

**Palacký University Olomouc**

**Faculty of Law**

**Martin Mach**

**Reasons for rejection of derogation of the Internal Market of EU  
for 'pomazánkové máslo'.**

**Master's thesis**

**Olomouc 2020**

I declare that I am a thesis on the subject Reasons for the rejection of derogation of the Internal Market of the EU for 'pomazánkové máslo' have been developed separately and I have quoted all the sources used.

Olomouc, 14 March 2020

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Martin Mach

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## List of Abbreviations

Art.	Article
Cit.	Cited
CMDA	Czech and Moravian Dairy Association
CMO	Common Market Organisation
Col.	Collective
Coll.	Collection
Commission	European Commission
CJEU	Court of the European Union
EC	European Community
EEC	European Economic Community
Etc.	<i>Et cetera</i>
g	Grams
TFEU	Treaty on the Functioning of the European Union
TSG	Traditional Speciality Guaranteed
PGI	Protected Geographical Indication
PDO	Protected Designation of Origin
EC Treaty	Treaty Establishing the European Community
EU	European Union
i.e.	<i>Id Est</i>
Kg	Kilogram
No	Number
p.	Page
pp	Pages
SEA	Single European Act
UK	United Kingdom
US	United States
v.	Versus
Vol.	Volume
(X)	Paragraph X

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## Introduction

A case of ‘pomazánkové máslo’ (‘butter spread’), which culminated in rejection of the use of this term as a trade name, for a few years was a medial theme of the Czech journalism and the Czech citizens themselves, which inspired emotions. Considering different levels of knowledge of the authors about relatively complicated functioning of the European Union, Internal Market and exemptions from it, and also with regard to the subjective opinions of politicians who got space for opinion in their reportages dedicated to ‘pomazánkové máslo’, more than one theories appeared in the Czech media about who is responsible for prohibiting to use this trade name. The case of ‘pomazánkové máslo’, however, continues to inspire emotions at the present, too. Some people indicate it as an exemplary case of the evil EU, which has been prohibiting us all this for already 15 years, including light bulbs, domestic rum (‘Tuzemský rum’), marmalade, and newly it is going to make decision on the composition of egg liquor. The second group, however, uses the case of ‘pomazánkové máslo’ as an example when - on the contrary - the European Union is celebrated for the thorough supervision of the Internal Market to protect customers, and - according to representatives of this opinion’s group - ‘pomazánkové máslo’ has nothing to do with butter. According to some people, the case of ‘pomazánkové máslo’ serves as an example of inability of Czech representatives to push ahead any issue in the European Union. The submitted paper is unique by its focusing, because, to the author’s knowledge, this issue hasn’t been scientifically explored yet. An only Ing. Adéla Žáková<sup>1</sup> was engaged in ‘pomazánkové máslo’ itself in her diploma paper,<sup>1</sup> however just from the point of view of technology of groceries but not from the standpoint of preserving its trade name in the Internal Market. Partially, more than one author is engaged in the case of trade name ‘pomazánkové máslo’, but they always solve it as an peripheral theme. For example, Ing. Jarmila Plšková,<sup>2</sup> solved a claim for inactivity and, thus, did bring neither replies nor confirmation or negation of the hypothesis of the author of this paper. That’s why the author proposes to expand knowledge in this field.

The paper’s author therefore proposes to map out the situation regarding the steps of the Czech Republic to preserve the trade name ‘pomazánkové máslo’ in the European Union Internal Market, starting from an application for the membership in 1996, through the present time, up to the future steps, and to discover an aspect why the Czech Republic wasn’t successful

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<sup>1</sup> ŽÁKOVSKÁ, Adéla. *Využití NIR spektroskopie při kontrole jakosti pomazánkových másel*. Brno: Mendelova univerzita v Brně, 2010. 52 pp.

<sup>2</sup> PLŠKOVÁ, Jarmila. *Prosazování práva Evropské unie na vnitřním trhu v oblasti volného pohybu vybraného potravinářského zboží*. Zlín: Univerzita Tomáše Bati ve Zlíně, 2018. 91 pp.

in its endeavours. Within the investigation focused on the European Union Internal Market, the author is going to try to confirm or negate his hypothesis that this trade name, ‘pomazánkové máslo’, is not allowed to be used by reason of repeated inactivity or insufficient activity of the Czech Republic representatives. The hypothesis would be confirmed in the case of discovering possibilities thanks to which the trade name ‘pomazánkové máslo’ could be kept, but the Czech Republic hasn’t used all its procedural possibilities. This must be the only reason why this trade name isn’t allowed to be used. Otherwise, the author will consider this hypothesis to be unconfirmed. And, at the conclusion, he is going to add an opinion what he could consider to be a success in the case of ‘pomazánkové máslo’.

The paper will firstly present areas with a case study of ‘pomazánkové máslo’ associated with the EU legislation and consumer protection, which creates a legal base of the reason why the product designated as ‘pomazánkové máslo’ hasn’t already offered in the market. The fundamental source for Chapter “Consumer protection” is a Helmut Lacheler’s paper in the Research Handbook on EU Economic Law.<sup>3</sup> With regard to its older date of issue, the author withdrawn from other sources as well. These chapters will describe importance of the existence of these terms, including their development, which - especially in case of consumer protection - shows its importance for the European Union and, thus, gives a chance to understand unwillingness of the European Commission to grant exemption or a product’s protected designation, which could mislead consumers, which is the opposite of what had been created over the years. That's why the theoretic part of the paper is fundamental for the case study of ‘pomazánkové máslo’.

Since there were more than one opportunities to “protect” the trade name ‘pomazánkové máslo’, the author presents separate opportunities firstly in general in the first part of the paper in order to integrate them into the context of ‘pomazánkové máslo’ within explanation. So, in the first part, the author has presented opportunities thanks to which any product could in general preserve its name and composition in the European Union Internal Market. In the second part, the author will refer these opportunities concretely to the case of ‘pomazánkové máslo’, including description of attitudes and actions of the European Commission which represents the European Union. In this second part, the author is also going to summarize the current state and planned steps for the future, because the case of ‘pomazánkové máslo’ lasting since 1996 is not closed in 2020 from the point of view of the Czech representatives. Then, at the conclusion of these parts, the author is going to deduce reasons of the research intention,

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<sup>3</sup> LACHELER, Helmut. In DAUSES, Manfred Albert (ed). *Příručka hospodářského práva EU (základy vnitřního trhu, ochrana životního prostředí a ochrana spotřebitele)*. Prague: ASPI Publishing, 2002. 754 pp.



why the trade name ‘pomazánkové máslo’ failed to be preserved. These parts also will help him to confirm or negate the hypothesis.

In the last part of the diploma paper, the author is focused on comparison of the case study of ‘pomazánkové máslo’ with the procedure of Austria, which had a product containing a name of a protected product, i.e. ‘Rum’, namely ‘Inländerrum’, which was a product that also didn’t satisfy the legal regulations of the European Union, with other details with the Czech case of ‘pomazánkové máslo’. Although the initial state of the products of the both member states was the same, the final result is different. It is the initial similarity of the both products of the two neighbouring countries which the author chose in order to demonstrate different approaches how to solve collisions with the EU law, which however cannot be applied to ‘pomazánkové máslo’, and he specifies it as another possible solution how to preserve the product in the Internal Market. The author chose Austria by reason of similarity of the both countries, including the area, number of population, membership in the same international organizations, part of history and mentality of this neighbouring country. For the needs of research questions, the case study of ‘pomazánkové máslo’ is comparatively compared in the paper with the Austrian case, which had a similar initial position as ‘pomazánkové máslo’, which the author is going to describe in the respective chapter.

The main sources will be legislative acts of the European Union, professional literature and papers. The paper uses analytic and descriptive methods. The analytic method serves for the dissection of the process of dispute, which results in inability to use the trade name ‘pomazánkové máslo’, into separate parts in order to discover particular influence on the current state. The descriptive method provides a basic image of sub-processes of the investigated dispute. With regard to the used interviews, the author also peripherally uses exploratory methods. Though the paper is described in the media, the author, as he writes in the introduction, doesn’t consider these sources to be sufficiently valuable. The cause is insufficient knowledge of journalists and only superficial processing. Therefore, the author preferred personal communication. To provide lucidity, the author - unless otherwise required - will use the term “European Union” within the whole paper, including for the period of time when another name existed.

## 1. EU law

In order to understand a reason why the term ‘pomazánkové máslo’ mustn’t be used, it is necessary to know not only the process of political negotiation of this exemption from the Internal Market. It is important to understand development of the EU law and also the legal order of the European Union with the focus on the European Union Internal Market and the consumer law by reason of relationship with the development of the case of ‘pomazánkové máslo’. The reason is that development of the EU law may also cause non-uniformity of approach to exemptions from the Internal Market, to which the Czech Republic tried to include ‘pomazánkové máslo’.

In the Czech Republic as a member of the European Union, there is - together with the national law and the international law - also another legal order, i.e. EU law. In view of this paper, it is important that this includes consumer protection and the European Union Internal Market, including its exemptions, with which the theme of the diploma paper directly works. The EU law may be divided based on different points of views. For the theme of ‘pomazánkové máslo’, according to the author, the most beneficial division is from the structural aspect, i.e. from the point of view of the origin of the standards. It is a primary law, which is created especially on the basis of agreements of the European Union and other contracts. The secondary law, or actually the EU legal regulations, goes from the primary law, and those are regulations, directives, resolutions, recommendations and statements. Another fields are general principles of the EU law, which contains, for example, among others, the EU jurisdiction, consisting of judgments of the Court of Justice of the European Union and the Court of First Instance. According to the author, close interconnection of these 3 fields are can be proven by a fact that the EU Internal Market is regulated by means of the primary law in the third part of the Treaty on the Functioning of the European Union,<sup>4</sup> but also in the legal acts of the European Union (the former secondary law), and further obscurities and disputes are additionally defined within the EU jurisdiction. The last parts are international agreements, which the authors of the paper mentions by reason of complexity, which however in view of the diploma paper isn’t necessary to analyse in detail.

The EU law is important part of the creation and development of EU, because, analogous to all legal branches, thanks to the law the agreed rights and obligations come into force and are enforceable. It is autonomic, it is developed individually without relationship to any national

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<sup>4</sup> Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26 October 2012.

legal order, although it doesn't fully waive it. The EU law also has principles and traditions applied in the national legal orders. And it is independence and straight effectiveness of the EU law which also caused its priority over the national law. That's why the European Union authorities execute particular steps by means of legal instruments depending on the given legal procedures, which are being checked by the Court of Justice of the European Union. This fact can be the most dramatically seen in two legal forms of butter and 'pomazánkové máslo'. A legal definition existed at the EU level. The respective product must satisfy this definition, including types of package, to be marketable in the EU Internal Market as butter. But at the national level, there was a legal form of 'pomazánkové máslo', i.e. which requirements the product has to meet to be marketable in the Czech Republic market under the name of 'pomazánkové máslo'.

The EU law, thus, creates a legal base, in which protected products and possible exemptions from them, obligatory for all member states are defined. The author will work within the EU law predominantly with legal acts of the European Union and adjudications, which explained different legal interpretations of the Czech Republic and the European Commission. Agreements, i.e. the primary EU law, will be used mostly only to add historical context. The development of the EU law is connected with the incompatible attitude for the application of the Czech Republic for an exemption from the Internal Market and the Kingdom of Spain.

## 2. Consumer protection

As was described by the author in the chapter above, the acts and jurisdiction of the European Union will be fundamental for the paper. But if the author wants to write of 'pomazánkové máslo' and of the reason why this name isn't already allowed to be used, he will be interested in consumer protection- namely within the prior chapter, i.e. the EU law. This chapter explains the development when a peripheral theme, clogging the complete development of the free market, became important part of the policy of the European Union and definitions of the basic terms, because it is consumer protection which was an argument of the European Union for the prohibition of the use of the term 'butter' for the products, which don't meet a definition according to the Council Regulation, by which the common organization of the agricultural markets and special provisions for several agricultural products were defined.<sup>5</sup>

The reason of existence of consumer protection is endeavour to straighten relationships between the customer and the seller, because without such a protection the customer in such a legal relation would be in a more weak position. The consumer himself doesn't have enough knowledge and information to make responsibly a decision to buy a product. That's why legal regulations are originated. They regulate honesty of the seller and the sale, information obligations of the seller toward the consumer, prohibition of consumer's discrimination, prohibition to offer defective or dangerous products or prohibition of misleading the consumer. It is a risk of misleading the consumer which brought to the prohibition to use the name of 'butter' in the case of 'pomazánkové máslo'.

Legally enforceable protection, which is being permanently developed and improved, is provided to the consumer in a form of the consumer rights and determination of conditions for the seller. By reason of existence of the EU Internal Market, both Czech sellers and sellers of other EU member states work in the territory of the Czech Republic; that's why the most effective is to solve consumer protection at the EU level, although there is consumer protection at the national level as well. The connection between the consumer and the Internal Market is very close. This can be illustrated by a situation which occurred in the period of transition to the Internal Market, when consumers were distrustful to new products, which weren't from their country; and this prevented from the finalization of the Internal Market.<sup>6</sup> By this reason, the attitude of the European Commission regarding granting an exemption from the Internal

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<sup>5</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

<sup>6</sup> URBAN, Luděk. *Evropský vnitřní trh a příprava České republiky na začlenění*. Prague: Linde, 2002, p. 120.

Market for ‘pomazánkové máslo’ was dismissive, because a big number of exemptions could repeatedly bring to a consumer’s distrust of the product in the market.

## **2.1 Historical development of consumer protection**

A strong position of consumer protection within the EU law is not commonplace; it is particularly a result of long-term development and of an emphasis of the European Union on this field. Considering importance of consumer protection and its development, Chapter “Historical development of consumer protection” is included into this paper, although this is not a systematic enumeration of all programs and taken measures in connection with consumer protection. The author only selected moments which bring to the presentation of the increasing importance of this field, starting from its origination up to the current days, in order to understand the Commission attitude, which takes possible exemptions from the Internal Market as a step decreasing possible consumer protection.

Historically first voices requiring for consumer protection at the transnational level were heard already in 1972 in Paris on the summit of heads of governments and states. It became a primary impulse, on the basis of which the Council of EEC created and accepted on 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy.<sup>7</sup> The creators of this first document ever focusing on consumer protection were inspired in USA, namely in The Consumer Bill of Rights (1962). Within the programme for a consumer protection policy, the Council defined basic rights in the following 5 points:

- 1) The right to protection of health and safety.
- 2) The right to protection of economic interests.
- 3) The right to redress.
- 4) The right to information and education.
- 5) The right for representation (the right to be heard).

Although consumer protection went from the USA pattern, the development is historically different on the both continents. Comparison of the development could be worked out within another research. The European Community approached responsibly to the consumer protection, and this first preliminary programme was very extensive. It is

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<sup>7</sup> Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. Official Journal C 092, 25 April 1975.

extensiveness of protection which is in contradiction with then endeavour after an open single market, because the interests of the open market support more likely the manufacturer, but consumer protection creates new limitations and obligations (compensation for damage, awareness of consumers, minimum requirements for the products), that's why primary conflicts occurred between these two interests. As a result of development of consumer protection, more and more conflicts occurred, and occasional antinomy of these two directions became more and more visible in connection with the developing consumer protection. Representatives of the Community, however, were aware of necessity of consumer protection and therefore the Council issued by its resolution on 19 May 1981 the “Second programme of the European Economic Community for a consumer protection and information policy”,<sup>8</sup> in which it continues to extend consumer protection by other policies (policy of economic competition, agricultural policy and industrial policy) and consequential first three-year action plan of the Commission, which was accepted on 3 May 1990,<sup>9</sup> advanced consumer protection by the emphasis placed on the security of the minimum requirements for the safety of products and improvement of awareness of consumers via better product marking.

The next target was to enforce legal consumer protection and also its awareness. It became possible also thanks to a change of the treaty of the European Community foundation, where a new Art. 129 was added (now Art. 153). The Commission interpreted the new article as an explicit obligation to “be engaged in the whole scale of issues in the field of consumer protection, i.e. not only in aspects in connection with the endeavours at the completion of the Internal Market”.<sup>10</sup> The Commission, thus, defined priorities from the article concerning in on a whole of 9 fields, where also was a target of permanent improvement of awareness of consumers and their education. Consumer protection, in addition, proved as important and necessary in 1997, when development of consumer protection was fundamentally influenced due to the ongoing crisis regarding BSE – Bovine spongiform encephalopathy. Due to insufficient food for the livestock, the consequential sale of meat caused that the European Union more focused on the veterinarian and food law. The European Union performed this new policy via 3 different regional measures, which, however, in contrast to the notifications and

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<sup>8</sup> Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, Official Journal C 133, 3 June 1981.

<sup>9</sup> Three-year action plan of consumer policy in the EEC (1990–1992). CELEX number 51990DC0098, 3 May 1990.

<sup>10</sup> Communication from the Commission – priorities for consumer policy 1996-1998. COM 95/519, 31 October 1995.

resolutions adopted before the preliminary action plan of the Commission, were mutually added and created a complex unit:

- 1) Organization measures – should adapt the newly adopted initiative to problem management and to optimization of scientific consultations.
- 2) Legislative measures – development and issue of new regulations for consumer protection.
- 3) Control measures – Fortification of the performed inspections and checks for purpose of supervision over application of regulations of the Community.<sup>11</sup>

The Treaty of Amsterdam,<sup>12</sup> came into effect on 1 May 1997. It brought significant changes in consumer protection, including changes of the primary law.<sup>13</sup> Consumer protection, included in the primary law, proves importance of this field within the European Union. Consumer protection, in addition, fell into the scope of the Community, which again brought to its fortification, because it was possible to modify it complexly and there was no need to refer to separate national legal orders of the member states.

The strategy of the consumer policy for the years from 2007 to 2013<sup>14</sup> then defined 3 targets; among them there was also a target to enforce the consumer position in EU.<sup>15</sup> These targets should lead to the faith of the consumers in the Internal Market and to the faith of the sellers in the sales in the whole territory of the European Union. The actual program is the “Program for consumers”,<sup>16</sup> focused on the enforcement of the position of consumers, which is the main target of the strategy of the EU consumer policy.<sup>17</sup>

Development of consumer protection clearly shows that the European Union in this field is very active and makes effort to continue its graduate development. It is activity of EU in the

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<sup>11</sup> LACHELER, Helmut. In DAUSES, Manfred Albert (ed). *Průručka hospodářského práva EU (základy vnitřního trhu, ochrana životního prostředí a ochrana spotřebitele)*. Prague: ASPI Publishing, 2002, p. 673.

<sup>12</sup> Treaty of Amsterdam. Official Journal C 340, 10 November 1997.

<sup>13</sup> The Treaty of Amsterdam builds on and extends a brief reference to consumer protection in the SEA (Art. 100A) and Title IX in the Maastricht Treaty.

<sup>14</sup> Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013). Official Journal of the EU L 404, 30 December 2006.

<sup>15</sup> Communication of 13 March 2007 from the Commission to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy Strategy 2007-2013". Not published in the Official Journal.

<sup>16</sup> Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-2020 and repealing Decision No 1926/2006/EC. Official Journal L 084, 20 March 2014.

<sup>17</sup> MACIEJEWSKI, Mariusz, RATCLIFF, Christina. *Consumer policy: principles and instruments* [online]. Europarl.europa.eu, May 2019 [cit. 10 February 2020]. Available on <<https://www.europarl.europa.eu/factsheets/cs/sheet/46/spotrebitelska-politika-zasady-a-nastroje/>>.

field of consumer protection which is in contradiction to a big quantity of exemptions, because these exemptions are in conflict with the EU vision on a single market, where consumers will be protected and well informed about the products depending on the above-mentioned development. By describing consumer protection, including its development, the author wants to point out to the relatively short, but quick development of consumer protection from its beginning up to the current days, which, however, doesn't need to be only positive. It is a speed and endeavour to create several targets for each time period, having to be solved in the respective interval, which can lead to the placement of consumer protection to an imaginary pedestal, which is superior to the other fields, which has showed itself already at the beginning of the development of the collision with the thought of an open Internal Market. It is EU, searching for and striving to find a compliance between the inter-governmental and transnational element in the field of its functioning, which seemed to omit to search this compliance also in particular fields of the policy, concretely in consumer protection, which EU placed at the higher level than the arguments of the Czech Republic in resolving disputes regarding preservation of the name of 'pomazánkové máslo'. It had been dealt during the period of multi-annual plans, in which, as is described in chapter above, an emphasis was placed on increasing consumer protection. And the term of 'pomazánkové máslo' - from the point of view of consumer protection - suffered from the late time of resolving its terminology. The European Union, according to the author, would be more helpful to this application for an exemption if the given issue was negotiated in the period of the earlier multi-annual plans with other priorities. Consumer protection in the period of 'pomazánkové máslo', however, reached a phase when the European Commission didn't want to accept other exemptions from the Internal Market by reason of consumer protection. The author draws attention by Sub-chapter "Development of consumer protection" to the growing requirements for consumer protection from 1972 up to the present time, and to divergence in granting exemptions in the course of development. States which negotiated an exemption earlier were in a more beneficial position than, for example, the Czech Republic, when possibilities of negotiation of an exemption was very complicated. Granting of an exemption from the Internal Market in the present days is practically impossible, and only possibility is a transition but not long-term period. According to the author, it caused occurrence of dual standards in the issues of exemptions for the old member states and new member states, when for the old EU members it was much more easier to succeed in their applications for registering in the list of exemptions in comparison with the new states.



## 2.2 Determination of consumer template

### 2.2.1 Consumer

The definition of the term ‘consumer’ wasn’t stable at the beginning. This term used to be defined in legal acts only for their needs, with mutual differences between separate legal acts, or the definition was different even within one agreement.<sup>18</sup> It is, however, possible to refer to the jurisdiction of the Court of Justice of the European Union, which defined the consumer in a stricter sense of the word, i.e. as a physical person who buys only for private purposes<sup>19</sup> and “*who in relationship with a professional seller acts for a purpose, which cannot be considered to be his business activity, entrepreneurship, handicraft or occupation.*”<sup>20</sup> The consumer, thus, became a participant of the market, who uses or consumes the bought goods and who is not an entrepreneur. Since this definition is only general and it’s impossible to derive a consumer’s behaviour from it, it was necessary to create - by reason of his legal protection - an average user, i.e. an imaginary representative, from whom it could be possible to deduce his behaviour in the market.

### 2.2.2 Consumer template

To make decision whether a citizen of a member state is able to differentiate between ‘butter’ and ‘butter spread’ (‘pomazánkové máslo’), it is necessary, together with the definition of the term ‘consumer’, to specify a certain template of behaviour and intelligence of such a consumer as well in order to be able to say in contentious cases whether it was, for example, misleading the consumer or the consumer was in itself reasonless or inattentive, and the mistake is on his part. This template is necessary for the decision, but, however, it is very complicated to create it. It is necessary to take into consideration legitimate differences between separate member states and differences between separate consumers, which can be inter-regional, social or, in the case of ‘pomazánkové máslo’, very significant: lingual and cultural.<sup>21</sup> In connection with the consumer template, the jurisdiction of the Court of Justice of the European Union defined that the average consumer has to be also determined from the point of view of the used

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<sup>18</sup> Article 82 letter b) EC Treaty (now TFEU) contained a broad definition of the term ‘consumer’, including industrial processors, intermediaries or users, in the same contract in Article 87 (2) letter a) the term ‘consumer’ means only the end-user.

<sup>19</sup> For example: Judgment of the Court of 14 March 1991, *The Republic v Di Ponto Case*, C-361/89, ECR I-1189  
<sup>20</sup>Judgment of the Court of 3 July 1997, *Francesco Benincasa v Dentalkit Srl*, C-269/95, ECR I-03767 and Judgment of the Court of 22 November 2001, *Cape Snc v Idealservice Srl*, C-541/99, ECR I-09049.

<sup>21</sup> LACHELER, Helmut. In DAUSES, Manfred Albert (ed). *Příručka hospodářského práva EU (základy vnitřního trhu, ochrana životního prostředí a ochrana spotřebitele)*. Prague: ASPI Publishing, 2002, p. 685.

language.<sup>22</sup> Disputable cases are judged by national courts, under which judgment of the above-mentioned regional specialties falls into. And it causes occurrence of different consumer templates. The Court of Justice of the European Union respects these differences.<sup>23</sup> In general, it's possible to say that the consumer template is an average adult consumer averagely informed and averagely searching for information on the goods to be bought.

The European Commission, which reasoned its attitude by consumer protection, based its dismissive attitude, among others, also on a proposition that the average consumer from a member state other than the Czech Republic won't be able to differentiate 'pomazánkové máslo' from butter. According to the author, however, the paradoxical here is a fact that - together with the definition of the content of milk fat - other measures for the differentiation of butter from spreadable fats or other products other than butter were applied on the sale of butter. It was, for example, package size, which could be 1 kg, 500 g, 250 g, 125 g, and it also had to be in a package, which is fully different from circle plastic cup (only 'pomazánkové máslo' from Jaroměřické mlékárny dairy plant had a rectangular container), in which 'pomazánkové máslo' was sold. 'Pomazánkové máslo' varied both by a shape and a weight of the package (the packages of 'pomazánkové máslo' had a weight of 150 g or 200 g). As is specified by the author earlier, in some cases it is not easy to define a consumer template, but in this case the consumer template was heavily underestimated from the perspective of the author, especially if he considers that the application for a Traditional Speciality Guaranteed for 'pomazánkové máslo' specified limitation only for the Czech market, with a Czech designation of 'pomazánkové máslo'.<sup>24</sup> If the author creates a consumer template from the target consumer according to the application for TSG for 'pomazánkové máslo', the consumer template is a Czech consumer speaking Czech and recognizing butter from 'pomazánkové máslo' not only by the description on the product, but also by the product package, when there is a difference between a cup with 'pomazánkové máslo' and a brick of butter. The Chapter "Consumer protection", according to the author, points out to a fact that no misleading of the consumer can occur here, because the consumer speaking on language other than Czech will find in his language a

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<sup>22</sup> Joined Cases T-178/03 and 179/03: Judgment of the Court of 8 September 2005, *CeWe Color v OHIM (Community trade mark. Word signs DigiFilm and DigiFilmMaker. Absolute grounds for refusal. Article 7(1)(b) and (c) of Regulation (EC) No 40/94)*, Report of Cases II-03105.

<sup>23</sup> A stricter measure was applied to the judgment because of the risk of injury to health through the products sold. Judgment of the Court of 16 December 1999, *Union Deutsche Lebensmittelwerke GmbH v Schutzverband gegen Unwesen in der Wirtschaft eV*. C-101/98, ECR I-0884.

<sup>24</sup> The term 'dairyspread' was used in English and 'Milchschreichfett' in German, which is 'milk spreadable fat'. The products for the German-speaking market, produced by the Choceň dairy, even mentioned "Böhmischer Brotaufstrich", ie "Czech bread spread". Thus, according to the author, none of these terms can be confused by consumer as butter.

description containing a word 'spread' but not 'butter'. The Commission in connection with translations argued by similarity of the Czech word 'máslo' (in English: 'butter') with equivalent words in Slovakian, Polish, Slovene and Bulgarian, but the product was delivered to the market out of the Czech Republic under the name of 'spread' ('širjenje'; 'разпространение'; for example), products was delivered to the Slovakian market under a name of 'máslová nátierka' and not of 'pomazánkové máslo'. In case of an application for exemption for 'pomazánkové máslo' for the whole EU Internal Market, the argumentation with the use of a consumer template is understandable, however in case of the application for TSG for only the Czech Republic, i.e. directly for the Czech consumers, this argumentation, according to the author, with regard to the set expression which the Czech consumer can't confuse with butter, is illogical, and the Commission - in case of the application for TSG - determined wrongly a consumer template. Instead of the Czech consumer, the Commission considered an average consumer from a whatever member state, which - according to the author - with regard to the application, is wrong.

### **3 Possibility to preserve the product in the EU Internal Market**

The Czech Republic, as is previously stated, had the Czech law, international law and EU law as well. Similarly as the international law,<sup>25</sup> the EU law has regulations defining requirements for different types of products. The EU law defines precise requirements for the products which want to use Protected Designations of Origin, as, for example, butter or rum, by reason of consumer protection, and may be then sold in the European Union Internal Market. If, however, manufacturers from a candidate or member state produce a product which doesn't satisfy the definition according to the EU law, it doesn't mean automatically prohibition of production of this product. There are 3 possibilities how to solve it. The first is to keep the composition and process of production of the product, and to change the trade name so that it didn't contain the protected designation of the product. The second possibility is to keep the trade name and to change the composition or process of production of the product so that it satisfied conditions according to the EU law. The third solution is a possibility - in case of a long-term existing product in the member state's market, or its exclusiveness - to grant an exemption or to register the product by a protected designation or by a trade mark. Each of these three variants has different objectives and has different conditions for granting, the satisfaction of which is being checked when making a decision on granting or non-granting the required statute. The applicant itself, therefore, can't choose arbitrarily how his product is to be registered, but he is trying to find a variant, the defined conditions of which are met by its product. Though these variants are different, granting leads - from the point of view of the diploma paper - to the similar result, namely to the definition and preservation of the product in the UE market. The author in this paper is going to focus on the concrete case of 'pomazánkové máslo', which were trying to preserve the trade name, composition and production process; that's why he will gradually present steps which can be executed within this endeavour.

#### **3.1 The granting of exemption**

For the given traditional product which a member state wants to preserve in a form of an exemption from the Internal Market, there are two possibilities how to reach this state. The first is the granting of exemption in the Access Agreement, when there is a possibility to negotiate exemptions through abilities of the negotiators of the respective member state. As will be stated by the author below in the paper, it is, according to him, the opportunity with the

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<sup>25</sup> Codex Alimentarius or Taric guide - European Database.

highest chance for success. This exemption is discussed within the one respective chapter of 35 in total, and in case of agreement on exemption for the given product, this fact is also registered in the respective Chapter in the Access Agreement. The concrete Czech example, included hereunder, is ‘Slivovice’.<sup>26</sup> Another possibility is the acquiring of exemption of type of the special mode. However, there is no unified procedure for all possible exemptions, all depends on a concrete regulation, whether and how an exemption from it is possible, and also on approval or non-approval of the application by the European Commission. Provided that an exemption from a concrete regulation, of which a member state asked for exemption, is approved for the product, then this fact is recorder in an annex of this regulation.

If the member state wants to preserve a traditional product coming from its territory, there is a possibility to ask for an exemption for it. The author divided exemptions into exemptions negotiated in accordance with the Access Agreement and exemptions of the special mode. The biggest chance, in the author’s opinion, is the granting of exemption in the Access Agreement, when there is a bigger chance within access negotiation to gain exemptions for the given product thanks to the abilities of negotiators of the member state, than in case of an application for exemption of the special mode, when the member state cannot significantly influence granting exemption but it depends on decision of the Commission on this application. This possibility of granting exemptions is, however, more like of a historical issue, having regard to the change in 2006, when the Commission proceeded to the cancellation of new exemptions in order to prevent from the continuing expansion of the list of products. It doesn’t mean, however, that presently there is no possibility to struggle for the preservation of a product name by other methods.

### **3.2 Trademarks and Protected Designations of the European Union**

One of the possibilities how to preserve a product name is to point out to its exclusiveness by means of an individual trade mark of the European Union or a type of

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<sup>26</sup> Annex 2, Chapter 6. Agriculture, point 7(4c) 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. Official Journal L 236, 23 August 2003.

Protected Designation. The directive on trademarks specified that “*A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:*

*a) distinguishing the goods or services of one undertaking from those of other undertakings; and*

*(b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.”<sup>27</sup>*

Whereas these both conditions must be met cumulatively. Concerning ‘pomazánkové máslo’, the problem was, however, that the trade mark of ‘pomazánkové máslo’ could be only used by the proprietor of the trade mark, thus, for example, only by a sole dairy plant. In case of ‘pomazánkové máslo’, however, this concerns the use of the term by all producers which satisfies conditions defined in order to enable selling this product in the market as ‘pomazánkové máslo’.

A relatively new type (from 2017) in the system of trademarks of EU are Certification trademarks, An EU certification mark shall be an EU trade mark, “*which is described as such when the mark is applied for and is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not so certified.*”<sup>28</sup> The advantage is that the Certification trademark is not bound to one area, that's why, in case of granting exemption for ‘pomazánkové máslo’, the origin of ‘pomazánkové máslo’ wasn't taken into consideration, and it may be sold in the Czech Republic or in the Slovak Republic. The Certification trademark, however, cannot be applied to ‘pomazánkové máslo’, since, in contrast to the individual trademark, a proprietor of a certification trademark (a physical or legal person, institution, authority or public entity) isn't allowed to carry on business comprising delivery of products or rendering of services that are certified. Practically it would mean to find an applicant for a certification trademark other than the proprietor and the seller of ‘pomazánkové máslo’.

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<sup>27</sup> Chapter 2 Section 1 Article 3 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks. Official Journal L 336, 23 December 2015.

<sup>28</sup> Article 83 (1) Regulation (EU) No 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark. Official Journal L 154, 16 June 2017.

This proprietor would only deliver the certification granted to ‘pomazánkové máslo’, and - by this - would confirm specific properties of ‘pomazánkové máslo’.

The European Union on the one hand endeavours after the uniformity of the Internal Market, and on the other hand also is particular about and supports variety of agricultural and food products in case that they bring a special benefit. Considering that there is a food product which doesn’t satisfy all conditions imposed toward it on the part of the European legislation, but which has another contribution for the Internal Market, for example, it is manufactured long-term in the respective member state and it is a local traditional food, then there is a possibility of exemptions for such products. These products are solved within the EU quality policy, when EU quality policy aims at protecting the names of specific products to promote their unique characteristics, linked to their geographical origin as well as traditional know-how.<sup>29</sup> Based on this EU policy, exemptions exist at all, and a state - thanks to it - is able to make an application to the European Commission on registration of the product with a protected designation and on placing it in the list in the annex of this act of the European Union.

And the Czech Republic also struggled to promote this exemption in an effort to preserve the name of ‘pomazánkové máslo’. At the time when ‘pomazánkové máslo’ is being resolved, there were 3 protective measures, which - in case of granting exemption - would keep a possibility to preserve the name of ‘pomazánkové máslo’. One of the possibilities was to register ‘pomazánkové máslo’ as a product with a Protected Geographical Indication (PGI). The fundamental thing for this protected indication is that at least part of manufacture has to come from the specified region and that the name of this place, region or country is used for the designation of the respective product in case that this product has a certain quality, reputation or other specific properties. In the case of ‘pomazánkové máslo’, however, the Protected Geographical Indication couldn’t be used, because ‘pomazánkové máslo’ isn’t bound to a specified geographical region (the specified region as the whole Czech Republic also isn’t suitable in this case, since ‘pomazánkové máslo’ with the same properties is manufactured, for example, by dairy companies in Slovakia). This designation, on the contrary, makes sense in case, for example, of ‘Olomoucké tvarůžky’, ‘Valašské frgály’, ‘Třeboňský kapr’ and others. One more protective designation is “Protected Designation of Origin” that might be granted to agricultural products or food products, which come from a certain specified territory, and these are quality and properties of the products which predominantly or exclusively influenced by the

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<sup>29</sup> European Commission. *Aims of EU quality schemes* [online]. EC.europa.eu [cit. 10 February 2020]. Available on <[https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained\\_en#otherschemes](https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en#otherschemes)>.

given special geographical environment with its characteristic factors (both natural's and human's), and at the same time they are manufactured and processed in the specified territory. It is the whole processing in the respective territory which differentiates the Protected Designation of Origin (PDO) from a product with the Protected Geographical Indication. This protected designation, however, in connection with 'pomazánkové máslo' cannot be used as well, because 'pomazánkové máslo', similarly as in case of the previous protected designation, again doesn't get its properties thanks to the unique geographic environment and it is not an agricultural product or food. The Czech Republic here registered, for example, 'Žatecký chmel', 'Český kmín' and 'Chamomilla Bohemica'. The third possibility is designation of Traditional Speciality Guaranteed, which - in contrast to the previous two protected designation - isn't bound to a geographical region. They, thus, may be manufactured in whatever geographical region under condition that the conditions of production technology (so called specifications) are preserved. One more advantage is that in case of registering a national product, this product can be manufactured even in another member state (again, however, under condition of preservation of the production technology). The last of the conditions is the production of the product by traditional methods for more than 30 years. The Commission proposed to increase the original period of time from 25 to 50 years, and the final version is 30 years.<sup>30</sup> The author sees in this step one more endeavour to achieve integrity of the market; and as expected, this period will be increased in the future, which should lead to decreasing a number of applications for TSG and also to a shorter list of such products registered in the future. The Czech representatives strove to obtain this protected designation for 'pomazánkové máslo'. TSG is absolutely ideal for it, because 'pomazánkové máslo' meets all conditions. Since production isn't bound to one place, even nor a single member state, there is no problem that 'pomazánkové máslo' was manufactured abroad (for example, in Slovakia). 'Pomazánkové máslo' originated in 1977 in the Liberec dairy plant, when there was demand of consumers for butter with a lower content of fat, that's why the condition of production by traditional method for at least 30 years was satisfied in the course of a dispute over preservation or non-preservation of the name of 'pomazánkové máslo'. The Czech Republic has registered by this way, for example, 'Tradiční Špekáčky', 'Pražská šunka' or 'Tradiční Lovecký salám'. Having satisfied conditions and at the same time having approved Traditional Specialities Guaranteed, it is possible in general to consider the granting of this exemption to be a real possibility.

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<sup>30</sup> *Proposal for a Regulation of the European Parliament and of the Council on agricultural product quality schemes* [online]. Eur-lex.europa.eu, 10 December 2010 [cit. 13 March 2020]. Available on <<https://eur-lex.europa.eu/legal-content/CS/TXT/?qid=1585746014814&uri=CELEX:52010PC0733>>.



All these 3 protected designations, i.e. Protected Geographical Indication, Protected Designation of Origin and Traditional Speciality Guaranteed, are registered as protected designations of EU and use advantages flowing from it. The PGI, PDO and TSG designations also contribute to the continuation of traditional forms of production, which is contributing for both producers and consumers. The proprietor of an EU protected designation, which he certified for a material, method of product manufacture or rendering services, quality, accuracy or other properties, can differ his products and services from products or services, which aren't so certified. It can be a competitive advantage for him in the market, that's why producers seek to meet conditions for granting. Beside of that, 'pomazánkové máslo' in case of granting a Traditional Speciality Guaranteed, could preserve its name, which was a reason why the Czech Republic also required for it according to Regulation "on quality modes".<sup>31</sup>

If a candidate state doesn't negotiate an exemption during access negotiations for a traditional product, which it wants to continue to produce and to supply to the European Union Internal Market, the next possible endeavour is an application for registration of a Trademark or Protected Designation of EU at the time of membership. The author here chose a Trademarks and Protected Designations of EU, for which it is possible to apply and at the same time analysed each of them from the point of view of applicability for 'pomazánkové máslo'. A member state can apply for exemption for its product thanks to the EU quality policy, thanks to which there is a few possibilities under which the respective product can be registered. The state cannot choose itself a type of protected designation, because - as is described hereunder in this sub-chapter, each protects something other and each of them has also its own conditions, the fulfilment of which serves as a presumption for its acceptance of the application of a member state by the Commission. Satisfaction of conditions, however, automatically doesn't mean approval of application, as the author describes in the Sub-chapter "Complaint of the Commission against the Czech Republic".

### **3.2.1 Process of application for a Protected Designation**

The process of submitting an application is described in a consolidated wording of the Regulation of the European Parliament and of the Council (EU) No 1151/2012 dated 14 December 2019.<sup>32</sup> The application for registering Protected Designations of Origin and

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<sup>31</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, Official Journal L 343, 14 December 2012.

<sup>32</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, Official Journal L 343, 14 December 2012.

Protected Geographical Indications only slightly differs from the application for registering a Traditional Speciality Guaranteed; that's why the both applications will be described within a common sub-chapter. The both applications may be submitted by a coalition of producers, and in case of an application for recording Protected Designations of Origin and Protected Geographical Indications, it might also do a coalition of producers from the member and third states in case of cross-border cooperation,<sup>33</sup> or an individual if he/she satisfies the condition and is a sole producer.<sup>34</sup> The content of the application is described by the Regulation in Art. 7, or Art. 20 in case of TSG. In the application for registering, it is necessary to specify a name, address of the coalition of applicants and specification of the product, its basic physical, chemical, microbiological or organoleptic properties. In case of an application for registering Protected Designations of Origin and Protected Geographical Indications, also a description of relationship between the product and the geographical environment or geographical origin, or special data, which substantiate this relationship.<sup>35</sup> In case of an application for a Traditional Speciality Guaranteed, it is necessary to describe the method of production, which the producers must observe, and fundamental elements creating traditional character of the product.<sup>36</sup>

The fulfilled application has to be submitted to an authority of the respective member state, which in case of the Czech Republic is the Industrial Property Office of the Czech Republic for PGI and PDO, and the Ministry of Agriculture for TSG. This authority will examine the application whether all conditions according to Art. 49 were satisfied. In case that there is a mistake in the application or if some information is missing, the corresponding authority of the member state will call the applicant to remedy or addition till two months. In case of failure to remedy, the application will stop; and in case of satisfaction of all conditions, the application will be published for three months to enable submission of objections. If they are reasonable, the application will be rejected,<sup>37</sup> and if aren't, the application will be submitted to the Commission. The Commission - as well as the national authority - will publish it for possible objecting.<sup>38</sup> In case of absence of objections, the Commission will decide - by its implementing regulation - on registering the name in the register of Protected Designations of Origin and Protected Geographical Indications or in the Register of Traditional Specialities

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<sup>33</sup> Article 49 (1), Ibidem.

<sup>34</sup> Article 49 (1) letters a) and b), Ibidem.

<sup>35</sup> Article 7 (1), Ibidem.

<sup>36</sup> Article 20, Ibidem.

<sup>37</sup> Industrial Property Office of the Czech Republic. *Metodické pokyny část CH – Označení původu a zeměpisné označení* [online]. upv.cz, [cit. 18 March 2020]. Available on <[https://webcache.googleusercontent.com/search?q=cache:RRIKAZ3NXQ4J:https://upv.cz/dms/pdf\\_dokumenty/metodicke\\_pokyny/CH-oznaceni\\_puvodu\\_201401.pdf+&cd=1&hl=cs&ct=clnk&gl=cz](https://webcache.googleusercontent.com/search?q=cache:RRIKAZ3NXQ4J:https://upv.cz/dms/pdf_dokumenty/metodicke_pokyny/CH-oznaceni_puvodu_201401.pdf+&cd=1&hl=cs&ct=clnk&gl=cz)>.

<sup>38</sup> The request is published in the Official Journal of the European Union, the comment period is 6 months.

Guaranteed. Reasons of objections for the Protected Designations of Origin and Protected Geographical Indications are specified in Art. 10; reasons of objections for the Traditional Speciality Guaranteed are specified in Art. 21.

In case of ‘pomazánkové máslo’, a debatable point, which the Court of Justice of the European Union itself had to decide about, was whether the Commission may or may not reject the application based on its own re-examination. The author supposes that the competence to examine an applications results directly from Point 64 and Articles 50, 52 and 57, which directly refer to a possibility of re-examination of the Commission and a possibility of rejection of an application. The important thing for the reasoning of rightfulness of the Commission in the issues of the application for registering to decide but not only check fulfilment of the conditions for Protected Designations of Origin, Protected Geographical Indications or Traditional Specialities Guaranteed is Art. 57, which mentions the procedure of re-examination of the Committee for Quality Policy of agricultural products. The Commission, based on its re-examination according to Art. 50, may recommend it, but it is the Committee that is responsible for the decision itself, according to which the Commission either accepts the application by its implementing act or doesn’t accept.<sup>39</sup>

In case of non-accepting the application for granting a trademark or protected designation, it is possible to file a proposal for the cancellation of the implementing decision of the Commission, by which the Commission rejected the respective application. Since it is about a complaint, the Court of Justice of the European Union shall decide on the dispute. If the Tribunal delivers a resolution of refusal concerning the cancellation of the implementing decision of the Commission, the member state shall lose its last possibility to preserve the existing trademark in the European Union Internal Market. The substantial thing for the author, however, is that the Commission’s decision doesn’t need to be final and there is a possibility here for the member state to defend in a form of an application for the cancellation of the implementing regulation of the Commission, by which the respective application was rejected.

By reason of integrity of information on possible exemptions, it is necessary for the author to introduce the procedural part of the submission of application as well. With regard to small differences between the application for registering Protected Designations of Origin and Protected Geographical Indications, and considering that the applications for registering a Traditional Speciality Guaranteed show minimal variance and that the both applications are

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<sup>39</sup> Article 5 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers. Official Journal L 55, 28 February 2011.

specified in the same regulation, the author decided to describe the both of them in the same sub-chapter. The above-described Regulation No 1151/2010 in a consolidated wording, dated 14 December 2019 historically hasn't existed yet at the time of the application of the Czech Republic; and applications at that time were submitted according to Regulation No 2081/92 or Regulation No 509/2006 depending on the time of submission. The author, however, refers to the latest wording, because for the aim of this sub-chapter, of the partial step for registering exemptions and of understanding the opinion of the Commission for the right to make decision on the application, it is sufficient and the historical version is not required. An application for the cancellation of an implementing regulation may be submitted against the implementing regulation of the Commission, by which it rejected the application. This possibility, however, the Czech Republic in case of 'pomazánkové máslo' didn't use and didn't submit an application for the cancellation, which is described by the author in the case study itself.

### **3.3 The first opportunity to negotiate an exemption**

The primary opportunity is negotiation of an exemption during the access negotiations of the candidate country to join the European Union. This is a *sui generis* entity, because it has competences of both an international organization and each particular member state. Transferring of the supreme rights caused origination of competences which may be exercised with immediate effects toward the recipients, i.e. toward member states and particular persons in the member states.<sup>40</sup> The member states are voluntarily pledged themselves to respect decisions and other legal acts of the European Union authorities and to continue to respect them in the future, too. The national law order, thus, is subordinated to the EU law. The primary step for the membership in EU is the submission of application for the membership. This is a unilateral act on the part of the state. The Czech Republic submitted an official application for the membership in the European Union already in 1996, namely in Rome on 23 January via then the Prime Minister Václav Klaus to the European Council.

The access negotiations began after more than two years from the submission of an official application for the membership, so not earlier than in March 1998. Since it is a complicated process, it can last even a number of years. The state shall obtain a status of candidate country since the approval of the application by the European Council and receiving a concurring opinion of the Commission. After having received a unanimous decision of the

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<sup>40</sup> TICHÝ, Luboš a col. *Evropské právo*. 3. vyd. Prague: C.H. Beck, 2006, p. 66.

European Council, access negotiations are being initiated. The important point in view of the diploma paper is the fact that before the member state, in our case the Czech Republic, joins the EU, the national law is being approximated to the EU law. This so called harmonization process is intended to create new legal regulations, which regulate relations of the national entities, to provide full transformation of the legal order of the Czech Republic. The access negotiations are divided into 35 areas of policies (chapters), and the consequential screening criticizes performance of necessary legislative changes in the candidate country within each from the negotiated areas of the policies, no matter if immediately or on the date when the candidate country joins the European Union. All the time of the process, the Commission shall inform the Council and the European Parliament, especially by means of annual reports, of progress. These reports are discussed by the European Parliament that specifies its suggestions in resolutions accepted in plenary sessions. The candidate country shall also compile annual national programmes, in which it evaluates its own progress in the execution of various chapters of the *acquis*<sup>41</sup> (the body of EU law). The best time to negotiate an exemption is during negotiation of the chapter, in which the member state wants to obtain an exemption. In case of the diploma paper, this is an exemption in the chapter of agriculture and rural development. Since the approximation of the Czech law and the EU law is an obligation to provide compatibility on the part of a member state, the state must take care about which areas or themes could be problematic and to resolve them actively by itself. Here is a splendid opportunity of additional negotiation of different exemptions, for example, an exemption from the European Union Internal Market for 'pomazánkové máslo' in case that the member state, in this situation the Czech Republic, discovered that the EU law has a 'butter' definition, and a product in the Czech market doesn't satisfy its conditions. But it is not only 'pomazánkové máslo'; the same situation was with 'Tuzemský rum'. By this description, the author indicates complexity of the process of access negotiations, which hides the first opportunity for granting an exemption for the product from a candidate country. It is, however, a unique opportunity for the candidate country, because the national law is being approximated with the European one, including a detailed monitoring of the EU law. This moment, thus, provides a big chance to discover discordance between these two legal orders and space for its resolving. While in case of a member state it is a breach of the EU law, which is superior to the national law, in case of a candidate country it is better negotiation position for the member state, since it is about negotiations between two equivalent partners, which have more will to find a compromise, and

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<sup>41</sup> *EU accession – accession process* [online]. Publications.europa.eu [cit. 15 March 2020]. Available on <[http://publications.europa.eu/resource/cellar/0ae670d2-1ece-4994-b1e3-adda39e1c6de.0002.02/DOC\\_7](http://publications.europa.eu/resource/cellar/0ae670d2-1ece-4994-b1e3-adda39e1c6de.0002.02/DOC_7)>.

thus are more opened for the acceptance of a possible exemption than toward a member state, when between the EU law and national law and, thus, between the European Commission and the member state there is a relation of superiority and subordination. The diploma paper's author doesn't affirm that it was the only opportunity for granting an exemption, but deduces, as is indicated in this paragraph, that it was a moment when there was a possibility of the simplest negotiation of an exemption from the European Union Internal Market by reason of a relation between a state and EU and long and detailed discussion of European regulation.

A state's application for membership in the European Union has to be accompanied by harmonization of the national law with the European Union law. Since membership of a new state in EU is a result which is wanted by the both parties, there is a big opportunity here for the conclusion of possible exemptions, because non-completion of the access negotiations due to disagreement regarding a possible exemption for a certain product is disproportional in comparison with a possible membership of the new state. The participants of the access negotiations on behalf of the European Union non-officially retroactively confirmed this theory to its counterparts from the Ministry of Agriculture.<sup>42</sup> Unfortunately, separate points may be negotiated only on impulse of a candidate state, and the Czech Republic didn't open this debate, which the author describes in the case study of 'pomazánkové máslo', including substantiation of the absence of this step and designation of a regulation, from which it had to ask for the exemption.

### **3.4 The second opportunity to obtain an exemption**

In this sub-chapter, the author wants to describe a possibility of the state when applying for exemption after changing the candidate statute to the member state statute for the needs of part focused on 'pomazánkové máslo'. The Czech Republic passed through the access process, and thus through the access negotiations, where the candidate country has the first possibility to negotiate necessary exemptions, and the area for negotiations is the highest at that time. Accession of a state to EU means acceptance of the European Union legal order, which is very important for the author's concrete case of 'pomazánkové máslo'.

By joining EU, the Czech Republic as a member of the European Union, accepted the European Union legal order as well. Together with the EU legal order, however, the accession brought a priority of the European law, too. Although provisions about priority of the European

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<sup>42</sup> ŠÍR, Jiří. *Interview with Jiří Šír*. Prague, 14 February 2019. Audio recording 52 minutes. Author's archive.

law over the national law is missing,<sup>43</sup> it is confirmed in the jurisdiction of the Court of Justice of the European Union, where it is most visible on two cases, namely *Van Gend en Loos*<sup>44</sup> and *Costa*.<sup>45</sup> “Reasons why the doctrine of priority of the EU law could be pushed through directly inside the member states, i.e. with unusually bigger outreach than in the international law, is a fact that the Treaty establishing the European Economic Community introduced a sophisticated judicial mechanism, in particular about the preliminary issue.”<sup>46</sup> The second reason of enforcing the principle of priority of the EU law over the national law is consonance with the principle of direct effect. It is consonance of these two reasons which is fundamental. If only one of the principles could be applied, then pushing through of the principle of priority of the EU law wouldn't be really possible and enforceable. It is important for understanding why Czech dairy plants couldn't produce and sell 'pomazánkové máslo' though the Czech Republic didn't issue any legal act prohibiting the production and sale in the territory of the Czech Republic.

The first opportunity for the preservation of the product which doesn't satisfy conditions of the EU law was when a state is in the candidate country statute during the access negotiations. The second opportunity is submission of application when the respective state is a member of in the European Union, if there is a product which this member state wants to preserve. This possibility of exemption, however, depends on a concrete regulation, and Regulation No 123/2007,<sup>47</sup> of which the Czech Republic wanted to get an exemption for 'pomazánkové máslo', enabled it. With regard to the change of the European legislation, this opportunity means an opportunity theoretically possible at the time of submission of the first application by the Czech Republic in 2004, but even at that time the Commission planned not to expand the list of exemptions. In case of applications submitted after that date a chance to designate the respective product as an exemption, in author's opinion, is zero, because the Commission has already stopped approval of new applications. The both these applications will be analysed by the author in the case study of 'pomazánkové máslo'. At the present days, the author thinks that the most effective would be if a member state asked for a transition period, during which the

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<sup>43</sup> Eur-lex. *Founding treaties* [online]. Eur-lex.europa.eu [cit. 8 March 2020]. Available on <<https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-founding.html?locale=en>>.

<sup>44</sup> Judgment of the Court of 5 February 1963, *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62.

<sup>45</sup> Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L*, Case 6-64.

<sup>46</sup> BOBEK, Michal, BRÍZA, Petr, KOMÁREK, Jan. *Vnitrostátní aplikace práva Evropské unie*. Prague: C.H. Beck, 2011, p. 5.

<sup>47</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

respective product may appear in the market, and during which the producers might prepare themselves for a change of name, composition or production process of the product.

### **3.5 Complaint against the Commission**

Based on the logics of European Union functioning, first of all, it is necessary to try to find agreement between two or more parties by negotiating and searching for a compromise for all participating parties. If the Commission rejects to accept the chosen product to be a traditional product and accept, thus, an exemption of the European Union for it, and if the member state supposes that the respective product should be accepted, there is a possibility to indict the Commission's decision judicially in the Court of Justice of the European Union. The Court, if the member state presents sufficient arguments proving the correctness of its statement, may declare the complaint to be duly justified. The important role also plays here the justified period for the submission of a complaint from the announcement of non-acceptation of the exemption; and if the member state didn't have a time to submit an appeal till the given date, it is impossible then to consider it to be duly justified, and, thus, no arguments specified in it would be evaluated. There isn't any possibility to appeal against the decision; an appeal is only possible in the field of legal issues, for a breach of legal regulations by the Tribunal or due to competency of the Tribunal. But in neither of these cases, the issue itself is a subject of deciding. A complaint against the Commission is one of the possible steps of a member state to protect itself against the Commission's decision for the preservation of the product or its trade name in the European Union market.

### **3.6 Infringement procedure – the Czech case**

A special case related to the entry of a new member state into EU is a situation when a product, which is being appeared in the Internal Market, doesn't satisfy European regulations and doesn't have any exemption from them. The explanation is that the member state wrongly integrates the EU law into its national legal order or doesn't do it at all. The Commission in this moment may initiate proceedings for a failure to fulfil obligation of the member state, which may result in the phase of pre-trial proceedings, or the proceedings would get up to the trial phase. But this point is extraordinary and it's impossible to affirm that complaints against inactivity could be submitted regularly, which is proven by a fact that by the year 2015 only approximately 7 % of the pre-trial proceedings concerning failing to fulfil obligation proceeded



to the trial phase.<sup>48</sup> A legal support of the complaint against inactivity is specified in Art. 258, 259 and 260 of the Treaty on the Functioning of the European Union.<sup>49</sup> A complaint against inactivity, however, isn't a primary step of the Commission. The primary step is a pre-trial phase, when the aim is to achieve peaceful settlement in a form of remedy on the part of the member state or clarification of situation by the member state to the Commission.

Pre-trial proceedings are being initiated on impulse of an individual or a member state, or from its own source of the Commission. In case of initiative of a member state, the respective state may also act in the trial proceedings, but - by diplomatic reasons - it is very rare. Having evaluated information, the Commission initiates proceedings which are formally opened by sending a notifying letter by the Commission to the member state, in which there is information how the member state didn't fulfil its obligations. In case of 'pomazánkové máslo', the impulse went on the part of the Slovakian dairy plants to the Commission. Having initiated proceedings, the Commission enables the respective state to make a statement to the Commission, and if the Commission is not satisfied with the explanation, it will be continued by reasonable opinion to the matter, in which there is detailed critique of the Commission, corrective actions and time to remedy;<sup>50</sup> however the Commission is not obliged to do this step, and if it doesn't do so on impulse of the member state till 3 months, it may directly submit a complaint. The complaint is direct, obligatorily there is peaceful settlement before it.<sup>51</sup>

The substance of the proceedings is to declare that the member state has breached one of its obligations toward the European Union and to oblige it to fulfil and observe them. The burden of proving has the Commission here, and the member state is obliged to cooperate; mostly it means to give relevant information.<sup>52</sup> If the Commission has already presented its arguments, it is the member state who has to disprove them. In case of termination of a failure to fulfil the obligations in the course of trial proceedings, the Court of Justice continues to be entitled to make decision on the breach and possible financial sanctions.<sup>53</sup> Although the trial phase of the infringement procedure is sporadic, it is necessary to mention about it with regard to the case study of 'pomazánkové máslo', which reach this phase. The author specifies this sub-chapter in order to the use the infringement procedure in the case of 'pomazánkové máslo',

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<sup>48</sup> SVOBODA, Pavel. *Úvod do evropského práva*. 6<sup>th</sup> Edition. Prague: C.H. Beck, 2019, p. 209.

<sup>49</sup> Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26 September 2012.

<sup>50</sup> SVOBODA, Pavel. *Úvod do evropského práva*. 6<sup>th</sup> Edition. Prague: C.H. Beck, 2019, p. 208.

<sup>51</sup> TICHÝ, Luboš. *Evrpské právo*. 4<sup>th</sup> Edition. Prague: C. H. Beck, p. 368.

<sup>52</sup> Article 4 Consolidated version of the Treaty on European Union. Official Journal C 326, 26 October 2012.

<sup>53</sup> However, in this case he may be remitted a penalty payment. Judgment of the Court of 12 July 2005, *Commission of the European Communities v French Republic*, C-304/02, Reports of Cases I-06263.

because the Czech Republic had a legal opinion other than the Commission's one, and therefore this instrument was used as well.

The member states are represented by attorneys, and 3 different approaches can be seen. The Great Britain and Ireland use external lawyers as its representatives, Austria and the Czech Republic use government representatives, and Germany and Belgium use a combination of the both above-mentioned variants. Representation of the Czech Republic in the Court of Justice and Tribunal is provided by a government representative for the representation of the Czech Republic in the Court of Justice of the European Union. JUDr. Martin Smolek, Ph.D., LL.M. was nominated to this position.<sup>54</sup> He was a government representative in the both trial proceedings which took place in connection with 'pomazánkové máslo' and continues to be a government representative till now.

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<sup>54</sup> SMOLEK, Martin. *Zpráva o činnosti vládního zmocněnce za rok 2018* [online]. Vláda.cz, 1 April 2019 [cit. 15 February 2020]. Available on <[https://isap.vlada.cz/homepage2.nsf/pages/esdvlz/\\$file/VLZ-zprava\\_2018.pdf](https://isap.vlada.cz/homepage2.nsf/pages/esdvlz/$file/VLZ-zprava_2018.pdf)>.

## 4 The case of ‘pomazánkové máslo’

Consumers began to place emphasis on healthy lifestyle in the early 70-ies of the twentieth century, and therefore interest in products with lower energetic value was increasing. This pressure of consumers, however, took place at the time of communistic totality and in the conditions of its central planning of the market, when even basic goods and raw materials were missing through the whole range of the market.<sup>55</sup> One of the possible solutions was to find new manufacturing procedures, in which missing raw materials could be replaced to enable at least production of the product. These were these two facts which were projected in the dairy industry, where there was endeavour to develop a new butter-type product with a lower energetic value than butter, and at the same time to resolve the problem with critical lack of milk fat, which is necessary for the production of butter. The new product, which responded to the both situations, was developed by Ing. Zdeněk Pech with Docent Ladislav Forman from the Research Dairy Institute and Ing. Václav Vondrouška, Director of Liberec dairy plant in 1977. So, a product, which appeared in the market, was easy-spreadable even after taking from refrigerator, with lower fat content, thus with a lower energetic value, and later originated its flavoured variants as well. All this distinguishes ‘pomazánkové máslo’ from butter, for which ‘pomazánkové máslo’ should be just an alternative but not a butter substitute.<sup>56</sup>

The designation of ‘pomazánkové máslo’ was also used till the end of October 2013 by the Czech legislation, which defined ‘pomazánkové máslo’ as “*a dairy product from culture cream, enriched with dried milk or dried buttermilk, containing at least 31 % vol. of milk fat and at least 42 % vol. of dry matter*”,<sup>57</sup> thus this term had been actively used for at least 36 years,<sup>58</sup> including its legal definition, and - according to the author - it would be suitable to draw attention for it, because the time of existence and use of the term is important when trying to obtain a protected designation for a traditional product, which must exist at least for 30 years, and ‘pomazánkové máslo’ met this condition, and - in addition - this set expression had been

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<sup>55</sup> But the inhabitants were already accustomed to it. The only crisis to communist leaders was in 1988 because of the fire of Harmanecké paper mills, when in the market was not available toilet paper.

<sup>56</sup> From the legal point of view is also interesting history of patenting the product, when the product was first patented in the USA (USPat 4, 177, 293, ‘*Process of manufacture of butterspread*’ – 4 December 1979) and then in 1982 in our country (copyright certificate No 193760 ‘*Způsob výroby máselné pomazánky*’), because of shorter US procedure.

<sup>57</sup> Decree No 397/2016 Coll., Vyhláška o požadavcích na mléko a mléčné výrobky, mražené krémy a jedlé tuky a oleje, as amended by Decree No 77/2003 Coll., effective as of 31 October 2013.

<sup>58</sup> The term ‘pomazánkové máslo’ is used by Czech consumers and companies even today, for example through the application “Nesněženo” it was possible to buy ‘Netradiční pomazánkové máslo bylinkové (125 g)’ on 12 March 2020, or ‘Nemléko-pomazánkové nemáslo’ on 14 March 2020.

actively used for years, so the Czech consumer - as is demonstrated in the result of research below - is able to recognize this product from butter.

#### **4.1 Designation of ‘butter’ (‘máslo’) in the term ‘pomazánkové máslo’**

In the author’s opinion, a connection between butter and ‘pomazánkové máslo’ results even from the introducing paragraph. Endeavour to create a dairy product similar to butter and to react at the same time to two challenges related to it (endeavour to create a product with a lower energetic value and at the same time to create a product with a lower content of milk fat by reason of its absence) wasn’t here absolutely accidental, but on the contrary it was a dairy product derived from butter. It is similarity with butter which evoked the product’s name that includes a word ‘máslo’ (‘butter’) – the both are used for spreading to bread, they have a similar colour (the both products exist in a scale of colours from creamy white to slightly yellowish), the both are a dairy product manufactured on the basis of milk components, and for the production of the both products it is necessary to “butterify” initial cream during its technological processing, which enables origination of the typical character of a butter product.<sup>59</sup> In addition, both butter and ‘pomazánkové máslo’ have no additional substances, such as emulsifiers and preserving agents, which differentiates them from other mixed, dairy and fat products. Although it is also possible to enumerate differences, for example, different consistence, or flavoured variants, but, in spite of this, ‘pomazánkové máslo’ is very close to butter, and designation of ‘máslo’ (‘butter’), in the author’s opinion, is logical in this case. For example, the Great Britain has a product containing butter with an addition of alcohol, which is designated as butter, and the final product is also flavoured and has a different consistence (Sherry butter, Brandy butter, etc.). ‘Pomazánkové máslo’ is more similar to butter than Spanish ‘Mantequilla de Soria’ (‘Butter from Soria’), which nevertheless may use designation of ‘butter’. The author here draws attention again to the double standards for the member states when member states from 1997 could use Art. 4 of the currently cancelled regulation of the Commission,<sup>60</sup> which allowed designation of ‘butter’ even for the products which had lowed quantity of fat. The author’s opinion regarding the dual standards toward the member states underlines a fact that the Spain ‘Mantequilla de Soria’ (‘Butter from Soria’) got an exemption

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<sup>59</sup> KOPÁČEK, Jiří. Pomazánkové máslo – jedinečný český výrobek. Zvítězí ve sporu, který s ním vede Evropské unie? *Potravinářská revue*, 2011, vol. 8, No 2, p. 17–20.

<sup>60</sup> Commission Regulation (EC) No 577/97 of 1 April 1997 laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94 laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products. Official Journal L 87, 2 April 1997.

according to this article not earlier than in the decision of the Commission dated 15 February 2007,<sup>61</sup> it means - pure 2 months before the cancellation of this article.<sup>62</sup> In the Czech case of ‘pomazánkové máslo’, however, this designation caused an antagonism between the European Union and the Czech Republic, though in this case - as is described above - it is a product more similar to butter than exemptions which may use the term of ‘butter’, which, however, is indirectly confirmed by the Commission in its complaint against the Czech Republic for non-fulfilment of obligations by the state.<sup>63</sup> Larger similarity with butter, and on the other hand non-fulfilment of the definition of the protected product, i.e. ‘butter’, can sound like a cause of the problem by reason of a similar replacement of the consumer between these two products, but - according to the author’s opinion - it is not a product that competes with butter, which simulates the butter’s properties so that it is possible to mistake it for butter, but the alternative product, which is presented as a product other than butter, and which only has its name by reason of similarity of the both products, which, however, are not so significant to cause confusion between these products. On the contrary, similar properties concurrently with separation of the both products in a form of differentiation of the name and package, should be - according to the author - an argument which allows an exemption.

## **4.2 Negotiation of the exemption from the Internal Market for ‘pomazánkové máslo’**

The Czech Republic has more opportunities to push ahead preservation of the designation of ‘pomazánkové máslo’. The first was the access negotiations, as is described by

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<sup>61</sup> Commission Regulation (EC) No 148/2007 of 15 February 2007 registering certain names in the Register of protected designation of origin and protected geographical indications (Geraardsbergse mattentaart (PGI) — Patata de Galicia or Patata de Galicia (PGI) — Poniente de Granada (PDO) — Gata-Hurdes (PDO) — Patatas de Prades or Patates de Prades (PGI) — Mantequilla de Soria (PDO) — Huile d'olive de Nîmes (PDO) — Huile d'olive de Corse or Huile d'olive de Corse-Oliu di Corsica (PDO) — Clémentine de Corse (PGI) — Agneau de Sisteron (PGI) — Connemara Hill Lamb or Uain Sléibhe Chonamara (PGI) — Sardegna (PDO) — Carota dell'Altopiano del Fucino (PGI) — Stelvio or Stilsfer (PDO) — Limone Femminello del Gargano (PGI) — Azeitonas de Conserva de Elvas e Campo Maior (PDO) — Chouriça de Carne de Barroso-Montalegre (PGI) — Chouriço de Abóbora de Barroso-Montalegre (PGI) — Sangureira de Barroso-Montalegre (PGI) — Batata de Trás-os-Montes (PGI) — Salpicão de Barroso-Montalegre (PGI) — Alheira de Barroso-Montalegre (PGI) — Cordeiro de Barroso, Anho de Barroso or Borrego de leite de Barroso (PGI) — Azeite do Alentejo Interior (PDO) — Paio de Beja (PGI) — Linguíça do Baixo Alentejo or Chouriço de carne do Baixo Alentejo (PGI) — Ekstra deviško oljčno olje Slovenske Istre (PDO)). Official Journal L 46, 16 February 2007.

<sup>62</sup> Article 4 Commission Regulation (EC) No 445/2007 of 23 April 2007 laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94 laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products (Codified version). Official Journal L 106, 24 April 2007.

<sup>63</sup> Point 29 ‘*In any event, that is not the case with pomazánkové máslo, since, in particular, it is not sufficiently distinct from the protected product, namely butter.*’ Judgment of 18 October 2012, *Commission v Czech Republic*, C-37/11.

the author in the first part of the paper. That time, negotiations on the trade name ‘pomazánkové máslo’ should be initiated within the agriculture, which falls into the chapter of Agriculture and rural development. It, however, didn’t happen, what the author retrospectively evaluates as the largest wasted opportunity, which had happened in the whole period of debating about the preservation of the name of ‘pomazánkové máslo’. The author sees here a problem primarily in a big amount of legal regulations, whereas each of them is very extensive. The quantity of text and terms, which should be processed in the Ministry of Agriculture and negotiated by it, was significant. Time, thus, especially played against the Czech and Moravian Dairy Association, which represents the biggest domestic dairy plants and, naturally, particular dairy plants. The Ministry negotiated a big amount of points falling into the chapter of Agriculture and rural development and - according to the author - was unable to identify in time a level of importance concretely in the case of ‘pomazánkové máslo’.<sup>64</sup> And there is discrepancy here in the statements of the Ministry of Agriculture and the Czech and Moravian Dairy Association (CMDA), when - as the Ministry stated - the interested parties were addressed, i.e. including CMDA, to express their requirements for the access negotiations. This information, however, is negated by the current chairman and then board member of the Czech and Moravian Dairy Association, Ing. Jiří Kopáček, CSc.<sup>65</sup> These were representatives of the manufacturers of ‘pomazánkové máslo’ who - within the access negotiations according to their own words - needed more time for more detailed analysis of new, legally binding documents, in which they could identify a possible conflict of manufactured ‘pomazánkové máslo’ with the Regulation of the Council No 2991/94, which defines standards for spreadable fats and which, thus, contains a definition of butter, including necessary content of milk fat.<sup>66</sup> On the contrary, Rudolf Jelínek Company, a producer, has famously reacted in the process of the access negotiations. This company much more better studied the EU law concerning its production, and thanks to this producer there is an exemption for ‘Slivovice’, which contains a small amount of alcohol. It is, however, the first exemption at all granted from application of the regulations for fruit distilled beverages, but from the point of view of traditionalism it is the same reason as the reason specified in the application for the inclusion of the trade name ‘pomazánkové máslo’

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<sup>64</sup> At the time of the accession negotiations, there was no parallel bilateral meeting between the Ministry of Agriculture and Czech and Moravian Dairy Association. Thus, from the point of view of negotiation, there could be more potential options to resolve, ranging from the smooth renaming of ‘pomazánkové máslo’ to negotiating a transitional period to designating the product as a traditional specialty, which would mean granting an exception for ‘pomazánkové máslo’ and continuing to use that name.

<sup>65</sup> KOPÁČEK, Jiří. *Interview with Jiří Kopáček*. Prague, 9 March 2020. Audio recording 54 minutes. Author's archive.

<sup>66</sup> Council Regulation (EC) No 2991/94 of 5 December 1994, laying down standards for spreadable fats. Official Journal L 316, 9 December 1994.

into the annex of the Commission Regulation No 577/97.<sup>67</sup> The pre-access process was finished in the session of the European Council, which took place on 12 and 13 December 2002, where also were closed all negotiated chapters, including Chapter “Agriculture and rural development”, which ‘pomazánkové máslo’ falls into, and it closed a possibility to negotiate about ‘pomazánkové máslo’ within the pre-access negotiations. The Czech Republic, thus, should ask for an exemption for ‘pomazánkové máslo’, registered in Chapter 6 of the Access Agreement,<sup>68</sup> which nevertheless didn’t happen because neither representatives of the Czech Republic nor the Czech and Moravian Dairy Association nor the manufacturers themselves identified a future discrepancy between the EU law and the trade name ‘pomazánkové máslo’. Considering the future decision of the Commission about non-expanding exemptions, the author believes that it is this neglect which significantly contributed to the prohibition to use the trade name ‘pomazánkové máslo’.

According to the author, the access negotiations look like - in the issue of granting exemptions from the Internal Market - as an opportunity for the state with the largest chance for success. It is clear - as the author thinks - that at the time of accessing a new state, endeavour to successfully incorporate a new member state in the European Union is preferable and bilateral, that's why it is possible to speculate retrospectively, in connection with the case of ‘Slivovice’, which was negotiated within the access negotiations, that ‘pomazánkové máslo’ could be approved as a traditional product, which is connected with granting an exemption from the Internal Market. Nevertheless, representatives of the Czech Republic didn’t specify this request within the negotiations. The Czech Republic had advantage that its access negotiations were led before the year 2006, after which changes in the EU legislation were made, which at the present days means that even within the access negotiations there is no possibility to obtain an exemption from the Internal Market. It is impossible, however, to determine in this phase a concrete offender who caused that presently trade name ‘pomazánkové máslo’ mustn’t be used.

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<sup>67</sup> Commission Regulation (EC) No 577/97 of 1 April 1997 laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94 laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products. Official Journal L 87, 2 April 1997.

<sup>68</sup> 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. Official Journal 236, 23 August 2003.

But it is possible to determine who should initiate the respective impulse. These are the Ministry of Agriculture, the Czech and Moravian Dairy Association and dairy plants themselves as manufacturers of ‘pomazánkové máslo’. The Ministry of Agriculture, however, in this case didn’t identify a definition of butter as so problematic part which requires more attention with regard to ‘pomazánkové máslo’, and instead devoted its time and energy to other points. Upon accession to the European Union, the European legislation impacts among others producers that together with the national legal regulations must adapt themselves to the European ones. Dairy plants, producing ‘pomazánkové máslo’, thus, may themselves, or through the Czech and Moravian Dairy Association that associated the biggest producers, call attention to the fact of failing to fulfil the definition of ‘butter’ in case of a product that they produce and in the trade name of which this protected product is contained. Rudolf Jelinek Company deserves to be positively evaluated in this case, because it drawn attention to a possible conflict between the European legislation and the product named ‘Slivovice’, and thanks to it we can find this name now in the European legislation.<sup>69</sup>

Though, in connection with the initial omission, representatives of the Ministry together with the Czech and Moravian Dairy Association relatively quickly reacted to the occurred situation, and the Czech Republic, thus, on 18 June 2004, 49 days after accession into the European Union, asked for granting an exemption via an application for the insertion of the product name ‘pomazánkové máslo’ into the annex of the Commission Regulation (EC) No 577/97.<sup>70</sup> Endeavour to preserve additionally a *status quo*, when the omission could be remedied within the access negotiations for ‘pomazánkové máslo’, was not appreciated by a positive attitude of the European Commission, which this application rejected by a letter dated 23 September 2005 with substantiation of failing to satisfy the condition for the designation of the product with the protected designation of ‘máslo’ (‘butter’), which was - according to the Commission’s statement - the basic condition for possible granting an exemption. According to the Commission’s statement during the consultations in 2006, the Commission proceeded to the cancellation of exemptions with the aim to prevent from the further expansion of the list of products with an exemption of traditional designation, i.e. to

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<sup>69</sup> Annex 2 point 46 (2) Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 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, 13 February 2008.

<sup>70</sup> Commission Regulation (EC) No 577/97 of 1 April 1997 laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94 laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products. Official Journal L 87, 2 April 1997.



preserve the state of exemptions registered by the year 1997.<sup>71</sup> In connection with this aim, the Commission distributed a draft regulation to the member states in 2007, which should help to its aim and which cancelled or changed the previous regulation enabling exemptions. The Czech Republic reacted to it by sending its statement and submitting a repeated application for exemption for ‘pomazánkové máslo’. It was, in the author’s opinion, a very good tactical step that can be interpreted as a support of the Commission’s proposal in exchange for the satisfaction of the application. Due to the clear prevalence, when only the Czech Republic was against the regulation and Poland desisted,<sup>72</sup> this application was rejected, too. So, the new Council Regulation No 1234/2007,<sup>73</sup> came into effect in March 2007. This regulation defined at the European level the minimum standards for a product, which may be named as butter, specified products with a content of milk fat lower than 39 % as ‘milk spread fat’ (‘pomazánkové máslo’ had it in a range of 31 – 33.1 %).<sup>74</sup> It, according to the paper’s author, terminated the chance for granting an exemption for ‘pomazánkové máslo’. But according to the same regulation, products, the character of which results from the traditional use, or if this designation of the product is used for the description of a characteristic property of the products, might be named differently.<sup>75</sup> The Ministry of Agriculture therefore referred to this wording of the regulation, which, according to him, didn’t evoke a necessity of a decision of the Commission regarding approval of an exemption for ‘pomazánkové máslo’ or other traditional product, and reasoned by fulfilling all conditions cumulatively, which should automatically cause the registration of ‘pomazánkové máslo’ into the annex of the regulation as a traditional product, i.e. of an recognized exemption from the regulation.

The Czech Republic, thus, in its statement to the new regulation, submitted one more application on 14 March 2007 for an exemption for ‘pomazánkové máslo’, but the Commission, which its rejection of the application by its letter dated 27 August 2007 substantiated it by failing to fulfil the requirements for the composition of ‘pomazánkové máslo’ for a trade designation ‘butter’,<sup>76</sup> argued also by endeavour to cancel new exemptions with the aim to prevent from the further (theoretical infinitive) expansion of the list of products with exemption

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<sup>71</sup> TRÍSKOVÁ, Dana. Jak je to s pomazánkovým máslem? *Potravinářská revue*, 2011, vol. 8, No 4, p. 17-19.

<sup>72</sup> Ibidem.

<sup>73</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

<sup>74</sup> Appendix to Annex XV (A4) of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), Official Journal L 299, 16 November 2007.

<sup>75</sup> Annex XV Article 2 (2) first indent, Ibidem.

<sup>76</sup> Appendix to Annex XV, Ibidem.

granting for the traditional designation, which was achieved by changing the legislation, and thus nor ‘pomazánkové máslo’ might be already included in the list of exemptions. It means that the “new” list of exemptions only kept the products registered by the year 1997, therefore - according to the Commission - ‘pomazánkové máslo’ can’t be registered.

In the author’s opinion, this step of the Commission is at least unconsidered, because if EU doesn’t want long lists of exemptions, the solution to “freeze the list” by the year 1997 isn’t, according to the author, a suitable solution if that’s a solution at all. As a result of this step, new member states may feel discriminated compared to the founding members, and this division divides the states into “states” and “states with privileges”. If the European Commission really didn’t want to have extensive lists of exemption, more logically is - according to the author’s opinion - to cancel these exemptions absolutely. The Commission’s behaviour, however, follows from the Sub-chapter “Development of consumer protection”, when more and more bigger emphasis is taken to this field and in case of absence of intervention of the Commission, the list of exemptions could be extended over and over again, which, however, doesn’t do the market more transparent, and thus it doesn’t protect the consumer, who could obtain misgiving to the Internal Market due to the reason of big amount of different exemptions. The reason of preservation of certain exemptions, instead of cancelling the all of them, according to the author, is the endeavour of the Commission to obtain a support for the new regulation from the respective states.

The Commission in its letter informing on rejecting the second application of the Czech Republic also required to change the trade name ‘pomazánkové máslo’ till the end of the first quarter of 2008.<sup>77</sup> This requirement for a change of the trade name arose from the complaint of the Slovakian dairy producers against the Commission in 2006, which complained that it is still possible to buy ‘pomazánkové máslo’ in the Czech Republic, while it was renamed to ‘maslová nátierka’ in the Slovak Republic.<sup>78</sup> Since the Czech Republic didn’t agree with the Commission’s decision and considered its own interpretation to be correct, its national law regulations for ‘pomazánkové máslo’ wasn’t changed within the specified period, and, thus, this product continued to be defined in Decree No 77/2003 Coll.<sup>79</sup> And this dairy product continued to be manufactured in the Czech Republic and it was possible to buy it in the Czech

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<sup>77</sup> KOPÁČEK, Jiří. Pomazánkové máslo – jedinečný český výrobek. Zvítězí ve sporu, který s ním vede Evropské unie? *Potravinářská revue*, 2011, vol. 8, No 2, p. 17–20.

<sup>78</sup> This is linked to the Commission’s selective decisions on the infringements to be prosecuted, as well as the theory of some participants directly related to the ‘pomazánkové máslo’ case. That this whole ‘case’ would not have to take place and reach the stage of legal proceedings without Slovakia’s notice.

<sup>79</sup> Decree č. 397/2016 Coll., Vyhláška o požadavcích na mléko a mléčné výrobky, mražené krémy a jedlé tuky a oleje, as amended by Decree č. 77/2003 Coll., effective as of 31 October 2013.

market. In 2008, a formal notification of the initiation of proceedings about the breach of Art. 3 of the Treaty on the Functioning of the European Union was delivered from the Commission to the Czech Republic.<sup>80</sup> This step had a formal character; the Commission indicates by this step that there is discordance between the European and national laws, and asks for explanation and also gives a possibility to the member state to arrange remedy, which wasn't arranged by the state before obtaining the appeal. The Czech Republic made no step to arrange remedy according to the Commission's appeal, because - as the Czech Republic wrote via the Ministry of Agriculture in the reply to its appeal - although 'pomazánkové máslo' didn't satisfy the minimum quantity of milk fat, but the Czech Republic supposes that the product automatically uses the exemption according to Regulation No 1234/2007,<sup>81</sup> without necessity in the further step in a form of an implementing regulation of the Commission and with regard to the existence of the product in the market for a series of years, the consumer would unequivocally recognize a difference between butter and 'pomazánkové máslo'. That's why, on 29 October 2009, the Commission advanced the proceedings to the phase of so called reasoned opinion, when it argued that exemptions according to Regulation No 1234/2007 can't be applied implicitly, but according to the Implementing Regulation No 445/2007,<sup>82</sup> which represents an obligatory method of the use for exemptions. The reasoned opinion included the Commission's application for providing a compliance till two months. And in this case, however, the Czech Republic made no steps satisfying the requests of the Commission, because it insisted on immediacy of the used provision, thus, that the product satisfying conditions shall obtain exemptions automatically, without necessity of approval by the Commission. The last step, which remained for the Commission, because it didn't consider the reply to be satisfied, was the submission of a draft complaint against the Czech Republic in the Court of Justice of the European Union for failing to fulfil an obligation by the state, because the Czech Republic continued not to arrange steps to remove 'pomazánkové máslo' from the market.<sup>83</sup>

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<sup>80</sup> Article 3 Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26 October 2012.

<sup>81</sup> Article I (2) third subparagraph letter a) Annex XV of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

<sup>82</sup> Article 121 (i) letter c) Commission Regulation (EC) No 445/2007 of 23 April 2007, laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94, laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products (Codified version). Official Journal L 106, 24 April 2007.

<sup>83</sup> Remove 'pomazánkové máslo' from the market - It means the use of the trade name 'pomazánkové máslo'. The product on the market did not bother the Commission if it were called 'spreadable fat', so it was merely a failure to use the name.

The prior paragraph familiarizes the reader with a situation when the Czech Republic were trying via the Ministry of Agriculture to additionally negotiate an exemption for ‘pomazánkové máslo’, namely twice, with the first application which was sent shortly after the Czech Republic joined the European Union in 2004, and with the second one, which was sent to the Commission in March 2007. The Commission, however, rejected the both applications and informed the Czech Republic about it by two letters. But since the Czech Republic interpreted legality of the fulfilment of the conditions defined in Council Regulation No 1234/2007<sup>84</sup> as sufficient for granting an exemption, the product ‘pomazánkové máslo’ was defined in national Decree No 77/2003 Coll.,<sup>85</sup> the product continued to be allowed to be produced and sold under condition of satisfaction of conditions of the national decree. On the contrary, the Commission argued by necessity to re-examine and approve the application of the Commission, which caused a dispute between the Czech Republic and the Commission that ended in an infringement procedure. As described in the prior paragraph, a complete pre-trial phase of proceedings took place between the Czech Republic and the Commission, i.e. a statement of the Czech Republic and the Commission and a reasoned opinion of the Commission, after which the Czech Republic didn’t change its national decree. But the pre-trial phase of proceedings didn’t lead to resolving, and thus the case got to the trial phase, as described in the consequential sub-chapter.

### **4.3 Complaint No C-37/11 of the Commission against the Czech Republic**

Seeing that there were two parties of the dispute, where one party considered that it is in the right, because ‘pomazánkové máslo’ satisfies the conditions for registering in the list of exemptions as a traditional foodstuff, and the second party, which considered the ongoing occurrence and sale of ‘pomazánkové máslo’ to be a breach of the European law, which couldn’t agree bilaterally, this issue came up to legal proceedings. The European Commission, on 25 January 2011, sued the Czech Republic for a failure to fulfil an obligation by the state based on Art. 258 TFEU, which the first senate of The Court of Justice of the European Union was engaged in, the judgment of which dated 18 October 2012<sup>86</sup> can be divided into two parts. The first part is created by the issue of admissibility of the complaint, because the Czech

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<sup>84</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

<sup>85</sup> Decree č. 397/2016 Coll., Vyhláška o požadavcích na mléko a mléčné výrobky, mražené krémy a jedlé tuky a oleje, as amended by Decree č. 77/2003 Coll., effective as of 31 October 2013.

<sup>86</sup> Judgment of the Court of 18 October 2012, *European Commission v Czech Republic*, C-37/11.

Republic objected inadmissibility of the complaint under consideration, and the Commission objected examination of admissibility only from the point of view of Art. 258 TFEU<sup>87</sup> and stating that the subject of the proceedings is limited itself only to the verification whether the used national legal regulations are in accordance with the EU legal regulations. The second part is created by ‘pomazánkové máslo’ in its substance. The legal representatives of the Commission repeatedly stated a difference between butter and ‘pomazánkové máslo’ and non-recognition of exemption included in Annex I of Regulation No 445/2007 by reason of non-approval by the Commission, which has to decide for each exemption whether to include it or not into the list of Annex I of Regulation No 445/2007. The satisfaction of conditions, according to them, cannot be interpreted as automatically approved application. The representatives of the Commission asked the Court of Justice to make decision whether the Czech Republic - continuing to specify the product as ‘pomazánkové máslo’ in its legal order after rejection to register ‘pomazánkové máslo’ in the list of exemptions - violates or doesn’t violate the European law. The reason of it is that Czech Republic permitted introduction in the market of a dairy product that cannot be classified as butter, under the trade designation ‘pomazánkové máslo’.<sup>88</sup>

Interpretation of the definition of the Commission’s letters dated 23 September 2005 and 27 August 2007, that announced rejection of the application of the Czech Republic for the inclusion of ‘pomazánkové máslo’ in the list of Annex I of Regulation No 445/2007, became an independent disputed point. In the Commission’s opinion, these were acts, and it means that it was possible to indict them according to Art. 263 TFEU. On the contrary, the Czech Republic held an opinion that the letters don’t have a character of acts according to Art. 263 TFEU, that’s why the Czech Republic didn’t have an opportunity to indict these “acts” as the Commission’s decision. The Czech Republic also drawn attention to the defect of the proceedings upon rejection of the application on the part of the Commission as well as disputed criteria of application of the exemption.

The senate of the Court of Justice found this complaint duly justified, in spite of objections of the Czech Republic, when it decided that the member state can’t efficiently appeal to illegality of the decision and, consequently, to use this reason as protection against the

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<sup>87</sup> Article 258 Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 326, 26 October 2012.

<sup>88</sup> This was to infringe Regulation No 1234/2007.

complaint for failing to fulfil the obligation.<sup>89</sup> Beside of that, the Czech Republic may not apply arguments impugning legality of the Commission's decision regarding non-including 'pomazánkové máslo' in the list of Annex I of Regulation No 445/2007, but it should indict the legality of the decision by means of complaint.<sup>90</sup> Since the Czech Republic didn't do so, with regard to the steady jurisdiction, which requires - by reason of legal certainty of determination of nullity of the act of the European Union authorities - reservation only for really extraordinary cases, the Senate of the Court of Justice found the Commission's complaint as admissible.

In the matter of the complaint itself, the Commission's complaint was found substantiated, because, in the issue of competence of the Commission to make decision on exemptions, the Commission goes from Regulation No 1234/2007, when the Commission is explicitly powered to take implementing rules regarding the exemptions, and that failure to respect this regulation would impeach the competence of the Commission entrusted by the Council of the European Union as well as the useful effect of the regulation, which consists in the unification of the use of trade designations for the purpose of preservation of the economic competition and consumer protection.<sup>91</sup> Thus, the Senate of the Court of Justice agreed in the issue of omission of the Commission's obligation, which confirmed the competence to make decision on registration of a product in the list of exemptions of Annex I of Regulation No 445/2007 and stated a breach of obligations of the Czech Republic in its judgment: *„Declares that, by authorising pomazánkové máslo (butter spread) to be sold under the designation 'máslo' (butter) even though that product has a milk fat content of less than 80 % and water and dry non-fat milk-material contents of more than 16 % and 2 % respectively, the Czech Republic has failed to fulfil its obligations under Article 115 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in conjunction with the first and second subparagraphs of point I(2) of Annex XV to that regulation and points 1 and 4 of part A of the appendix to that annex.“*<sup>92</sup>

According to the former Member of the European Parliament Ing. Petr Mach, Ph.D., a big role-played translation of 'pomazánkové máslo' to other languages. The Tribunal consisted of citizens of different nationalities, to whom the term 'pomazánkové máslo' was translated to

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<sup>89</sup> This may be invoked if it is permitted to plead illegality under the provisions of the Treaty. Whether the act in question is so manifest and serious as to render it legally null and void. However, neither of these variants can be applied to this case.

<sup>90</sup> In due time according to Article 263 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26 October 2012.

<sup>91</sup>Point 61 Judgment of the Court of 18 October 2012, *European Commission v Czech Republic*, C-37/11.

<sup>92</sup> Verdict Ibidem.

their native languages. The Maltese got a translation “butir sabiex jiddellek” (butter to be spread), Italian “burro da spalmare“ (butter to be spread), Lithuanian “Tepamasis sviestas“ (spreadable butter), Pole “masło do smarowania“ (spreadable butter) a Greek „βούτυρο για επέλειψη“ (butter to be spread). The judges were confused that something what is not butter and what is to be spread, should be named as spread butter. “*The judges thus thought that the product named ‘butter spread’ must invoke a false impression in the consumer that this is butter determined to be spread to something.*”<sup>93</sup> Strong evidences were presented that the product doesn’t have 80 % fat, therefore it isn’t butter and, thus, it must be renamed in interest of consumer protection.<sup>94</sup> According to Petr Mach, the English expression - ‘butter spread’ - was similarly incorrectly translated. It was about something that simulate spread, which pretends that it is butter. The ideal, in his opinion, would be a revers translation, i.e. ‘spread butter’, similarly as butter with peanut is ‘peanut butter’ but not ‘butter peanut’. The same opinion had the Union of Interpreters and Translators, too.<sup>95</sup> But a significant change of interpretation in case of throwing-over the both words, according to the translator and certified interpreter, Mgr. Eva Procházková, doesn’t bring a significant change of sense for English, because he/she feels as one noun.<sup>96</sup> According to the author, however, the translation itself doesn’t play too large role, since the Tribunal doesn’t decide just on the basis of a written expression in the text of the complaint. At the same time, it only makes decision in the submitted subject matter of the complaint. In its complaint, the Commission wanted the Tribunal to decide whether the Czech Republic violates or not the European law, when it permitted introduction of a dairy product in the market, which cannot classified as butter, under a trade designation of ‘pomazánkové máslo’. The Tribunal, accordingly, only stated in the judgment that the product ‘pomazánkové máslo’ contains in its name a word ‘butter’ (‘máslo’), but this product doesn’t satisfy a fat content for this protected product, and since the Czech Republic defines it in the national regulation, which it didn’t change even after initiation of an infringement procedure, it didn’t fulfil its obligations, which follow from Art. 115 of Council Regulation (EC) No 1234/2007.<sup>97</sup>

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<sup>93</sup> MACH, Petr. *Evropská unie ztracena v překladu pomazánkového másla* [online]. PetrMach.cz, 14 January 2013 [cit. 15 March 2020]. Available on <[www.petrmach.cz/evropska-unie-ztracena-v-prekladu-pomazankoveho-masla/?fbclid=IwAR2jqGkiFAUknkFNYCTdxhyBB9FPEpQ21OpM9csYx\\_hCfvcidROP3KZp7w4](http://www.petrmach.cz/evropska-unie-ztracena-v-prekladu-pomazankoveho-masla/?fbclid=IwAR2jqGkiFAUknkFNYCTdxhyBB9FPEpQ21OpM9csYx_hCfvcidROP3KZp7w4)>.

<sup>94</sup> Ibidem.

<sup>95</sup> Union of Interpreters and Translators. *MACH: Evropská unie ztracena v překladu pomazánkového másla* [online]. JTPUnion.org, [cit. 15 March 2020]. Available on <[JTP.: MACH: Evropská unie ztracena v překladu pomazánkového másla](http://JTP.: MACH: Evropská unie ztracena v překladu pomazánkového másla)>.

<sup>96</sup> PROCHÁZKOVÁ, Eva. *Pomazánkové máslo, díl 153* [online]. Česky-anglicky.cz, 13 May 2016 [cit. 15 March 2020]. Available on <[cesky-anglicky.cz/blog/58/pomazankove-maslo-dil-153](http://cesky-anglicky.cz/blog/58/pomazankove-maslo-dil-153)>.

<sup>97</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal L 299, 16 November 2007.

The order of words in the English translation, according to the author, is irrelevant for the decision whether the product containing the word “butter” in its designation satisfies conditions or not to be designated as “butter”.

Thus, the Czech Republic in its first complaint associated with ‘pomazánkové máslo’ didn’t win the dispute. The Court of Justice agreed with the Commission, namely in the both considered points, i.e. regarding both legality of the complaint and in the matter of ‘pomazánkové máslo’ itself. In connection to the judgment, the Czech Republic, on 14 May 2013, informed the Commission that it initiated a legislation process in order to change the trade designation ‘pomazánkové máslo’ to ‘tradiční pomazánkové’ (‘traditional spreadable’), completed with a remark: ‘mléčná pomazánka 34%’ (‘dairy spread, 34%’).<sup>98</sup> A precise date for the rename wasn’t specified, it was just defined as “at the nearest time”, which the Czech Republic determined as April 2014 with a possibility of the final sale of the products,<sup>99</sup> which would remain in the sale by that time. With regard to durability of ‘pomazánkové máslo’, which is about 30 days, no product designated as ‘pomazánkové máslo’ shouldn’t be in sale by 1 June 2014. The author isn’t surprised with the judgment at all, considering that process of decision-making only concerned the point that the Czech Republic failed to fulfil its obligations, but not the exemption itself. The Commission had to specify whether the Czech Republic violates or not the European law, when it permitted market introduction of a dairy product, which cannot be classified as butter, under a trade designation ‘pomazánkové máslo’. The Tribunal logically found that the product contained a word ‘butter’, but didn’t satisfy the content of fat for the protected product, i.e. ‘butter’. From this perspective, the Commission’s steps are absolutely logical, which wanted to prevent from the sale of this product under the existing designation. Since the Commission, during the pre-trial phase, drawn attention to a discrepancy between the national Decree No 77/2003 Coll.,<sup>100</sup> and the European law, and the Czech Republic didn’t change this decree at all, it was be possible, according to the author, to suppose in advance how the Tribunal would decide. A difference would be in case of the complaint of the Czech Republic against the judgment of rejection of the application for granting an exemption for ‘pomazánkové máslo’, when the Tribunal would decide on the exemption itself, but this didn’t

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<sup>98</sup>Point 22 Judgment of the General court of 12 May 2015, *Czech Republic v European Commission*, T-51/14.

<sup>99</sup> Almost a one year (May 2013 – April 2014) was set in view of the arguments of Madeta dairy, which claimed that it has a million quantities of packaging already manufactured and would cost a large amount of funds to modify. However, some of the interviewees raised the idea that Madeta did not physically have these packages and hastily ordered them to argue with them. This idea, however, the author of the thesis failed to confirm or refute also because of zero willingness on the part of Madeta, including director Milan Teplý.

<sup>100</sup> Decree č. 397/2016 Coll., Vyhláška o požadavcích na mléko a mléčné výrobky, mražené krémy a jedlé tuky a oleje, as amended by Decree č. 77/2003 Coll., effective as of 31 October 2013.



happen, because the Czech Republic, according to its own words, didn't know about this possibility.<sup>101</sup>

#### 4.4 'Pomazánkové máslo' as a Traditional Speciality Guaranteed

In parallel with the Commission's steps, however, the Czech party not only passively waited, but it also took further steps, which could help to keep 'pomazánkové máslo' in the Internal Market of the European Union. With regard to the rejected application by the Commission for the designation 'pomazánkové máslo' as a traditional food product and the corresponding registering of 'pomazánkové máslo' in the list of exemptions, Ing. Jiří Kopáček CSc., as Chairman of the Czech and Moravian Dairy Association, worked out a new application, by which the Czech Republic tried to register a protected designation of a Traditional Speciality Guaranteed for 'pomazánkové máslo', whereas the Czech Republic - by complying procedural requisites - wanted to protect this product as a Traditional Speciality Guaranteed with territorial limitation only for the Czech Republic, i.e. without possibility to export with the designation 'pomazánkové máslo' by reason of simple identification of 'pomazánkové máslo' by the Czech consumer who can't mistake it for butter. In case of export, the product would be no longer designated as 'butter', which means that no non-Czech speaking consumers can be misled.<sup>102</sup> The application contained substantiation in a form of extraordinary character of 'pomazánkové máslo', and therefore it was submitted for registering with reservation of the name according to the valid EU legislation.<sup>103</sup> This application was published on the webpages of the Ministry of Agriculture for the comment procedure and upon the expiration of the obligatory three-month period, it was sent to the Commission on 22 December 2010.

The Czech Republic no longer applied for registering 'pomazánkové máslo' in the list of exemptions, but asked for the protected designation, i.e. "Traditional Speciality Guaranteed" for 'pomazánkové máslo'. This step could be understandable from the point of view of the Czech Republic, but the Commission in its letter dated 1 April informed the Czech Republic that - according to its re-examination - it is impossible to register the subject matter which is similar with a protected product, i.e. with butter, but it doesn't satisfy its definition. The reason is that 'pomazánkové máslo' contains a word 'máslo' ('butter'), which may mislead the

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<sup>101</sup> Point 35 Judgment of the Court of 18 October 2012, *European Commission v Czech Republic*, C-37/11.

<sup>102</sup> The term 'dairyspread' was used in English and 'Milchschreichfett' in German, ie 'milk spread'. In addition, the Choceň dairy supplying the German market used the designation 'Böhmischer Brotaufstrich' (Czech bread spread), which was placed over the entire packaging of the product.

<sup>103</sup> Council Regulation (EC) No 509/2006 of 20 March 2006, on agricultural products and foodstuffs as traditional specialities guaranteed. Official Journal L 93, 31 March 2006.

consumer, because it indicates properties which the respective product doesn't have. The Czech Republic replied by letter dated 30 May 2011, in which it informed the Commission on the planned legal analysis. By mutual agreement with the Commission, they then waited for the decision of the Court of Justice of the European Union in the concurrently ongoing application No C-37/11. Upon judgment delivery, the Czech Republic in its second reply dated 23 October 2012 replied that according to the national analysis<sup>104</sup> the name 'pomazánkové máslo' for the Czech consumer isn't misleading and therefore there is no obstacle for the continuation of the proceedings for registering the name 'pomazánkové máslo' in the list of Traditional Specialities Guaranteed.<sup>105</sup> On 2 July, the Commission informed the Czech Republic that the application doesn't satisfy the requirements of the regulation, and on 17 October 2013, on the Agricultural Product Quality Policy Committee, it proposed a rejection of the application for registering 'pomazánkové máslo' as a Traditional Speciality Guaranteed, and it was majority-approved. That's why it rejected the application for registering the name 'pomazánkové máslo' in the implementing decision dated 13 November 2013.<sup>106</sup> The Commission's attitude regarding the rejection of the application was also supported by the decision of the Senate of the Court of Justice dated 18 October 2012,<sup>107</sup> which is also specified in the substantiation of the implementing regulation together with the rejection of the protected designation of the product containing a word 'butter', which doesn't satisfy the definition of butter according to 1234/2007, what is substantiated by the quantity of fat and unequal competition, when the Commission described the rejection of the application as follows: „*Products with a content of milk fat lower than 80 %, and, thus, with a higher content of water than in butter produced in accordance with the EU legal regulations, compete in the market with this product. The higher content of water provides economic advantages for the manufacturer of such products. It leads to unequal competition.*” According to the author, this attitude of the Commission, however, didn't reflect a fact that the application of the Czech Republic referred to the Czech market and the Czech name. At this very moment, the Czech consumer should be chosen for the evaluation of the application as the consumer template, according to which butter and 'pomazánkové máslo' are judged, and it is clear that the Czech consumer doesn't consider these two products to be exchangeable. It means that the approval of TGS for 'pomazánkové máslo' wouldn't lead

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<sup>104</sup> Because Traditional Specialty Guaranteed wanted only for the territory of the Czech Republic.

<sup>105</sup> Annex I.

<sup>106</sup> Commission implementing decision of 13 November 2013, rejecting an application for entry in the register of traditional specialities guaranteed provided for in Regulation (EU) No 1151/2012 of the European Parliament and of the Council (Pomazánkové máslo (TSG)) (notified under document C (2013) 7615). Official Journal L 305, 15 November 2013.

<sup>107</sup> Judgment of the Court (First Chamber) of 18 October 2012, *European Commission v Czech Republic*, C-37/11.

to unequal competition. The author from this moment thinks that there is zero chance for the preservation of the term ‘pomazánkové máslo’. It cannot be denied that the Ministry of Agriculture expressed its fighting spirit in the battle for ‘pomazánkové máslo’, but from the Commission’s point of view, it was endeavour which isn’t 100% understandable, because the Czech Republic had to negotiate an exemption within the access negotiations, when it had an opportunity for it and possibility for negotiation, but now this is no form of negotiation but regular violation of the EU law, which was confirmed, among other, by the judgment of the Court of Justice. The interesting thing is that in the procedure for entering ‘pomazánkové máslo’ in the register of traditional specialties guaranteed, some countries asked why the Czech Republic did not negotiate an exemption as they have for similar products and were surprised by the reaction that the exemptions have not been registered by the European Commission since 1997.<sup>108</sup>

#### **4.5 Complaint No T–51/14 The Czech Republic in the Commission**

The Czech Republic, which has been already instructed about possibility to submit a complaint against the Commission’s letter rejecting the application for the registration in the register of Traditional Specialities Guaranteed, didn’t want to identify with the rejection through the implementing decision of the Commission.<sup>109</sup> It, thus, submitted a complaint against the Commission with a subject matter to cancel the implementing decision of the Commission. Since from the time of submission of the application (2010) till the judgment delivery (2015), the validity of Regulation No 509/2006, according to which the Czech Republic submitted the application, expired, the consequential Regulation No 1151/2012 effective from 3 January 2013. was used in the period of the legal dispute.<sup>110</sup> It specifies that *“A name shall be eligible for registration as a traditional speciality guaranteed where it describes a specific product or foodstuff that results from a mode of production, processing or composition corresponding to a traditional practise for that product or foodstuff; or is produced from raw materials or ingredients that are those traditionally used. Furthermore, Article 18 (2) of the above-mentioned regulation specifies that “For a name to be registered as*

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<sup>108</sup>TRÍSKA, Head of the Food Chain Department, Ministry of Agriculture. Email communication with Ing. Dana Tríska, 15 April 2020. Author's archive.

<sup>109</sup>Commission Implementing Decision 2013/658/EU of 13 November 2013 rejecting an application for entry in the register of traditional specialties guaranteed provided for in Regulation (EU) No 1151/2012 of the European Parliament and of the Council (Pomazánkové máslo (TSG)) (notified under document C (2013) 7615). Official Journal L 305, 15 November 2013.

<sup>110</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012, on quality schemes for agricultural products and foodstuffs. Official Journal L 343, 29 December 2010.

*a traditional speciality guaranteed, it shall have been traditionally used to refer to the specific product; or identify the traditional character or specific character of the product.*<sup>111</sup> Registration of a product or foodstuff name as TSG must satisfy conditions specified for this purpose by this regulation, and especially must be in accordance with the specification of the product according to Article 19 of this regulation. Regulation recognizes protection for this name specified in Articles 23 and 24 of the respective regulation.<sup>112</sup> The Czech Republic proposed the Tribunal to cancel the indicted decision by reason that the Commission didn't carry out re-examination of satisfaction of the conditions necessary for registering a name as ZTS, but rejected the application from another reason.<sup>113</sup> The Czech Republic supposed that if in case of satisfaction of conditions in Art. 18 (2), 'pomazánkové máslo' is eligible to be registered as TSG, the Commission conversely argued that satisfaction of conditions specified in Regulation No 1234/2007 has to be taken into consideration as well, since Article 2 (3) of Regulation No 1151/2012 specifies that "*this Regulation shall be applied without prejudice to other specific Union provisions relating to the placing of products on the market and, in particular, to the single common organization of the markets, and to food labelling.*". Considering that 'pomazánkové máslo' didn't satisfy the definition of butter, the application - according to the Commission - must be rejected. The Tribunal of the Court of Justice of the European Union decided that for the interpretation according to a steady jurisdiction, it is necessary to consider both a change of the EU law and its context and monitored aims.<sup>114</sup> That's why, according to Art. 2 (3), which the Commission refers to, it is necessary to understand that it is not enough to meet conditions in Art. 18 (1), but the conditions specified in Regulation No 1234/2007 must be met as well. In addition, according to Point 4 of the substantiation of Regulation No 445/2007,<sup>115</sup> the list is full and it is impossible to add all products which will only satisfy Art. 18 (1) of Regulation No 1151/2012 into it. The second Senate, thus, decided that the Commission - in its interpretation of Art. 2 (3) of Regulation No 1151/2012 - didn't commit incorrect legal assessment, when supposed that the name couldn't be registered in the Register of TSG, if it didn't satisfy conditions for the market introduction specified by

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<sup>111</sup> Article 18 Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012, on quality schemes for agricultural products and foodstuffs. Official Journal L 343, 29 December 2010.

<sup>112</sup> Ibidem.

<sup>113</sup> Article 2 (3) Ibidem.

<sup>114</sup> Point 34 Judgment of the General Court of 12 May 2015, *Czech Republic v European Commission*, T-51/14.

<sup>115</sup> Paragraph 4 Commission Regulation (EC) No 445/2007 of 23 April 2007, laying down certain detailed rules for the application of Council Regulation (EC) No 2991/94, laying down standards for spreadable fats and of Council Regulation (EEC) No 1898/87 on the protection of designations used in the marketing of milk and milk products (Codified version), Official Journal L 106, 24 April 2007.

Regulation No 1234/2007,<sup>116</sup> and - by this - found the sole point of the complaint of the Czech Republic to be unsubstantial and rejected the complaint.

The Czech Republic tried to defend against the implementing decision of the Commission and submitted a motion for abolition of the implementing decision of the Commission to the Court of Justice. The Czech Republic argued that the Commission didn't re-examine fulfilment of conditions, but the Commission argued back that it is necessary to evaluate each application from the point of view of the whole European Union legal order and not only of one regulation; and registration of 'pomazánkové máslo' would concern other legal regulations of EU, namely failure to fulfil the requirements for the product which uses a protected name 'butter' in Regulation No 1234/2007,<sup>117</sup> with which the Senate of the Court of Justice also agreed and, thus, rejected the complaint of the Czech Republic. The author recognizes the court decision as correct, but doesn't see the above-mentioned protection for only the territory of the Czech Republic, which here, according to the author, wasn't considered, and the decision was made only on TSG as such.

#### **4.6 'Pomazánkové máslo' in the future**

At the current situation, the name 'pomazánkové máslo' isn't used and starting from April 2014 it has been replaced by an expression 'tradiční pomazánkové' ('traditional spreadable') usually modified depending on the respective producer,<sup>118</sup> when the absence of a noun evokes to add the word of 'butter', and that means that the consumer understands which kind of product is considered. Generally speaking, any other case would probably terminate. The Czech Republic tried to preserve the name by its applications for granting an exemption for 'pomazánkové máslo' and an application for protection as a Traditional Speciality Guaranteed, and lost in this case two legal processes with the Commission. But from the point of view of 'pomazánkové máslo', or newly 'tradiční pomazánkové', it was - in each case - endeavour to preserve, together with the recipe and production process, especially the trade name 'pomazánkové máslo', and it is word 'butter' which became this dispute point but not the product itself. And the Czech and Moravian Dairy Association headed by Ing. Jiří Kopáček, CSc., is planning in the future to ask for registering the product 'tradiční pomazánkové', which

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<sup>116</sup> Point 53 Judgment of the General court (Second Chamber) of 12 May 2015, *Czech Republic v European Commission*, T-51/14.

<sup>117</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Official Journal of the European Union, L 299, 16 November 2007.

<sup>118</sup> The biggest producer of traditional spreads today, Choceň dairy uses the name 'Choceňské tradiční pomazánkové' and so do other manufacturers modify the name according to themselves.

though has been in the market since 2013, but considering that the production technology hasn't been changed from the seventies, satisfies, thus, all conditions for the granting the Traditional Speciality Guaranteed. Since the name hasn't already connected with the dispute term, i.e. 'butter', the Commission may not object similarity with the protected product 'butter', and possible misleading the consumer resulting from it. This application will be sent by reason of protection of this traditional dairy product, which would preserve its technological and production process with a content of fat in a range between 31 and 33.1 % fat and to differentiate it from alternatives, which appear in the market,<sup>119</sup> which, however, belong to the category of milk spreads. Beside of that, the composition with milk fat would be registered, and that would mean that products from vegetable fats manufactured by vegan companies with a name evoking 'tradiční pomazánkové' should be renamed.<sup>120</sup>

From the point of view of the sale, this is far from saying that the long pleading between the Czech Republic and the European Union regarding 'pomazánkové máslo' had fundamental effect. Up to the time of accession of the Czech Republic to EU, production of this product shown slow growing, and an analogous trend with slight deviations had been ongoing till 2010, when more than 10 thousand tons of 'pomazánkové máslo' was produced. The decline after this year can be explained by new alternatives to 'pomazánkové máslo', which appeared in the market and which aren't included in the diagram. Starting from this year, the sale of 'pomazánkové máslo' stagnates near 7 thousand tons of 'pomazánkové máslo' per year. The growth of demand, and therefore the growth of production of 'pomazánkové máslo' occurred in the years 2014, 2015 and 2016, and this can be explained by interest which 'pomazánkové máslo' got in the medial space by reason of submitting an application of the Czech Republic to the Commission, and - after judgment delivery - also as a result of short-term "pro-penal" buying of this product by Czech consumers. In 2017 and the next years, production was stabilized at the level of 7 thousand tons per year by reason of secession of the medial interest.<sup>121</sup> As is clear from the attached data, according to the author, neither renaming itself of the product nor the whole case regarding 'pomazánkové máslo' didn't influence its production and sale, excepting the last years 2014-2016, and the author of the paper presumes that the Czech consumer fully understands 'pomazánkové máslo', its difference compared to

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<sup>119</sup> Alternative products to 'tradiční pomazánkové' are also offered by traditional spread producers, for example Choceň's dairy offers the 'Fit line', a combination of 'pomazánkové máslo' and creamy yoghurt, which, with 19 % fat, no longer meets the content needed for 'pomazánkové máslo' and has different consistency.

<sup>120</sup> 'Netradiční pomazánkové', 'tradiční pomazánkové vegan', 'tradiční nemáslo' and others.

<sup>121</sup> Annex II.

butter, and after renaming in 2014 also understands a difference between ‘pomazánkové máslo’ and milk spread.

## 5 Austrian case of ‘Inländerrum’

A similar case as the Czech Republic’s case of ‘pomazánkové máslo’ occurred with Austria’s ‘Inländerrum’. While ‘pomazánkové máslo’ originated as a reaction to the absence of basic raw material for butter manufacturing, which is milk fat, the same reason, i.e. absence of basic raw material, sugarcane, caused occurrence of ‘Inländerrum’. Since Austria at the time of colony neither had a colony with sugar-cane, which was so necessary for the production of rum, nor had so possibilities to acquire so quantity of it in business as Hanseatic cities in Germany, or a big commercial city such as Danish Flensburg, quantity of rum was insufficient in Austria. The common sign of occurrence of ‘pomazánkové máslo’ and ‘Inländerrum’ was the pressure of consumers, in case of ‘Inländerrum’ by reason of price-accessible variant of rum, because high duties was imposed to ‘Caribbean rum’. That’s why 2 variants of rum originated in the 19<sup>th</sup> century. They didn’t contain then inaccessible sugarcane, but instead included another component. Sugar-cane in the first variant was replaced by sugar-beet, which was used among sailors, and the second variant was created by an Austrian druggist from Krems an der Donau by means of water, ethyl-alcohol and essence,<sup>122</sup> and this variant was very similar to original rum.<sup>123</sup> It is true that ‘Inländerrum’ has longer tradition than ‘pomazánkové máslo’,<sup>124</sup> the both products, however, fulfil the substance of a traditional product by their more than 30-year production. The last, and for the author - which regard to the theme of the diploma paper - the most important, is their similarity in problematic naming according to the European Union and problem-free naming within the national law. The Czech Republic has definition of ‘pomazánkové máslo’ in the regulation,<sup>125</sup> Austria differentiated between rum with cane molasses and rum without cane molasses, when the above-mentioned product as ‘Inländerrum’. So, before the access negotiations of the both countries, there were two products with relatively high similarity from the point of view of their origination and solution of their existence within their countries. A difference was resolving of a problematic name in collision with the EU law<sup>126</sup> and character of the product in relation to baking, when ‘pomazánkové máslo’ is absolutely unsuitable for baking, but producers of ‘Inländerrum’, on the contrary, present it as

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<sup>122</sup>The most common essences used were vanillin caramel and butterscotch.

<sup>123</sup>*Kunst Rum / Inländer Rum* [online]. Rumundco.de, [cit. 15 March 2020]. Available on <<https://www.rumundco.de/rum-arten-kunst>>.

<sup>124</sup>STROH Austria GmbH dates the product launch to the market in 1832, spread butter in 1977.

<sup>125</sup>Decree č. 397/2016 Coll., Vyhláška o požadavcích na mléko a mléčné výrobky, mražené krémy a jedlé tuky a oleje, as amended by Decree č. 77/2003 Coll., effective as of 31 October 2013.

<sup>126</sup>Article 1 (4) (a) and Article 9 (1) Council Regulation (EEC) No 1576/89 of 29 May 1989, laying down general rules on the definition, description and presentation of spirit drinks. Official Journal L 160, 12 June 1989.



a product sui generis with a typical taste and with the use especially for aromatization of tea, rum-tea, pastries and so on thanks to their special organoleptic properties.

Already during the access negotiations, Austria realized discrepancy of 'Inländerrum' with the Government Regulation No 1576/89,<sup>127</sup> that defined products, which may use the trade name 'rum', and failing to fulfil of its conditions, that's why it was subject of active dealing in the access negotiations. Regulation No 1576/89 stipulated that rum (also 'Inländerrum') is obtained exclusively by alcoholic fermentation and distillation of molasses from the production of sugar cane and is distilled to less than 96 % volume, so that the distillation product has rum organoleptic characteristics. The Austrian party, not insisting on preservation of the name as well as composition, negotiated, in contrast to the Czech Republic, two transition periods, because it was necessary to perform a series of modifications according to the EU norms. Within these transition periods till the year 1997 and 2000, due to the content of methanol in special brandy from berries (currants, raspberry, rowanberry and elderberry),<sup>128</sup> they also negotiated one more transition period for 'Inländerrum', namely till 31 December 1998. Thus, from 1 January 1999, it was necessary to change the product name or its composition so that it complies with Regulation No 1576/89. These transition periods came into effect from the access of Austria to the European Union, i.e. 1 January 1995 in accordance with the judicial Act concerning the conditions of accession and the adjustments to the Treaties.<sup>129</sup> Active Austrian approach in the access negotiations resulted in a three-year transition period for 'Inländerrum'. During the previous transition period, Austrian producers managed to replace the sugar component by cane molasses and with help of essence to add to 'Inländerrum' its original taste, or at least managed to approach as much as possible to it. The author evaluates work of the Austrian negotiators in the access negotiations as success, because thanks to the three-year transition period, the producers could finish sale of the existing reserves and had also a time to find a new composition, however with keeping the name and taste properties of the product. From the point of view of the consumer, then, no significant perceptible change occurred.

On 15 January 2008, Regulation of the European Parliament and of the Council was issued,<sup>130</sup> by which the prior Council Regulation No 1576/89 was cancelled and within

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<sup>127</sup> Council Regulation (EEC) No 1576/89 of 29 May 1989, laying down general rules on the definition, description and presentation of spirit drinks. Official Journal L 160, 12 June 1989.

<sup>128</sup> UHL, Alfred and coll. *Handbuch Alkohol – Österreich: Zahlen, Daten, Fakten, Trends zweite, überarbeitete und ergänzte Auflage*. Wien: Bundesministerium für soziale Sicherheit und Generationen, 2001, p. 234.

<sup>129</sup> Documents concerning the accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union. Official Journal of the European Communities, C 241, 29 August 1994.

<sup>130</sup> Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008,

definition of rum new points of definition of rum were added, according to which rum mustn't be flavoured and may contain added caramel only as an agent to modify colour.<sup>131</sup> These new conditions, however, were violated by 'Inländerrum', which contains added essences. Austria responded by an application for a Protected Geographical Indication, which the Commission approved, and 'Inländerrum' was included in the list of the new regulation as PGI, which also meant preservation of the trade name.<sup>132</sup> Regulation No 110/2008 also stipulated that only rum from sugar cane molasses that was distilled in Austria was used to produce Inländerrum. This was based on the word 'Inländerrum', because this establishes a fixed connection to "inland" Austria – so it must be based on Austrian rum distillate. So, preservation of the term 'inländer' could remain in the name, because not only distillation of sugar-cane proceeds in Austria, but also further steps of production enumerated in Regulation No 1576/89,<sup>133</sup> which will be used in production, are being executed in Austria, which is more strict than the definition of PGI, according to which it is enough to have at least one phase of production – distillation, or modification associated with this territory. Presently, 'Inländerrum' is protected according to Regulation No 2019/787 of April 2019,<sup>134</sup> which replaced Regulation No 110/2008 and also is specified in Codex Austriacus, chapter 23.

Although the initiate start positions of 'pomazánkové máslo' and 'Inländerum' seemed to be at least very similar, there are two different situations at the end. The trade name 'pomazánkové máslo' is prohibited, the trade name 'Inländerrum' is remained, and this product is being sold in the European Union Internal Market till now. There are two significant differences between these two cases.

The first is non-underestimation of the access negotiations on the part of Austria, which, when negotiating, knew about conflict of 'Inländerrum' with Regulation No 1576/89, compared to the Czech Republic, which hasn't solved a conflict of the trade name with Council Regulation No 2991/94. The second one is reaction of separate member states. While Austria used a

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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, 13 February 2008.

<sup>131</sup> Annex II (1) points (d) and (e) Ibidem.

<sup>132</sup> Current list is now in Annex III of Commission Regulation (EU) No 2016/1067 of 1 July 2016 amending Annex III to Regulation (EC) No 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks. Official Journal, 2 July 2016.

<sup>133</sup> Article 1 (3) Council Regulation (EEC) No 1576/89 of 29 May 1989, laying down general rules on the definition, description and presentation of spirit drinks. Official Journal L 160, 12 June 1989.

<sup>134</sup> Regulation (EU) No 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008. Official Journal L 130, 17 May 2019.

relatively long transition period for 'Inländerrum' (from 1 January 1995 to 31 December 1998) negotiated within the access negotiations, and consequently the Austrian producers modified the product composition by the use of molasses or cane sugar, and by this fulfilled definition for a protected product, i.e. 'rum', specified in Regulation No 1576/89, the Czech producers didn't change the product composition to satisfy definition of 'butter' according to Council Regulation No 2991/94. In other words, Austria from two possibilities, i.e. to rename with preserving the traditional product composition, or to preserve the name with changing the product composition, choose a possibility to preserve the name. Neither of the variants, according to the author, isn't better or worse than another, it depends on priorities of the producers and, of course, of consumers as end users. The Czech producers decided to combine advantages of the both variants, thus to preserve the name and the product composition. The reasons for it, described in this paper, are understandable from their point of view, and expended efforts to achieve the settled aim, are significant, but the end result is again one of two variants, which was possible to choose at the beginning, in case of the trade name 'pomazánkové máslo', thus, to rename the product and to preserve its composition. Of course, Austria had a slight advantage in protected designation, in case of 'Inländerrum', the designation of Protected Geographical Indication, since tightening of definition has occurred already at the time when Austria was a member of EU and therefore, according to the author's opinion, had more beneficial position for possible negotiation, however it is necessary to realize that a difference upon applying for registering a protected designation between 'Inländerrum' (PGI) and 'pomazánkové máslo' (TSG) was in the fulfilment of the basic definition for the first of the mentioned product. According to the author, a bigger chance for approval has a product, which satisfies a basic component of the protected designation (cane or molasses) but doesn't satisfy definition in raw material, which is not a fundamental component (essence), than a product, which didn't satisfy even definition of the content of the basic raw material (fat content in 'pomazánkové máslo'). Disadvantage of 'pomazánkové máslo' in this case is that the increase of fat content in 'pomazánkové máslo' would significantly change product properties, while rum consumers will recognize no change.

By return, the procedure of the Austrian producers shown to be shorter, cheaper, and in addition the Austrian producers, according to the author, are more satisfied with the current situation than their Czech colleagues, which lived through multi-year dispute, at the end of which there wasn't a wished win in a form of preservation of the trade name, composition and production process. In case of 'Inländerrum', it turned out that negotiations about it during the access negotiations wasn't important, since the negotiated transition period wouldn't ensure

continuation of the trade name without changing the composition. The approach of the producers themselves was fundamental; the Austrian producers wanted to preserve the name, that's why their products satisfied requirements for the basic component, i.e. sugarcane, and the trade name remained unchanged. In case of 'pomazánkové máslo', however, by contrast, access negotiations appeared to be as the most important point, because the Czech producers couldn't change composition without changing product's properties and taste.

## Conclusion

The main aim was to reply to a question why the Czech Republic was unsuccessful in its endeavour to preserve the trade designation ‘pomazánkové máslo’ and what state would be considered by the author to be ideal. The initial hypothesis for these issues was that the trade name ‘pomazánkové máslo’ mustn’t be used by reason of repeated inactivity or insufficient activity of the Czech Republic representatives. To reply to these questions, at first it was necessary to imagine the EU law as a legal base for the occurred dispute and its concrete field of consumer protection, as well as particular opportunities which - in an effort to preserve the name - could be used and consequently applied for a particular case of ‘pomazánkové máslo’.

The word ‘butter’, according to the European legislation, is a protected product as a product with the fat content at least 80 %, which ‘pomazánkové máslo’ didn’t satisfy with its content in a range of 31–33.1 %. In the Commission’s opinion, which is based on Council Regulation No 1234/2007, it is fat spread of dairy origin with a fat content up to 39 %. Initially the Czech Republic exerted efforts to designate the product as a traditional product so that an exemption from the Internal Market could be granted for it and its trade name could be continued to be used. Upon rejection of two applications in the years 2005 and 2007 and consequently of an application in 2011 that culminated in a pre-trial phase, which started in 2007, for a failure to fulfil obligations in a form of an implementing EU regulation in the national legal order, in 2011 the Czech Republic submitted an application for the designation of ‘pomazánkové máslo’ as a Traditional Speciality Guaranteed, which the Commission rejected again by reason of the use of the term ‘butter’ as a protected product of EU. The Czech Republic submitted a complaint for cancelling the Commission’s implementing decision,<sup>135</sup> by reason of failing to fulfil the re-examination of the Commission’s conditions, but nor this trial dispute was successful. In order to fulfil conditions for granting a Traditional Speciality Guaranteed for the product ‘pomazánkové máslo’, considering that the whole dispute was about the use of the trade name ‘pomazánkové máslo’, the Czech and Moravian Dairy Association will later submit an application for granting a Traditional Speciality Guaranteed for ‘Tradiční pomazánkové’.

In the course of its work, the author was trying to determine reasons why the term ‘pomazánkové máslo’ wasn’t preserved. At the earliest opportunity, during the access

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<sup>135</sup> Commission implementing decision 2013/658/EU of 13 November 2013 rejecting an application for entry in the register of traditional specialities guaranteed provided for in Regulation (EU) No 1151/2012 of the European Parliament and of the Council (Pomazánkové máslo (TSG)) (notified under document C (2013) 7615). Official Journal L 305, 15 November 2013.

negotiations, an omission was on the part of the Czech Republic, initiation of a dispute to preserve the trade name 'pomazánkové máslo' didn't come from the Ministry of Agriculture, nor from the Czech and Moravian Dairy Association, nor the dairy plants manufacturing 'pomazánkové máslo'. The author evaluates the access negotiations as the biggest opportunity to promote the trade name, by reason of the valid EU legislation and possibility of its negotiation between two parties which were equal between each other. If the producers wanted neither to change the name nor composition, they themselves or within the Czech and Moravian Dairy Association should want to negotiate an exemption for 'pomazánkové máslo' via the Ministry of Agriculture in the Access Agreement. And secondly, this theme could be opened by the Ministry of Agriculture itself, which didn't identify correctly a possible future conflict. The reason of non-recognition of the exemption is absence of negotiation within the access negotiations.

This, however, didn't terminate the multiyear dispute. The Czech Republic very flexibly responded, and already a couple of days after accession to EU in 2004 submitted the first application for exemption for 'pomazánkové máslo', and in 2007 the second one. The second application is relatively clear for the author. Within the legislation and endeavour not to implement any new exemptions from the Internal Market of the European Union, the Commission really proceeded based only on legal regulations and directives of the European Union. In case of the first application submitted in 2004, however, substantiation for the rejection of the application, according to the author, wasn't so clear. The reason is that at the time of evaluation of the Czech Republic application, exemptions from the Internal Market designated as 'butter' occurred, which, however, didn't satisfy definition of butter, for example, Spanish 'Mantequilla de Soria' ('Butter from Soria'), or British 'Cherry butter', etc. But here, in the author's opinion, there was a step more political than legal. In this case, thus, the author notices a dual way of seeing of the member states and affirms that the reason for non-recognition of the exemption in this case was political approach of the Commission. The reason of non-approval of the application in 2004 is, thus, in the author's opinion, prioritizing of the political approach over legal one by the Commission, because it was legally possible to ask for an exemption in 2004, but the Commission had already argued by a future change which was never approved. In addition, the Commission also approved an exemption for Spain in the same year. The author evaluates it as incorrect dual approach to the member states. The application in 2007, in turn, according to the author, was rejected legitimately.

The further trial processes, including an application for Traditional Speciality Guaranteed, were proceeded in spirit of unwillingness of the Commission to grant any

permission to continue with the trade name 'pomazánkové máslo', which, in addition, was supported by decisions of the Court of Justice, which agreed with the Commission. Just theoretically, the author could polemize whether could be better - from the point of view of the Czech Republic representatives - just focus the argumentation not on traditionalism of the product, but on the set expression 'pomazánkové máslo'. 'Butterfly' also includes word 'butter', and nobody requires the Great Britain to rename it. Beside of that, according to the author, limitation only to the Czech Republic wasn't sufficiency accentuated through the whole process.

The author in the last part of the paper describes Austrian 'Inländerrum', which had a similar initial position as 'pomazánkové máslo', and describes a method applied by the Austrian producers, thanks to which the term 'Inländerrum' is registered as PGI. By this, the author shows possible preservation of product taste and name at the expense of a change of composition, which, however, the Czech producers refused reasoning it by changing properties of 'pomazánkové máslo', and - on the contrary - the producers of 'Inländerrum' declare that although the composition was changed, but all have the unmistakable characteristic domestic flavour of 'Inländerrum'.<sup>136</sup> This was, according to the author, a big advantage of 'Inländerrum', because it satisfied the requirement for a concrete basic component in its content without recognizing it by the consumer. But the producers of 'pomazánkové máslo' cannot choose such a variant, because it would lead to a significant change of product taste and properties. Based on this fact, the author thinks that satisfaction of the basic definition of a protected product, which the product wants to have in its designation, increases chances for registering such a product with protected designation, although it doesn't satisfy it absolutely ('Inländerrum' contains essence). Contrariwise, failure to fulfil requirement for a type and content of the basic component significantly decreases chances for registration. According to the author, such a chance is more likely zero.

The author presented his hypothesis in the paper introduction that the trade name 'pomazánkové máslo' mustn't be used by reason of repeated inactivity or insufficient activity of the Czech Republic representatives. The Czech Republic, namely representatives of the Ministry of Agriculture in cooperation with the Czech and Moravian Dairy Association, acted very actively through the time of the dispute and exerted efforts to preserve this term, and the only inactivity, according to the author, was during the access negotiations and non-appealing against the Commission's decision on rejecting the application for exemption from 2004.

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<sup>136</sup> KUMMER, Sabrina, MA, Junior Brand Manager, Sebastian Stroh Austria GmbH. Email communication with Sabrina Kummer, 23 March 2020. Author's archive.

However, these 2 cases are not the unique reason of non-recognition of exemption; the Commission approach played a role in it, too, as is explained in point 2 below. So, it is impossible to declare that the only reason why we don't have 'pomazánkové máslo' is repeated inactivity of the Czech Republic. The author, thus, didn't confirmed the hypothesis. Answers for the question in the introduction of the paper:

- 1) Why the name 'pomazánkové máslo' mustn't be used?
- 2) Why the Czech Republic was unsuccessful?

They are, according to the author, as follows:

- 1) Failure to negotiate about an exemption from the Internal Market for 'pomazánkové máslo'.

The representatives of the Czech Republic - within Chapter "Agriculture and rural development" didn't proposed an exemption from the EU Internal Market for 'pomazánkové máslo', which could be designated as a traditional product, and, thus, to use its trade name till now. The author, retrospectively, based on the analysis of all possibilities, thinks that it was the sole real opportunity to promote an exemption, and all further opportunities were problematic by reason of a change of legislation or because the name of the protected product 'butter' in the trade name 'pomazánkové máslo'. During the access negotiations, the producers themselves may warn the Ministry of Agriculture that the product, which they produce, doesn't satisfy the EU legislation and to ask the Ministry of Agriculture to negotiate an exemption during the access negotiations. This, however, didn't happen in case of 'pomazánkové máslo', that's why Director of Dairy plant Madeta paradoxically said: "*This is an example of inability of the Czech representation in Brussels, I can't react properly to this*"<sup>137</sup> in his response to the successful Commission's complaint for failing to fulfil obligations, considering that if Madeta exclaimed during the access negotiations, the application itself might not be submitted at all.

- 2) Commission's attitude to the exemption for 'pomazánkové máslo'.

The European Commission historically refused any endeavour of the Czech Republic to preserve the trade designation 'pomazánkové máslo', no matter if these were applications for designating it as a traditional product or by protected designation of EU. The author thinks that, with regard to the valid legislation, at least the application of the Czech Republic submitted in 2004 could be satisfied, including with regard to the fact that an exemption in the same year was granted by Spanish 'Mantequilla de Soria' ('Butter from Soria'). The Spanish product also

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<sup>137</sup> Šéf Madety: Pomazánkové máslo budu vyrábět dál! [online]. Týden.cz, 18 October 2012 [cit. 15 March 2020]. Available on <[https://www.tyden.cz/rubriky/domaci/sef-madety-pomazankove-maslo-budu-vyrabet-dal\\_249390.html](https://www.tyden.cz/rubriky/domaci/sef-madety-pomazankove-maslo-budu-vyrabet-dal_249390.html)>.



doesn't satisfy definition of the protected product 'butter', nevertheless this term may be used. The Commission in this case used dual standards. Especially, as the author wrote in the description of the product 'pomazánkové máslo', the 'pomazánkové máslo' resembles butter more than the granted exemptions. Provided consumer protection is really so important that the Commission rejects to accept new exemptions by reason of misleading the consumer, it would be generally more rightful to cancel all exemptions and not to divide them into 'old and new states' or 'old states with a stronger position and states with a weaker position'.

### 3) Consumer template for TSG.

In the author's opinion, the reason for the rejection of the application for TSG is also a wrongly defined consumer template by the Commission, which choose a citizen of a member state as the template. But this means, however, that it didn't take into consideration territorial limitation only to the Czech Republic, as it was specified in the application, that's why it also rejected to permit the application by reason of misleading the consumer. The author supposes - as it is also described in the paper and is proven in Annex I - that the Czech consumer knows differences between the products and, thus, cannot be misled. A non-Czech consumer, in turn, won't find term 'butter' in translations, that's why it cannot mislead him.

The case of 'pomazánkové máslo' is relatively complicated due to multiyear duration of the dispute regarding searching an answer to the author's questions in the introduction; in any case, the author supposes that he's found an answer. The diploma paper includes passages on possibility to grant exemptions from the Internal Market, which - from the current-days point of view - have only historical character, but even today there is a possibility to register products via protected designation or trademarks. The author of the paper repeatedly criticized this change made in 2006, when the Commission decided not to accept further exemptions, with regard to dual standards between the new and old states. The member states, which were in the European Union longer, have protected designations thanks to a possibility which the current states cannot already use. That's just it why the author considers to be problematic the case of 'pomazánkové máslo', and this fact is reflected on the rejection of the second application for exemption for 'pomazánkové máslo'. In the author's opinion, all these exemptions should be cancelled. During the work, the author discovered a different approaches of UE to exemptions from the Internal Market and to protection of national products, and he suggests it as a subject for the further research. According to the author, a successful conclusion of an exemption for 'pomazánkové máslo' within the Access Agreement would be considered to be a great achievement, but this theme wasn't considered within the access negotiations at all. Then, with regard to the change of the legislation, designation of 'pomazánkové máslo' as a Traditional

Speciality Guaranteed with the limitation to the Czech Market could be considered as success. The current state couldn't be designated as success for the Czech Republic, even if TSG would be granted for 'tradiční pomazánkové'.

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## **Abstract**

The case of 'pomazánkové máslo', at the end of which was leading to the refusal to use this term as a trade name, had been the media topic of the Czech journalism and Czech citizens themselves for several years and it evoked many emotions. Thus, the thesis examines possible ways of preserving the trade name in the Internal Market of EU and the reasons why this did not succeed in the case of 'pomazánkové máslo', including a comparison of a product in Austria, which had a similar starting point and yet has kept its trade name.

## **Keywords**

European law, Internal Market, Butter spread, Traditional Specialty Guaranteed, Internal Market Exceptions, Protected Designation of Origin, Protected Geographical Indication, Quality Schemes, EU Trade mark, Pomazánkové máslo, Infringement Procedure.

## **Abstrakt**

Případ pomazánkového másla, na jehož konci bylo zamítnutí užívání tohoto pojmu jako obchodního názvu, bylo po několik let mediální téma české žurnalistiky i samotných českých občanů, který budil emoce. Práce tak zkoumá možné způsoby zachování obchodního názvu produktu na vnitřním trhu a důvody, proč se to v případě pomazánkového másla nepovedlo, včetně komparace s produktem v Rakousku, který měl podobnou výchozí pozici a svůj obchodní název si dodnes zachoval.

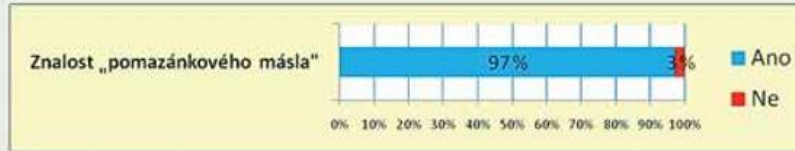
## **Klíčová slova**

Evropské právo, Vnitřní trh, Zaručená tradiční specialita, Výjimky z vnitřního trhu, Chráněné označení původu, Chráněné zeměpisné označení, Ochranné značení, Ochranná známka EU, Pomazánkové máslo, Řízení pro neplnění povinností členského státu.



# Annex I

Grafy z výsledků spotřebitelského průzkumu (zdroj GfK Czech, 02/2011)



## Annex II

