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The Wine & Law Program is based on the idea that Wine Law can and should be apprehended and analyzed through a historic, geographic, economic and even political context. While asserting the constraints of legal methodology, research in wine law should enhance interactions among humanities, social sciences and even natural sciences in order to successfully respond to the different needs of a demanding and culturally interesting sector (winegrowers, distributors, policy-makers, administration, and civil society)

Private and public schemes of certification applied to geographical indications. USA and EU experience.

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Abstract:

There are several schemes of certification applied to products and services. The fundamental principles of objectivity and independence must be the compulsory guidelines in order to respect the structure of any certification scheme: trust. The European Union rules recognize private and public bodies in charge of the certification of products with geographical indications and appellations of origin. There has been an evolution from public systems (monopolies) to private ones (subject to competition rules): this means the liberalization of an activity. The submission of the certification systems to the market's freedom implies a completely different philosophy on the approach to the certification policy.

Il existe plusieurs régimes de certification appliqués aux produits et aux services. Les principes fondamentaux de l'objectivité et l'indépendance doivent être les lignes directrices obligatoires afin de respecter la structure de tout système de certification: la confiance. Les règles de l'Union Européenne reconnaissent des organismes privés et publics en charge de la certification des produits avec indication géographique et appellation d'origine. Il y a eu une évolution des systèmes publics (monopoles) à ceux privés (subordonnées aux règles de concurrence): cela signifie la libéralisation d'une activité. L'assujettissement des systèmes de certification à la liberté du marché implique une philosophie complètement différente concernant la politique de certification.

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1. Introduction.

There are several schemes of certification applied to products and services. The fundamental principles of objectivity and independence must be the compulsory guidelines in order to respect the structure of any certification scheme: trust. A certified product means a trustful and reliable product for the consumer and a competition tool for the producer.

The European Union rules recognize private and public bodies in charge of the certification of products with geographical indications and appellation of origin. There has been an evolution from public systems (monopolies) to private ones (subject to competition rules): this means the liberalization of an activity. The submission of the certification systems to the market's freedom implies a completely different philosophy on the approach to the certification policy.

The United States of America has a long history on certification mechanisms, especially through private systems. The United Kingdom has even a longer experience. This has proven to be a winner model.

There are international and European standards applied to certification bodies. These rules are guided by a liberal approach to international trade. In fact, it was the market – global market – that demanded the establishment of standard rules applied to products.

Today, certification schemes are competition tools in a globalized, competitive and opened market. They are, it must be underlined, an opportunity to gain new markets, to conquest an increasingly demanded consumer and to promote the country's territory: its products, tradition, know-how, culture, tourism, history.

2. Main principles of certification schemes.

When we refer «certification of products» and «certification schemes» we are mainly addressing the certification of products with appellation of origin or geographical indication and, especially, wines with the right to use one of these intellectual property rights. This means that we are not dealing with standard rules, namely European Standards and the European Standardization Organizations or International Standards and the International Organization for Standardization.

Standards, either European or International, are very important tools to guarantee a free international trade. In fact they mean direct access to the market by removing trade barriers for European industry. Concerning European Standards they have been a way to facilitate trade between countries and have helped the development and consolidation of the single European market for goods and services. On the other hand they also mean an efficient self and co-regulation tool.

In a globalized world the need for international standards is higher. The answer to this need is the International Organization for Standardization. The aim is always the same: facilitate trade between countries, that is, a mechanism to a liberal and open market and, in other words, an instrument to remove technical barriers to trade (a benefit to business at an international level).

Standards also mean a minimum level of harmonization, a standardized “quality” (that is, technical characteristics of the products and services) in order to conciliate national policies with international trade demands and to assure free movement of merchandise and global competition. These standard rules do not assume quality as a differentiation factor. It is the opposite; their aim is standardization and not differentiation. In this sense, standard rules are the opposite of appellations of origin and geographical indications.

So, when we speak of certification schemes concerning appellations of origin and geographical indications on the wine sector (and other agricultural products and foodstuffs) we are mentioning a complete different reality. Each product with an appellation of origin or geographical indication must comply with a specification – that is, several rules that determine the region (geographical origin of the product), the characteristics and qualities of

the product, means of production, aging, storage, labeling, etc. These set of rules demands the establishment of means of control and certification. Schemes of certification are required by the quality guaranty function of appellations of origin and geographical indications.

Control of the geographical origin and quality certification (the conformity of the product with the specification) implies a control and a certification body. In accordance with European Union rules on protected designations of origin and protected geographical indications, the verification of compliance with the specification (before placing the product on the market) is ensured by a public authority or a certification body. The product certification body shall be accredited in accordance with European Standard EN 45011 or ISO/IEC Guide 65 (General requirements for bodies operating product certification systems).

These certification schemes shall offer adequate guarantees of objectivity and impartiality and have at their disposal the qualified staff and resources necessary to carry out their functions.

The principle of objectivity means that a certification body will verify if the product complies with the product specification. It is not the owner of the appellation of origin or of the geographical indication that certifies the product, but a third party and this third party verifies the compliance with a specification previously established.

Connected with the principle of objectivity is the principle of impartiality and independence. The certification body must have its own means to verify the compliance with the product specification, that is, it must be independent from the producers and traders owners of the appellation of origin or geographical indication. Producers and traders of the product must not participate, in any way, on the process of certification. The certification function is a public function that must be carried out without the interference of private interests of the producers and traders. Certification bodies must be autonomous in relation to the owners of the appellation of origin or the geographical indication. Besides they must offer adequate guarantees of exemption and equity in relation to all producers and traders, assuring that all may have free access to the certification system.

3. Geographical indications.

Appellations of origin and geographical indications are product distinctive signs: they identify a product (or even a service) as having originated in a specific place (the distinctive function therefore turns into an indicative means of source). The appellation of origin also assures the consumer that the product holds a certain number of qualities and characteristics, this is to say, that the product is in accordance with a specific regulation and complies with a certain number of specifications whose fulfilment is ensured by a body responsible of its control (which must be impartial and objective). Such a function of quality assurance is not so evident when it comes down to geographical indications. In fact, the link to be established between the product and the region/place from where it proceeds is weak, being enough that the product's reputation can be imputed to its specific geographical provenance, this meaning that the quality guarantee function may be at stake here. Consequently both geographical indication and appellation of origin, and the latter in particular, have also a function of quality guarantee. As long as cases of imitation and usurpation are properly attacked, the consumer will be protected and will not see his preference for quality products with a specific geographical origin defrauded.

Besides satisfying consumers' interest, appellation of origin and geographical indication are also tools at the service of producers and traders. They are competition tools. Appellations of origin and geographical indications are common property (being an example of collective property) of the producers and traders of that specific and determined region. Both appellation of origin and geographical indication appeared essentially as a means for the producers and traders of a specific region succeed in placing their quality products on the market. Last but not least, the geographical indication and appellation of origin also provide for the satisfaction of collateral and public interests. In the presence of a certain product bearing an appellation of origin, the consumer not only sees a product originating from a certain place and therefore having a certain number of characteristics, but above all he sees a product with a superior degree of quality, with strictly controlled production stages, therefore the consumer is protected. On the other hand, quality products assure the conservation and respect of the environment, the diversification of agricultural production, contribute to rural

development and to the maintenance of the rural population. As a matter of fact, production and elaboration of quality products are performed, sometimes, under adverse natural conditions to which only such products persist. Both appellations of origin and geographical indications have been recognised as a means of protecting the traditional knowledge and folklore, which is to say, a People's culture. Associated to these signs, rural tourism has also been developing itself, in particular the wine routes. This means that an appellation of origin performs a quality function, besides other collateral functions.

To comply with the main functions of a geographical indication or an appellation of origin a certification scheme is necessary. On the other hand, to understand completely the need of an independent and autonomous certification body we must take into account the special juridical nature of appellations of origin and geographical indications.

Appellations of origin and geographical indications are, in their juridical nature, very special. They are distinctive signs, they are industrial property rights, but they are not property of one single person or association or public institution. Appellations of origin and geographical indications, in our opinion, does not constitute a type of co-ownership or roman common property, but the German type of common property (the *Gemeinschaft zur gesamten Hand*), that is, a communal property. This means that the appellations of origin or the geographical indication belong to several persons, to a collectivity of persons who are the owners of the appellation. The use and fruition of the designation belongs to the whole collectivity, that is, to all producers and traders of the demarcated region whose products comply with the established rules. It is important to underline that this communal right is indivisible and is owned independently by each of the members of the community. We have here a collective understanding of the world and not an individualistic one as we have on the Roman type of co-ownership. The interests of the group or of the community are far above the individual interests. This communal right means that the right belongs to all the producers (in a large concept) of the demarcated region whose products comply with a specification. This communal situation is not divisible and, in consequence, it is not possible to license the right or assign or transfer that right. This communal right is inherently linked to the community and the interests of the community. This communal property is characterized – as any other communal right – by the existence of only one right that belongs to several persons, but a single right (and not several property rights) that is exercised independently by each of

the members of the community. This also means that each member does not have a single right – as it happens on the Roman co-ownership – which he could assign or transfer. The appellation of origin or the geographical indication is owned (is a property of) by the collectivity of the producers, but each producer can use that right independently from the others. Finally, this community is not closed in time: each newcomer by use the right and those that have left the community do not have a right for an indemnity or any compensation (even if they have contributed energetically to build a prestigious name).

This understanding of the legal nature of appellations of origin and geographical indications is not easy. Much easier it would be to considerer that they belong to the State. But we are facing private rights and not public rights. On the other hand, appellations of origin and geographical indications are used by several persons, a collectivity, but this does not qualify a right as public neither we see here public interests. We are facing the interests of a community, of a collectivity of persons, but not public interests. However, as we are facing the interests of a community, this will demand difficult answers to several questions.

Taking this into account, who is entitled to apply for registration (in the cases where we have a registration system)? The whole or the disorganized group of producers and traders owners of the appellations of origin is not entitled to apply for registration. This would be impossible because we cannot determine, in a stable and solid way, which are the owners of the appellation of origin. According to the European law relating to the protection of appellations of origin and geographical indications only a group is entitled to apply for registration. For the purpose of this Regulation, a group means any association, irrespective of its legal form or composition, of producers and/or processors working with the same agriculture product or foodstuff. Other interested parties may participate in the group. However, it is possible for a natural or legal person to submit an application for registration, but subject to certain conditions. It is also possible for a group of individuals without legal personality but where the national law treats as a legal person, to submit an application for registration.

Two final remarks relating to the European law: in first place, a group or a natural or legal person may apply for registration only in respect of wines, agricultural products or foodstuffs which it produces or obtains; in second place, and this is I think, a very important

observation, the group that applies for registration must be “opened” or “unlocked”, that is, the number of producers or processors is not “locked” in time, but instead is always changing. Each newcomer whose products comply with the specifications established has the right to use the corresponding appellation of origin or geographical indication. In fact, the legitimate users of an appellation of origin or geographical indication are all the producers and/or processors whose products, coming from a certain region, comply with the rules that govern the use of the appellation or geographical indication.

This means that we make an important distinction between the owners of the appellation of origin or geographical indication and the person in which name the registration is conceded. The owners of those industrial property rights are, in my opinion, all producers and traders of the demarcated region whose products comply with the established rules, being a case, as referred, of communal property. If we look at the Industrial Property Offices in several countries, most probably the name of the person that is referred on the registration of an appellation of origin or a geographical indication corresponds to a public body (sometimes a State agency) or a certification body (usually a public authority). Even in these cases, these bodies are acting in the name of those that are the owners the appellation of origin or the geographical indication. For example, the appellation of origin Port is registered internationally, according to the Lisbon agreement for the protection and international registration of appellations of origin from 1958, in the name of the Douro and Port wine Institute but representing all the producers of the Douro region. This means that the owners of the right are the producers of the Douro region. However, it is important to take into account, as we will see, that in free market where certification bodies are in competition (this means that the State has privatized the certification function), usually this private certification body has no interest in the registration and protection of an appellation of origin or geographical indication.

At the European level we have developed the concept of «group of producers» or «interested group of producers», which is very large, does not demand legal personality (usually it means an association with legal personality or not) and may include producers (in a strict sense), traders and any other interested parties.

In fact it is important to distinguish the owner of the right from the person in which name the register is conceded and also from the certification body, as we will see.

This application group must establish the product specification and indicate the authorities or bodies responsible for the verification of the compliance with the provisions of the product specification. This means that we must differentiate ownership of the right (a case of communal property) and the exercise or use of that right. The exercise of the industrial property right demands the verification of the product's compliance with a specification. In other words, the exercise of the right depends from or demands an authorization of the certification body. Only with the compliance of the product's specification can the communal property be respected and the right of all the members of the community is fairly and loyally exercised. Otherwise, we would be destroying that communal right and the interests of the community. It is to avoid any free rider that the use of the communal right (an appellation of origin or an geographical indication) is subject to the compliance of a specification. This means that the use of the right demands the fulfillment of certain conditions.

Which is the best scheme of certification? A private or a public scheme?

4. Private and public schemes.

The certification function is usually qualified as public power, but in itself certification is not a public function. The State may decide not to privatize this function; may reserve it to itself, but in this case the State has to create state agencies or delegate this public power in private bodies. The State has to create the conditions necessary for a right to be used. In fact, certification is a prerequisite to allow a producer or a trader to use the appellation of origin or the geographical indication. Producers and traders may be the owners of an appellation of origin or a geographical indication, but they cannot use those rights without the previous certification by an independent body. This means that the State must develop the conditions to allow the exercise of the right by the owners of the appellation of origin or geographical indication.

However, this public power (if qualified as such) does not belong, necessarily, to a public body or authority. This public power may, in fact, be executed by a public body, but the State may concede this task to a private body. But this does not mean that the certification was privatized. The State may, as we said, execute itself – through a public body – this task, but may also concede this task to a private body. In this case, we have a delegation of the public power to a private body that has a monopoly on the certification. This is a public scheme of certification, even if executed by a private body. In other words, the State didn't want a free market of certification bodies.

But the State may choose another route. The certification function may be liberalized and submitted entirely to a free market of certification bodies (this means the end of monopolies in the certification business). In this case, it is compulsory that these certification bodies be accredited in accordance with the European standard EN 45011 or ISO/IEC Guide 65 (General requirements for bodies operating product certification systems). This is a free market of providing services of certification (and fully subjected to the European Directive 2006/123/CE, 12 December, on the services in the internal market). The State only controls these private bodies through the accreditation system. In this free and competitive market of certification bodies, producers and traders willing to use an appellation of origin or a geographical indication could choose their certification body.

5. European Union and USA experience.

The European Union – in accordance with the position of the World Trade Organization (WTO) – allows public and private schemes of certification. Both on the wine sector (including spirits) and on agricultural products and foodstuffs it is possible to have a monopoly model (certification is a public power executed by a public authority or a private body with public powers) or a competition market on certification bodies. In this case these certification bodies must comply with European or International Standards applied to certification systems.

It is important to remember here the decision from 2005 of the WTO panel concerning this subject – besides many others that are beyond our aim in this text – on the appreciation of the Council Regulation (EEC) No. 2081/1992, of 14 July, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (WTO document WT/DS174/R of 15 March 2005). The panel was very clear: the requirement of government participation in inspection structures «accords less favorable treatment to the nationals of other Members than to the European Communities' own nationals». According to that Regulation in order for an appellation of origin or a geographical indication obtain protection in the European Union, it was necessary that the third country government designated and or approved, and monitor, the inspection structures. This is an obligation for the European Union Member States, but third country governments do not have these obligations, this meaning that applications made by a group of producers from a third country could be refused, because the government of that third country didn't have the obligation to designate and or approve, and monitor, inspection structures. The WTO panel underlined that it is not demonstrated that «some form of public oversight» is necessary to «ensure that the inspection body will at all times carry out its functions duly and appropriately».

Today, private and public schemes of certification are possible and equivalent. The Council Regulation (EC) No. 1234/2007, of 22 October, establishing a common organization of agricultural markets (Single CMO Regulation) that incorporated the wine CMO is very clear. In fact, the verification of the compliance with the specifications can be made by public authorities or certification bodies. These certification bodies must be accredited in accordance with the European standard EN 45011 or ISO/IEC Guide 65 (General requirements for bodies operating product certification systems). This same model is established on the Regulation (EU) No. 1151/2012, of 21 November, on quality schemes for agricultural products and foodstuffs [that revoked the Council Regulation (EC) No. 510/2006, of 20 March, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs – this Regulation revoked the above indicated Regulation (EEC) No. 2081/92]

On the last decade, clearly member States of the European Union have changed from a monopoly model to a competition one on certification bodies. This seems to be the future.

Also clearly, this means that the US model of certification bodies without the participation of a governmental body has been recognized as a model to adopt. It is not an imposed or compulsory model, but it is a model to follow according to a liberal understanding of the market where we live today.

The United States of America have a long experience of products' certification, especially through the mechanism of certification marks. Longer experience has the United Kingdom which began to recognize standardization marks since 1905.

The European Union had to recognize that private and public schemes of certification are equivalent in terms of guaranteeing the product's compliance with the specification.

6. Portugal and Port experience.

In Portugal we have three systems.

On the wine sector we have either public authorities or private bodies in which the State has delegated the public power of certification, that is, these private bodies have a monopoly. The Douro and the Madeira regions have public authorities to certify the wines from those regions (Port, Douro and Madeira). The other wine regions (Vinho Verde, Dão, Alentejo, etc.) have private bodies in which the State has delegated the public power of certification (still a monopoly system).

Concerning agricultural products and foodstuffs with appellation of origin or geographical indication we have a free and competitive market of certification bodies that must be accredited according to the above indicated European Standards.

7. Conclusion.

The European rules on certification – especially on certification of products with appellation of origin or geographical indication – allow a choice: public or private schemes of certification. The future seems to belong to private schemes and to the subordination of the certification bodies to the rules of a free market, namely to the competition rules.

A free and competitive market of certification bodies may create some difficulties. Competition between certification bodies may damage the quality of the product as well as the level of control that is demanded. Free market and quality are not synonymous. Quality control has costs and high quality usually is associated to high level of control, which means high cost. A competition market of certification bodies may generate a lower level of quality.

As always, it is important to balance all the interests and benefits of a competition market on certification bodies. Appellations of origin and geographical indications may loose in the competitive market of certification bodies especially because we are facing collective rights.

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