

THE RELATIONSHIP BETWEEN COMMUNITY, INTERNATIONAL AND NATIONAL PROTECTION OF DESIGNATIONS OF ORIGIN AND GEOGRAPHICAL INDICATIONS

Zuzana Slováková*

On 31st March 2006, Council Regulation (EC) No. 510/2006 of 20th March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs¹ entered into force; this regulation has cancelled and replaced Council Regulation (EEC) No. 2081/92, bearing the same title², which had introduced formal protection of designations of origin and geographical indications in all Member States of the European Community (hereinafter referred to as “the Community”) for selected agricultural products or foodstuffs on the basis of a single registration in the register of protected designations of origin and protected geographical indications administered by the European Commission (hereinafter referred to as “the Register” and “the Commission”). Community protection under Council Regulation (EEC) No. 2081/92 was granted to more than 750 designations of origin and geographical indications for various product categories (in particular for cheeses, meat products, bakery products, beers and other beverages, olive oil, fruits and vegetables) within the Community.³ The new arrangement brought by Council Regulation (EC) No. 510/2006 maintained the concept of Community protection of geographical indications and designations of origin. Especially the substantive law conditions for granting and cancellation of Community protection and the criteria that the already registered geographical indications and designations of origin must fulfil during the period of duration of Community protection remained identical. Neither has Council Regulation (EC) No. 510/2006 affected the existing Community legal regulations concerning wines and spirits.⁴ Council Regulation (EC) No. 510/2006 has introduced in

* JUDr., PhD.; head of the legal department of the Industrial Property Office and a senior lecturer on the Department of Commercial Law at the Faculty of Law of the Charles University in Prague.

¹ Official Journal L 93, 31st March 2006, p. 12.

² Official Journal L 208, 24th July 1992, p. 1.

³ http://ec.europa.eu/agriculture/qual/en/1bbaa_en.htm.

⁴ Council Regulation (EC) No. 1493/1999 of 17th May 1999 on the common organization of the market in wine, Official Journal L 179, 14th July 1999, p. 1.

particular changes of procedural character, consisting in a shift in the focus on application procedures concerning Community protection of geographical indications or designations of origin to the Member States of the Community for the purpose of an increase in efficiency and an acceleration of these procedures. The Member States of the Community have now an obligation to ensure that the applications meet the conditions set out by Council Regulation (EC) No. 510/2006 before they are handed over to the Commission. Only then the Commission becomes involved in the examination, which ensures that the application meet the conditions set out by this regulation and that all Member States apply a unified approach.⁵

During fifteen years of functioning of the Community system of protection of geographical indications and designations of origin also many questions concerning the interpretation of the provisions of Council Regulation (EEC) No. 2081/92 have been raised; the European Court of Justice (hereinafter referred to as “the ECJ”) has been solving these questions within the scope of preliminary rulings. Nevertheless, the ECJ has not yet unequivocally and completely answered the crucial question of the relationship between Community, international and national protection of geographical indications and designations of origin for agricultural products and foodstuffs. Specifically, this is a question of the extent to which Council Regulation (EC) No. 510/2006 has priority over the national law of the Member States of the Community, and the related question of the destiny of possible international protection connected with national protection of a certain designation of origin or geographical indication of agricultural products and foodstuffs that do not enjoy Community protection, for whatever reason. Identical questions were raised also at the time when the former Council Regulation (EEC) No. 2081/92 was in force.

Here it is important to stress that Council Regulation (EC) No. 510/2006 as well as the formerly applicable Council Regulation (EEC) No. 2081/92 do not apply to all geographical indications and designations of origin but only to those that are related to agricultural products intended for human consumption that are listed in Annex I to the

Regulation (EC) No. 110/2008 of the European Parliament and of the Council of 15th January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No. 1576/89, Official Journal L 39, 13th February 2008, p. 1.

⁵ Recital 11 in the Preamble to Council Regulation (EC) No. 510/2006.

Treaty establishing the European Community (hereinafter referred to as “the ECT”), the foodstuffs listed in Annex I to this regulation and the agricultural products listed in Annex II to this regulation. That is to say, none of the abovementioned regulations restricts, or restricted in the past, the protection of geographical indications under the national law of a Member State either for other product categories or for agricultural products and foodstuffs that indeed fall within these categories but no connection exists between their characteristics and their geographical origin. Also the ECJ expressed its opinion on the latter possibility in its judgment in Case C-312/98 *Warsteiner Brauerei*⁶ stating that protection granted by a Member State to geographical indications that do not meet the conditions for registration in terms of Council Regulation (EEC) No. 2081/92 shall be governed by national law and limited to the territory of such a Member State. The ECJ stated that “*Regulation No 2081/92 does not preclude the application of national legislation which prohibits the potentially misleading use of a geographical indication of source in the case of which there is no link between the characteristics of the product and its geographical provenance*”. Therefore the question of admissibility of concurrence of Community, international and national protection does not concern the cases when the national law of a Member State of the Community grants protection to geographical indications or designations of origin for products that do not fall within the sphere of Council Regulation (EC) No. 510/2006 (formerly Council Regulation (EEC) No. 2081/92).

For example, Czech law enables to protect even a name of a certain territory used for denomination of goods or services as a geographical indication or a designation of origin, provided the conditions set out by law are met,⁷ whereas a goods means any movable thing which was produced, exploited or otherwise obtained, regardless the level of its processing, and is determined to be offered to consumers.⁸ On the territory of the Czech Republic e.g. the following designations of origin are protected: Bohemia Crystal (“Český křišťál“), Karlovy Vary China (“Karlovarský porcelán“), Jablonec Jewellery (“Jablonecká bižuterie“)

⁶ Judgement of the ECJ of 7th November 2000 in Case C-312/98 *Schutzverband gegen Unwesen in der Wirtschaft eV v Warsteiner Brauerei Haus Cramer GmbH & Co. KG.*, [2000], ECR I-09187, par. 50 and par. 54.

⁷ Act No. 452/2001 Coll., on the protection of designations of origin and geographical indications and on amendments to the Act of protection of consumer, as amended.

⁸ The provisions of Section 2 Letter c) of Act No. 452/2001 Coll., on the protection of designations of origin and geographical indications and on amendments to the Act of protection of consumer, as amended.

or Vamberk Lace (“Vamberecká krajka“). Similarly, in Slovakia⁹ the designations of origin Piešťany Mud (“Piešťanské bahno“) or Modra Majolica (“Modranská majolika“) and in Hungary¹⁰ the designation of origin Szentgotthárd – Hongrie (arms) are protected.

The first section of this contribution deals with the relationship between the protection of geographical indications and designations of origin under Community law and under the national law of the Member States, the following section addresses the relationship between the protection of these denominations under Community law and under international law and the last section describes the reference for a preliminary ruling in Case C-478/07 *Budějovický Budvar*¹¹ concerning the examined problems, which is being solved by the ECJ at the moment.

1. The relationship between the protection of designations of origin and geographical indications under Community law and under national law

Already at the time when Council Regulation (EEC) No. 2081/92 was in force the question of the relationship between the Community system of protection of designations of origin and geographical indications and national protection of these denominations arose. Specifically, this question arose concerning those designations of origin or geographical indications that were protected on the national level and for which an application for protection under Council Regulation (EEC) No. 2081/92 was not filed e.g. because the users of the denomination concerned were not interested in Community protection or an application was filed but it was refused by the Commission in particular cases.¹²

The provisions of Article 17 of Council Regulation (EEC) No. 2081/92 granted the Member States a period of six months to submit their names protected under their national law to the Commission for registration (Article 17 Paragraph 1) whereas the Member States

⁹ Act No. 469/2003 Coll., on designations of origin for products and geographical indications for products and on amendment of some acts, as amended.

¹⁰ Act No. XI of 1997 on the Protection of Trademarks and Geographical Indications.

¹¹ Announcement of preliminary ruling procedure in Case C-478/07 *Budějovický Budvar, n.p. v. Rudolf Ammersin GmbH*, ESD, 29th November 2007.

¹² In the case of the Czech Republic no applications have been refused yet; nevertheless, several applications have been withdrawn.

were allowed to maintain national protection until the decision on registration was taken (Article 17 Paragraph 3).¹³ This arrangement has been modified by the adoption of Council Regulation (EC) No. 535/97¹⁴, which supplemented Article 5 Paragraph 5 with the provisions included in alinea 2 – 5, according to which a Member State could temporarily grant protection on the national level to a name for whose Community protection an application had been filed whereas this transitional protection began as of the date of filing of the application and ended as of the date of issue of a decision on registration pursuant to the regulation. After such a decision was adopted it was possible, under given conditions, to grant an adjustment period of five years at the maximum. In the event that the name was not registered in accordance with the regulation only the Member State was responsible for the consequences of such national protection.

A similar arrangement can be found also in the provisions of Article 5 Paragraph 6 of the existing Council Regulation (EC) No. 510/2006, according to which a Member State may grant transitional protection on the national level in accordance with this regulation and possibly grant an adjustment period under given conditions. This transitional national protection begins as of the date of submission of the application to the Commission and ends as of the date of adoption of the decision on registration pursuant to this regulation. If the name is not registered in the Register, only the Member State concerned is responsible for the consequences of the transitional national protection.

In connection with the accession of new Member States these Member States were also granted a six month period beginning as of their accession. For instance, in connection with the accession of the 10 new Member States to the European Union in 2004, Commission Regulation (EC) No. 918/2004¹⁵ was adopted; the subject matter of this regulation were transitional arrangements for the protection of designations of origin and geographical

¹³ Article 17 was cancelled by Council Regulation (EC) No. 692/2003 of 8th April 2003, amending Regulation (EEC) No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. Official Journal L 99, 17th April 2003, p. 1.

¹⁴ Council Regulation (EC) of 17th March 1997, amending Regulation (EEC) No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. Official Journal L 83, 25th March 1997, p. 3.

¹⁵ Commission Regulation (EC) No. 918/2004 of 29th April 2004 introducing transitional arrangements for the protection of geographical indications and designations of origin for agricultural products and foodstuffs in connection with the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Official Journal L 163, 30th April 2004, p. 88.

indications concerning these new Member States. Pursuant to the provisions of Article 1 of this regulation these new Member States were allowed to maintain national protection of these names until 31st October 2004. In the event that at least by this date an application for Community protection in accordance with Council Regulation (EEC) No. 2081/92, which was in force at that time, was submitted to the Commission, this national protection was maintained until adoption of the decision by the Commission. It was also laid down that in the cases when a name is not registered on the Community level the Member State concerned is entirely responsible for the consequences of the said national protection. During the abovementioned period, 31 applications for Community protection were filed in the Czech Republic. There was an exception to which Commission Regulation (EC) No. 918/2004 did not apply, namely only three designations of origin for Budweiser beers (Budweiser Beer – “Budějovické pivo”, Beer from České Budějovice – “Českobudějovické pivo” and Budweiser Civic Brewery – “Budějovický měšťanský var”), which were granted Community protection directly on the basis of the Treaty of Accession¹⁶.

Council Regulation (EEC) No. 2081/92 provoked concerns that its purpose was to supersede the existing national protection of designations of origin and geographical indications in favour of Community protection as the only permissible kind of protection.¹⁷ The same may be said also about Commission Regulation (EC) No. 918/2004 and Council Regulation (EC) No. 510/2006 currently in force. Similarly, according to the interpretation of Council Regulation (EEC) No. 2081/92 by the Commission¹⁸ this regulation had created an exclusive system of protection of geographical denominations falling within the sphere

¹⁶ Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union. Annex II, Chapter 6. Agriculture, Paragraph 18. Official Journal L 236, 23th September 2003, p. 359.

¹⁷ Knaak, R., „Case law of the European Court of Justice on the Protection of Geographical Indications and Designations of Origin Pursuant to EC Regulation No 2081/92“ in: *International Review of Industrial Property and Copyright Law (IIC)*, 2001, pp. 386 - 389.

¹⁸ European Commission, DG Agri, H.1. Agricultural law, Interpretation Note No. 2003/08, Date: 24th February 2004.

within the Community. According to the opinion of the Commission, in consequence of the creation of the Community system of protection of designations of origin and geographical indications the Member States could not maintain separate national or regional systems for the protection of denominations falling within the sphere of the regulation. National protection could be granted solely under fulfilment of the given conditions during the examination of the registration application on the Community level.

The Commission interprets identically Commission Regulation (EC) No. 918/2004 and Council Regulation (EC) No. 510/2006 currently in force.¹⁹ According to the opinion of the Commission, Council Regulation (EC) No. 510/2006 does not allow to obtain national protection for a designation of origin or a geographical indication in another way than by means of an application for Community protection in accordance with this regulation. Commission Regulation (EC) No. 918/2004 set out the six month period ending on 31st October 2004 as an exception from this rule, taking into account the accession of the new states; during this six month period, national protection could be granted to designations of origin and geographical indications regardless of whether an application was submitted to the Commission or not. Transitional national protection after that date was conditioned by filing of an application for registration to the Commission and it lasted until the decision of the Commission concerning the given application. Thus any national protection for denominations for which no application was filed to the Commission ended as of the abovementioned date.

Although the Commission anticipates exclusive effect of Council Regulation (EC) No. 510/2006, similarly to the case of Council Regulation (EEC) No. 2081/92, which precludes parallel existence of the system of national protection, in connection with the examined problems neither the opinion is excluded that both Community and national protection of designations of origin and geographical indications may exist simultaneously, similarly to the parallel existence of systems of trade mark protection on the Community level and on the national level. The argument may be based on the principle of territoriality of protection of the said denominations, which is fully respected within the scope of the current

¹⁹ European Commission, DG Agri, Directorate F. Horizontal aspects of rural development, F.4. Agricultural product duality policy, FRF/cs D (2007) 29588.

Community regulations. Thus protection may be granted either for the territory of the Member State concerned or for the territory of the Community as a whole, which is one of the conditions *sine qua non* for the application of the Community regulation. In this respect, also the judgment of the ECJ in Case C-216/01 *Budějovický Budvar* may be used as an argument: “*The scope of Regulation No. 2081/92 is not determined by reference to such factors, but depends essentially on the nature of the designation, in that it covers only designations of products for which there is a specific link between their characteristics and their geographic origin, and by the fact that the protection conferred extends to the Community.*”²⁰

Last but not least, it is necessary to state that if the Community system of protection of trade marks and industrial designs and the national systems of protection of trade marks and industrial designs can co-exist with each other without problems, this parallel existence should be perfectly possible for the Community system and the national system of protection of designations of origin and geographical indications for agricultural products because contrary to the former systems these do not provide the users of these denominations with absolute protection *erga omnes*.

There is a question how to assess the consequences of non-granting of protection on the Community level, as set out by the provisions of Article 5 Paragraph 5 the fourth alinea of Council Regulation (EEC) No. 2081/92 formerly in force as well as by the third alinea of Article 1 of Commission Regulation (EC) No. 918/2004, in connection with the second paragraph of the preamble of this regulation. These provisions said that in cases when the names concerned was not registered in the Register administered by the Commission, the Member State concerned was responsible for the consequences of the said national protection. The argument may be used that in order to be able to “be responsible” for the consequences of the “said national protection” this protection on the national level must remain in existence. Otherwise, these provisions would be redundant. Similarly, the valid

²⁰ Judgment of the ECJ of 18th November 2003 in Case C-216/01, *Budějovický Budvar, n.p. v. Rudolf Ammersin GmbH* [2003] ECR I-13617, par. 76.

provisions of Article 5 Paragraph 6 the fourth alinea of Council Regulation (EC) No. 510/2006 also set out that in such cases “*the consequences of such transitional national protection, ..., shall be the sole responsibility of the Member State concerned*”. Therefore it is possible to interpret the abovementioned provisions in such sense that the consequences of national protection in the cases when a certain denomination is not granted Community protection are a matter of the Member State of the Community concerned.

As an argument for the abovementioned interpretation, also the jurisprudence of the European Court of Justice may be used. The aim of Commission Regulation (EC) No. 918/2004 was to set out conditions for acceding states similar to the conditions set out in Article 5 Paragraph 5 of Council Regulation (EEC) No. 2081/92 at the time of its entering into force. The European Court of Justice dealt with interpretation of Article 5 Paragraph 5 of Council Regulation (EEC) No. 2081/92 in its judgment in Case C-312/98 *Warsteiner Brauerei*. The European Court of Justice stated that “*that provision [Article 5 Paragraph 5] thus has no bearing on the question whether Member States may, on their respective national territories, grant protection under their national law to geographical designations for which they do not apply for registration under Regulation No 2081/92 or which do not meet the conditions for receiving the protection provided for by that regulation.*”²¹

As already explained above, Council Regulation (EC) No. 510/2006 is applicable only under simultaneous fulfilment of the conditions related to the nature of the denomination and of the condition that the protection comprises the whole territory of the Community. Thus by an argument *a contrario* Council Regulation (EC) No. 510/2006 should not be applicable in a situation when the protection is not claimed for the whole Community (i.e. the Community element is missing) and the denomination is protected solely under the national legal regulations for the territory of the Member State concerned.

²¹ Ibid 6, par. 53.

It is also possible to deduce from Clause 6 of the Preamble of Council Regulation (EC) No. 510/2006 that the intention of the Community legislator was not to establish exclusive applicability of the provisions contained in this regulation. That is to say, the following is stated as a justification of adoption of Community rules: “*A framework of Community rules on a system of protection permits the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework ensures fair competition between the producers of products bearing such indications and enhances the credibility of the products in the consumer's eyes*“. In other words, the intention of the Community legislator was to set out *more uniform* rules, nevertheless not *uniform* rules, which would be a necessary consequence of exclusive applicability of Council Regulation (EC) No. 510/2006 in the area of protected designations of origin and geographical indications. On the contrary, the aim to set out *more uniform* rules corresponds rather to the parallel existence of the Community system and of the national systems of protection, which besides follows also from the delimitation of competences between the Community and the Member States in this area.

Thus in conclusion we can say that both the former and the current legal regulations of the Community concerning Community protection of designations of origin and geographical indications leave enough space for an interpretation that would enable the existence of national protection even after refusal of application for Community protection by the Commission or in the cases when the application for Community protection has not been filed at all.²² Of course, only on condition that the national legal regulations of the Member State concerned allow for this. Besides, argumentation in favour of forfeiture of national protection by reason of non-filing of an application for Community protection or by reason of refusal of an application by the Commission is problematic with regard to international obligations of some Member States (see below).

²² Concerning the interpretation of Council Regulation (EEC) No. 2081/92 similarly Knaak, R., „Case law of the European Court of Justice on the Protection of Geographical Indications and Designations of Origin Pursuant to EC Regulation No 2081/92“ in: International Review of Industrial Property and Copyright Law (IIC), 2001, p. 387.

2. The relationship between the protection of designations of origin and geographical indications under Community law and under international law

International protection of designations of origin and geographical indications is anchored in several multilateral international treaties; both the Member States of the Community and third states are parties to these treaties. These are in particular the Paris Convention for the Protection of Industrial Property²³, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration²⁴ (hereinafter referred to as “the Lisbon Agreement”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁵. Apart from multilateral international treaties, some Member States of the Community are also bound by bilateral agreements in this area. From the point of view of the relationship between Community protection of designations of origin and geographical indications and international protection of these denominations the Lisbon Agreement is crucial, as well as possible existence of bilateral agreements.

The Lisbon Agreement established a special system of international protection, not for all geographical indications but only for their specific category, namely appellations of origin²⁶. The member countries of the Lisbon Agreement have pledged to protect on their territory the appellations of origin of products from other countries participating in this agreement under the fulfilment of two conditions. The first condition is that these appellations of origin are recognized and protected by this virtue in the country of origin

²³ Paris Convention for the Protection of Industrial Property of 20th March 1883, as revised at Brussels on 14th December 1900, at Washington on 2nd June 1911, at the Hague on 6th November 1925, at London on 2nd June 1934, at Lisbon on 31st October 1958 and at Stockholm on 14th July 1967, and as amended on 2nd October 1979.

²⁴ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31st October 1958, as revised at Stockholm on 14th July 1967, and as amended on 28th September 1979.

²⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to the Agreement Establishing the World Trade Organization. The TRIPS Agreement refers only to geographical indications among the subjects of intellectual property protection; nevertheless, with regard to the definition of this term in the provisions of Article 22 Paragraph 1 geographical indications may be interpreted in a broader sense and comprise both designations of origin and geographical indications in terms of Council Regulation (EC) No. 510/2006.

²⁶ Pursuant to the provisions of Article 2 Paragraph 1 of the Lisbon Agreement, appellation of origin means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

and the second condition is that they are registered with the WIPO International Bureau, which has its seat in Geneva (hereinafter referred to as “the International Bureau”). The protection is established by registration of the appellation of origin in question in the international register of appellations of origin kept by the International Bureau. The International Bureau notifies other member countries of the Lisbon Agreement of the registration and publishes it in its journal. International registration of an appellation of origin has the same effects as national registration of the appellation of origin in the country of origin in every country that has not declared within one year from the receipt of the notification of the international registration of the appellation of origin that it cannot ensure protection of the appellation of origin concerned. An appellation of origin is protected against any usurpation or imitation, even if the true origin of the product is indicated or even if the appellation is used in translated form or accompanied by expressions such as e.g. “kind”, “type”, “make”, “imitation”, etc.²⁷ An appellation of origin is also protected against being deemed to have become generic.²⁸ The protection granted by the Lisbon Agreement lasts for the time period for which the appellation of origin concerned is protected as appellation of origin in the country of its origin.

With respect to the specific requirements of the Lisbon Agreement the number of its member countries is not very high.²⁹ The Community is not a member country of this agreement. In consequence of this fact, in the past individual states were also entering into bilateral agreements on protection of designations of origin and geographical indications. The purpose of such agreements was to prevent the protected designations from being improperly used and from becoming generic. These agreements include two lists containing enumerations of denominations that enjoy protection in the other state being party to the agreement in question. The said agreements also specify what kind of protection is granted to the denominations concerned. For instance, the Czech Republic is

²⁷ Article 3 of the Lisbon Agreement.

²⁸ Article 6 of the Lisbon Agreement.

²⁹ Only 26 member countries are parties to the Lisbon Agreement (Algeria, Bulgaria, Burkina Faso, Costa Rica, Montenegro, Czech Republic, France, Gabon, Georgia, Haiti, Italy, Iran, Israel, Congo, Democratic People’s Republic of Korea, Cuba, Hungary, Mexico, Moldova, Nicaragua, Peru, Portugal, Slovakia, Serbia, Togo and Tunisia).

bound by three such bilateral international agreements on protection of designations of origin and geographical indications entered into with Portugal, Austria and Switzerland.³⁰

In connection with the Lisbon Agreement a question arises as to how Council Regulation (EC) No. 510/2006 (formerly Council Regulation (EEC) No. 2081/92) or possibly Commission Regulation (EC) No. 918/2004 affect, in relation to the Member States that acceded to the Community in 2004, possible existence of protection of designations of origin and geographical indications under the Lisbon Agreement following from national protection in the Member State concerned. A similar question may be formulated with regard to the impact of the abovementioned regulations on the obligations following from bilateral agreements entered into between the Member States of the Community in the past. In this connection, a question arises as to whether the Community system of protection of designations of origin and geographical indications enables the Member States of the Community to become parties to the Lisbon Agreement in the future if they are not yet parties to this agreement or to become parties to bilateral agreements with other Member States of the Community or possibly with third countries.

According to the opinion of the Commission,³¹ the Community has exclusive competence to enter into international treaties in the area covered by Council Regulation (EEC) No. 2081/92 (at present, Council Regulation (EC) No. 510/2006). Thus the Member States of the Community are not allowed to enter into mutual agreements on protection of geographical denominations falling within the sphere of the abovementioned regulation. According to the Commission, the existing agreements between the current Member States and the acceding Member States become invalid as of the moment of accession of the latter ones. A Member State may not even enter into an agreement on protection of geographical denominations falling within the sphere of the regulation with a third country. The

³⁰ The Agreement between Government of Portugal and CSSR on Indications of Source on Goods, Appellations of Origin of Products and other Geographic Denomination (Lisbon, 10th January 1986), the Agreement between Austria and CSSR on Indications of Source on Goods, Appellations of Origin of Products and other Marking Concerning the Origin of Agricultural and Industrial Product , Protocol to the Agreement and on the Implementation Agreement for the Agreement between Austria and CSSR on Indications of Source on Goods, Appellations of Origin of Products and other Marking Concerning the Origin of Agricultural and Industrial Product (Vienna, 11th June 1976) and the Agreement between Switzerland and CSSR on Indications of Source on Goods, Appellations of Origin of Products and other Geographic Denomination (Bern, 16th November 1973).

³¹ Ibid 18.

agreements entered into between a Member State and a third country before 1st January 1958 or before the date of accession of new Member States remain unchanged. Article 307 of the ECT allows a Member State to continue using an agreement entered into before 1st January 1958 or before the date of accession of new Member States if such agreement contains obligations that bind such state under international law. In the event that the provisions of such agreement are inconsistent with the ECT, the new Member State is obliged to take all appropriate measures to exclude such inconsistency. In particular the Lisbon Agreement creates a system of international registration and protection for designations of origin that fall entirely within the sphere of the regulation. Concerning the fact that according to the Commission, a designation of origin may not benefit from national protection any more, the protection of such a denomination in a third country is questionable as well.

However, in its consequences such interpretation would negate international obligations of the acceding countries, namely in particular in the context of protection in the states that are parties to the Lisbon Agreement, among which there are not only Member States of the Community. That is to say, forfeiture of national protection of an appellation of origin results in automatic forfeiture of international protection of the appellation of origin concerned under the Lisbon Agreement. Thus the Member States of the Community that are parties to the Lisbon Agreement would, in relation to the appellations of origin protected under the Lisbon Agreement for whose Community protection applications were not filed within the set periods of time (e.g. by 31st October 2004 pursuant to Commission Regulation (EC) No. 918/2004 for the Member States that acceded to the Community in 2004) or for whose Community protection applications were filed but these applications were refused by the Commission, lose the protection of appellations of origin also in all member countries of the Lisbon Agreement that are not Member States of the Community.³²

Besides, the abovementioned negative consequence for international law obligations of the Member States would be contrary to the provisions of Article 307 Paragraph 1 of the ECT, which says: *“The rights and obligations arising from agreements concluded before*

³² Out of 26 member countries of the Lisbon Agreement, only 7 are simultaneously Member States of the European Union: Bulgaria, Czech Republic, France, Hungary, Italy, Portugal and Slovakia.

1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.” The aim of this provision of the primary law is to protect the rights and obligations following from former international agreements in accordance with the principle *pacta sunt servanda* and to prevent exactly the above described negative consequences with regard to the international law obligations of the Member States.

Thus concerning the impact of the Community system of protection of geographical indications and designations of origin on the international protection of appellations of origin under the Lisbon Agreement it is possible to conclude that both of them should be viewed as separate co-existing systems of protection. From the point of view of international law it may be problematic if the legal regulations of the Community in question were interpreted in such way that would deduce forfeiture of national protection of appellations of origin protected under the Lisbon Agreement in those member countries of the Lisbon Agreement that are simultaneously Member States of the Community in cases when no applications for the protection of such appellations of origin were filed within the time limits set out by these regulations or when their protection was refused by the Commission.

Concerning the impact of the Community system of protection of geographical indications and designations of origin on bilateral international agreements the same conclusion may be drawn. If these are bilateral agreements entered into with third countries, this conclusion is supported also by the judgment of the ECJ in the preliminary ruling procedure in Case C-216/01 *Budějovický Budvar*.³³ In this procedure, among others the question of compatibility of the former Council Regulation (EEC) No. 2081/92 with national provisions concerning geographical indications and designations of origin was raised, including the protection following from the bilateral agreement between Austria, as a Member State of the Community, and the Czech Republic, which was not yet a Member State of the Community

³³ Ibid 20.

at that time. The ECJ referred to its previous jurisprudence, namely to the judgment in Case C-312/98 *Warsteiner Brauerei*³⁴, according to which the said regulation does not prescribe that simple denominations of geographical origin that would not meet the requirements for protection on the Community level may not remain protected by national regulations of a Member State. In the given case the ECJ considered indisputable that the denomination “Bud” does not fall within the sphere of Council Regulation (EEC) No. 2081/92 and came to the conclusion that this regulation does not preclude the use of a bilateral agreement between a Member State and a country that is not a Member State of the Community.³⁵

Nevertheless, at the same time the ECJ sets out restrictive conditions for geographical indications and designations of origin in relation to free movement of goods pursuant to the provisions of Article 28 of the ECT. This article prohibits quantitative import restrictions between the Member States of the Community as well as any and all measures with equivalent effects. The provisions of Article 30 of the ECT permit an exception from this prohibition, among others in cases when a restriction pursuant to Article 28 is justified by protection of industrial property provided it is not a means of arbitrary discrimination or a disguised restriction on trade between Member States of the Community. According to the ECJ, the provisions of Article 28 of the ECT preclude the application of the provisions of a bilateral agreement between a Member State and a country that is not a Member State of the Community under which in the importing Member State a denomination is protected which in the given (non-member) country does not refer, either directly or indirectly, to the geographical origin of the product it represents.³⁶ In relation to such denomination it would not be possible to apply an exception under Article 30 of the ECT and the provisions of the bilateral agreement protecting such denomination would be contrary to Community law.

We may conclude that legal regulations of the Community should exclude neither the application of bilateral agreements on protection of geographical indications and designations of origin nor entering into such bilateral agreements in the future provided

³⁴ Ibid 6, par. 45.

³⁵ Ibid 20, par. 73 - 78.

³⁶ Ibid 20, par. 111.

such arrangement does not collide with free movement of goods on the Community internal market. If a restriction of free movement of goods is justifiable by an exception under Article 30 of the Treaty establishing the European Community, consisting in protection of industrial property, the fact whether the bilateral agreement has been entered into between a Member State and a country that is not a Member State of the Community or between two Member States of the Community should not play an important role.

3. Preliminary ruling procedure in Case C-478/07 Budějovický Budvar, n.p. v. Rudolf Ammersin GmbH

A brief summary of facts of the case could be as follows: in proceedings before Austrian courts the plaintiff, the company Budějovický Budvar, n.p. demanded that the courts impose a duty on the defendant, the company Rudolf Ammersin GmbH, to refrain from using the denomination “Bud” or a confusingly similar denomination in connection with beer or similar products on the territory of Austria. The plaintiff argued that the denomination “Bud” was subject to exclusive protection in favour of Budějovický Budvar, n.p. on the basis of a bilateral international agreement between the Czech Republic and Austria.³⁷ The denomination in question, “Bud”, had been registered by the national registration point in the Czech Republic, the Industrial Property Office, as an appellation of origin protected for the territory of the (then) Czechoslovak Socialist Republic on 25th February 1975.³⁸ On the basis of the national registration, the denomination “Bud” was granted also international protection for the states bound by the Lisbon Agreement on 10th March 1975.

At present, a preliminary ruling procedure is under way before the ECJ in Case C-478/07 Budějovický Budvar, n.p. v. Rudolf Ammersin GmbH³⁹. Handelsgericht Wien (Austria) made a reference for a total of three preliminary rulings to the ECJ. It is necessary to note that in the given case this was already the second reference for a preliminary ruling (see the judgment of the ECJ in the preliminary ruling procedure in Case C-216/01 Budějovický

³⁷ Ibid 30.

³⁸ Entry No. 86 in the list of appellations of origin of the Industrial Property Office.

³⁹ Ibid 11.

Budvar⁴⁰). According to Handelsgericht Wien, the reason for a new reference for a preliminary ruling was a change in the factual and legal state compared to the time when the ECJ gave the first preliminary ruling; this change consisted among others in accession of the Czech Republic to the Community. In consequence of this step the question of exclusive effect of Council Regulation (EC) No. 510/2006 and of the Treaty of Accession arose⁴¹.

The second and the third of the preliminary rulings the reference was made for have essentially the same aim, namely assessment of the effect of Council Regulation (EC) No. 510/2006 in relation to national systems of protection of geographical indications and designations of origin for agricultural products and foodstuffs and the related instruments of international protection on the basis of public international law. Specifically, the ECJ should clarify whether the fact that the denomination was neither disclosed nor registered, neither during the period of six months set out in Commission Regulation (EC) No. 918/2004 nor in another way within the scope of Council Regulation (EC) No. 510/2006 results in a situation when the existing national protection or in any case the protection that has been extended to another Member State by means of a bilateral agreement becomes ineffective if the denomination is a qualified geographical indication according to the national law of the country of origin. The ECJ should also assess whether the fact that within the framework of a treaty of accession between the Member States of the European Union and a new Member State this new Member State used the protection of several qualified geographical indications for foodstuffs under Council Regulation (EC) No. 510/2006 results in a situation when the national protection or in any case the protection that has been extended to another Member State by means of a bilateral agreement for another denomination for the same product may not remain preserved and the abovementioned regulation has exclusive effect in this connection.

Thus the expected preliminary ruling of the ECJ in Case C-478/07 is an opportunity to clarify a particularly important question concerning the relationship between Community,

⁴⁰ Ibid 20.

⁴¹ Ibid 16.

international and national protection of designations of origin. In its jurisprudence hitherto the ECJ has tended to a more flexible interpretation of legal regulations of the Community concerning Community protection of geographical indications and designations of origin, in favour of a parallel existence of both national and international protection of such denominations. Therefore it will be very interesting to watch whether the ECJ will maintain this approach also in this undoubtedly crucial decision.

4. Conclusion

Exclusive effect of legal regulations of the Community concerning Community protection of designations of origin and geographical indications, especially with reference to Council Regulation (EC) No. 510/2006 as well as the preceding Council Regulation (EEC) No. 2081/92 arouses serious questions regarding the existence of national protection of these denominations in Member States of the Community and the destiny of possible international protection related to this national protection.

It may be said that both the former and the existing legal regulations of the Community concerning Community protection of designations of origin and geographical indications leave enough space for an interpretation that would enable the existence of national protection provided the national legal regulations of the Member State concerned allow for it. The existence of international obligations of the Community, following especially from the Lisbon Agreement, also supports such interpretation. That is to say, it would be contrary to international law if the legal regulations of the Community in question were interpreted in a way that deduces forfeiture of national protection of appellations of origin protected under the Lisbon Agreement in those member countries of the Lisbon Agreement that are simultaneously Member States of the Community in cases when no applications for Community protection of these appellations of origin were filed within the periods of time set out by these regulations or in cases when protection of these appellations of origin is refused by the Commission. The obligations following from bilateral international agreements, both already existing and entered into in the future, may be viewed in a similar

way. Of course, on condition that the application of international agreements is justifiable by an exception in accordance with Article 30 of the ECT consisting in the protection of industrial property and therefore it is not considered being inconsistent with free movement of goods on the internal market of the Community.

Thus as far as the impact of the Community system of protection of designations of origin and geographical indications on national and also international systems of protection of these denominations is concerned, the possibility that they could be viewed as separate systems of protection co-existing with each other cannot be excluded. The ECJ will undoubtedly have the last word concerning clarification of the discussed question of the relationship between Community, international and national protection.