Geographic Indications: heritage or terroir?

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Geographic Indications: heritage or terroir?

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This paper considers geographic indications (GIs) from both the European *terroir* perspective and the New World heritage perspective. Consumer protection rationales are critically assessed. Arguments about privileges for producers, often couched in terms of rural development and sustainability, raise competition concerns. These are drawn out using material from case law and GI registrations for foodstuffs in the European Union. This identifies the concentrated usage of GIs and the principal competition issues: defining boundaries and generic names and the strength of the granted privileges. The key sticking point in global GI negotiations is "strong-form" GIs which extend producer privileges substantially beyond those provided by trademarks. Options for tackling this major area of disagreement are identified, drawing on the analysis of competition concerns and alternative approaches used in Australia. This greater clarity might reduce the extent of the conflict between Old and New Worlds over legal privileges for geographical indications.

Acronyms

AOC	Appellations d'Origine Contrôlée
CTM	Community Trade Mark
EC	European Council
ECJ	European Court of Justice
EU	European Union
GIs	geographical indications
IP	intellectual property
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
TM	trademark
TSG	Traditional Specialty Guaranteed
TRIPS	Agreement on Trade Related Intellectual Property Rights

Introduction

Geographical indications (GIs) are the newest form of "intellectual property" ("IP") and the most contentious. This is because the underlying philosophical and economic justifications are even weaker for GIs than they are for more traditional forms of "IP". Indeed the European Union – the strongest advocate of GIs – clearly sees them as an essential element of its new agricultural policy and GIs are administered by the Directorate-General for Agriculture and Rural Development.[1]

All forms of IP raise important issues in regard to competition policy. A lack of factual evidence has never been an impediment to longer and stronger IP privileges, nor to the retention of IP policies that are clearly welfare-reducing.[2] But in the belief that evidence provides the best basis for sound policy, this paper uses the available empirical data to focus on the issue of potential conflicts between GIs and competition. As the EU is pursuing an active strategy of demanding longer and stronger GI privileges as a *sine qua non* of trade liberalisation,[3] understanding how GI policy can be managed to reduce conflicts between rural and competition policy is important. A better grasp on this issue might reduce or clear the GI impediment from trade liberalisation discussions.

The paper commences with a very brief review of the rationales for GIs, then considers the available evidence as to whether these rationales – especially the argument about consumer confusion – are justified in the context of foodstuffs. The major rationale for GIs is based on the *presumption* that wines and foodstuffs are credence goods – that the consumer cannot actually tell the difference between products from the protected GI region and similar products from other regions. In regard to consumer confusion, there is little doubt that "strong-form" GI privileges – policies that prevent the use of the GI name even with qualifiers such as "style" and "type" is unsustainable. Consumers cannot be confused by clearly labelled goods such as "feta-style cheese, product of Denmark". The main rationale thus becomes benefit to the producer, particularly reputation. Arguments about producer reputation are then considered, together with the very small literature on the impact of GIs on rural economic health.

While there is a considerable lack of data on the use of GIs, there are some estimates which suggest that GIs cover only a small proportion of agricultural output. There is therefore a real question as to whether GI policy really matters, outside a very small number of products. In regard to wines, several nations which oppose GI policy have voluntarily relinquished use of regional names for wines in exchange for improved access to the European wine market. Consumers have quickly learned to name wines by the grape variety not the historic region where the particular style of wine was first produced.[4] In respect of foodstuffs the contentious areas relate to only a small number of names, mostly for cheeses and meat products. Given the solutions that have already been found for wines and spirits, this paper concentrates on how GIs are used to protect foodstuffs.

The only major region which has experience with large-scale implementation of GI policy for foodstuffs is Europe.[5] The paper focuses on the European GI program, looking first at how

[1] "The protection of geographical indications for agricultural products and foodstuffs is one of the major pillars of the Common European Agricultural Policy …" (Profeta et al. 2009: 622).
[2] See, for example, Chaudhuri et al. 2006; Branstetter et al. 2011; Dutta 2011. For a summary of the evidence that most industrial innovations do not need patent protection see López 2009 and Moir 2013: chapter 2.
[3] See, for example, Josling 2006: 356-358; Viju et al. 2012; Moir 2015.
[4] This has been harder for fortified wines, where alternative names such as pipe for port are less memorable.
[5] Globally most protection of GIs is for wines and spirits. In terms of foodstuffs, only a small number of non-European nations provide GI protection (Giovannucci et al. 2009: 11). Countries with large numbers of food GIs

GIs are used, and by whom, then at case law. The latter raises competition issues, particularly how generic names are defined, how regional boundaries are set and expropriation of trademark owners. The latter issue raises the question of the strong form of privilege granted by a European GI. Effectively registration of a GI in Europe means that a producer does not need to demonstrate consumer confusion or unfair competition. The simple use of the name – even for an entirely different product – is made unlawful by the GI regulation.

The limited jurisprudence available from the EU suggests two things. Much of the role in managing GI policy rests with national governments. The European courts are largely concerned with whether the Commission has conformed to procedural requirements. Indeed scrutiny of the EU regulations indicates that, in common with other "IP" policies, there is very little mention of economic criteria – they simply set out the procedural steps for application, objection and enforcement. Despite the limitations of the EU jurisprudence, the key cases on names, boundaries and other uses of the name do throw light on issues that need consideration in ameliorating anti-competitive effects. Procedures used in other countries for alternative forms of GI "protection" such as certification marks also suggest ways in which GI policy can be designed to minimise anti-competitive effects.

Rationales for GIs

While patents are designed to encourage innovation and copyright creativity, GIs specifically reward traditional means of production.[6] Patents prevent the use of independently invented products, but GIs only affect labelling not the production of identical products. The standard utilitarian analysis of the "IP" intervention as an incentive for new products thus does not apply to GIs. Nor does it apply to trademarks, when used traditionally as a means allowing consumers to identify producers and producers to ensure that their competitors do not pass off products falsely.[7]

The sole benefit conferred by a registered GI is prevention of the use of the registered name, in all forms and for all products.[8] Like trademarks, GIs benefit from a presumption that consumers are misled if the registered mark/name is wrongly used.[9] But the presumption is much stronger for GIs – it is also presumed that the reputation of the GI is harmed if the registered GI is used with reference to other products. In the UK, Taittinger successfully put a stop to “elderflower champagne”, though it would be the rare consumer who would confuse a non-alcoholic elderflower drink with sparkling wine from the champagne region.[10] Reaching even further, in 1993 a French court prevented Yves St. Laurent from using the word champagne for a new perfume as it would involve misappropriation.[11] This goes well beyond

are identified as China with several hundred domestically protected names (and also 10 names on the EU GI register by end 2012), the Russian Federation, with some 70 protected names and Turkey and New Zealand each with some 50 foodstuffs with protected names. Korea, not listed in the Giovannucci table, is the only country which has identified a substantial number of GI foodstuffs to include in an EU trade treaty (Moir 2015).

[6] For concerns about the possible negative effect of GIs on innovation see van Caenegem 2004 and Josling 2006.

[7] Newer uses of trademarks involve branding of specific product lines rather than simple identification of the producer. The consumer rationale for marks for product lines is less persuasive than the rationale for identification of the producer.

[8] In fact there is some argument as to whether GIs prevent use of the GI name in translated form. But clearly use of the identical name is banned across a far wider range of products than is the case with a registered trademark.

[9] While the presumption that consumers have been misled was a major benefit from the introduction of trademark registration, initially in France and shortly after in the UK (Kingston 2010: 25-41), a legitimate defence is demonstrating that this is not so.

[10] The basis for the decision was mis-representation, passing off and consumer confusion, see *Taittinger and Others* -v- A*llbev Ltd* [1993] FSR 641 (Thienes 1994).

[11] Evans and Blakeney 2006: 586; Hughes 2006: 348, citing *Cour d’appel* Paris 1st ch.A., 15 December 1993.

the privileges extended to trade mark owners – trade mark name protection is limited to designated product groups.

A major and important difference between GIs and TMs is that descriptive words – such as geographic names – cannot generally be used for trademarks.[12] They must be left free for general use. But GIs allow the permanent appropriation of a geographical name for a designated product. They also reach far more broadly in their preventative effect, preventing ***any*** use, even when it is not confusing. Indeed EU GI policy grants the privilege that any ***evocation*** of the registered name is unlawful. The evocation standard is "designed to check the mental association or "calling to mind" of a registered GI. … [It] does not require any consumer confusion" (Gangjee 2007: 178). This far broader privilege is indicative of the important GI objective of providing producer benefits, not simply addressing consumer confusion.

Raustalia and Munzer (2007) provide an excellent assessment of the full range of normative justifications for GIs. Normative justifications based on Lockean labour-desert principles cannot be effectively applied to GIs, given that they protect traditional methods of production. Those who developed these methods are long gone and their descendants cannot call on the labour-desert principle to defend inherited privileges. Moral rights of the originator fail as a justification on similar grounds. Like others, Raustalia and Munzer conclude that the most tenable justification for GIs is akin to that for trademarks – to reduce consumer confusion and search costs. But such a justification ought to allow for labelling of products as "Roquefort-style Blue from Catalonia", that is the "weak-form" TRIPS requirement for foodstuffs other than wines and spirits. Weak form GIs can act to provide consumers with considerable information. In contrast, strong-form GI policy ***simply assumes*** misrepresentation and misleading conduct leading to reputational injury (Evans and Blakeney 2006).

Empirical evidence for GI rationales

The main justification used for GIs – information asymmetry between producers and consumers – was a theory developed in respect of consumer durables, where poor purchasing decisions can carry significant costs. Most GI studies present summaries of this literature on information asymmetries and draw on this to justify GIs, without in any way assessing whether this really applies to foodstuffs (Bramley et al. 2009; OECD 2000). But as Teuber (2011) points out, most foodstuffs are repeat purchase goods, falling into the category where experience leads to consumer knowledge. The experience of consuming the product thus creates new consumer information, eliminating the information asymmetry. Given this, the information asymmetry rationale for GIs then reduces to that of credence goods – where even after consumption consumers are unable to determine their quality.[13]

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[12] "It is a well-established principle that a private monopoly in ordinary terminology has anti-competitive effects. For that reason, descriptive terms or devices cannot be registered as trade marks. Other traders must not incur additional costs when using ordinary descriptors. This applies as well to geographical terms." (van Caenegem 2003a: 708). Indeed early UK TM legislation specified that trademarks could only be granted for "fancy" words, i.e. words that had been made up for the purpose. Nonetheless, if a geographic word acquires a "secondary meaning" it can sometimes be registered as a TM. One example is Wimbledon, see *Think Promotions Ltd v All England Lawn Tennis Club (Wimbledon) Ltd*. Office for Harmonization in the Internal Market (Cancellation Div), 21 December 2004.

[13] Information asymmetries were first analysed by Nelson (1970) who identified the differences between search and experience goods. The issue of credence goods was identified by Darby and Karni (1973). Subsequently more detailed analysis of the interaction of consumer knowledge, expectations and producer quality was put forward by Shapiro (1982, 1983). For a clear and succinct presentation of these economic theories see OECD 2000: Annex 1.

GIs are only one of a number of food quality systems (Becker and Staus 2008). Others include health and safety standards and regulations and organic farming certification and labelling. While in theory GI inspections systems could be tied into inspections for food safety, it is unclear that his actually happens, and may vary from country to country. But what is clear is that GI specifications do not necessarily cover health and safety issues. They specify certain product characteristics that are associated with their regional origin.[14] These origin-associated characteristics are the sole basis for the special regulatory treatment of regional names, though origin-associated characteristics are defined to include human factors.

The credence goods argument is based on consumers not being able to determine a product's characteristics through consumption. The features specified in a GI relate to taste and other sensory features, not to safety. This then raises the question of whether the inability to taste the difference creates any detriment to the consumer. If what the consumer is seeking is a product with a particular taste, and the GI and non-GI products taste the same, then the consumer is getting what s/he wanted.

There are also issues as to whether GI names actually provide correct information to consumers. The implication with a GI is that the name identifies regional origin, with associated characteristics. But although in theory PDO-labelled products should be entirely produced within the specified region, in practice this is often not the case. The EU regulations allow some types of raw materials to be drawn from a different, often quite large, geographic region, so the PDO descriptor may be misleading (Calboli 2014). In the case of PGI products, the requirements in regard to regional origin are quite low, and the bulk of ingredients could easily come from elsewhere. Such consumer concerns were considered in the 2008 evaluation of EU GI policy (London Economics, 2008: 86-91), but do not seem to have resulted in any changes in the regulations.

Setting these concerns to one side, there remains an issue of the extent to which unique product characteristics derive from particular regions. Hughes, in evaluating the strength of the land-product characteristic claims underlying GIs points out that those products most closely linked with *terroir* – building material such as particular marbles or minimally processed foodstuffs – do not generally have registered names.[15] It is processed foodstuffs – particularly wine – that first gave rise to GI labelling and restraints on competition.[16] He suggests that GIs arose to cover products with one dominant ingredient, where processing took place near the raw material production site by multiple producers and where the product was transportable to more distant markets. Indeed it is the development of improved means of global transport which has increased the potential value of GIs. But Hughes adds an important last characteristic to GI products – "that the local product can be imitated and consumers cannot by themselves, at least not enough of them, distinguish the imitations" (Hughes 2006: 356). He argues that, to the extent that there is any taste difference between GI

[14] And, as the OECD points out, these specified characteristics do not require higher quality (OECD 2000: 13).

[15] Hughes (2006: 357-368) provides a pointed and detailed criticism of the *terroir* argument – important objective climate and terrain features vary within single designated areas and over time as well as being found in other regions. He notes the absence of scientific information showing how the terrain features relate to the taste of the GI product. He notes how the origin of raw materials has substantially changed over time even for products whose mode of production has not allegedly changed since the C13th (Parmigiano-Reggiano). These factors explain the addition of "human factors" to the geographic features of *terroir*. But, as history shows, migrants take these human factors with them to new homes. Blakeney (2014: 52) raises further queries in relation to the link to the land, suggesting that with climate change the best area for growing grapes for champagne could become southern England.

[16] van Caenegem 2003b reviews the early history of restraints on the French wine trade showing that these were largely designed to ensure that producers near Bordeaux were able to exclude producers from the hinterland from accessing overseas markets.

products and similar products from elsewhere, only a very few people are able to distinguish this. This "discerning-few terroir narrative" raises substantial questions about "strong-form" GI privileges.[17]

Gangjee too points to the limited credibility of the consumer confusion rationale for GIs. Exploring the nature of generic names against the background of the German-French PGI-PDO compromise, he comments that the "fig leaf of consumer protection is easily blown aside by sufficiently determined gusts of litigation, leading to embarrassment all round," making particular reference to "the strained consumer protection rationale" in the Parma ham litigation with ASDA (Gangjee 2007: 179).

Does protection of the producer adequately replace consumer confusion as an argument for the strong privileges granted to users of registered GI names? Such reputation-based arguments underlie both trademarks and the PGI form of registered GIs. But providing far stronger privileges to geographical names than to trademarks seems to have little basis, either in normative terms or in terms of economic rationales.

Theories about information asymmetry focus on the importance of consumer knowledge as an inducement for a producer to focus on quality. Without clear signals about producer quality, consumers will not be willing to pay a premium for it. Likewise, producers will not be willing to produce to a higher quality unless they can be certain that consumers will be prepared to pay the higher cost (Shapiro 1982, 1983). GI policy affects who may use particular geographic names to signal the characteristics of a product.

For foodstuffs, as for most products, there is only a small segment of the market which is willing to pay a premium for higher quality. Much of the willingness to pay literature is summarised by Bramley and colleagues (2009). Such studies use a variety of methodological approaches – hedonic pricing models, multinomial logit models and conjoint analysis. All face challenges in separating out different quality indicators, including the separate impact of GI labelling and trademarks. Some are restricted to consumers who are already aware of GI products, thus raising issues about bias. Teuber (2011) notes that many consumer studies unrealistically assume a uniform distribution of consumers with respect to quality. This naturally raises questions as to their policy value.

The single resounding common finding is that only a small segment of consumers is willing to pay the premiums required for GI products. This finding is reflected in the outcome of the 2008 EU GI evaluation – retailers report that GI products have little impact on their profitability as they form a very low proportion of goods sold (London Economics 2008: 147-150). This holds more strongly for large retailers. Some smaller retailers specialise in premium products, and for these GI labelled products are more important.

The finding that only a small proportion of consumers are willing to pay higher prices for higher quality products is also reflected in the data on the share of GI products in total agricultural output. Although such data are rare, London Economics (2008: 107-109) reports that some such data are available for four countries. For France, a country with many

[17] Indeed Hughes reaches rather a strong conclusion in respect of GIs. "To sum up, the terroir theory is needed to justify the product- specific usurpation standard of protection presently found in TRIPS for wine and spirits that many countries would like to extend to all GIs. It is needed because phrases like "X style," "imitation X" and "X type" can efficiently increase consumer knowledge, *unless X has truly unique, consumer-desired qualities* in which case such phrases are arguably deceptive. Without the terroir theory, broad usurpation protection (as under French law) is a straightforward, additional monopoly rent penumbra attached to the otherwise legitimate purpose of a GI. Similarly, the terroir theory is needed to justify the European Union's "claw back" list in terms of "market access" - otherwise, the claw back list is also a naked monopoly rent wish list" (Hughes 2006: 367).

registered names and a long GI tradition, PDO products are reported as forming 2.5% of total agricultural production, while PGI products are a further 3.8%. Spanish data indicate that the share of PDO and PGI products in the total turnover of agriculture and food processing is about 1%. For Germany survey estimates suggest that GI products account for 2.2% of agricultural and food processing output. London Economics consider this figure rather on the high side, but it should be remembered that many German GI names are for beers. Italian data do not provide estimates of the share of GI products, but do indicate that more than 60% of their GI value comes from just four products – Parmigiano Reggiano, Grana Padano, Prosciutto di Parma and Prosciutto di San Daniele.

There are also some data suggesting that a proliferation of GI names can so confuse consumers that they turn to products from a different country where such labelling is less used. Broude (2005) points to the falling market share of French wines in the UK in the face of increasing numbers of AOC names, suggesting consumer confusion. He also gives an example of Italian winemakers totally side-stepping the GI system in order to make, and successfully market, a new wine.

Knowledge about the impact of GIs on agricultural and rural policy goals is less than that for consumer responses. Both Bramley and colleagues (2009) and Teuber (2011) review the available evidence. One of the challenges for such studies is specifying the market structure – almost every form of market structure can be found for some GI products. Nonetheless the essential question is whether the protection from competition adds more to rural incomes than it takes from the negative impacts on competitors and at least some consumers. Callois (2004) found the potential of GIs to induce rural development to be highly qualified, with potential exclusionary effects. Case studies from the EU's DOLPHIN project show ambiguous results about the impact of GIs on rural development (Tregear et al. 2004).

There are few studies on whether the net effect of GIs is welfare-enhancing. This is a complex issue as it needs to consider not only the net impact of quality choices on producer and consumer welfare, but also needs to take account of any rural development impacts. In regard to the former issue the challenge is the degree of control by producers over quality decisions and how they manage supply. Mérel (2009) is persuasive in demonstrating that input controls – such as over the supply of land – involve lower deadweight losses than output controls. The various models reviewed by Teuber (2011) show the net effect is highly dependent on market conditions and consumer preferences. But they are models, not studies of real world impacts. Using a case study approach van Caenegem and colleagues (2015) demonstrate that, under the right conditions, GIs can be used to establish regional benefits, giving the example of the Queensland Granite Belt. But they question whether many types of products can be effective in achieving such outcomes.

One of the important issues underlying concerns to provide agricultural producers with greater market power is the increasingly powerful role of large supermarkets in the distribution chain for agricultural products (Rangnekar 2004; London Economics 2008; van Caenegem et al. 2015). There are a variety of responses to this issue of differential bargaining power, and GIs are just one of these.

As a number of writers warn, GIs are not always an effective solution for primary producers (see, for example, van Caenegem et al. 2015; Rangnekar 2004; Giovannucci et al. 2009; Grote 2009; Evans 2010). The costs of establishing a GI can be significant and careful analysis is needed before adopting a GI strategy. A number of case studies indicate that unless and until reputation has been established, a GI is not likely to produce increased returns. Indeed trademarks may be an essential step on the way to establishing a broader regional reputation.

The European Union experience implementing GIs

In respect of agricultural products and foodstuffs, the EU GI regulation covers two different forms of GI:[18]

- Protected Designations of Origin (PDOs) must have an *essential* link to the designated region and *all essential steps in the production process* must take place in the designated region. PDOs recognise human as well as geographic factors.
- Protected Geographical Indications (PGIs) must have a *specific quality or reputation* linked to the designated region and *at least one element* of the production process must take place in the designated region.

These two different types of GIs derive from the different legal traditions of France and Germany. PDOs derive from the French Appellations d'Origine Contrôlée (AOC) system, introduced in France in 1919 following earlier laws addressing false designation of origin after massive fraud in the selling of wine (van Caenegem 2003a; Gangjee 2006: 302). The PGI system is German in origin, based on unfair competition laws and on judge-made development of protection for product reputation where this is linked to place.[19] The "harmonisation" of these two quite distinct systems into a single European regulation in 1992, simply provided “strong-form” privileges for both. This "strong-form" protection – the TRIPS absolute protection standard for wines and spirits – prevents a registered name being used even with qualifiers such as "style" and "like" as this would cause "reputational injury" (Evans and Blakeney 2006: 582).

By combining the two different types of GIs into a single system, the regional (*terroir*) based justification for the market intervention is attenuated. The PDO system is the more strongly based on links to specific regions, but even here the link allows both “inherent natural and human factors” (2081/92 and 510/2006, Article 2(1)(a)). Further, for PDOs registered before May 2004, raw materials which are live animals, meat or milk may be brought from a wider region as long as this is specified together with their production conditions and inspection arrangements.[20] The rationale for GIs is substantially undermined by such exceptions.

The PGI system has a far looser link to region, though it does require that products have “specific quality, reputation or other characteristics attributable to that geographical origin” (2081/92 and 510/2006, Article 2(1)(b)). The PGI definition brings **reputation** into play,[21] indicating a far stronger preferencing of producer interests compared to potential consumer confusion. This extension to reputation allows for the argument that the use of the name *in other commercial contexts* can harm reputation. The looser place of origin requirement for PGIs undermines the rationale for their existence. If only a proportion of the raw materials

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[18] Council Regulation (EEC) No 2081/92 of 14 July 1992 (hereafter 2081/92); Council Regulation (EC) No 510/2006 of 20 March 2006 (hereafter 510/2006) and Regulation (EU) No 1151/2012 of 21 November 2012 (hereafter 1151/2012). The 1151/2012 regulation brought a third category – “traditional specialities guaranteed” (TSG) within its ambit (Josling 2006). Before this TSG had a separate regulation, Council Regulation (EEC) No 2082/92 of 24 July 1992. TSGs have no require link to any geographic region and are beyond the ambit of this paper. Wine and spirit GIs are covered by yet a different regulation and are also beyond the scope of this paper.

[19] See Gangjee 2006 for a discussion of the history behind the development of the first EU GI regulation and the different legal traditions from which PDOs and PGIs derive.

[20] For example, for Parma ham, the pigs must be “Large White, Landrance and Duroc breeds, born and raised by authorised breeding farms” in 10 Italian regions (http://www.prosciuttodiparma.com/en_UK/prosciutto/pigs). This designated area covers most of central and northern Italy – a substantially larger area than implied by the registered name Parma ham.

[21] See Gervais 2009 for a detailed discussion of the incorporation of the concept of reputation into the TRIPS definition of GIs and the implications for consistency with the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

and/or a limited part of the production takes place in a region, then GI labelling may in itself be false and misleading.

The EU regulation governing GIs has been amended twice, following its initial introduction in 1992. The 2006 amendments took on board the WTO criticism of the difficulty non-EU members had in applying for GI registration.[22] A major evaluation commenced in 2008, leading to a much expanded regulation in 2012.[23] The evaluation is of very poor quality,[24] largely because there are few systematic data about the use and impact of GIs. The data analysis for the evaluation was largely based on a small number of case studies and self-evaluations by interested parties (stakeholders). The only sound data are the number of registered names.

The analysis in this paper is also limited, for similar reasons. Data on the number of registered names are from the DOOR database.[25] They include all registered GIs, based on the year in which the application was filed. Applications filed by the end of 2012 and having "registered" status as at 6 July 2015 are counted.[26] Application year is the point at which the decision to seek registration of a GI is first recorded and is a more useful variable than registration year which is strongly affected by administrative factors. There was a fast-track process for the initial set of GIs, which largely transferred names from national registers to the EU one. The analysis is limited to registrations from EU member states, thus excluding 17 registrations.[27]

Of the resulting 1,188 registrations 75% (887) were owned by the five "southern" member states, Italy, France, Spain, Portugal and Greece. All these countries had a substantial number of initial fast-track registrations and all have been regularly adding names, especially in the period since 2002 (Figure 1).

The five "southern" countries started with large numbers of PDOs and moderate to large numbers of PGIs (Table 1). Italy now has a total of 162 PDOs and 104 PGIs, by fruit, vegetables and cereals (39%), cheeses (18%), oils (16%) and meat products (14%). France has the second largest number of registered GIs, now having 95 PDOs and 111 PGIs. The dominant product types are fresh meat (31%), cheeses (23%) and fruit, vegetables and cereals (22%). Spain has almost as many GIs as France, despite being a smaller economy. Spanish GIs largely parallel those of Italy, with vegetables and cereals (33%), oils (17%) and cheeses (16%) dominating. Portugal and Greece are much smaller economies yet still have large numbers of registered GIs, respectively 129 and 101. In Portugal dominant food types are

[22] There were a small number of other changes. The requirement to produce a list of generic names was dropped – effectively this had proved too hard (Gangjee 2007: 175). Labelling with EU logos for PDOs and PGIs was made compulsory. Non-geographic names became allowed for PGIs; and a one-year deadline for processing at the EU level was introduced. See Profeta et al. 2009 and London Economics, 2008: 15-16 for discussions of the differences between the two regulations.

[23] There was also a minor change to the regulation in 2008 when salt and cotton were added to the products covered by the GI system. Because of "economic urgency" this change was brought forward rather than remaining part of the broader evaluation (European Commission staff 2010: 18, footnote 31).

[24] The impact assessment provided to the European parliament in 2010, prior to the 2012 regulatory change, reports that the EU Impact Assessment Board considered that "the added value of the EU measures for geographical indications schemes was weak" (European Commission staff 2010: 6).

[25] http://ec.europa.eu/agriculture/quality/door/list.html. Data were downloaded on 6 July 2015. Unless otherwise specified data in all tables and figures are from this source.

[26] On this basis 29 registered GIs, filed in 2013 or later, were excluded. The normal registration process takes longer than this, hence these more recent applications are less representative of their cohorts. Further the GI Regulation was amended in 2012 and the latest year for which other required data, such as GDP, are available is 2012. Using a cut-off of application in 2012 or earlier provides a relatively clean dataset of applications filed under the 1992 Regulation or the marginally amended 2006 Regulation, and excludes very few cases.

[27] Ten from China and one each from Colombia, Vietnam, Thailand, India, Turkey, Andorra and Norway.

meat products (31%), fresh meat (24%) and fruit, vegetables and cereals (21%). Greece's dominant product types are similar to Italy and Spain: fruit, vegetables and cereals (42%), oils (29%) and cheeses (21%).

Figure 1 Cumulative registered GI names by country

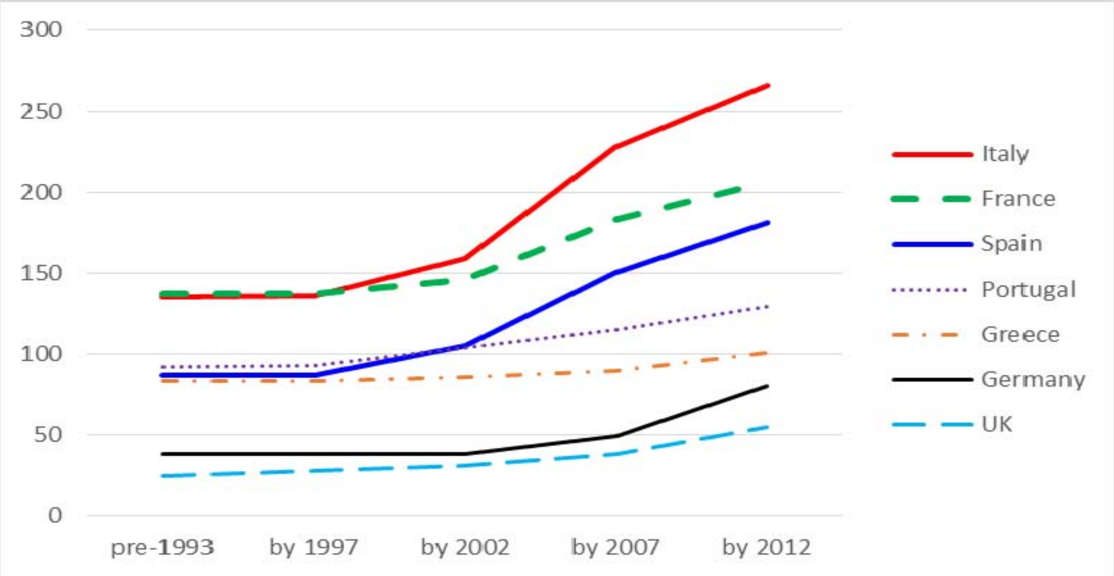

Table 1 Registered GIs over time: the 5 "southern" members

Year applied	Italy	France	Spain	Portugal	Greece
Protected Designations of Origin (PDOs)					
pre-1993	90	65	52	53	62
by end 1997	91	65	52	53	62
by end 2002	105	69	61	56	63
by end 2007	145	85	80	57	67
by end 2012	162	95	96	63	74
Protected Geographical Indications (PGIs)					
pre-1993	45	72	35	39	21
by end 1997	45	72	35	40	21
by end 2002	54	77	44	48	23
by end 2007	83	98	70	58	23
by end 2012	104	111	85	66	27

In their 2008 evaluation of the GI system London Economics noted the high correlation between the number of registered GIs and the size of a country's agricultural sector. Using data on agriculture value added for the period 2000-07,[28] they found a correlation coefficient of 0.81 for PDOs and 0.87 for PGIs. Investigating other variables which might explain the concentrated distribution of GI names, they used an indicator for food culture (which simply identified the 5 dominant countries, Italy, France, Spain, Portugal and Greece), the extent of government encouragement to register GI names and whether they were a new member state. These variables added little to the analysis, with overall explained variance (R^2) being just short of 30% (London Economics 2008: 96-106).

Looking beyond the five countries with a tradition of GI-style name privileges, four other countries own a reasonable proportion of registered names. Germany, which has a tradition of PGI privileges, owns some 7% of registered names. Some consider that the German Patent Office is unreasonable tough on GI registrations and compare the approach unfavourably with that of Italy (Profeta et al. 2009). The UK also owns a moderate number of registered names and two of the new members – Poland and the Czech Republic – are actively using the system. While the southern five own 75% of registered names, Germany, the UK, Poland and the Czech Republic between them own a further 17%. This leaves just 9% shared between the other 19 member States.[29]

As noted by London Economics, the countries dominating the GI system have large agricultural sectors. Italy, France and Spain together have 55% of GIs and 48% of agricultural value added. Other relevant variables to use as benchmarks for investigating the relative extent of use of the GI system are population and size of the total economy, as these reflect at least some aspects of consumer demand. As the data in Table 2 demonstrate, these variables do not fully explain GI use. They do, however, put the dominant use by France, Italy and Spain into perspective. The three right-hand columns of Table 2 provide summary indicators of whether a country has more or fewer GIs than would be expected simply on the basis of population, GDP or agricultural valued shares.

On an agricultural value added basis, the proportion of GIs owned by France is what one would expect were GI ownership based solely on agricultural value added. Similarly Spanish GI ownership is only 10% higher than expected. But Italian GI ownership is 50% greater than would be expected on the basis of the size of its agriculture sector, and 90% higher than expected based on population or GDP share (Table 2).

The two countries that are truly over represented in terms of GI ownership are Portugal and Greece. These are rather small economies: in combination contributing around 3% of EU GDP and just over 4% of EU population. The agricultural sector is more dominant in Greece – in relative terms being nearly 4% of the EU total compared to a GDP share of 1.6% – but not in Portugal. The proportion of GIs owned by Greece is more than twice what one would expect based on the size of the agricultural sector, more than 5 times as large with respect to GDP share and nearly 4 times as large based on population. Portugal's over-representation in terms of GI share is even more striking – between five and seven times larger than expected.

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[28] They used Eurostat data for Nace sections A and B: Agriculture, hunting, forestry and fishing (London Economics 2008: 101).

[29] Estonia and Malta had no applications for GI registrations as at early July 2015. Latvia and Croatia each have one name registered in 2015 and thus not included in the analysis here. Belgium and Romania each have only 1 registered GI amd Cyprus and Bulgaria each have only two.

Table 2 Percentage shares of GIs, GDP, population and agricultural value added

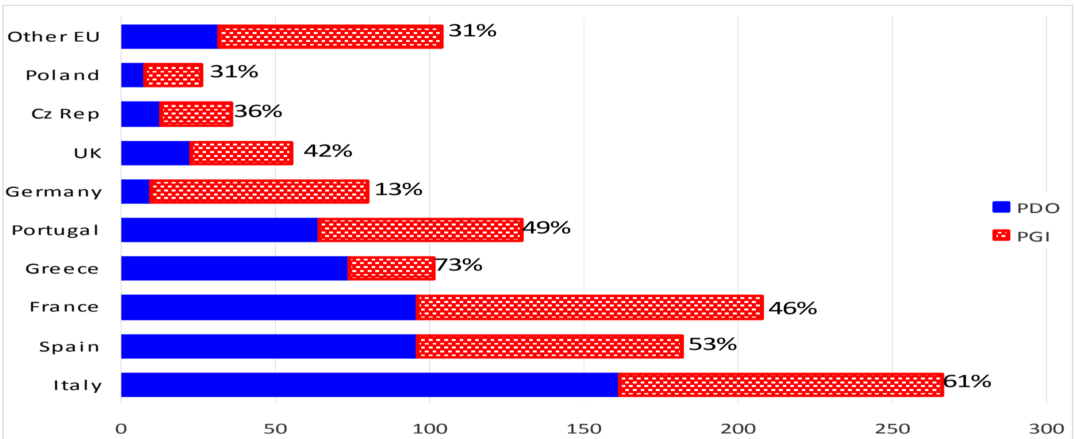
	Share of EU total (percent)				Over-under representation of GIs vis-à-vis indicator		
	GIs by 2012	Population, 2012	GDP (PPP) 2012	Agricultural value added, 2000-07	pop	GDP	Ag VA
Germany	6.8%	16.0%	20.0%	10.6%	0.4	0.3	0.6
France	18.1%	13.1%	14.0%	18.3%	1.4	1.3	1.0
UK	4.6%	12.7%	13.4%	7.6%	0.4	0.3	0.6
Italy	22.3%	11.9%	11.9%	14.9%	1.9	1.9	1.5
Spain	14.9%	9.3%	8.6%	13.3%	1.6	1.7	1.1
Poland	2.2%	7.7%	5.0%	4.7%	0.3	0.4	0.5
Greece	8.5%	2.2%	1.6%	3.9%	3.9	5.3	2.2
Portugal	11.0%	2.1%	1.5%	2.0%	5.2	7.1	5.6
Czech Rep	2.4%	2.1%	1.7%	1.3%	1.2	1.4	1.9

Sources: GI data from DOORS, GDP and population figures from http://knoema.com ; agricultural value added figures (for 2000-07 in €millions) from London Economics, 2008: 52.

In contrast Germany, the UK and Poland are all substantially under-represented in terms of the share of registered names. Together these three countries produce nearly 40% of the EU's GDP, have over 26% of its population and 23% of agricultural value added. But, lacking the southern "food culture" attitude to registering GI names, they have under 14% of registered GI names. Poland, which joined the EU in May 2004, started using the GI system straight away. It now has eight registered PDOs and 18 PGIs. But its share of GIs remains substantially below what one would predict on the basis of overall economic indicators.

There are distinct national preferences between the two types of GI (Figure 2), with two countries showing a marked preference for PDOs (Greece, where 73% of GIs are PDOs and Italy where 61% are PDOs). Spain, France and Portugal fall into a central band with PDO percentages close to 50%. In marked contrast only 13% of German GIs are PDOs, and only around one-third of GIs from northern members or new member states are PDOs. These differences, especially the dominance of PGIs in Germany, reflect historic differences in legal systems and business culture.

Figure 2: National patterns of GI use: PDO vs PGI



Source: Calculated from data downloaded from DOORS. Figures at end of bars are PDO%.

Overall the most important food types for which there are registered European GIs are fruit, vegetables and cereals (28%), cheeses (19%), meat products and fresh meat (24% combined) and oils (10%). Other product classes together form 19% of registered GIs (Figure 3). These smaller classes are often more specific than the category name suggests. For example, almost all products registered under "other animal products" are honeys. As would be expected with a program based on agricultural products, there are some distinct national patterns to the types of products covered by registered GIs (Figure 4).

Figure 3 Types of product covered by GIs

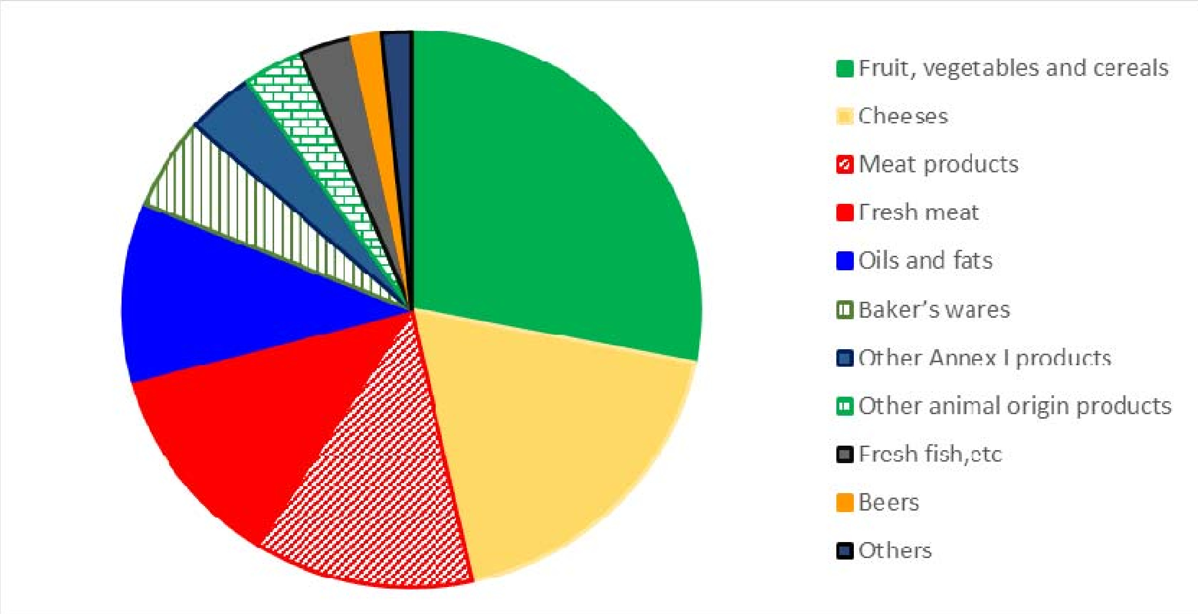
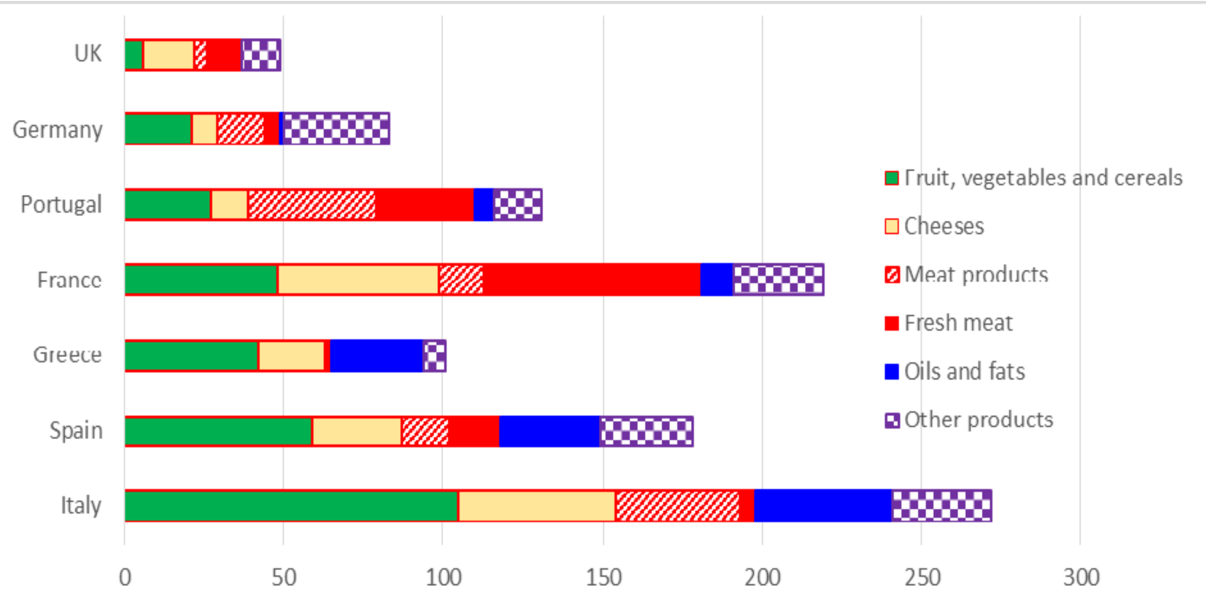


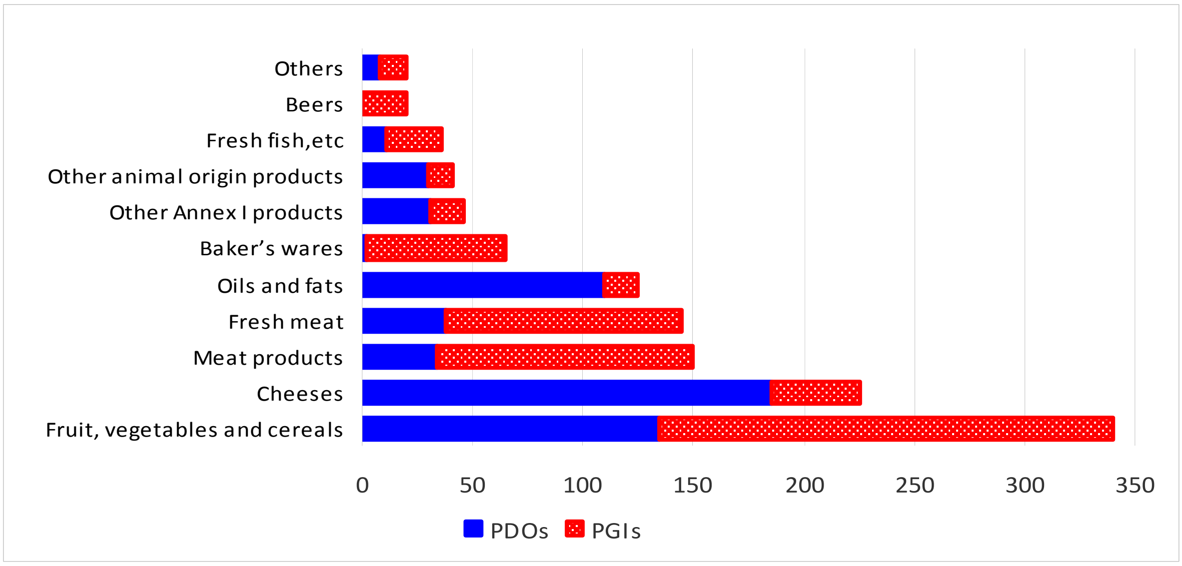
Figure 4 National differences in product type of registered GIs



Oils – almost exclusively olive oils – are most important in the three mediterranean countries, Italy Greece and Spain (Figure 4). All countries have GI cheeses, but France and Italy dominate, followed by Spain and Greece. Meat and meat products are important in all the main GI countries except Greece. Germany's higher proportion in the "other" category largely represents baker's products and beers.

While overall 48% of registered GIs are PDOs, there is clear variation in the type of GI chosen for some particular product groups (Figure 5). For the largest product group – fruit vegetables and cereals – less than 40% of registrations are for PDOs. For cheeses – nearly one-fifth of total GI registrations and the class where GI policy has caused the greatest controversy – over four-fifths of registrations are for PDOs. The other classes where PDOs are the dominant type of registration are oils and fats, other animal products (mainly honeys) the truly miscellaneous "other Annex I products" class, which includes vinegars, ciders, salt and spices.

Figure 5 Products by type of GI



What these data do not tell us is how important GI products are and to whom. There are few data on the number of producers involved in any registered GI.[30] There are few data on the value of output, and often output values are given without any context. Thus we may be told how many millions of PDO output is sold, but not what proportion that forms of total agricultural output or agricultural and food processing output. Indeed, as noted above (p.8), such data are available only for France and Spain. But even here we do not get a good denominator for the French data – while GI products are 6.3% of total French agricultural output, many GI products are processed and we do not know what percentage they are of total french output from agriculture and food processing. For Spain, this figure is just one percent (London Economics, 2008: 107-109).

While much of the discussion on GIs implies that most GI producers are small, it is clear that in some product lines very large producers play an important role. Rangnekar, for example, points out that in a case study of Tuscan extra virgin olive oil less than two percent of certified production was by small producers (Rangnekar 2004: 5).

One of the major recommendations by London Economics, in evaluating the program in 2008, was to collect and make publicly available proper data for evaluating the impact of the

[30] London Economics (2008: 107) provides data for total producers involved in all registered names for only six countries, and some of these data are partial. The *proportion* of all producers/processors involved in GI products is available only for France and Italy.

program. As yet there appears to have been no action to implement this recommendation. Key data required are the number (and percentage) of producers involved wholly or partly in GI production, and the value of GI output (not only in absolute terms but also as a proportion of the relevant output base). Even more important are data on the impact of GIs on profitability, and identification of the conditions under which GIs do or do not act as a catalyst for broader regional development.

The European Union GI experience: insights from case law

All IP policies have built-in anti-competitive effects, and a principal concern in policy design is, or should be, to balance the goals of the IP policy with the public interest in maximising competition. The stated goals of EU GI policy are twofold: reducing consumer confusion; and contributing to farmer and rural prosperity.

As the EU GI system has now been in place for some 20+ years, disputes over the underlying policy have occurred and these provide some insights into tensions between GI and other public policies, particularly that fundamental driver of the EU's existence – free trade and competition. A structured search of the Europa database[31] and of Westlaw identified a number of cases, as did a review of the legal literature. The OECD (2000) undertook a review of cases where there was some consideration of GI policy from a competition perspective.

From the viewpoint of competition policy, economic theory raises particular concerns about collusion between producers and barriers preventing new market entrants. Disparity in size and power between producers and consumers can also have anti-competitive effects. The OECD (2000: 16) identified monopolistic cartels, entry restrictions and over-regulation as potential problems from a competition viewpoint.

The OECD interprets EU GI inspection rules as pro-competitive. This is questionable. It seems probable that inspection is merely about compliance with producer-drafted regulations not whether there are anti-competitive effects. In the GI context, producers association set the production rules for the proposed PDO or PGI. There appears to be no process of oversight or scrutiny, certainly none at the EU level. If there is competitive scrutiny at the national level – before applications are forwarded to Brussels – I have not found it. The example of Parma ham provides useful insights into this aspect of GI policy.

Producers also set the regional boundaries for a PDO or PGI, and again this has the potential to impact on competition – these boundaries control which producers have the right to use the name. The UK Melton Mowbray pork pie case shows the lack of competition considerations in how regional boundaries are set.

A third area where GI policy can impact negatively on competition is the conflict between a newly registered GI name and previously granted trademarks which use the name. As noted above, the privilege granted by a GI is both strong and broad, and can over-ride trademark names. This contrasts with Community Trade Mark (CTM) policy where generic or common use of a name in any part of the EU is grounds for refusal (Gangjee 2007: 178). As the feta case shows, if a name is upheld as not generic, it can over-ride pre-existing producer rights, effectively leading to expropriation.

These three issues are intertwined as, in all cases, the issue devolves to one of who may use a particular name under what circumstances.

[31] For the terms "geographical indication*" and 2081 or 510 (these are 1992 and 2006 regulation numbers).

Production rules: the case of prosciutto di Parma

The *Consorzio Del Prosciutto Di Parma* (the Consortium) has challenged at least two UK supermarkets over the final stages in delivery of Parma ham to the market. In 1989 the Consortium sued British retailer Marks & Spencer for passing off as they were buying whole Parma hams and then slicing and packaging them in the UK.[32] There was no dispute that the ham was from Parma – merely whether it could be sold as “Parma ham”. The UK court of appeal held that the Consortium had no rights under English law. Then in 1992 the new EU GI regulation came into effect and the Consortium sued a different UK supermarket, ASDA, for a similar practice.[33] In this new context, the outcome of the legal action was very different.

The case was determined by the European Court of Justice (ECJ).[34] ASDA argued that slicing and packaging was a trivial stage in production with no effect on the authenticity of the product. They thus argued that the Consortium’s claim amounted to a restrictive trade practice and were a quantitative restriction of exports as set out in Article 29 EC (Rangnekar 2004: 25-26). The Consortium argued that while the impact of PDO specifications might be equivalent to quantitative restrictions, this was justified in order to preserve the reputation of Parma ham. The Court agreed with the Consortium, noting that export restrictions based on protecting industrial and commercial property are justified. The court did not assess whether slicing and packaging were legitimate parts of the registered process.

This is a major change in EU law since the *Sekt* case in 1975,[35] when Germany’s restriction of the names Sekt and Weinbrand to German sparkling wine and German brandy was held to contravene Articles 28 and 30 of the EC Treaty. Gangjee reports that "the court suggested as obiter that *reputation-based indications of source did not fall within the industrial property exception*" (Gangjee 2006: 305, emphasis added). This perspective was over-turned in 1992 in the *Exportur* decision,[36] when the court found against French manufacturers who were using the Spanish names Alicante and Jijona for particular styles of confectionery.[37] Because they were reputation-based products linked to a place of origin, the court held that use of these names fell within the safe-harbour provisions of Article 36 (Gangjee 2006).

From an economic perspective, these decisions are challenging, particularly as the rationale for GIs is debateable for the “weak” form and unsustainable for the “strong” form. In the case of Parma ham, it is hard to see why ASDA's view – that these are trivial stages of production – does not hold weight from a competition perspective. The ECJ largely looks at formalities issues, and in this case the formality was that as these were specified in the PDO registration they fell under EU safe harbour provisions. But this leaves a major competition gap in the system – when regulations are proposed for a PDO, there is no process of scrutiny as to whether they include unnecessary anti-competitive elements. In this case the Consortium has both been allowed to define an exceedingly large area from which to source its pigs, and an extension down the production chain which can have a major cost impact.

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[32] *Consorzio di Parma v. Marks & Spencer PLC and others*, Court of Appeal, Chancery Division, November 1990. R.P.C. (1991) 108 (15): 351-384. doi: 10.1093/rpc/1991rpc351.

[33] *Consorzio Del Prosciutto Di Parma v Asda Stores Ltd* [2001] UKHL 7.

[34] *Consorzio del Prosciutto di Parma v Asda Stores Ltd* (C-108/01) [2003] 2 C.M.L.R. 21.

[35] Case 12/74, ‘Sekt-Weinbrand’ judgement of 20 December 1975, C-12/74, ECR 181.

[36] *Exportur SA v LOR SA and Confiserie du Tech* [1992] E.C.R. I-5529.

[37] This contrasts with the 1967 case where Spanish sherry producers failed in an attempt to prevent the words “British sherry” on product labels. *Vine Products Ltd v Mackenzie* [1967] F.S.R. 402. Again this case was heard prior to the EU GI regulation.

Boundary rules: Melton Mowbray pork pies

The British case of Melton Mowbray pork pies raises the issue of how designated regional boundaries are drawn. The story of this case is discussed in some detail elsewhere, and makes fascinating reading.

Melton Mowbray is a small English town and a particular style of pork pie has long been known as a Melton Mowbray pork pie. A group of five producers fairly broadly scattered around this town formed a producers association and applied for a PGI. They specified a large area of central England, though this excluded those parts of the Midlands where another producer – having some 28% of the market – was located. Naturally this excluded producer, Northern Foods, objected to the registration. The UK High Court rejected Northern Foods' objection on the grounds that "European case law indicates that when considering the grant of a defined geographical area, the size of the area is immaterial" (Evans and Blakeney 2006: 588).[38] Indeed, if one reviews the EU GI regulations there are no criteria set out for drawing such regional boundaries – it is simply up to the producers association to define these.

Writing before the ECJ considered the matter, Gangjee posited the question as to whether, "[a]s one moves away from "natural" features, the argument that GIs are a commercially or politically expedient monopoly in a term, with arbitrary production boundaries, becomes increasingly difficult to ignore" (Gangjee 2006: 300). The referral to the ECJ was of a highly specific question as to whether the designated region met the requirements of Article 2(2)(b) of 2081/92 and what criteria should be applied in delimiting the defined geographical area.[39] In the event the referral was withdrawn 11 months after it was made,[40] and the matter was never heard by the ECJ.

The normal response of the ECJ to questions on GI policy content is to refer the matter back to the national government. For example, the German courts referred an issue about the origin of raw materials where it felt that the proportion of product originating from the defined region was insufficient to warrant a PGI.[41] The German court was of the view that this low proportion might not be sufficient for a valid PGI registration. The ECJ, however, simply

[38] *Northern Foods Plc v DEFRA, Melton Mowbray Pork Pie Association* [2005] EWHC 2971

[39] Case C-169/06. The question referred was "Where the specification in an application for a protected geographical indication (PGI) in respect of "Melton Mowbray Pork Pies" made pursuant to Council Regulation 2081/92/EEC on the protection of geographical indications and designations of origin for agricultural products and foodstuffs ("the Regulation") defines the relevant geographical area pursuant to Article 4(2)(c) of the Regulation as the town of Melton Mowbray and its surrounding region bounded as follows:
- to the North by the A52 from the M1 and the A1 and including the city of Nottingham;
- to the East by the A1 from the A52 to the A45 and including the towns of Grantham and Stamford;
- to the West by the M1 from the A52 and the A45; and
- to the South by the A45 from the M1 and the A1 and including the town of Northampton

are the requirements of Article 2(2)(b) of the Regulation capable of being satisfied insofar as the proposed PGI would apply to products produced and/or processed and/or prepared in places other than that whose name appears in the PGI; if so, what criteria must be applied in delimiting the defined geographical area referred to in Articles 2(2)(b) and 4(2)(c) of the Regulation?" (http://curia.europa.eu/juris/document/document.jsf?text=Melton%2BMowbray&docid=56786&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=63022#ctx1).

[40] http://curia.europa.eu/juris/document/document.jsf?text=Melton%2BMowbray&docid=63001&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=63022#ctx1.

[41] C-269/99 - *Carl Kühne GmbH & Co. KG* and others *v. Jütro Konservenfabrik GmbH & Co. KG.* Other cases include *Severi v Regione Emilia-Romagna* (C-446/07) ECJ (Fourth Chamber), 10 September 2009, where the use of words in a label were referred back to the national government and *Budejovicky Budvar Narodni Podnik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (T-225/06) Court of First Instance (First Chamber), 16 December 2008, stating that national courts are the sole decision-makers with regard to the validity of a PDO.

looked at the processes the Commission followed in registering the PGI, thus considering only formalities. At no point did it address the question referred to it – what content was required for a PGI. This matter was left to member states. Indeed the EU directive contains mostly process requirements and has not economic criteria for assessing the content of a proposed PDO or PGI.

The losing party in the Melton Mowbray case, Northern Foods, has now built a new production facility within the designated region (London Economics, 2008: 81-82). The main losers from this decision may well be previous employees in the towns of Market Drayton and Trowbridge. On its face, the boundary-drawing exercise appears to have been specifically designed simply to exclude one major competitor from the market. The EU regulations do not require any check for such actions, leaving this matter entirely to member states. But as this case indicates, the UK appears to have no checks on potential anti-competitive impacts of proposed GIs.

Generic names: feta

The best-known and most contentious GI case determined by the ECJ is that of feta. In fact the ECJ considered this case twice. Initially the ECJ determined that the Commission had not properly considered all the factors that were relevant to determining whether feta was or was not a generic name, and as a result feta was removed from the GI register.[42] In its second decision, the ECJ determined that feta not a generic name, and it was re-listed as a PDO on the EU register.[43] Long-standing producers in at least four other European countries had to transition out of using the name feta on their equivalent product.

The initial EU GI regulation (2081/92, Article 3(3)) required the EU to publish a non-exhaustive list of generic names. While the Commission tried to produce such a list, it proved impossible to gain agreement. It was so contentious that the requirement for such a list was dropped from the 2006 regulations (Profeta et al. 2009: 633). But it is interesting to note that the majority of member states proposed the name feta during the process of attempting to produce a list of generic names (Gangjee 2007: 175). This does not appear to have been any part of the evidence considered by the ECJ in its second feta decision.

The second ECJ decision was based partly on the fact that per capita feta consumption was highest in Greece and that therefore Greek views on whether feta was a generic name ought to prevail. But in fact Greece forms only 2.2% of the EU population, so it is possible that the absolute consumption of feta outside Greece may have been greater than the absolute consumption in Greece. If, for example Greek per capita consumption is nearly 17 kg of feta per person per year,[44] and the five most populous countries in Europe have per capita annual consumption of 750 grams (i.e. under 5% of Greek consumption), then annual consumption of feta in these five countries is 237,066,349 kg pa, or 56% of total EU consumption. Such a consumption distribution would indicate that greater weight should be given to the views of these other member states.[45]

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[42] *Kingdom of Denmark, Federal Republic of Germany and French Republic v Commission of the European Communities*(Joined Cases C-289/96, C-293/96 and C-299/96) [1999] E.C.R. I-1541.

[43] *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities*(Joined Cases C-465/02 and C-466/02) AGO, delivered on May 10, 2005.

[44] Assuming total Greek cheese production is entirely feta and entirely consumed in Greece. The 17 kg estimate is based on total Greek cheese production figures from Eurostat (http://ec.europa.eu/eurostat/statistics-explained/index.php/Milk_and_milk_product_statistics#Milk_products) divided by population data from http://knoema.com. 17 kg a year equates to 330 grams a week.

[45] Unfortunately the data and input materials considered by the ECJ are impossible to find on the InfoCuria and ERR-Lex databases.

This case demonstrates a clear difference in EU policy between trademarks and GIs. The EU regulation on a community-wide trade mark was only adopted in 1988 – just four years before the first GI regulation came into force. If any country objects to the registration of a CTM, then it cannot be granted. Generic or common use of a name is one ground for a country to object to CTM registration (Gangjee 2007: 178). But this protection of prior business investment has been omitted from the GI program. Had such an impact occurred under the North American Free Trade Agreement, there would have been strong grounds for challenging the new policy on the grounds of investor expropriation using Investor-State Dispute Resolution mechanisms.

Gangjee notes that following this second ECJ case the GI regulation was amended. In 2081/1992, Article 3 sets out three factors that must be considered in establishing whether a name has become generic: the situation in the country proposing the GI name; the situation in other member states; and relevant national/Community law. The 2006 regulation merges the first two of these factors, to "the existing situation in the Member States and in areas of consumption" (510/2006 Article 3(1)(a)). This would appear to debar countries where the product is not consumed from intervening in the case. It seems unlikely that there would be production in countries where there is no domestic consumption. But otherwise the intent of this minor change in wording is unclear. Would the feta case have unfolded differently if it had been held under the 510/2006 regulation?

What does competition policy mean?

The consequence of regulating geographical indications as a form of intellectual property – although the program is clearly designed as agricultural policy – is that it then falls into one of the exceptions to the over-arching principles of free trade and open competition that are the *raison d'être* of the European Union. Like much national legislation, the EU Treaty exempts the various forms of "IP" from laws designed to prevent anti-competitive practices. Such exemptions need re-consideration in the face of declining standards for grant of patents, increasing breadth and scope of copyrights, and the questionable IP rationale of GIs.

The only previous analysis of GIs from a competition policy standpoint is the 2000 OECD study. This report notes that, at that time, "competition authorities have not often intervened to deal with practices in PDO chains, and then have taken a case-by-case approach based on careful study of the market in question" (OECD 2000: 15). They note that one reason is that many GI products are produced on a small scale and hold only a very small market share. But they do identify five cases, four of which involved output controls and one price ceilings. Such practices were generally found to breach competition policy laws.

In its 2008 evaluation, the EU side-stepped the issue of the potential anti-competitive effect of GIs. The Explanatory Memorandum provided to the European Parliament in the context of what became the revised 2012 regulation simply stated:

> "The policy also is in line with the priorities for the European Union … in particular the aims of promoting a more competitive economy, as quality policy is one of the flagships of EU agriculture's competitiveness" (European Commision 2010: 4).

The line of this "logic" starts by positing that food quality policy is part of agricultural competitiveness policy. Different elements of food quality policy may, if combined with effective production and marketing processes, assist in competitiveness but there is not an automatic identity between food quality and agricultural competitiveness. The second element of this "logic" is that, as a consequence of the first presumption, GI policy contributes to promoting a more competitive European economy.

But there are no safeguards within EU GI policy to ensure that the impact of any proposed GI will minimise any anti-competitive effects. It therefore cannot simply be assumed that the GI program promotes competitiveness. Such logic abounds in the IP field, but has little place in evidence-based policy. It should be noted that the EU's own Impact Assessment Board considered that the added value of the GI schemes was weak (European Commission staff 2010: 6). That is, no substantial evidence has yet been produced as to whether the GI program is effective.

Indeed the staff paper accompanying the Explanatory Memorandum considers a number of options for reform, some of which are dismissed because one group or another objects. The most important option – one that would ease trade negotiations – is that of using Community Trade Marks. A down-side of this option is noted as being that CTMs would allow competitors to use the registered name "provided he [sic] uses them in accordance with honest practices in industrial or commercial matters" (European Commission staff 2010: 33). Other important reasons for dismissing this option include complexity (i.e. TM registration would be needed in each country), cost (of TM registration and enforcing such trademarks) and the lower degree of privilege. Essentially the lower degree of privilege would mean that potentially infringing practices would not actually infringe if consumers were not mislead and the indication was used honestly.

The EU approach to implementing GIs follows the best traditions of IP policy. There are no clearly stated economic criteria and the specified processes are all formalities and procedural matters. No economic criteria brought to bear on key issues such as how regions are defined, what proportion of a production chain is designated, or how the proposed GI will impact on competitors. There is no attempt to minimise potential anti-competitive effects.

Most relevant evidence about the impact of GIs is from case studies. These suggest that their impact is highly variable. Other evidence often does not address the main point. For example the 2010 Explanatory Memorandum presented data on the number of registered names and estimates of total PDO/PGI output (€14.5 billion in 2008 wholesale prices) to demonstrate the importance of the program (European Commision 2010: 12). The memorandum notes that this is slightly higher than organic output at €12 billion. But at no point are these data presented as a proportion of total agricultural and food processing output. The importance of the GI program is thus not properly addressed. Is it 1% of output, 2%, 3%? Based on the available data for France and Spain, the proportion of agricultural and food processing output from GIs is unlikely to be any higher than this.[46]

While the specific legal cases considered above show clearly that current EU GI policy can have anti-competitive effects, the costs imposed on competing producers are marketing and re-labelling costs. These can be substantial, but they are also one-off, and systems for compensation could readily be designed and added to the EU policy. From a consumer perspective there are many alternative products, and if the price of a particular brie is too high, there are many alternative bries, or other cheeses, on the market. As most registered GI names are unrecognised outside their region of origin, unwitting future trespass is unlikely given that geographic names are generally not allowed for trademarks.[47] Thus unlike other cases of anti-competitive conduct there is little negative impact on consumers but the possibility of a substantial negative impact on a small number of producers. These could be

[46] The suggested maximum of 3% adjusts for the fact that the denominator for French data in London Economics, 2008 excludes output from food processing industries.

[47] Though there are exceptions. More importantly the EU GI regulations now allow the use of non-geographic names for both PDOs and PGIs.

minimised by building into the registration process procedures to identify and exclude unnecessary anti-competitive impacts.

In Australia, for example, the processes for approving certification marks ensures that potential anti-competitive effects are identified and rejected. The Australian Competition and Consumer Commission (ACCC) is required to examine the rules for a proposed certification mark "to ensure they are not to the detriment of the public, or likely to raise any concerns relating to competition, unconscionable conduct, unfair practices, product safety and/or product information."[48] Only after an application has passed ACCC scrutiny can it be granted an Australian certification mark.

The European Union GI agenda and trade negotiations

A major demand by the EU in trade negotiations is a substantial extension in GI privileges beyond the compromise agreement reached in TRIPS. The EU demand centres on a compulsory register with opt-out provisions, enforcement by government authorities and "strong form" (TRIPS Article 23) privileges for all GIs. The net effect of these demands would be to claw back names that have become generic in some countries. Strong form privileges prevent producers from using qualifiers with GI names to indicate, for example, "feta-style cheese produced in Denmark". The EU trade demand does not, however, include the prohibition on evocation which is a feature of the European system.

The EU keeps expanding the number of registered GIs.[49] Many of the names now registered are not widely known outside their country of origin and certainly not outside Europe (Josling 2006). Only 20% of GI products are traded across national boundaries (European Commission 2012: 3) and the proportion traded outside the EU is smaller. But this does not mean that GIs are not important in certain regions and to certain producers. One of the underlying themes behind GIs is agri-tourism, where primary producers, hoteliers and restaurateurs combine to cross-sell each other's products, creating experiences which are hard to emulate. GIs which are not well recognised outside their country or region of origin are unlikely to create many anti-competitive effects.

The small number of names which have become generic in some parts of the world create the most tension in GI negotiations. In 2003 the EU tabled a demand for global protection for 41 key GI names. This list contains 13 cheeses, four meat products, one spice and one confectionary product (Table 3). Of the 19 names on the list 11 are Italian. Some of the listed names are very general descriptors – for example feta – and indeed feta has been one of the most contentious GI names. Others are highly specific – for example Parmigiano Reggiano. A footnote to the list indicates that translations such as parmesan, parmesano are also covered by the demand. Whether this extension would also apply to words such as prosciutto is unclear. Three specific prosciutto products are listed, but surely the word prosciutto (Italian for ham) remains a general descriptor, open of all to use? Similarly mozzarella is not listed in its generic variant, though Mozzarella di Bufala Campana is.[50]

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[48] https://www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks

[49] Indeed even before any steps have been taken to implement the EU-Korea Free Trade Agreement, the EU has tabled additional names for GI protection. Korea has indicated its intention to follow suit (Moir 2015). For information on European government incentives to register GIs see London Economics, 2008: 118-119.

[50] Mozzarella was listed as a TSG in 1998. This means that mozzarella cheese cannot be labelled as such and sold in Europe unless it follows the TSG recipe (production process). Four other cheeses (from Sweden, the Netherlands and Slovakia) are also registered TSGs.

The GI conflict with New World countries arises because, over several centuries, Europeans have migrated to these countries, bringing their cultural traditions with them. By producing familiar products in their new homes, they have introduced a range of wines, cheeses and meats into these large markets. European regional names for wines became widespread in these new markets until the series of EU wine agreements saw their use exchanged for greater access to the European wine market. But for foodstuffs, particularly cheeses and meat products, there is substantial disagreement. The disagreement rests fundamentally on two aspects of the EU demand: strong-form privileges and protection against any evocation. These two types of producer privilege are new to countries whose name protection systems are based on trademarks. Because consumer confusion does not apply, these demands are seen as just another producer subsidy. The clear understanding that GI policy is a fundamental part of EU agricultural policy, with its history of subsidies, adds to this perception.

Table 3 Priority GI names for EU trade negotiations

Cheeses	Meat products
Asiago (Italy) Comté (France) Feta (Greece) Fontina (Italy) Gorgonzola (Italy) Grana Padano (Italy)	Mortadella Bologna (Italy) Prosciutto di Parma (Italy) Prosciutto di San Daniele (Italy) Prosciutto Toscano (Italy)
Manchego (Spain)	**Other products**
Mozzarella di Bufala Campana (Italy) Parmigiano Reggiano (Italy) Pecorino Romano (Italy) Queijo São Jorge (Portugal) Reblochon (France) Roquefort (France)	Azafrán de la Mancha (Saffron, Spain) Jijona y Turrón de Alicante (Nougat, Spain)

Source: European Commission, 2003, *WTO talks: EU steps up bid for better protection of regional quality products*, http://europa.eu/rapid/press-release_IP-03-1178_en.htm (4 August 2015).

As noted above human factors can play the major role in defining a PDO and raw materials need not come from the designated region. These facts emphasise to New World countries that the *terroir* argument is weaker than the cultural heritage argument. If GIs protect cultural heritage rather than *terroir*, why should the descendants of European emigrants be excluded? Would a TSG approach not be preferable? Under the EU's TSG policy the traditional production process (recipe) is protected, so that all goods sold in the EU under that name (e.g. mozzarella) must be made to the registered recipe. But they may be made anywhere.

The EU has been pressing its GI demands in a series of "Global Europe" treaties, mostly with small economies. Similarly the USA has pushed its alternative trademark approach in its preferential trade agreements, again mostly with small economies. Korea has preferential agreements with both the EU and the USA. Its GI system is trademark based, but its EU treaty includes lists of 60 EU foodstuffs and 63 Korean foodstuffs to receive protection in the partner country (Moir 2015). The 63 Korean names do not yet appear in the DOORS database.

The EU's most recently agreed treaty is the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA). The EU has claimed break-through victories in relation to two aspects of its GI agenda. Most importantly "Canada has accepted that all types of food products proposed by the EU will be protected at a comparable level to that offered by EU law." This means they will have TRIPS Article 23 level privileges, including prevention of "the misleading use of flags and other symbols evoking a protected EU GI and the country where that GI product comes from." As the treaty also allows for the co-existence of GIs and prior trademarks, it is unclear whether there are exceptions that modify the EU-comparable level of privileges. The EU also claims that GI "rights holders [will] have recourse to an administrative process to uphold GI rights rather than only through the domestic court system."[51] Whether this is an additional process that rights-holders can initiate, or a process whereby enforcement agencies take action on a rights-holder's behalf is as yet unclear.

But Canada retained perpetual use rights for makers of certain cheeses and meat products. Existing users of the names feta, asiago, gorgonzola, fontina and munster will be able to use these names as at present, as will their successors and assignees (CETA Article 7.6). New producers will also be able to use these names, but will have to add modifiers such as "-like" or "-style". Producers of Nürnberger Bratwürste, Jambon de Bayonne and Beaufort meat products are also allowed to continue using these names, provided they were using these names before 18 October 2009. New GI names will not be registered if they are the same as existing trademarks. As yet, we do not know whether the European Parliament will agree to these outcomes. Unlike Canada, the EU did not include member states in the negotiations.

Other "Global Europe" treaties show that the EU has settled for more modest outcomes, though its CETA successes suggest it might now have a higher compromise point. Certainly CETA suggests that grandfathering provisions can be agreed for key GIs. But a critical issue for other New World countries who are considering preferential agreements with the EU will be the exact implications of Canada's agreement to "strong-form" privileges for foodstuffs.

Options to reconcile GI differences

Strong-form GI privileges remain a substantial impediment to global agreement. The consumer confusion argument provides a rationale only for weak-form GI privileges – similar to those granted for trademarks, except that geographical names are specifically allowed. This makes it hard to sell such provisions as "free trade" benefits to consumers. The rationale based on the protection of producer reputation is remains unconvincing as a justification for strong-form privileges. Further as actual EU GI policy allows substantial exceptions to the *terroir* rationale, one simply needs to recognise that the GI privileges written into TRIPS were simply a poor bargaining outcome.

Global strong-form privileges would have little practical effect for most EU-registered GI names (as they are little traded outside the EU). But there would also be little benefit to the EU in gaining strong-form privileges just for such unknown names. Unless, that is, the EU decides to frame this as a temporary win on the route to yet further negotiations. In contrast, should the EU be willing to settle for weak-form privileges, there would be little disagreement over a global GI agenda. Indeed EU agreement to weak form privileges for all foodstuffs, except for a tightly limited number of names where the link to *terroir* is tight, might be traded for an agreement to a form of global register.

It is unlikely that other nations will agree to the type of compulsory register proposed by the EU (van Caenegem 2004), This would apply automatically to all WTO members, and WTO members would have only a limited period to object to specific names. On the other hand producers see advantages to a clear database of protected names, and a compulsory register which simply listed names registered in each WTO member nation, together with the level of

[51] All quotations in this paragraph are from European Union 2014: 14-15.

attached privileges is unexceptional. Such a proposal could see New World nations withdraw their objects to any form of compulsory register.

The core of the objection to strong-form privileges could also be reduced by limiting EU GI privileges to those of Community Trade Marks. If EU GI policy had been placed on this basis, the feta dispute would never have arisen, as the majority of member states consider feta to be a generic name.[52] The EU has to date been unwilling to consider such an option, and indeed in the rather poor quality evaluation of their GI policy in 2008, dismissed this option on a range of political grounds.[53] An interesting substantive comment in this rejection was that global TM registration would be too costly. This could be subjected to empirical evaluation. As only a small number of GI products are traded globally, it would be interesting to investigate the extent to which these involve large or small suppliers, and the extent to which these producers have already taken out trademark protection in the countries to which they export. Perhaps much of the disagreement has little real business impact?

As regards competition concerns in GI policy, these need to be addressed for both weak- and strong-form privileges. Australia takes a trademark approach to weak-form GIs, using certification marks. Proposed certification rules must be scrutinised by the national competition authority, and may not be approved if they have the intended effect of excluding a particular competitor (van Caenegem et al. 2015: 12). This ensures that certification marks do not have anti-competitive effects. This type of procedure could be built into EU-style GI processes, and indeed there is some indication that at least one country actively considers the content of applications before forwarding these to Brussels.[54] Adoption of such modifications into the strong-form of GI privileges might reduce resistance to this demand. So too would clear statements that evocations were not among the granted privileges and that pre-existing trademark owners would maintain rights such as those agreed in CETA for feta, asiago, gorgonzola, fontina and munster.

New World countries might benefit from a less absolutist rejection of GIs. As van Caenegem and colleagues (2015) have suggested a well-designed GI system which minimises overhead costs and carefully balances granted privileges might be of use for some agricultural producers, depending on the products concerned and their location. Development of such alternative systems might give rise to new options to bridge the gap between the EU and New World positions on GIs.

The EU, in its current consideration of extending the GI system to non-agricultural products, might usefully focus on the two areas of major concern: potential anti-competitive effects and the breadth and strength of GI privileges. GI privileges for non-agricultural products that included absolute prohibition of name use, even with modifiers, might raise substantial marketing costs for existing producers. Similarly anti-evocation privileges extended over a wide array of products might increase rather than reduce consumer information.

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[52] Imputed from the fact that most member states proposed feta when the Commission was trying to develop a list of generic names.

[53] One reason the CTM option was not properly presented to the European Parliament was its inconsistency with the EU's bilateral negotiation position (European Commission staff 2010: 35).

[54] The criticisms that the German Patent Office takes a hard line on approving PGIs if the raw material origins are too low (Profeta et al. 2009: 632) suggests that Germany may pay attention to the proposed content of an application for a GI registration.

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