meaningfully mediate in the endless amount of claims reflected in food heritage.

Thirdly, any attempt to relocalise EU law requires translation into legal instruments. This can take the form of focusing on local judges and offering them more latitude in proportionality assessments to make sense of what is required to keep heritage ‘alive’; tweaking the legal prerogatives of the central Member State authorities in food regulation to the benefit of local and regional ones; or demanding that applications for protection of food heritage (whether in a free movement case, as an exception to the GMO regulation or before GI registration) explicitly engage with the demands of local stakeholders and protect their capacity to continuously recast heritage to take account of changes to the socio-economic, cultural and bio-physical environment.¹⁰⁶

Finally, this paper also tells us a story about EU law more generally, and its lack of sensitivity of what it is like, or feels like, to live ‘under’ EU law. Recent contributions have focused on this lack as explaining the increase in challenges to the authority of EU law and the EU more generally.¹⁰⁷ The focus on food heritage reveals how this critique correctly sees EU law as something unmoored from the reality of its citizens, whose lives are deeply embedded in space and time. This is not to say that the European context does not matter: even transnational lives and products are embedded in space and time. As the Court held in the 80s already, the European Union and its internal market are now indisputably factors in the process of heritage construction and management: habits are “variable in space and time, cannot be considered to be a fixed rule”¹⁰⁸ and “are likely to evolve in the course of time within a Member State. The establishment of the Common Market is, it should be added, one of

¹⁰⁴ M. DeSoucey, ‘Gastronationalism: Food Traditions and Authenticity Politics in the European Union’ (2010) 75 *American Sociological Review* 432.

¹⁰⁵ G. Welz, ‘Contested Origins: Food Heritage and the European Union’s Quality Label Program’ (2013) 16 *Food, Culture & Society* 275 using the example of halloumi.

¹⁰⁶ As required, for example, by UNESCO. See C. Bortolotto & B. Ubertazzi, ‘Foodways as Intangible Cultural Heritage’ (2018) 25 *International Journal of Cultural Property* 414.

¹⁰⁷ See A. Vauchez, ‘The Map and the Territory: Re-assessing EU Law’s embeddedness in European societies’ (2020) 27 *Maastricht Journal of European and Comparative Law* 134-5; L. Azoulai, ‘Living with EU Law’ (2022) 1 *European Law Open* xx; F. De Witte, ‘Here Be Dragons: Legal Geography and EU Law’ (2022) 1 *European Law Open* xx.

¹⁰⁸ Case 170/78, *Commission v United Kingdom* (‘Beer/Wine’) [1980] ECR 417, para 14.

the factors that may play a major contributory role in that development”.¹⁰⁹ It is unfortunate that, in the forty years since, the Court (and the EU more generally) have struggled to translate this very perceptive intuition into an appropriate conceptual and legal vocabulary.

¹⁰⁹ Case 178/84, *Commission v Germany* (*‘Beer’*) [1987] ECR I-1227, para 32.