

Chapter 5: Parliamentary sovereignty, the European Union, and Brexit

Problem scenario

Given the result of the 2016 referendum to leave the European Union, the Stilton Cheese Producers Association is concerned about the impact of Brexit on the businesses of its members. In particular they are concerned about the effect of EU law no longer applying to the UK once the UK leaves the EU.

This is because under EU Regulation 1151/2012¹ Stilton cheese is protected by 'Protected Designation of Origin' status which means that Stilton cheese can only be produced in the English counties of Leicestershire, Derbyshire, and Nottinghamshire and must be produced according to the traditional method. Even if a producer of cheese, elsewhere in the UK or in another EU Member State, uses exactly the same ingredients and production methods as the producers who are based within those three counties, it is unlawful for them to call their cheese 'Stilton'. Essentially, EU law protects the name 'Stilton' and ensures that consumers of Stilton cheese can be sure that what they buy in the supermarkets is genuinely Stilton cheese produced according to traditional methods.

Imagine that you were presented with this scenario and asked to discuss any issues arising from it that concern the status of EU law after the UK's withdrawal from the EU.

The objectives of the EU include the internal market and the common agricultural policy. A concern is that if goods can flow freely across member states of the EU, then products that are closely associated to particular places or localities could be exploited. For example, the very term "champagne" is an indicator of a sparkling wine that has particular characteristics and quality from wines produced in the Champagne region in north west France. This means that consumers can purchase a bottle of champagne confident that it will have those characteristics. The concern is that under the free movement of goods, if goods are lawfully produced in one Member State, then, in principle, they are able to be sold without restriction in all other Member States. This means that in

¹ Parliament and Council Regulation (EU) 1151/2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L343/1.

principle, a sparkling white wine produced in Portugal (for example) could also be called ‘champagne’. However, due to different production techniques and climatic conditions, it would be unlikely to share the characteristics expected of champagne produced in France. The result is that consumers could end up being confused, and the value of the term “champagne” as an indicator of quality would be diluted.

Consequently, the EU has decided that certain food products should be protected from being exploited in this way. Regulation 1151/2012 is the way in which foods known for their quality are protected. This establishes a common system of protection across all Member States, and producers of foods that qualify for protection can be registered under this scheme. As the problem scenario outlines, Stilton cheese is one such product.

Under the EU treaties, as a regulation, Regulation 1151/2012 is said to be directly applicable across all Member States of the EU. This means that once it was adopted it automatically became part of the law of each Member State. Consequently, once foods, such as Stilton, are registered for protection under Regulation 1151/2012, they are automatically protected in each Member State. The principle of supremacy of the EU law means that even if a Member State passes legislation which seeks to exclude the Regulation from their law, or even exclude certain foods from being protected by the Regulation, EU law and the Regulation would take precedence.

To give effect to the UK’s entry into (what later became) the EU in 1973, the UK enacted the European Communities Act 1972, section 2 of the Act states that

all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties ... are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

Regulation 1151/2012 is covered by section 2 of the 1972 Act, recognising that the regulation is directly applicable. This means that foods protected by the regulation, including Stilton cheese are protected in the UK, even though no other legislation has been passed in the UK.

Following the referendum, and the decision of the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*,² the UK Parliament enacted the European Union (Notification of Withdrawal) Act 2017. The 2017 Act was required to trigger the process of leaving the EU as laid down in the Treaty on European Union, Article 50. This set out a two-year period within which to

² [2017] UKSC 5

negotiate the UK's terms of withdrawal, and framework for the future relationship between the UK and EU.

The then Prime Minister, Theresa May, notified the EU of the UK's intention to leave on 29th March 2017, starting the two-year negotiation period. At this point the status of EU law remained entirely unchanged, the Regulation continued to apply with full effect as during the negotiation period, the UK's membership of the EU remains unchanged.

Under the terms of the Withdrawal Agreement agreed between the UK and the EU, on leaving the EU on 31st January 2020, the UK entered into the transition period. During this period, the UK, although no longer a member of the EU, remains bound by EU law. The transition period is due to end on 31st December 2020, although it can be extended for one or two years. At the end of the transition period, EU law will no longer apply to the UK (subject to any agreement to the contrary for specific laws between the UK and the EU). This means that Regulation 1151/2012 remains part of UK law throughout the transition period. This ensures that the UK meets its commitment under the Withdrawal Agreement to maintain the level of protection as provided by Regulation 1151/2012 for the duration of the transition period.³

Giving effect to Brexit in UK law is a complex task. In principle, from the point EU law no longer applies to the UK it will no longer be part of the UK legal system. Given the relationship between UK law and EU law, this could create substantial gaps in the UK legal system. In particular, those aspects of EU law that have direct effect or are directly applicable would no longer be available in the UK. This includes Regulation 1151/2012 which protects Stilton cheese.

European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, seeks to ensure legal continuity, so that at the point it no longer applies to the UK, the great majority of EU law remains part of the UK legal system. It achieves this by firstly repealing the European Communities Act 1972,⁴ at which point the majority of EU law continues to

³ European Commission, 'Working document – Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 "Negotiations on the future relationship" and Article 185 "Entry into force and application" (document TF50 (2019) 64), as agreed at negotiators' level and endorsed by the European Council', (TF50 (2019) 66, 17 October 2019), Art 54(2).

⁴ Technically, the European Communities Act 1972 was repealed on 31st January 2020, however, due to amendments inserted into the 2018 Act by the European Union (Withdrawal Agreement) Act 2020, the "effect" of the 1972 Act remains through the transition period. These saving provisions will no longer have effect at the conclusion of the transition period.

be part of the UK legal system by being converted into “retained EU law”, which is a category of UK law. As a regulation, it is protected as ‘direct EU legislation’.⁵

The next difficulty is that Regulation 1151/2012 was written to apply to Member States of the EU. Naturally, this means that it contains references to EU concepts such as ‘Member States’, ‘Commission’, and so on. These make little sense once EU law no longer applies to the UK. As provided for by section 8 of the 2018 Act, these references are known as deficiencies and can be amended by secondary legislation. To prepare for this, the Food and Drink, Veterinary Medicines and Residues (Amendment etc.) (EU Exit) Regulations 2019 have been passed, correcting these deficiencies.⁶

As can be seen, the focus of the 2018 Act is about preserving the status quo once EU law no longer applies and to make the necessary adjustments to take account of the UKs withdrawal from the EU. This is important, because until the 2018 Act takes effect, the UK has no domestic law governing the protection of foods such as Stilton. Consequently, if the status quo was not preserved in this way, not only could the protection of foods such as Stilton in other Member States across the EU be under threat, but in the absence of any UK specific legislation, all protection within the UK would be lost, and producers from across the UK able to produce and sell cheese branding it as Stilton.

This is the position regarding the transition. The bigger question relates to the future. The future relationship between the EU and the UK is currently being negotiated, and the intention is that this will take effect at the end of the transitional period. As of May 2020, details are scarce. However, the future relationship between the UK and EU suggests that following what has been agreed in the Withdrawal Agreement, the parties commit to seeking ‘arrangements [that] provide appropriate protection for their geographical indications’.⁷ This suggests that the UK will closely follow EU law, even when EU law no longer applies.

For a fuller discussion of the issues raised in the problem scenario, see Craig Prescott, Manuela Pilato, and Claudio Bellia, ‘Geographical indications in the UK after Brexit: An uncertain future?’ (2020) *Food Policy* (Vol 90, Article 101808), available at:

<https://doi.org/10.1016/j.foodpol.2019.101808>

⁵ European Union (Withdrawal) Act 2018, s 3.

⁶ SI 2019/865

⁷ European Commission, ‘Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators’ level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019’ (TF50 (2019) 65, 17 October 2019) para 43.