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POLITICS MEETS TERROIR. THE STORY OF PROSECCO - ARE GI'S JUST A PROTECTIONIST RACKET?

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Abstract

The recent Free Trade Agreement negotiations between Australia and the European Union have again put the issue of Geographical Indications (GIs) in the spotlight. Australia has long demonstrated its understanding of GIs and maintains a clear and rigorous GI protection system for wine. For many years, Australia's wine sector was a strong advocate for GIs and a strong system to protect the rights of users. However, in recent times, trust has been eroded by the move by the European Union to legislate away the use of the grape variety 'Prosecco' and create an artificial region called 'Prosecco'. This effectively downgraded the value of the GI Conegliano Valdobbiadene Prosecco by removing the legitimate terroir link between the region and the product. In Australia and other countries, this was perceived as a cynical attempt to remove the rights of other producers to use the traditional variety Prosecco and has been strongly resisted. In this paper, we use the case study of 'Prosecco' to explore the importance of GIs and how the national political agendas can impact on the validity of the concept. Recent developments in international law and practical experience in recent Free Trade Agreement negotiations allow the authors to develop a hypothesis that GIs are being used as a bargaining chip in trade negotiations. Their very credibility is being eroded as protectionist ideology is driving short-sighted political decision making to devalue the whole concept of GIs by de-linking terroir from the GI. This limits the acceptability of the GI concept and potentially will lead to a consumer backlash as the integrity of the system is questioned. This study also investigates the international legal developments and the implications for these on GI protection.

Keywords: Geographic Indications, grape varieties, regionality, Prosecco, wine trade

Introduction

The European Union (EU) is currently negotiating a Free-Trade-Agreement (FTA) with Australia. Geographical Indications (GIs), are defined by the Word Trade Organization (WTO) as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (WTO, 1994). They are a form of intellectual property linking a product to a place and form a key element of these negotiations. The European Union is asking Australia to extend the protection of these names from wines to spirits and foodstuffs. Australia has protected European GIs since 1994, following the signing of the Agreement between Australia and the European Community on Trade In Wine (the Wine Agreement). The Wine Agreement was further modified in December 2008. The 2008 revision of the Wine Agreement provided for full protection of EU wine GIs, including for Australian wines being exported. It included the phasing out by Australia of the use of a number of names, including, inter alia, Champagne and Port, within one year from the entry into force of the revised Wine Agreement. It specifically eliminated the use within one year after the entry into force of the agreement of some vine varieties (i.e. Hermitage, Lambrusco). The grape variety Prosecco was not included in the Wine Agreement as one of the terms which was to be phased out.

The Prosecco Story

Prosecco is a grape variety which has been internationally recognised as such by the European Union, its member state governments and influential wine experts for many years. There are many historical references to the grape variety Prosecco including, European regulation, Italian government documents, journals, reference manuals and other recourses spanning at least the past 60 years which support this fact (Davison *et al.,* 2019). It has been planted around the world and grown in Australia for over 20 years after it was first imported into Australia in 1997.

In 2009, the EU and Italian Governments sought to revise history and recognised Prosecco as a geographical indication under Italian Law, and created a large area Controlled Designation of Origin (DOC) region spanning large parts of the Veneto region of northern Italy. The EU subsequently recognised Prosecco as a Protected Designation of Origin and renamed the vine variety 'Prosecco' as 'Glera.'"(EC, 2009). From this point forward, the EU and Italian governments set about rewriting history to remove the grape variety from the records and replace it with the Geographic Indication. They invested millions in promotion of GI regime and are systematically working through restricting the IP rights to the term Prosecco and others through trade negotiations across the world.

In 2013, the European Union tried and failed to have Prosecco recognised as a GI in Australia. IP Australia found in favour of the Australian wine industry that in Australia the term Prosecco was recognised as a name of a grape variety.

Prosecco production is still comparatively small in Australia but is clearly growing rapidly. In the past few years, sparkling wine made from the Prosecco grapes has become very popular in major markets (Griffante, 2018). Australia is one of the fastest growing sparkling wine markets in the world and the EU knows this. The investment in the variety in terms of plantings, production infrastructure and branding is significant and the potential for growth is huge, both in Australia and elsewhere. In 2019, the Prosecco grape variety entered the top 10 list of Australia's most common white grape varieties. Prosecco grapes are fetching prices in excess of $1000 per tonne, some of the highest of any variety this year. Its potential is well known in the sector with some suggesting it has the potential to become the next great Australian wine trend (Griffante, 2020).

What is a Geographic Indication?

GIs are recognised as intellectual property rights under the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The Geneva Act of the Lisbon Agreement, to which accession of the EU as a Contracting Party is currently ongoing, also provides for protection of appellations of origin and geographical indications.

At the moment, the only definition of a GI that Australia is bound by is that contained in Article 22(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), namely*:*

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

The wording of that definition is also contained within the current Wine Agreement.

In Australia, the 65 Geographical Indication (GI) regions for wine are clearly defined and highly regulated. The boundaries are well established and many hold strong global reputations for specific aspects of the wine they produce.

In Europe, whilst the purpose of regional boundaries is similar, the way in which they are defined and regulated is completely different. In Italy, the main regional definitions include:

- Denominazione di Origine Controllata e Garantita (DOCG): Meaning the wine producers followed strict regulations to produce that wine. The wine has been assessed by a committee that guarantees the quality and geographic authenticity of the wine. Very limited Italian wines qualify for DOCG status.
- Denominazione di Origine Controllata (DOC): Meaning the rules governing quality and authenticity are a little more flexible than those of a DOCG. For instance, the geographic zone might be bigger or the rules around variety of grapes or style might be a little more relaxed.

EU Regulation

Under its quality policy in the area of agricultural production, the EU protects the names of GIs and Traditional Specialities Guaranteed (TSGs) for agricultural products, foodstuffs, spirit drinks, wines and aromatised wines. By protecting the registered names (GIs and TSGs), the EU:

1. promotes the specific characteristics of the products, linked to their geographical origin and traditional knowhow; and
2. helps producers in informing consumers about the quality products.

The corresponding quality scheme rules are set out in four Regulations of the Council and the European Parliament. In total, the EU registered over 3200 GIs and 61 TSGs. All protected names are included in the EU databases and registers. The registration also covers around 30 GIs from non-European Union countries.
EU rules distinguish between the following types of geographical indications, depending on the degree and type of association with a defined geographical area:

1. names registered as a protected designation of origin (PDO) for agricultural products, foodstuffs, and wines (the raw ingredients need to come from the region of origin where all steps of production need to take place);
2. names registered as a protected geographical indication (PGI) for agricultural products, foodstuffs, and wines (for most products, at least one of the stages of production, processing or preparation takes place in the region);
3. names registered as a geographical indication (GI) for spirit drinks and aromatised wines (at least one of the stages of distillation or preparation takes place in the region).

The EU also protects the names of TSGs to safeguard traditional methods of production and recipes of agricultural products and foodstuffs (European Union, 2020).

Issues

The EU has made GI protection and extension of the type and level of protection a fundamental part of their trade policy. Importantly, this raises a fundamental question of whether, and if so to what extent, domestic legal systems may permissibly be used to generate claims to intellectual property that are then used to leverage international protection for that intellectual property. When other governments have no particular interest in the subject matter other than to recognise it in return for trade concessions, the position becomes both complicated and distorted, because these governments' interest in concluding trade agreements has come at the cost of detailed consideration of the evidence of the existence of the alleged intellectual property (Davison *et al.,* 2019).

The highly subsidised agriculture sector of the European Union has grasped the concept of GIs as providing them a silver bullet for advancing trade interests. Through significant investment in GI promotion and protection the EU has given itself a negotiation advantage refusing to finalise FTAs without its provisions for GIs being met. This

leaves Australia and many other countries at a disadvantage with limited investment and understanding of Geographic Indication they are left to the mercy of the EUs demands on GIs without truly understanding their significance.

The European Commission is using Geographic Indications are a key part of their trade policy to protect their domestic producers. They have a clear objective of internationalising their GIs and their GI systems. The European Commission began an evaluation of its quality schemes in 2019. (Ares, 2019). The purpose of this evaluation is to provide an in-depth assessment of the overall functioning of the GIs and TSGs quality schemes of the EU with a focus on GIs registered at EU level (from EU and third countries) and placed on the EU internal market. The Commission aims also at ensuring that the evaluation of the EU quality schemes provides a relevant contribution to the design and implementation of the Common Agricultural Policy (CAP post 2020). The European Commission has flagged the results of the Commission evaluation could also be used in the context of the EU international relations at multilateral level, notably in the framework of the WTO and World Intellectual Property Organization (WIPO) (European Commission 2019).

The Convenience of Shifting Boundaries

In Italy, the regional boundaries of the new DOC 'Prosecco' have grown rapidly in response to increased demand. The variety used to be grown mainly within the 6,500 hectares of Conegliano Valdobbiadene regions. In 2009, the total area where Prosecco could be grown increased to around 20,000 hectares with the creation of the new DOC.

To put this jump in size in perspective, the change would be akin to the Australian region of Coonawarra (planted area of 5,827 hectares) growing to the size of the Riverina, one of Australia's largest wine regions (>20,000 hectares planted area), virtually overnight.

Not only was the original change in 2009 a huge jump in allowable area but since that time the boundaries of the larger Prosecco DOC have shifted to accommodate market demand. As global demand for Prosecco has risen, so too has the size of the Prosecco DOC.

In 2016, Stefano Zanette, President of the Consortium tasked with promoting and protecting the Prosecco DOC, announced that the DOC planned to expand its vineyards by about 5% a year from 2017 to 2019[1]. In that year, an additional 3,000 hectares of vineyards were planted in the regions of Veneto and Friuli Venezia Giulia (North East of Italy), extending the total planted area of the Prosecco DOC to 23,250 hectares[2].
What is clear is that the producers in the premium production areas of Conegliano Valdobbiadene are concerned about the expansion of the Prosecco planting and its impact on the 'quality' perception of prosecco from these premium regions (see for example https://www.oggitreviso.it/azienda-di-valdobbiadene-rinuncia-al-nome-prosecco-215130). In contrast to the DOC, the DOCG plantings are 8,446 hectares: more than one-third of its producers here make fewer than 500,000 bottles per year (almost a quarter make fewer than 2 million, 14% fewer than 5 million, 23% are larger than that). Of the more than 300 producers, 182 are spumante bottlers (Gordon, 2020).

If the importance of regional boundaries is that they denote aspects of quality associated with the region, the continuingly expanding Prosecco DOC must be challenged. It is not one based on historical or cultural significance, but rather made in an attempt to monopolise the market of this highly valuable grape variety. The threat is again on the horizon and Australia must ensure the rights of our producers to grow and label, not only, the Prosecco grape variety but all other grape varieties, are protected into the future.

Prosecco is a Different Story to Champagne

The attempts to protect the term Prosecco are often likened to the issue Australia experienced some years ago with the protection of Champagne, however it is a completely different story. The key difference being that Prosecco is a grape variety and there is no single variety called "Champagne" which is used to make Champagne. Restricting the use of Prosecco in Australia would be like restricting the use Shiraz, Chardonnay, Riesling or any other variety. The ongoing attempts to restrict Australian producers' ability to use this grape variety is the thin

[1] https://www.winemag.com/2017/11/28/prosecco-price-increases-15-percent-201/
[2] http://doitbetter.info/prosecco-doc-increase-production/

edge of the wedge. There are other varieties too that are currently under threat globally, such as Montepulciano, Nero d'Avola, Barbera, Dolcetto, Fiano and others.

Prosecco therefore becomes the thin edge of the wedge as, allowing it to be protected as a GI paves the way for this to occur for other varieties. We cannot allow other countries to dictate what varieties Australian producers can grow and sell on our own shores. It stifles market opportunity and innovation and provides others with a competitive advantage.

EU Food Quality Schemes: Are They Fit for Purpose?

The number of PDOs, PGIs is rising in Europe due to the strong support for the schemes from National governments and the European Union. Arguably, this is due to subsidies that support involvement. However, there is a growing discontent among small producers who do not feel they can benefit from these quality schemes (Pantzer, 2019). In Europe, producers who produce food with traditional methods feel they are penalised, because of the excessive expansion of the geographical area covered by PDOs and PGIs, and the loose corresponding rules of the quality schemes. Large-scale producers are better equipped to request GIs certifications, which puts them in a powerful position of determining the production protocol rules and bringing down prices to a level which is unbearable for small-scale artisanal production. This often forces traditional production out of the market. An example from France, cited by Slow Food Italy is where 'the PDO consortium of Camembert de Normandie cheese modified the production protocols to allow pasteurised milk including from cows that have not been raised on Normandy's pastures. Consequently, only two farmers are left who still produce Camembert cheese with raw milk from pasture-raised cows.

Another example is the one of Stilton cheese, which obtained the PDO status from the EU in 1996 and in the protocol, includes the strict use of only pasteurised milk. This clashed with the traditional production method using raw milk. To date, only one producer of Stilton cheese using raw milk remains, who does not qualify for the PDO and has had to name his cheese Stichelton instead (Pantzer, 2019).

The cynical approach taken to quality scheme certifications in Europe, are leading to the very thing they purport to protect - an increasingly generic product resulting from the standardisation of techniques, the disappearance of small-scale farmers, increasing tension between efficient production techniques and 'traditional methods, and an unhealthy reliance on subsidised production and marketing methods. For quality schemes to maintain consumer acceptance in an increasingly digital world they must have integrity. Increasingly, this means the quality brand must be verifiable, 'real' and speak to the consumer. The current schemes increasingly are divorced from quality and origin, including concepts such as traditional, artisanal, cultural, and local, with a focus on small-scale producers. The absence of sustainability, labour and environmental standards in European quality certification systems also weaken the consumer acceptance, as consumers now demand these as a component of 'quality'.

Expanding Regulation

A further concern is the continually moving of the goal posts by the European Union. One of the most serious of these has been the concept of 'evocation' a complex concept which can create grey areas in GI interpretation and enforcement. For example, "Queso Manchego" is on the list of GIs that the European Union is seeking protection in Australia under the current FTA negotiations. It is a registered PDO in the EU for a cheese from the region of La Mancha in Spain. In a 2019 case, the European Union Court of Justice ruled that the use of imagery that evoked either the PDO or the geographical area with which the PDO is associated in relation to a product that does not meet the specifications can constitute evocation of the PDO and so constitute infringement, even if the infringing producer is based in the same area and makes the product there. Applying this ruling, the Spanish court found that the use of an image of Don Quixote (a famous novel based in La Mancha) on packaging and other imagery like windmills that are typical of La Mancha, as well as calling the cheese "Queso Rocinante" ("Don Quixote's horse"), amounted to evocation of the PDO Queso Manchego and thereby prevented their use. The EU's proposed wording would therefore confer on European producers significantly wider protection than for the listed term itself, and significantly wider than what is required under TRIPS Article 23 for wine and spirit GIs. The right holder would have a monopoly not just over the listed term but also for terms and imagery that "evoke" it or the geographical area indicated (Intellectual Property Committee of the Business Law Section of the Law Council 2019).

Trevisan and Cuonzo (2020) have summarised the European Court of Justice (CJEU) case law showing the tendency of the Court to expand the level of protection (and thereby increase uncertainty for producers) and we are indebted to them for the following explanation.

The concept of "evocation" appeared for the first time in Art. 13(1) of the now repealed Council Regulation (EEC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. Under this article, a PDO or a PGI shall be protected against "***any*** *misuse, imitation or* ***evocation****, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar*". This wording was then maintained in the subsequent EU regulations (Regulation (EC) 510/2006, Regulation (EU) 1151/2012 for agricultural products and foodstuffs, Regulation (EC) 110/2008 for spirit drinks, Regulation (EU) 1308/2013 for wines and Regulation (EU) 251/2014 for aromatised wines).

The peculiarity of the protection against evocation of PDO and PGI provided by EU law lies in the fact that it is not governed by the criterion of the likelihood of confusion, which presupposes that the sign that conflicts with the registered name is likely to mislead the public as to the geographical origin or the quality of the product. Because of such *sui generis* nature, the Court of Justice has been called upon to interpret the concept of "evocation" since the outset and on several occasions since.

The Court ruled on the concept of "evocation" for the first time in **C-87/97 (Gorgonzola./.Cambozola)**, clarifying that "evocation" covers a situation where the term, used to designate a product, incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected. The factors indicated by the Court for determining whether there is evocation, include the "phonetic and visual" similarity between the name, in addition to the similarity between the products in question.

In **C-132/05 (Parmigiano Reggiano./.Parmesan)**, the Court enlarged the concept, stating that "evocation" may take place not only in cases of phonetic or visual similarity between the names, but also where "conceptual proximity" exists between a PDO/PGI and the term allegedly infringing the protected name. In other words, evocation may also be established on the basis of the mere "conceptual similarity" between the contested sign and the protected name, if that similarity is capable of triggering in the mind of the public the products covered by that name.

The CJEU extended the same assessment criteria set out in C-87/97 and C-132/05 to the protection of geographical indications of alcoholic beverages in **C-4/10 – C-27/10 (Cognac)**.

In **C-75/15 (Verlados./.Calvados)**, the CJEU clarified that the concept of "evocation" within the meaning of EU law is totally independent from the risk of confusion and occurs even if the public is not at all misled as to the true origin of the disputed product. The Court also pointed out that these criteria were intended to give the national courts guidance in their decision, being national courts those who must evaluate whether, in the specific circumstances of the case, there is "evocation" within the meaning of EU Regulations.

In **C-44/17 (Scotch Whisky),** the Court confirmed that neither the partial incorporation of a protected geographical indication in the disputed designation, nor any phonetic and visual similarity between the PDO/PGI and that designation constitutes an essential requirement for the purpose of assessing whether there is "evocation" within the meaning of EU Regulations, finding that, in the absence of any such incorporation or similarity, there may be evocation as a result of the simple "conceptual proximity" between the PDO/PGI and the disputed sign. However, the Court recognized that "conceptual proximity" is not as straightforward as phonetic or visual similarity. The Court identified the need to set limits to identify the concept of conceptual proximity for avoiding that the scope of unlawful evocation could go beyond what is necessary for the effective protection of registered names. In this respect, the Court ruled that there is proximity only when the associative connection between the disputed element and the protected name is sufficiently "clear and direct".

In the last decision on the issue (**Queso Manchego, C-614/17**) the Court went further, broadening the scope of protection against evocation to figurative signs.

The decision advances the protection of European PGI and PDO, in line with the tendency of the CJEU to interpret "evocation" widely and in line with the broad protection granted to PGI/PDO by the EU legislature (Trevisan & Cuonzo, 2020).

The expansion of the scope of GIs via evocation and the lack of respect for the geographical and production rules will inevitably lead to consumer backlash. Consumers are well informed and their expectations are unlikely to be reflected in the laissez-faire approach taken by unscrupulous producers and a complaint regulatory regime.

Conclusion

The European Commission's increasing moves to introduce environmental and social responsibility into its regulatory framework is adding costs to business that is not reflected in returns. The European quality schemes are seen as way of adding value to those food products that can then defray inefficient production systems, promote social objectives of small regional producers and help compensate burgeoning regulation arising from social and environmental objectives.

The European Union's desire to export their GI regulations for the purpose of limiting competition is clear. The Accession of the EU to the **Geneva Act of t**he Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, is a clear indication of the pressure they will put on future aspirational partners to trade agreements to fall in step with their GI protection regime. It was made clear that their accession would have positive effects for developing countries which consider joining the Geneva Act as their GIs could gain protection in the EU through the Lisbon system. The interest of the 17-member African IP office, OAPI, to join Lisbon was cited as evidence of the attraction of the GI instrument to protect developing country farmers' rights and traditional value. However, it is clear that many developing countries to do not fully appreciate the risks of this approach and over- estimate the gains.

The quality schemes are losing support from both producers and consumers. We contend trust has been eroded by the move by the EU to legislate away the use of the grape variety 'Prosecco' and create an artificial region called 'Prosecco'. This effectively downgraded the value of the GI Conegliano Valdobbiadene Prosecco by removing the legitimate terroir link between the region and the product. In Australia and other countries, this was perceived as a cynical attempt to remove the rights of other producers to use the traditional variety Prosecco and has been strongly resisted. It is clear GIs are being used as a bargaining chip in negotiations. Their very credibility is being eroded as protectionist ideology is driving short-sighted political decision making to devalue the whole concept of GIs by de-linking terroir from the GI. This limits the acceptability of the GI concept and potentially will lead to a consumer backlash as the integrity of the system is questioned.

References

Davison, M., Henckels, C., Emerton, P., 2019. In: *Vino veritas? The Dubious Legality of the EU's Claims to Exclusive Use of the Term "Prosecco"*. Australian Intellectual Property Journal.

European Commission, 2009. Regulation (EC) No 1166/2009 of 30 November 2009 amending and correcting Commission Regulation (EC) No 606/2009 laying down certain detailed rules for implementing Council Regulation (EC) No 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions.

European Commission, 2019. Evaluation of Geographical Indications and traditional specialities guaranteed protected in the EU. Document Ares, 2019: 282681**.**

European Union, 2020. Quality schemes explained. Retrieved from: https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en

Griffante, D., 2018. Shifting the boundaries: Why we must fight to keep Prosecco. Wine & Viticulture Journal, 33(3): 1-2.

Griffante, D., 2020. The Prosecco GI lie. Wine & Viticulture Journal, 1: 1-73.

Gordon, SH., 2020. Help you understand the complexities of Conegliano-Valdobbiadene Prosecco. Retrieved from: https://www.forbes.com/sites/susangordon/2020/06/25/how-the-rive-will-help-you-understand-the-complexities-of-conegliano-valdobbiadene-prosecco/#36f50ed943f0

Intellectual Property Committee of the Business Law Section, 2019. Submission to the Department of Foreign Affairs and Trade, November 2019, Retrieved from:

https://www.lawcouncil.asn.au/resources/submissions/proposed-australia-european-union-free-trade-agreement--submission-concerning-geographical-indications-issues

Pantzer, Y., 2019. Feedback from Slow Food to evaluation of Geographical Indications and traditional specialities guaranteed protected in the EU. Document Ares, 2019: 282681**.** Retrieved from: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2029-Evaluation-of-Geographical-Indications-and-Traditional-Specialities-Guaranteed-protected-in-the-EU/F463675 .

Trevisan, L.., Cuonzo G., 2020. Figurative elements on the packaging of the product may represent an evocation of PDO and/or PGI. Italy Intellectual Property Blog, May. Retrieved from: https://www.lexology.com/library/detail.aspx?g=2aff2482-9ff0-4d0b-bb09-c279441d748d

World Trade Organization, 1994. Section 3 Geographical Indications, Article 22. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Retrieved from: https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm