Geographical Indications in the UK After Brexit: An Uncertain Future?

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ABSTRACT

The protection of geographical indications ('GIs') within the UK is placed into doubt by the UK's withdrawal from the European Union ('Brexit'). The default legal position is that after Brexit, there would be no legal provision for GIs in UK law. This default position can only be changed if the UK and the EU agree the terms of the UK's withdrawal and then their future relationship. The article considers the implications of the draft withdrawal agreement which, *inter alia* ensures the continuing reciprocal protection of UK and EU GIs. In July 2019, a new UK Prime Minister took office, and renegotiated the draft withdrawal agreement, which retained the reciprocal protection of GIs. The ratification of this renegotiated withdrawal agreement depends on the result of the December 2019 general election. Under the withdrawal agreement GIs from outside the EU are not protected. Consequently, the article considers how UK GIs will continue to be protected in countries that have concluded a free trade agreement with the EU, by examining the rollover agreements that the UK Government are concluding around the world. Finally, given the intention of the UK Government that, post-Brexit, the UK will conclude free trade agreements with countries that have traditionally been reluctant to recognise GIs, such as the USA and Australia, the article examines the prospects for GI protection to be included in these agreements.

KEYWORDS

Food, geographical indications, Brexit, Food Policy, free trade agreements, EU law.

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HIGHLIGHTS

- Brexit will mean that the UK, for the first time, will have its own GI scheme.
- UK GIs will continue to be protected in the UK under any Brexit outcome.
- It is unknown whether the reciprocal arrangement provided for in the withdrawal agreement will continue in the future relationship.
- Protection of UK GIs outside of the EU will continue under rollover agreements.
- Protecting UK GIs in future trade agreements depends on UK's negotiating strength.

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1. Introduction

In a referendum held on 23rd June 2016, the United Kingdom voted in favour of leaving the European Union by the narrow margin of 52% to 48% (BBC, 2016). This has given rise to the phenomenon that is 'Brexit'. The EU is a collection of institutions operating on the supranational level, responsible for developing laws and rules in a range of policy areas. One such area is the Common Agricultural Policy. This is an exclusive competence of the EU, meaning that Member States must apply EU rules unless allowed to develop their own policy on specific matters. Consequently, the EU has the power to regulate the price, production, and marketing of agricultural products (European Union 2016a, Article 40). Combined with the power to create European intellectual property rights that provide uniform protection across the EU (European Union 2016a, Article 118), the EU has decided to protect certain food products through granting them geographical indication ('GI') status. In summary, this status means that, in order for a product to use the name protected by the GI, it must be produced according to the registered specification, which may cover where it is produced (either wholly or partly), and the method of production, including ingredients. As this article explains, for producers of GI-protected food products, GI status can be extremely valuable.

In principle, Brexit places into doubt the continued protection of GIs in the UK, whether it is a UK GI, a GI from the rest of the EU, or a country with which the EU has secured a trade agreement. Furthermore, the protection of UK GIs in the rest of the EU and those countries with a trade agreement is also in doubt. Resolving these questions requires an understanding of the underlying politics that led the UK to vote to leave, the relationship between UK law and EU law, the process of the UK's withdrawal from the EU, the possible nature of the UK's

future relationship with the EU, and the UK's intention to conclude its own free trade agreements with that currently have no agreement with the EU, with the United States, Australia and New Zealand as prime targets.

An answer to some of these questions was provided in the Draft Withdrawal Agreement and Framework for the Future Relationship that the UK and EU published in November 2018 (European Council, 2019a; European Council 2019b) ('Draft Withdrawal Agreement' and 'Draft Framework for the Future Relationship' respectively). However, this was rejected by the House of Commons on three separate occasions between January and March 2019. The failure of the UK Government, led by Theresa May, to deliver Brexit on time, or to adequately respond to Parliament's rejection of the Draft Withdrawal Agreement ultimately led to the resignation of Theresa May as Prime Minister.

Her replacement, Boris Johnson has renegotiated aspects of the agreement as concluded by Theresa May (European Commission, 2019a; European Commission 2019b) ('Withdrawal Agreement' and 'Framework for the Future Relationship' respectively). However, the UK Parliament declined the opportunity to immediately approve the Withdrawal Agreement, meaning that Johnson was required to seek an extension of the negotiating period until 31st January 2019 (European Union (Withdrawal) (No 2) Act 2019). The House of Commons also voted to slow down the passage of the legislation required to implement the agreement into UK law. In response, Johnson sought to hold a general election, to be held on 12th December 2019, and is campaigning as Conservative Party leader to "Get Brexit Done" (Early Parliamentary General Election Act 2019) and to ratify the Withdrawal Agreement so that the UK can leave the EU on 31st January 2019. Other political parties are campaigning on a

platform to conduct further negotiations and then hold a second referendum with remain as an option, or to abandon Brexit entirely (BBC News, 2019a; 2019b). While, it remains the case that different outcomes to the Brexit process remain possible, this article focuses on the most likely option that the Withdrawal Agreement will be ratified and that the UK will leave the EU on 31st January 2019.

This paper addresses these issues by adopting the following structure. Firstly, by explaining GIs and their importance. The paper then outlines the Brexit process in general, applying it to GIs. It achieves this by considering the reasons for the vote in favour of Brexit, how the UK law took account of EU law, the negotiations and the response in the UK to them, how the Withdrawal Agreements provides for GIs. Although the chances of the UK leaving without an agreement with the EU at the end of the Article 50 negotiation period ('No Deal Exit') has reduced considerably, the UK government's preparations for this outcome may influence how the UK approaches it future relationship with the EU. A further issue is how UK GIs will continue to be protected in non-EU countries that have concluded a free trade agreement with the EU, given that, unless to the contrary is agreed, exit from the EU also means an exit from those free trade agreements.

This article considers the general position as it stood on 19th November 2019.

2. GI's and Their Benefit

Since 1992, the EU has legislated to protect particular foods and methods of production by requiring that protected foods can be produced either wholly or in part in a specific geographic area, or according to a specified method or ingredients. The present regulation

dates from 2012 (European Parliament and European Council, 2012) ('GI Regulation'). This provides for the following three GIs:

- **Protected Designation of Origin (PDO)** - This identifies products 'whose quality or characteristics are essentially or exclusively due to a particular geographical environment' and their 'inherent natural and human factors' (GI Regulation, Article 5(1)(b)). This is taken to mean the local ingredients and the expertise of local producers in developing these products.

  For example, blue Stilton cheese can only be produced within the counties of Leicestershire, Derbyshire, and Nottinghamshire of the UK, and must take the form of a 'blue veined moulded cheese made in cylindrical form from full cream cow's milk with no applied pressure and forming its own crust' (European Commission, 1996).

- **Protected Geographical Indication (PGI)** - This identifies products whose 'quality, reputation or other characteristic is essentially attributable to its geographical origin' (GI Regulation, Article 5(2)(b)). This is a more open category than PDOs because only one steps of production process must take place in the geographical area specified in the registration (GI Regulation, Article 5(2)(c)).

- **Traditional Speciality Guaranteed (TSG)** - This indication identifies products that are either produced using traditional methods or from raw materials or ingredients that are traditionally used (GI Regulation, Article 18). Unlike with PDOs and PGIs, there is no link with a specific locality, with producers based anywhere in the EU that comply with the methods or ingredients specified able to benefit from TSG status. Although,

TSG's are not a 'geographic indication' in the sense that PDOs and PGIs are, the term 'geographic indication' is frequently used to describe all three schemes.

The level of protection is extensive, going beyond protection against unfair competition. The use of a protected name accompanied by expressions such as 'style', 'type', 'method' or 'produced in' is not allowed (GI Regulation, Article 13(1)). In particular, products protected by a PDO or PGI must be produced (wholly if a PDO, or partly if a PGI) in the areas indicated in the protection. Even if the product complies with the ingredients or method outlined in the registration, it is illegal for that product to use the protected name. Indeed, the PGI for Newcastle Brown Ale was cancelled at the request of its manufacturer when they moved production to a more efficient brewery outside of Newcastle (European Commission, 2007; Evans, 234).

In this sense, PDO and PGI indications aim to capture what could be described as the '*terroir* factor'. Borrowing from wine, this is the sense that there is an intangible connection between a specific locality and the available human skills in that area that contribute to the production of the food product and that this is worthy of legal protection (Scottish Affairs Committee, 2018, Q66). Yet, in economic terms, the level of protection is such that it has been described as a 'geographical name monopoly' (Becker and Staus, 2008, 4).

A particular issue is the relationship between GIs and trade marks. The GI Regulation makes specific provision for different circumstances. Firstly, an application for a new GI would be rejected if, in light of a trade mark's 'reputation and renown and the length of time it has been used', it would mislead the consumer as to the true identity of the product' (GI Regulation, Article 6(4)). Similarly, an objection can be raised if a proposed GI 'would

jeopardise the existence of an entirely or partly identical name or trade mark' that has been on the market for at least five years before the application has been published by the Commission (GI Regulation, Article 10 (1)(c)). Applications for new trade marks should be rejected if it would breach the protection granted to a pre-existing GI (GI Regulation, Article 14(1). The more complex situation is when a pre-existing trade mark conflicts with a proposed new GI. If the trade mark has been applied for, registered, or established by use before an application for a new GI was submitted to the Commission, then the trade mark can continue to be used as long as its use in good faith, and there is no other ground for its invalidity or revocation under EU trade mark law (GI Regulation, Article 14(2)). In these instances, both the trade mark and the GI can be used. In other situations, a five-year transitional period can be adopted by the Commission (GI Regulation, Article 15).

A separate EU regulation specifically covers wine, with a distinction made between 'Quality Wine Produced in Specified Regions' and 'Table Wines', with the former being afforded greater protection. However, producers of a Table Wine are entitled to apply for PDO or PGI status as discussed above (European Council, 2009). A further regulation protects spirits, providing them with PGI status. It is under this regulation that products such as Scotch Whisky and Cognac are protected (European Parliament and European Council, 2008). This article focuses on agricultural PDOs, PGIs, and TSGs only.

As of November 2019, the Commission's database shows that there are 1,457 registered GIs. This shows how the provision of GIs has become 'a strategic factor of the EU agro-food system' (Velčovská and Sadílek, 2015). Of these 1,457 GIs, 73 are registered from the United Kingdom with 27 PDOs, 42 PGIs, 4 TSGs, and 13 applications remain to be determined by the

Commission (European Commission, n.d.). Overall, this just short of 5% of the total GIs, which appears low given that the UK makes up approximately 16% the EU's economy when measured by GDP (Eurostat, 2017, 10). Some have suggested that the UK has successfully adopted a 'small but mighty' approach. For example, in 2010, the UK's eight protected fresh meat products accounted for 40% of GI fresh meat sales within the EU (Plaistowe and Lewis, 2018). Compared to other Member States, it appears that some food types, such as cheese, are overrepresented amongst UK GIs. For example, only 6.81% of cheese-related GIs are from the UK, but this accounts for 28% of all the UK's GIs (Velčovská and Sadílek, 2015, 1853).

A study commissioned by the European Commission found that the scheme of GIs provides numerous benefits to consumers and producers, including quality assurance, fair competition, and efficient protection (Chever et al., 2012). Furthermore, a product benefiting from a GI can command 1.55 times the price of a comparable non-GI product (Chever et al., 2012, 71); although, evidence suggests that the price premium for UK GIs is 1.07 times (McIver, 2018, 8). Despite this price premium producers may not experience significantly higher profit margins as the traditional methods of production required are often more costly than more modern methods (Hajdukiewicz, 2014, 10). Despite the price premium, further evidence suggests that consumers show increased loyalty to PDO food products (Espejel et al., 2008).

This is consistent with other evidence that suggests that the PDO indication is particularly valued by consumers, as part of an 'an intensified search for quality food attributes' caused by concerns about globalisation, standardisation, and food scandals (de-Magistris et al., 2017). Eurobarometer surveys show that the percentage of EU citizens who consider the

origin of food as an important factor when making purchasing decisions has increased from 28% in 1998 to 77% in 2017 (European Commission, 1999, p 25; 2018a, p 19).

A 2012 study for the Commission also showed that the worldwide sales of agricultural products and foodstuffs protected by GIs amounted to £15.8 billion. Across the EU, domestic markets were the main market for GI products with 78% of sales, with intra-EU trade accounting for 16%, and extra-EU trading, 6%. Total sales of UK GIs exceeded £1.1billion, with £264 million sold in the rest of the EU, and £91 million sold outside the EU (Chever et al, 2012).

The economic value of individual GIs within the UK is significant. For example, Welsh Lamb and Welsh Beef (both protected as PGIs) are part of the £1billion Welsh red meat industry, with exports worth £188million, of which 93% of beef and 92% of lamb go to the rest of the EU. The internal protection provided within the country of the GI is also important, as between 45-50% of Welsh lamb is consumed in the rest of the UK (Hybu Cig Cymru – Meat Promotion Wales, 2017). Consequently, the continuing internal protection of GIs is just as, if not more, significant than the external protection. This shows how aspects of EU law, such as GIs, underpin the UK food sector.

3. Brexit

3.1. Why Brexit?

Despite a deep level of legal integration, within UK politics, membership of the European Union (and its predecessor, the European Economic Community) remained controversial. The creation of the EU, and its increasing competence in areas other than the single market,

increased the political salience of EU membership within the UK. In the 2014 European Parliamentary Elections, the UK Independence Party, committed to holding a referendum on EU membership, won the most votes and seats. This was the first time since 1906 that neither the Conservative or Labour parties had won a national election (Rallings and Thrasher, 2012). The response of the then Prime Minister, and Conservative Party Leader, David Cameron, was to promise that that a future Conservative government would seek to renegotiate the UK's terms of membership of the EU, and then hold an 'in or out' referendum on those terms (Cameron, 2013). After winning a surprise overall majority at the 2015 General Election, Cameron renegotiated minor changes to the UK's terms of membership and held the referendum on 23rd June 2016. (European Council, 2016a).

The referendum delivered a narrow but surprising vote in favour of leaving the EU, with 52% voting to leave (BBC News, 2016). One immediate consequence of the referendum result was David Cameron's resignation as Prime Minister, with Theresa May appointed as his successor. May, despite supporting remaining in the EU, accepted the referendum result and took on the responsibility to deliver Brexit (May, 2016).

Many theories and reasons have been proposed for the result of the referendum. These range from increasing levels of immigration, the UK economy's slow recovery from the 2008 credit crunch and ensuing recession, to high house prices or an intangible 'feeling of being left behind' as London and the South East became increasingly prosperous ahead of the rest of the country (Ansell and Alder, 2019; Goodhart, 2017; Lanchester, 2016; Matti and Zhou, 2017; Morgan, 2017). More specifically, some Brexit campaigners wanted the UK to pursue its own independent international trade policy (Minford et al., 2015; Minford and Shackleton, 2016).

Whatever the reason, there was little discussion of GIs during the referendum campaign (and generally little focus of the effect of Brexit on the food sector), nor has it appeared in any theory that sought to explain why 52% of the electorate voted to leave. Yet, the explanations advanced above for the vote in favour of Brexit are important to understanding the broad approach of the UK Government when negotiating the terms of Brexit. In particular, concerns about immigration have been interpreted as meaning that the UK can no longer be a member of the Single Market, as that would require accepting the principle of the free movement of people from other EU Member States into the UK (HM Government, 2017). This also rules out membership of the European Economic Area. By definition, the desire for the UK to conduct its own independent trade policy and negotiate its own free trade agreements precludes membership of the EU Customs Union, or for that matter the European Free Trade Association.

3.2. The Negotiations

The process of a Member State leaving the EU is governed by the Treaty on European Union, Article 50 (European Union, 2016b) ('Article 50'). Firstly, the Member State must notify the EU of their intention to leave. Then, there is a two-year period during which to negotiate two texts. Firstly, a withdrawal agreement, which is a legally binding treaty setting out the basis on which the withdrawing Member State leaves the EU. The other document is a framework for the future relationship, a political declaration between the EU and the Member State outlining the broad direction of their future relationship. This is not legally binding, but forms the basis of negotiations for a separate treaty that will be negotiated in due course. If these two documents are not agreed within the two-year period, then the withdrawing Member

State leaves the EU without any agreement. Alternatively, Article 50 allows for an extension to the two-year period to facilitate further negotiations.

On 29th March 2017, the UK Government sent the EU notification of the UK's intention to withdraw (May, 2017). By November 2018, the UK Government and EU had agreed the Draft Withdrawal Agreement and Draft Framework for the Future Relationship (European Council, 2019a; European Council, 2019b). So far as relevant, the Draft Withdrawal Agreement provided as follows. Once the UK left the EU on 29th March 2019, there would be a transition period lasting until 31st December 2020 (which could be extended once for one or two years), during which the UK would continue to be bound by EU law, this includes the GI Regulation, so initially nothing will change as a consequence of the UK's withdrawal.

At the end of the transitional period, the Draft Withdrawal Agreement ensures that all GIs registered with the EU (including those registered during the transition period) will continue to receive the same level of protection as at present. This protection will last until the future relationship between the EU and UK is agreed and takes effect. However, any GIs protected in the EU due to an international agreement that the EU has concluded with another country do not benefit from this protection and will be unprotected after the expiry of the transitional period (European Council, 2019a, Article 54(2), Article 184).

The Draft Framework for the Future Relationship, which is intended to inform the future relationship states that, '[n]oting the protection afforded to existing geographical indications in the Withdrawal Agreement, the Parties should seek to put in place arrangements to provide appropriate protection for their geographical indications' (European Council, 2019b,

para 45). This falls short of a clear commitment to maintain the reciprocal level of protection as provided for in the Draft Withdrawal Agreement.

3.3. Political Reaction in the UK to the Negotiations

In the UK, political reaction to the Draft Withdrawal Agreement and Draft Framework for the Future Relationship was overwhelmingly negative. In particular, for many Conservative MPs, their chief concern was what became known as the 'Northern Ireland Backstop'. Intended to avoid the reintroduction of a 'hard' border between Northern Ireland the Republic of Ireland, the backstop is a series of commitments from the UK that they will continue to comply with certain EU standards and customs rules, even though they are no longer a member of the EU. This backstop would take effect in the absence of a free trade agreement concluded at the end of the transition period, and would last until it was agreed between the UK and EU that it was no longer necessary. The absence of a unilateral right to withdraw from the backstop raised concerns that it could become binding in perpetuity, meaning that the UK would remain bound to a significant proportion of EU law (Institute for Government, 2019). When the House of Commons voted on the deal, it was rejected by 432 votes to 202 (Hansard HC Deb., 15 January 2019). When the Government tried a second time, it was rejected by 391 votes to 242 (Hansard HC Deb., 2 March 2019). Both government defeats were the largest in modern history. The provisions on GIs did not figure at all in parliamentary debates over the Draft Withdrawal Agreement and were not part of the backstop.

Given that the deadline of 29th March 2019 was looming, the EU and UK agreed an extension to the Article 50 negotiation period, initially until 12th April 2019, which was then later extended to 31st October 2019 (European Union (Withdrawal) Act 2019; European Council,

2019c). The Draft Withdrawal Agreement was then rejected a third time (Hansard HC Deb, 29 March 2019). When it was clear that a fourth attempt would not succeed, Theresa May announced her intention to resign as Prime Minister. In the 2019 European Parliamentary Elections, the newly formed Brexit Party, which, in light of the backstop, campaigned to leave the EU without a deal, won 30.5% of the vote and 29 of the 73 seats available (BBC News, 2019c). The Conservatives' 8% share of the vote was its worst national result since its creation in 1834 (Kirk, 2019).

This political backdrop has resulted in May's replacement, Boris Johnson, being more assertive with the EU in public. Johnson has stated that the terms of the Draft Withdrawal Agreement 'are unacceptable to … Parliament and to this country' (Hansard HC Debs, 25 July 2019). This has led to Johnson seeking, and in October 2019, agreeing with the EU, amendments to the Draft Withdrawal Agreement and Draft Framework for Future Relationship. Primarily, these amendments ensure that only Northern Ireland, as oppose to the whole UK will continue to comply with certain EU standards and customs rules, allowing for a degree of divergence from the rest of the UK. The provisions relating to GIs are untouched (European Commission, 2019a, Art 54(2); European Commission, 2019b, para 43) ('Withdrawal Agreement' and 'Framework for the Future Relationship' respectively). This reflects how GIs have barely featured in this prolonged political debate. However, in his first speech as Prime Minister, Johnson stated that the UK's 'food and farming sector will be ready and waiting to continue selling ever more not just here but around the world' (Johnson, 2019). At the very least, this indicates support for food exports.

After being agreed by the EU, the House of Commons declined the opportunity to approve the Withdrawal Agreement and Framework for the Future Relationship, instead preferring to withhold approval until the passing of the European Union (Withdrawal Agreement) Bill which would implement the Withdrawal Agreement into the UK law (Hansard HC Deb., 19 October 2019). UK law requires that this Bill must be enacted before the UK can formally ratify the Withdrawal Agreement (European Union (Withdrawal) Act 2018, section 13). This then meant that Johnson was required by the European Union (Withdrawal) (No 2) Act 2019 to seek a further extension to the Article 50 negotiation period to 31st January 2020. This extension enabled the House of Commons to vote to allow more time to debate the European Union (Withdrawal Agreement) Bill, a move that Johnson believed that was tantamount to blocking the legislation entirely (a tactic that MPs have previously used to block controversial legislation) and sought an general election (Hansard HC Deb,. 28 Oct 2019). Under the Early Parliamentary General Election Act 2019, a general election will be held on 12th December 2019.

3.4. Potential Brexit Outcomes

Taking account of the renegotiations, the general election and the extension to 31st January, leaving aside the possibility of revoking Article 50 entirely, or a second referendum, the following Brexit outcomes now appear most likely.

Should the 2019 General Election return a majority for the Conservative Party, then following its "Get Brexit Done" mantra, Parliament will approve the Withdrawal Agreement and the Framework for Future Relationship and enact the necessary legislation. This will allow the UK Government to ratify the Withdrawal Agreement and the UK will leave the EU on 31st January

2019. Should the Conservative Party fail to get a majority, then given the Brexit stance of the other main political parties, it is likely that a further extension under Article 50 would be sought to facilitate further renegotiations and possibly a second referendum. The chances that the UK will leave the EU without a deal at the end of the Article 50 period have reduced considerably.

Should the Withdrawal Agreement be ratified, then, under its provisions, all UK and EU GIs registered under the GI regulation at the end of the transitional period will be protected in the UK and EU on a reciprocal basis (European Commission, 2019a, Article 54(2)). This protection will last until a treaty establishing the future relationship between the UK and EU is agreed, based on the Framework for the Future Relationship. However, any GIs protected due to an international agreement signed by the EU do not benefit from this protection. This issue is considered in Section 4.4.

The main concern is that due to the various delays to Brexit during 2019, the time to negotiate the future relationship has been compressed as the transitional period still ends on 31st December 2020 (European Commission, 2019a, Article 132). Although this can be extended once by one or two years, the UK government have stated that they do not intend to exercise this right (Payne, 2019). This has led to suggestions that the effect of the Withdrawal Agreement has been to simply defer a "No Deal Brexit" from the end of the Article 50 to the end of the transitional period. As without the future relationship being agreed, the UK exits the transition period, is no longer bound by EU law, and has no underlying trading relationship with the EU. This means that the UK would trade with the UK on what has been described as 'WTO Terms', the UK is treated as a third country, while future relationship, and a free trade

agreement is negotiated (Dhingra and Datta, 2017). However, with GIs, this would not be the case, as the protection provided for by the Renegotiated Withdrawal Agreement lasts until a treaty establishing the future relationship enters into force (European Commission, 2019a, Article 54(2)).

3.3. EU law in the UK

Whatever outcome the political process delivers, in practical terms, Brexit will be delivered through legal change. This reflects how the UK's membership of the EU was given legal effect in UK law through the enactment of the European Communities Act 1972. Section 2 of that Act gives the Government the power to implement EU directives and, without any further legislation being passed, gives legal effect to provisions of EU law that are directly applicable, meaning that they automatically become part of UK law. This means that that regulations, some provisions of the treaties and directives have direct effect and can directly be relied upon before the courts in the UK and other EU Member States (*Van Gend en Loos v Nederlandse Administratie der Belastingen,* Case 26/62 [1963] ECR 1). As a regulation, the GI Regulation is both directly applicable and has direct effect in UK law, through the European Communities Act 1972.

Within the UK, this was a novel constitutional development, as the central principle of the UK's uncodified and unwritten constitution is parliamentary sovereignty (*R (Miller) v Prime Minister* [2019] UKSC 41, para 41). At its very purest, this is the concept that Parliament is free to pass any law it wishes and is not bound by any prior enactment or any other institution (Bradley et al., 2018; Dicey, 1982; Goldsworthy, 2010). However, membership of the EU necessarily entails a limitation on sovereignty as the UK, as a Member State, is bound to give

effect to the supremacy of EU law (*Costa v ENEL*, Case 6/64 [1964] ECR 585). Consequently, any legislation passed by the UK Parliament that is contrary to EU law is 'disapplied' in favour of EU law (*R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* (1990) 1 AC 603; Stanton and Prescott, 2018, pp 166-175). For some, the attraction of Brexit is the restoration of parliamentary sovereignty in its purest form (Jones, 2018; Philips, 2016); although, the value of this is contested by others (Gordon, 2016).

To give legal effect to Brexit, the European Union (Withdrawal) Act 2018, at section 1, repeals the European Communities Act 1972. This is to take effect on 'Exit Day' meaning that the UK will no longer be bound by EU law (originally Exit Day was set at 29th March 2019, but in light of the successive extensions it has since been to 31st January 2020 (European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019). On its own, this would have the legal effect of removing those provisions of EU law which are automatically binding on Member States from the UK legal system as they rely upon the European Communities Act 1972 for their link into UK law. This could be described as leaving a 'black hole' in the UK's legal system. Regulations, including the GI Regulation, would form a key part of this 'black hole'. In short, without any other legal intervention, there would be no protection for GIs in UK law.

3.4. EU law in the UK on 'Exit Day'

Consequently, the European Union (Withdrawal) Act 2018 provides for all directly applicable EU law, such as EU regulations, and EU derived laws, for measures implementing EU directives, to be frozen and the converted into UK law, as a new category called 'retained EU law' (European Union (Withdrawal) Act 2018 Explanatory Notes,

2018). This means that, should the UK leave without any agreement with the EU, the GI Regulation will remain part of UK law. Theoretically, at this point, or later, the UK Parliament could amend or repeal the GI Regulation.

Indeed, immediately on Exit Day the GI Regulation will be amended. Like much of retained EU law, the GI Regulation makes reference to the Commission and other EU law concepts, which will not be relevant once the UK has left the EU. In response, using powers granted under the 2018 Act, the UK Government has amended the GI Regulation by replacing such EU law terms and concepts with their UK equivalents. For example, references to 'Member States' are removed, and the references to the 'Commission' are replaced with 'Secretary of State' (The Food and Drink, Veterinary Medicines and Residues (Amendment etc.) (EU Exit) Regulations, 2019). These amendments will take effect on Exit Day. In parallel, the UK Government has enacted further regulations introducing into UK law, for the first time, a bespoke enforcement process for GIs (*The Quality Schemes (Agricultural Products and Foodstuffs) Regulations 2018*).

The structure described in the previous two paragraphs would apply, if the UK leaves the EU on 31st January 2020 on a No Deal basis without ratifying the Withdrawal Agreement. However, given that the UK government now intends to leave under the terms of the Withdrawal Agreement, this is increasingly unlikely. Instead, under the terms of the agreement, the UK will remain bound by EU law, including the GI Regulation, until the end of transitional period, which 31st December 2020.

To give effect to the transitional period, the European Union (Withdrawal) Act 2018 must be amended so that EU law remains part of UK law despite the repeal of the European

Communities Act 1972 (HM Government, 2018b, para 60). These amendments must be enacted by 31st January 2020. Should the Conservative Party be returned with a majority at the 2019 General Election, then their intention is that the necessary legal changes made will be through the enactment of the European Union (Withdrawal) Agreement Bill. This will have to be reintroduced after the general election. Assuming that it takes the same form as when it was introduced into Parliament in November 2019, then this Bill will amend the key provisions of the European Union (Withdrawal) Act 2018 as outlined above, so that they would only take effect at the end of the transitional period.

4. The Future of GI Protection in the UK

4.1. The "End of Transition Gap"?

As explained in Section 3.4, the Renegotiated Withdrawal Agreement at Article 54(2), is clear that all EU GIs *registered* during the transitional period will be protected in the UK, but it is silent on how those registered *after* the end of the transitional period will be treated. This reveals a curiosity. Under Article 54(2), the reciprocal protection afforded to GIs registered before the end of the transitional period will last until the treaty providing for the future relationship takes effect. Given the disinclination of the UK government to extend the transition period beyond 31st December 2020, it is increasingly possible that there could be a gap between the end of the transitional period and when the future relationship takes effect. For example, if the treaty providing for the future relationship took effect on 1st January 2022, then all new EU GIs registered during 2021, would effectively fall into an "end of transition gap" as they would not be covered by Article 54(2). As the Renegotiated Framework for the

Future Relationship indicates that some form of protection for GIs will continue, the UK and the EU will have to address how to treat any GIs that fall into this "end of transition gap".

4.2. The Future Relationship

As discussed in Section 3.2. according to the Framework for Future Relationship, the UK and EU have agreed that, given the protection afforded to GIs during the transition period, they 'should seek to put in place arrangements to provide appropriate protection for their geographical indications' (European Council, 2019b, para 45). 'Appropriate protection' does not necessarily mean the same as the full and continuing reciprocity for existing and new UK and EU GIs as during the transitional period.

Following the transitional period, the UK is no longer bound by EU law and will become a third country with which the EU can then enter into international agreements, just like any other non-EU state. This means it is instructive to consider how the EU has approached the issue of GIs with other third countries.

The EU has entered into a range of agreements with third countries that aim to facilitate increasing trade. These agreements take a variety of different forms, reflecting the underlying relationship between the EU and the country in question and the foreign policy objectives of the EU. Agreements establishing free trade areas have been concluded with South Korea, Singapore (which also includes an accompanying investment agreement), as well as an agreement with Columbia and Peru, which has since been extended to Ecuador (European Union, 2011a; European Commission, 2018b; 2012; European Council, 2016b). It is also the case that free trade agreements, such as that with Central America, have been part of a

broader association agreement that makes provision for some political co-operation (European Union, 2012).

More extensive still is the Comprehensive Economic and Trade Agreement ('CETA') between the EU and Canada, which eliminates almost all tariffs on goods. The deepest economic integration can be seen in the Association Agreements with Moldova and Ukraine that include a Deep and Comprehensive Free Trade Agreement ('DCFTA') within their architecture (European Union, 2014a, 2014b). When negotiating these agreements, the EU has placed 'great emphasis' on the protection of GIs with the result that they all include arrangements to protect GIs (Mimler, 2017).

The UK Government, European Parliament, and European Council have all agreed that an Association Agreement is likely to provide the basis of the UK's future relationship. However, the UK's negotiating objectives include leaving the jurisdiction of the Court of Justice of the European Union, the Single Market, and the Customs Union (HM Government, 2017). The reasoning behind the UK Government's approach is that this would address at least some, but arguably not all, of the reasons underlying the Brexit vote, in particular concerns over immigration and the free movement of people.

The European Parliament has stated that a DCFTA requires both acceptance of the Court of Justice of the European Union's jurisdiction and an acceptance of all four fundamental freedoms of the internal market (goods, services, people and capital) (European Parliament 2018, para 12). It also states that access to the single market is 'conditional on strict compliance with all EU law and standards, notably in the fields of … geographical indications' (European Parliament 2018, para 20). The European Council is less strident, merely stating

that as part of an 'ambitious and wide-ranging free trade agreement' would 'address *inter alia* geographical indications' (European Council 2018, paras 8 and 8(iv)). Given the negotiating objectives of the UK, the creation of a DCFTA such as those with Moldova and Ukraine are unlikely, but an agreement similar to that between the EU and Canada is possible.

The CETA between Canada and the EU does protect GIs (European Union, 2017a). Canada had a pre-existing system of GIs focusing on wines and spirits. As a result of CETA, Canada amended its Trademarks Act to expand the category of GIs to include the same categories of agricultural products as protected under EU law (Trademarks Act 1985). This meant that 170 GIs from the EU were included when CETA came into effect on 21st September 2017 (European Union, 2019). However, no UK GIs were included in this group of 170. Currently, only Scotch Whisky is protected as a GI in Canada due to pre-existing rules. The Canadian scheme is now open to GIs from any WTO member. If an application is lodged for a GI that would cause confusion with a pre-existing Canadian trademark, then the trademark holder can raise an objection (Trademarks Act 1985, s 11.13(2)(c)).

Overall, the GI provisions of CETA fall short of the protection granted to GIs within the EU. Firstly, there are considerably fewer, and new EU GIs are not automatically protected in Canada, as will be the case for during the transitional period. This means that if the CETA is used as a template for the future relationship, the real question is whether the EU and UK will agree to an enhanced version of CETA that provides for reciprocal and continuing protection for new GIs.

4.3. The UK's New Scheme

Both the “End of Transition Gap” and the future relationship raise the same question, which is what will be the approach of the UK when they are no longer bound by EU law. For an indication of the UK’s approach, it is worthwhile to consider the UK’s preparations for a No Deal Brexit, i.e. if the UK left the EU without any withdrawal agreement at the end of the Article 50 period and without any transitional period be no longer subject to EU law.

In February 2019, the UK Government announced that in the event of a No Deal Brexit, it would establish its own GI schemes, which ‘will mirror the EU schemes and fulfil the UK’s World Trade Organisation obligations’ (Department for Environment, Food & Rural Affairs, 2019a). This clarified the UK Government’s thinking, which initially only promised to go beyond the requirements of the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) (HM Government, 2018a). The very fact of these considerations shows how, Brexit means that the UK will no longer be ‘represented’ at the WTO by the EU, and will have to comply with WTO rules in its own right.

The UK government then stated that in the event of a No Deal Brexit (leaving without a deal under Article 50), ‘the UK would no longer be required to recognise EU GI status. EU producers would be able to apply for UK GI status’ (Department for Environment, Food & Rural Affairs, 2019b). This is likely to be the approach that the UK government takes at the end of the transitional period and in negotiations for the future relationship. This means that EU GIs falling into the “end of transition gap” will have to separately register under the UK scheme, and that the UK does not intend for the future relationship to provide for full and continuing reciprocity for new EU GIs. It could even be argued that if EU GIs caught in the “end of transition gap”, successfully register under the UK’s scheme, (which if it mirrors the EU

scheme, should be unproblematic), then this undermines the EU's argument for the future relationship to provide for full and continuing reciprocity. This approach would also be with CETA, which allows for new GIs from the EU to be registered under the Canadian scheme.

When it comes to the protection of existing UK GIs in the EU after the transition period, UK Government appears to take a bold approach. The UK Government believes that in any Brexit scenario (including a No Deal Brexit under the terms of Article 50), existing UK GIs will continue to be protected in the EU, by virtue of their existing entry on the EU's GI registers (Department for Environment, Food & Rural Affairs, 2019b). The Withdrawal Agreement is silent on this question. The UK Government's argument could be based on the GI Regulation, Article 54. This states that the Commission can only forcibly cancel a registration if the specification is not being complied with, or if no products using the GI have been placed on the market for seven years. More generally, the GI Regulation is clear throughout that it is open to registrations from third countries, so in any event UK GIs could re-register after the transition period, although this would also create an "End of Transition Gap". As with the registration of new EU GIs post-transition period under the UK scheme, any requirements to register could be facilitated by the future relationship.

4.4. 'Rollover Agreements'

A major aspect of the UK's preparations for when EU law no longer applies has been the negotiation of 'rollover agreements' with countries that have an existing free trade arrangement with the EU. The effect of a rollover agreement is that the terms of the free trade agreement as it currently applies to the UK via EU membership is 'rolled over' to the UK's new status as a non-EU state. The EU has trade agreements with 70 countries, governing

approximately 15% of the UK's exports. If no rollover agreement is concluded, then once EU law no longer applies, the UK loses the benefit of the agreement the EU has made with that country. In addition, under Article 54(2) of the Withdrawal Agreement, after the end of the transition period, any GIs from a state that has a trade agreement with the EU will no longer be required to be protected in the UK.

As of October 2019, the UK has agreed 18 agreements, covering nearly 48 countries. Unfortunately, with the exception of South Korea, Switzerland, and Norway, these rollover agreements have been with countries that account for relatively minor proportions of exports, and account for 11% of total UK trade (BBC News, 2019d). Furthermore, the UK and Canada are unlikely to agree to a rollover agreement as the UK's proposed tariff schedule in the event of a No Deal Brexit are almost identical to current tariffs under CETA (BBC, 2019e).

An example of a rollover agreement is that concluded between the UK and Columbia, Peru, and Ecuador. This ensures that the UK continues to benefit from the existing trade agreement with the EU (HM Government, 2019a). All GIs currently registered under the existing trade agreement will continue to be protected without being subject to any new procedures or objection process (HM Government, 2019a, 9). Currently, Columbia, Peru, and Ecuador have lodged applications for new GIs with the Commission. In the rollover agreement, these countries express their intention to apply to the UK for these same GIs when the UK officially leaves the EU, or 'when the GI scheme of the EU ceases to apply to the UK', whichever is later (HM Government, 2019a, 52). This is a clear reference to the end of the transitional period. Other countries, such as Iceland, protect EU GIs in a specific agreement (European Union, 2017b). The UK's rollover agreement instead folds these provisions into the broader

agreement with Iceland and Norway (HM Government, 2019b). The result is that the same 55 GIs from the UK continue to be protected in Iceland under the same EU rules.

The significance of these rollover agreements is that, regardless of what the future relationship decides regarding GIs, the UK has committed under international law to retaining a GI scheme that is practically identical to the existing EU scheme.

4.4. Free-Trade Agreements with Non-EU Countries

This level of continuity is likely to make it harder to include GI protection in new free trade deals that the UK may conclude with countries that do not have an agreement with the EU. Targets for the UK include Australia, the United States, and New Zealand. This rides along the split in GI protection between the 'old world' and the 'new world', where, at the turn of the 19th Century, emigrants from Europe to the Americas and elsewhere brought their foods and methods of production with them. Consequently, these new world countries, have less of an attachment to the concept of *terroir* when compared to the old world and, in particular, the EU. In evidence before a committee in the UK Parliament, one expert summed up the situation as,

> '[imagine the United States] where they have been openly making a particular type of cheese. Possibly emigrants from Europe brought it over with them. Where there is an issue is when as part of a negotiation, somebody says, "You are going to have to stop doing that." They will say, "Nobody realises that it comes originally from Greece or Spain. They think it is from us." That is really where the flashpoint occurs (Scottish Affairs Select Committee, 2018, Q103).

Seemingly, such an argument was brewing when the EU and the United States were negotiating the (now aborted) Transatlantic Trade and Investment Partnership ('TTIP'). The EU made proposals regarding GI protection (European Commission, 2016). However, 177 congressmen had already expressed their concerns about TTIP stating that '[t]he EU's abuse of GIs threatens U.S. sales and exports of a number of U.S. agricultural products' (Ribble et al, 2014). Although the United States' formal response to the EU's proposal was not made public, it highlights the controversy GIs raise in the United States.

A baseline level of protection is provided for by the World Trade Organisation's TRIPS Agreement. This requires that WTO members are required to 'provide the legal means', to protect GIs against use that misleads the public as to the geographical origin of the good, or against use that constitutes unfair competition (WTO, 1994, Article 22(2)). TRIPS rules provide that the registration of a trade mark can be refused or invalidated because it consists of a GI, relates to goods not originating in the territory indicated in the application, and will mislead the public as to the true origin of the goods (WTO, 1994, Article 22(3)).

By contrast, wines and spirits receive considerably greater protection. Any application to register a trade mark for a wine or spirit that consists of a GI, in relation to a wine or spirit that does not have that origin, *shall* be refused or invalidated. There is no requirement that the trade mark would mislead the public. In addition, a trade mark cannot be used to identify a wine or spirit not originating in the place indicated by the GI, even if the true origin is indicated, or accompanied with words such as 'kind', 'type' or 'style' (WTO, 1994, Article 23(1)). Consequently, a wine not produced in the Bordeaux region could not be labelled as a "Bordeaux-style wine" or "Californian Bordeaux".

Accordingly, the level of protection granted under TRIPS falls considerably short of the EU's scheme that the UK will be continuing with. The legacy of EU membership, and the adoption of the EU scheme means that in its trade organisations, the UK must seek what the EU achieved when negotiating the CETA with Canada or CARIFORUM-EU Economic Partnership Agreement (European Union, 2008) with the Caribbean Forum ('CARIFORUM') countries of the Caribbean, which required them to adopt an EU-style approach to GIs.

The big question is how highly GI protection will rank amongst the UK's trade priorities. Achieving this objective will be considerably easier in countries that already have a GI scheme, otherwise, the argument for GIs will have to be made. One advantage is the reciprocal nature of the protection. In return for protecting UK GIs, the UK, with its large domestic market, will protect GIs from the negotiating country. This could be valuable for producers in Australia, that lack a GI scheme. However, this may be a much harder challenge when negotiating with the US. For American producers, the benefits of securing protection of their GIs in the UK may come at the cost of losing market share to GI-protected products within a substantially larger market, and incur the cost of rebranding their goods. When Australia, the US, and New Zealand (along with nine other Pacific countries) negotiated the now defunct Trans Pacific Partnership (TPP), GIs could be protected either through a trademark or a specific GI scheme, as required by TRIPS (New Zealand Foreign Affairs and Trade, 2016, Art 18:30). Much will depend on the UK's, so far entirely untested, strength and capabilities for negotiating new free trade agreements.

A further difficulty will be dealing with existing trademarks and applications for a new GI. However, inspiration can be taken from the priority rules already found within the GI

Regulation, discussed in Section 2. The EU has incorporated this into its agreement with Iceland, which, after the initial list of GI's agreed between the parties, places Iceland under no obligation to protect a GI if the new GI is likely to mislead customers in light of a 'reputed or well known trademark' (European Union, 2017b, Article 3). Alternatively, a new GI and trademark can run in parallel, under provisions that closely follow Article 14(2) of the GI Regulation as discussed above (European Union, 2017b, Article 4).

5. Conclusion

In practice, Brexit is a technical and legal process that seeks to implement a political demand. GIs provide a perfect example of how the uncertainty over the form of Brexit and the UKs future relationship with the EU impacts on the operation of a specific policy. This is despite the principle of GI protection remaining relatively uncontroversial within the UK, and not figuring in the debate over either the principle or the implementation of Brexit. So far, the UK and the EU have agreed the Withdrawal Agreement which ensures the protection of all EU GIs in the UK until the future relationship takes effect. Whether, the UK ratifies this treaty depends on the result of the 2019 General Election.

Assuming that it is ratified, and the UK leaves the EU on 31st January 2019, the long-term basis on which EU and UK GIs will be protected in the UK and EU respective will be established the future relationship. There is a particular problem for new EU GIs who may fall into a gap between the end of the transition period and when the future relationship takes effect. The likelihood of a gap is increased by the UK's apparent reluctance to extend the transition period, and the basic fact that it is due to end on 31st December 2020, which leaves very little to negotiate the future relationship.

Yet, some positive progress has been made. The UK has the legislation in place to ensure the protection of UK GIs within the UK. In addition, the UK has ensured protection for UK GIs in countries with which it has concluded a rollover agreement, ensuring that the UK continues to benefit from terms of free trade agreements those countries have concluded with the EU.

This highlights the fundamental paradox of Brexit and GIs. The UK, in incorporating legislation such as the GI Regulation and in creating its own GI scheme, is "Europeanising" its law, food and international trade policy. In addition, through these rollover agreements, the UK has placed itself under an obligation to maintain a GI scheme that mirrors the EUs, which runs counter to the demand from some that Brexit means that the UK should become its own 'independent trading nation'. When negotiating with countries such as Australia and the United States, the UK's trade negotiators will have to consider how far they will push protection for UK's GIs in these new free trade agreements. Although a difficult task, should they secure GI protection, this could open the door for the EU to walk through at a later stage. That would be the greatest paradox of all.

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Note: All URLS were last accessed on 19.11.19.