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Brexit Implications for Geographical Indications of Food and Beverages

Dr Enrico Bonadio (City, University of London)

Dr Marc Mimler (Bournemouth University)

As is known, a geographical indication (GI) is a sign that indicates that a product possessing certain characteristics comes from a particular area, where its quality, reputation or other important characteristics are linked to that geographical origin.

GIs are protected in several countries of the world, especially in relation to food and beverages, although the degree and form of such protection varies from country to country.

The EU protection scheme

In the EU GIs that meet the relevant requirements are registered as protected geographical indications (PGIs) or protected designations of origin (PDOs). PGIs and PDOs are governed by EU Regulation 1151/2012 (in relation to foodstuffs and agricultural products),¹ Regulation 479/2008 (in relation to wines)² and Regulation 110/2008 (in relation to spirits).³ This framework is part of the EU agricultural policy, as the production, manufacture and distribution of agricultural produce and foodstuffs play an important role within the EU's economy.⁴

Very popular products' names, including Champagne, Feta and Parmigiano cheeses, Parma ham and Bavarian beer, are protected under this legislative framework. British designations currently protected under the EU regime include Welsh lamb, Stilton blue and white cheeses, Scotch whisky, Cornish pasties, Kentish ale and the Melton Mowbray pork pie.⁵ While France, Italy and Spain are the states with more EU GIs registrations, the UK has the highest number of GIs than any non-Mediterranean EU countries other than Germany. As recently as January 2018, the European Commission granted PGI status to a cheese from Wales (Traditional Welsh Caerphilly).⁶ UK does have 86 EU PDO and PGI registrations, in

¹ 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, [2012] OJ, L 343/1 [Council Regulation (EU) No 1151/2012].

² Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999.

³ 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.

⁴ Bertold Schwab, "The protection of geographical indications in the European Economic Community" (1995) 17:5 Eur IP Rev 242 at 242.

⁵ UK, Department for Environment, Food and Rural Affairs, "Protected food name scheme: UK registered products", online: <www.gov.uk/government/collections/protected-food-name-scheme-uk-registered-products>.

⁶ See the webpage of the Department for Environment, Food & Rural Affairs, at <https://www.gov.uk/government/publications/protected-food-name-traditional-welsh-caerphilly-and-traditional-welsh-caerffili>.

relation to products as diverse as wine, beer, cider, spirits, cheese and wool. Therefore, protection of geographical names does matter for British food and beverages' producers.

The EU GIs regime gives PDOs and PGIs a strong protection. The reason for that is that the relevant products have acquired a strong reputation among consumers the world over. Favourable climates and centuries-old manufacturing techniques rooted in their protected areas have contributed to build up this renown. The protected expressions are basically names that identify "products with a story", and protect the related cultural heritage.

Under EU rules such indications and designations not only are protected against any false or misleading use of the indication;⁷ they also can be enforced by their owners against whoever merely exploits the evocative power of the name without misrepresenting consumers as to the geographical origin of the product.⁸ For example, the use by a company based in France of the term "Cornish pasties made in France", or by a German company of the term "Parmesan" (a mere translation of the PDO Parmigiano) would still be – under EU law - an infringement of the GIs Cornish pasties and Parmigiano, even though consumers would not be confused as to the true geographic source of the product.

Post-Brexit scenario

After leaving the EU, neither PGIs nor PDOs would have effect in the UK, similar to what may happen to other EU intellectual property rights.⁹ The draft Withdrawal Agreement between the EU and the UK which was published in March 2018 foresaw the continued protection of GIs within the UK after the UK leaves the EU in March 2019. Article 50(2) provides that such GIs which are registered by the last day of the transition period (31 December 2020) would continue to be protected in the UK without any re-registration. Since EU Regulations would not extend to the UK, the provision states that right holder would "be entitled to use a right in the United Kingdom granted under the law of the United Kingdom which provides for at least the same level of protection." Whether this scenario could apply is doubtful. First, this provision has not yet been agreed upon unlike other areas of IP within the Agreement. And second, the provision would not apply within a no-scenario anyway which appears likely at the time of concluding this article.

The UK Government has recently published a note on the status of GIs in a no scenario.¹⁰ It purports to establish a UK GI scheme which would broadly mirror the current EU scheme and be in line with the TRIPS Agreement. Those UK GIs currently protected under the EU scheme would be automatically be protected under the new scheme, while such GIs originating from the remaining other EU member states would need to apply for protection.

⁷ See Article 13(1) of Council Regulation (EU) No 1151/2012.

⁸ See specifically Article 13(1)(b) of of Council Regulation (EU) No 1151/2012.

⁹ Luke McDonagh - Marc Mimler, "Intellectual Property Law and the Brexit: A Retreat or a Reaffirmation of Jurisdiction?", in Michael Dougan (ed.), *The UK After Brexit: Legal and Policy* (Intersentia 2017).

¹⁰ Department for Environment, Food and Rural Affairs, "Producing food products protected by a 'geographical indication' if there's no Brexit deal" (24 September 2018)

<https://www.gov.uk/government/publications/protecting-geographical-food-and-drink-names-if-theres-no-brexit-deal/producing-food-products-protected-by-a-geographical-indication-if-theres-no-brexit-deal>

These uncertainties have led some voices to utter that after Brexit day British food producers could freely use and exploit in the UK previously protected European names.¹¹ This may be the reason why the producers of Parmigiano cheese¹² and of Parma ham¹³ have applied for UK trade mark protection for their products. And, rather ironically, already registered British products would most probably not lose their EU registration as PGIs or PDOs, since the EU regime allows for the protection of geographical names from non-EU countries:¹⁴ which also means that British producers could continue in the future to apply for and obtain EU GIs registrations protecting their food and beverages.

Current British law currently provides certain legal measures that may partially cover the protection offered by EU PDOs and PGIs post-Brexit. Supplementary protection could indeed be provided by the common law action of “passing off.” This action allows producers and distributors to oppose misrepresentations by other traders. The producers of champagne, for example, successfully invoked passing off in Britain against producers labelling their beverage as “Spanish Champagne.”¹⁵

However, the scope of protection provided by passing off in the UK cannot be compared to that offered by the current EU system through registration as PGIs or PDOs, which – as mentioned - provides that not only confusingly similar expressions, but also terms that merely evoke the registered PGI or PDO, can be enjoined. A successful claim of passing off, on the other hand, requires the claimant to demonstrate that there is a misrepresentation, meaning that consumers must have relied on the misrepresentation when purchasing the goods of the defendant.¹⁶ Other titles that could be relied on to protect geographical names in the UK are certification¹⁷ or collective marks,¹⁸ which may provide a certain degree of protection for geographical terms.¹⁹ Harris tweed²⁰ and Stilton cheese,²¹ for example, are currently protected as certification marks in Britain. However, such protection is – again - weaker than that offered by EU law to GIs.

¹¹ Daniel Boffey, “EU fears influx of ‘British champagne’ once Brexit ends food naming rules”, *The Guardian* (15 February 2017), online: <www.theguardian.com/business/2017/feb/15/eu-fears-influx-of-british-champagne-once-brexit-ends-food-naming-rules>.

¹² The Consorzio del Formaggio Parmigiano Reggiano has registered a collective mark for the term parmesan in 2016 at the UK IPO: PARMESAN (WO0000000537947) <<https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/2/WO0000000537947>>

¹³ The Consorzio del Prosciutto di Parma has registered a certification mark last year at the UKIPO: PARMA HAM Certification Mark (UK00003278096) <<https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00003278096>>

¹⁴ Council Regulation (EU) No 1151/2012, recital 24. For example, “Café de Colombia” has been protected as a geographical indication in the European Union since 2007: EC, Commission Regulation (EC) No 1050/2007 of 12 September 2007 registering certain names in the Register of protected designations of origin and protected geographical indications (Mejillón de Galicia or Mexillón de Galicia (PDO) — Café de Colombia (PGI) — Castagna Cuneo (PGI) — Asparago Bianco di Bassano (PDO)), [2007] OJ, L 240/7.

¹⁵ *Bollinger v Costa Brava Wine Co Ltd*, [1960] RPC 16 (Ch).

¹⁶ Christopher Wadlow, *The Law of Passing-Off*, 5th ed (London, UK: Sweet & Maxwell, 2016) at 7-178.

¹⁷ UK Trade Marks Act 1994, section 49.

¹⁸ *Ibid*, section 50.

¹⁹ Trevor Cook, “‘Brexit’ and Intellectual Property Protection in the UK and the EU” (2016) 21:5-6 *J. Intell. Prop. Rts* 355, at 357.

²⁰ Reg. No UK00000319214.

²¹ Reg. No UK00000831407.

That the UK needs to make sure GIs are protected also comes from UK's membership in the WTO. The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²² indeed mandates that legal means to protect interested parties against misleading uses of GIs must be provided,²³ with a stronger protection (also enforceable against just evocative use of the names) given to GIs identifying wines and spirits.²⁴

Yet, the European Commission fears that post-Brexit the high level of protection European GIs currently enjoy in the UK under the EU regime (which is higher than that required under TRIPS) may evaporate, and could not be replaced by a (at the moment not-existing) comparable regime: "there is currently no domestic legislation in the United Kingdom on the protection of designations of origin and GIs as well as on other protected terms in relation to agricultural products."²⁵

Consequently, the European Commission noted in a recent position paper that the UK should put "in place, as of the withdrawal date, the necessary domestic legislation" for the protection of PDOs and PGIs and that "such protection should be comparable to that provided by Union law."²⁶ This position has been reaffirmed by above mentioned Draft Withdrawal Agreement published in March 2018²⁷ with the caveat that the text has not been agreed upon. In the meantime, the UK Government's White Paper on the future relationship between the EU and UK²⁸ stipulates the creation of a UK GI scheme which would go beyond of what is required by the TRIPS Agreement but it is unclear whether this will be comparable with the current level of protection by EU law.

The "possible UK / US trade agreement" factor

The EU request that post-Brexit UK keep providing a level of GIs protection comparable to that offered under EU law does not bode well with US strategic interests. As is known, the US position is an important factor to take into account in the Brexit negotiations, even more so when it comes to regulating the use of geographical names for food and beverages. The US would be willing to grant British businesses more favourable access to its market (in the context of a future trade agreement between the two countries) as long as the UK is able to guarantee US food and beverages' manufacturers more access to the British market. But such enhanced market access would only be possible if and when the UK drops the current (strong) EU-shaped protection of GIs.

²² Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299, 33 ILM 197, (entered into force 1 January 1995) [TRIPS Agreement].

²³ Art. 22 TRIPS.

²⁴ Art. 23 TRIPS.

²⁵ EC, Commission, "Position paper transmitted to EU27 on intellectual property rights (including geographical indications)" (6 September 2017) at 2, n. 1 ["Position paper"], online: <https://ec.europa.eu/commission/sites/beta-political/files/position-paper-intellectual-property-rights_en.pdf>.

²⁶ "Position paper", *supra* note ... at 2.

²⁷ Article 50(2).

²⁸ HM Government, "The Future Relationship between the EU and UK" (July 2018) Cm 9593 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf>

Indeed, the US plays by different rules as far as geographical names are concerned. There are numerous American food companies that freely use European geographical names (including Parmesan and Feta for cheese) to identify products that have not been produced in the relevant European locations. These expressions are basically considered in the US as generic names of the relevant products that cannot be monopolised by anyone, not even by the producers coming from the relevant European geographical area: a strong protection of such names is perceived in the US as an anticompetitive practice which unduly restricts trade. That is why the US would like the UK to abandon the EU-like regime of strong GIs protection, namely to allow US companies to enter the British market and freely use European geographical names in connection with their products.

Thus, the choice of whether and how European GIs will be protected in the UK may also be influenced by possible parallel trade negotiations between UK and US. Possible future trade talks between UK and Australia could also have an analogous impact on the the GIs chapter of the Brexit negotiations, as Australia is in the same position as the US, as it has an interest in allowing its food and beverages companies to freely use European geographical names in international markets.

A CETA-like approach as a possible solution?

The EU, for its part, places great emphasis on protection of PGIs and PDOs within its trade negotiations with other countries, and has been successful in exporting its norms on many accounts.²⁹ It would like to do obtain the same result in the Brexit negotiations.

Should the EU be willing to compromise, and thus give the UK concessions, a potential option might be to follow the CETA approach. CETA is the Comprehensive Economic and Trade Agreement between Canada, the EU and its member states.³⁰ The GIs chapter of CETA is the result of a compromise. It does not give European food producers full and strong exclusive rights over all their GIs. Rather, it leaves competitors in the Canadian market a certain degree of freedom to use European geographical names. For example, while this treaty strongly protects certain European wines and spirits such as Champagne, Bordeaux and Cognac, food producers are left free to use in the Canadian market the English and French translated version of some European terms, such as St George cheese, Black Forest ham, Tiroler bacon, as well as Munich and Bavarian beer.

CETA also allows new entrant cheese manufacturers to lawfully use some European geographical indications, such as Fontina, Asiago, Feta, Gorgonzola and Münster, accompanied by terms like “style”, “type” or “kind”. Plus, CETA protects several EU geographical names in Canada as compound names. Thus, Edam Holland and Gouda Holland

²⁹ Benjamin Farrand, “Bold and newly Independent, or Isolated and Cast Adrift? The Implications of Brexit for Intellectual Property Law and Policy” (2017) J Common Market Stud 1 at 10, DOI: <10.1111/jcms.12550>.

³⁰ EC, Commission, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016 [CETA], online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

are protected (not just Edam and Gouda), as is Mortadella Bologna and Brie de Meaux (not just mortadella or brie).

The UK may find such solution viable as it would allow more access to the British market for food and beverages from countries such as US and Australia, which could in turn be used by the UK to ask and obtain enhanced market access in those countries. Yet, this option is likely to meet strong opposition by several EU countries such as Italy and Greece which are particularly combative when it comes to defending their GIs. As EU member states will need to ratify the final trade agreement between UK and the EU, it is highly likely that the Italian and Greek parliaments will reject any deal which allows non Italian and Greek cheese producers and distributors to use terms such as Feta-like or Gorgonzola-like, which may enable said manufacturers and distributors to get a significant share of the relevant British market.

Conclusion

As mentioned, Brexit will not have a negative impact on British GIs registered in the EU as PDO or PGI. Indeed, British food and beverages' manufacturers would anyway keep post-Brexit their EU PGI and PDO registrations and be able to apply for and obtain in the future new EU GIs registrations protecting British products.

Yet, what Brexit may entail is a loss of Britain's negotiating power when it comes to obtaining or maintaining GIs protection in the context of trade negotiations or agreements with third non-EU countries. Designations such as Stilton cheese or Kentish ale may be more difficult to protect in such countries than it would have been the case if the UK had remained an EU member state.

The most delicate issue is the level of protection European food and beverages' producers may get in the UK post-Brexit, and the degree of flexibility the UK government may want to adopt on this point. A system which allows non-European food producers to use European geographical names in Britain (which would facilitate trade agreements between UK on the one hand and the US and Australia on the other) would likely not be accepted by several European countries (such as Italy and Greece), which would probably veto not only the GI-specific deal between UK and the EU, but also the entire Brexit package. This scenario cannot be ruled out, taking into account the insistence of certain EU countries on protecting their GIs. For example, the agriculture minister of the recently formed Italian government noted that Italy may not ratify CETA as in his view it does not adequately protect Italian GIs.³¹

A post-Brexit regime which allows food and beverages' producers from countries such as US and Australia to use European geographical terms in the UK may not be liked by some British food producers, either. Indeed, British manufacturers that use protected geographical expressions such as Cornish pasties or Stilton cheese may understandably

³¹ See the CNBC article of 14 June 2018 "Italy could try to block the EU-Canada trade deal to protect its famous foods" (by Holly Ellyat), available at <https://www.cnbc.com/2018/06/14/italy-could-try-to-block-the-eu-canada-trade-deal-to-protect-its-famous-foods.html>.

oppose attempts by overseas companies (for instance, from US or Australia) to freely use such geographical names in the UK.

On the other hand, providing a level of GIs protection which is comparable to the current EU scheme – for example, via a mutual recognition scheme - would facilitate the conclusion not only of the GIs chapter, but also of the entire Brexit trade deal, in addition to continuing strongly protecting valuable British geographical names. Yet, symmetrically, it would make favourable trade agreements with US and Australia less likely.