EXPLANATORY MEMORANDUM TO

THE AGRICULTURAL PRODUCTS, FOOD AND DRINK (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 1366

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This statutory instrument amends retained EU food and drink regulations concerning geographical indication ("GI") schemes. It addresses the specific matter of 'transitional trademark arrangements'; that is to preserve the existing relationship between GIs and trademarks with regards to precedence. The ongoing protection of GIs is an important matter for UK trading partners, and this instrument will guarantee continuity of protection and facilitate the successful agreement and ratification of trade deals.

Explanations

What did any relevant EU legislation do before exit day?

2.2 The retained EU legislation amended by this statutory instrument provides the EU framework to protect GI products. This enables applications to be made to register new product names as GIs, and to amend or cancel existing GIs. This framework ensures all products protected by GI schemes receive legal protection from imitation or evocation in EU Member States. The GI schemes ensure all EU Member States are compliant with the GI elements of the World Trade Organization ("WTO") Trade Related Aspects of Intellectual Property Rights ("TRIPS") agreement obligations.

2.3 This instrument protects the existing relationship between GIs and trademarks with regards to their priority. The existing EU regulations set out that where a conflict is identified between a trademark and a GI (a conflict in this instance would be a trademark evoking the GI in question, or directly copying it), the registered GI will have precedence over the trademark where its application has been submitted earlier. In practice, this means the trademark application will be refused, or, if registered, invalidated. Should the opposite be true, and a GI application is received after a trademark has been registered, in some scenarios, it can co-exist with the trademark – in this case the rights holders to both forms of intellectual property can legally use the name in question.

Why is it being changed?

2.4 This statutory instrument is being laid to address deficiencies in retained EU legislation arising from EU Exit. It is required to ensure that the regulations are operable in the UK (as provided for by the European Union (Withdrawal) Act 2018).

The retained direct EU legislation being amended by this statutory instrument is set out in the legislative context section of this document.

2.5 The UK has already legislated in relation to applications for EU trademarks which are pending on exit day. That legislation will allow the applicant, when applying for registration of the same trademark to the UK within nine months of exit day, to claim the filing date and priority date (if any) of their EU application. This instrument will allow the UK to recognise the application date to the EU of all pending and existing GIs and traditional wine terms, provided the GI applicant applies to the UK within 9 months of exit day, or the term falls into the scope of an international agreement to which the UK is a party. This aligns UK intellectual property law and preserves the existing relationship between GIs and trademarks, the purpose being to resolve any conflicts between trademark and GI applications.

What will it now do?

2.6 This instrument will allow the UK to recognise the application date to the EU of all pending and existing GIs and traditional wine terms. This aligns with the approach taken elsewhere in UK intellectual property law and preserves the existing relationship between GIs and trademarks, the purpose being to resolve any conflicts between trademark and GI applications.

2.7 This instrument contains schedules with amendments to each of the EU regulations which provide the legal basis for the four GI schemes; agri-food, spirit drink, wines and aromatised wines (see section 6 for the regulations affected). These inserted provisions, along with other, minor drafting amendments, will set out that:

i. For a period of nine months following the UK's departure from the EU, all GI and traditional wine term applications submitted to the UK will be able to refer to their corresponding date of application to the EU, should one exist. This will apply to all GIs already protected in the EU, and those where the application to the EU is pending a decision as at exit day.
ii. When examining a trademark application, or in the case of a registered mark, an application for declaration of invalidity is made in the UK, the IPO will use the effective date to determine precedence between conflicting GI and trademark applications.
iii. Should the effective submission date of a successful GI application precede a conflicting trademark application, it will be entitled to exclusive use of that name in the UK. Should the trademark application date precede the GI application, the names will normally co-exist in the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is an urgent procedure instrument being laid under Schedule 7(5) of the European Union (Withdrawal) Act 2018 ('EUWA').

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this statutory instrument includes Scotland and Northern Ireland.

3.3 The powers under which this statutory instrument is made cover the entire United Kingdom (see section 24 of EUWA) and the extent and application is as detailed in section 4 below.

4. Extent and Territorial Application

4.1 The territorial extent of this statutory instrument is the United Kingdom.

4.2 The territorial application of this statutory instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for International Environment and Animal Welfare, Zac Goldsmith MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This statutory instrument is made in exercise of powers conferred by section 8(1) of, and paragraph 21b of Schedule 7 to, EUWA. Section 8(1) of EUWA provides that a Minister of the Crown may by regulations make such provisions as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the withdrawal of the UK from the EU.

6.2 The retained direct EU legislation being amended by this statutory instrument is as follows:

i. Regulation (EC) No 1151/2012 of the European Parliament and of the Council.
ii. Regulation (EC) No 1308/2013 of the European Parliament and of the Council.
iii. Regulation (EC) No 251/2014 of the European Parliament and of the Council.
iv. Regulation (EU) 2019/787 of the European Parliament and of the Council.
v. Commission Delegated Regulation (EU) 2019/33.

6.3 The Regulations listed in this section are referred to in subsequent sections primarily by their code numbers.

7. Policy background

What are Geographical Indications ('GI's)?

7.1 GIs are a form of intellectual property protection for the names of food, drink and agricultural products with qualities or characteristics which are attributable to the place they are produced and/or the traditional methods by which they are made. Examples include: Scotch Whisky, English Regional Wine, Welsh Lamb and Lough Neagh Eels.

7.2 GIs recognise the heritage and provenance of food and drink products which have a strong traditional or cultural connection to a particular place. They provide registered products with legal protection against imitation, and protect consumers from being misled about geographical origin of goods. Their protection is enforced by the State.

What are Trademarks?

7.3 A trademark is an intellectual property right and is a sign which distinguishes goods or services of an undertaking from those of another. Trademarks predominantly take the form of words or logos, or a mixture of both – although, they can be anything which is capable of being represented in a manner which is clear and precise. Trademarks must be distinctive so that they are able to differentiate the goods and services of one trader from those of another. A trademark is a private right, and their enforcement is the responsibility of the right-holder. The UK's domestic trademark system is administered by the Intellectual Property Office, an Executive Agency of the Department for Business, Energy, and Industrial Strategy ('BEIS').

What is being done and why?

7.4 The principle that a GI has precedence over a conflicting trademark where its application has been submitted before the trademark is outlined in Regulation (EC) No 1151/ 2012. The amendments in this instrument ensure that the existing order of priority which currently exists between GI and trademark applications will remain the same as regards applications made to the UK during the nine months following the UK's exit from the EU.

7.5 Without a specific agreement in place with the UK, producers of non-UK GIs who wish to protect their GIs in the UK may need to reapply to the relevant UK GI scheme.

7.6 For nine months after EU Exit, all GI and traditional wine term applications to the UK will be able to refer to their corresponding date of application to the EU, should one exist. This aligns with intellectual property law, as the UK has legislated to allow trademark applicants with a pending EU right to claim the filing date from their EU trademark where a corresponding UK trademark application is submitted for a period of nine months following EU Exit. This ensures all rights holders of trademarks and GIs are afforded the same opportunity to protect their intellectual property in the UK.

7.7 If a GI (existing or pending) has, or would have, exclusive use of a geographically linked name in the UK, and the right-holder submits an application to the UK within nine months of EU Exit, they will keep that right. Without this instrument in place, a trademark application which would currently be refused on the basis that a conflicting GI already exists could be accepted in the UK (to be used alongside the GI). If the two coexist where, before, the GI would have had exclusive use of the name, the potential for consumer confusion would increase and the rights of the GI owner would be eroded.

7.8 Many countries with which the UK will trade after leaving the EU have GIs which they would like to protect in the UK. The majority of these are already protected in the UK (or pending protection) due to EU trade deals. In rolling over those trade deals to be applicable to the UK after leaving the EU, several trading partners have raised concerns that without the means to recognise the EU date of application for their GIs (as is currently the case for trademarks), a trademark application which conflicts with one of their GIs could be successful. GIs are important symbols of national pride and identity for many countries, and any risk posed to their protection in the UK is an issue with the potential to make agreement or ratification of a trade deal very difficult, or impossible. This instrument is necessary to give trading partners the reassurance that protection of their GIs in the UK will not be adversely affected by the UK's exit from the EU.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

8.1 This statutory instrument is being made using the power in section 8 of EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. This statutory instrument is also made under the powers in paragraph 21b of Schedule 7 to EUWA. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this explanatory memorandum.

9. Consolidation

9.1 Defra does not intend to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 A public consultation on the establishing UK GI schemes after exit took place in autumn 2018, see: https://consult.defra.gov.uk/food/consultation-on-uk-geographical-indications-scheme/ . This consultation sought views on various elements of new UK GI schemes which have been carried forward across several statutory instruments.

10.2 The full consultation summary and response was published on 25 January 2019, which can be found at: https://www.gov.uk/government/consultations/geographical-indications-gi-creating-uk-schemes-after-eu-exit .

10.3 The provisions in this instrument are not covered by that consultation, but they maintain the existing relationship between GIs and trademarks, and therefore no further consultation was felt to be necessary.

11. Guidance

11.1 Producers do not need to take any specific action in relation to these provisions. For non-UK producers who wish to apply for protection in the UK, the Government will be publishing wider guidance on the UK GI schemes, for example how to apply for, amend or cancel a GI award. This will be publicly available on GOV.UK on the day that the schemes enter into force.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies. Legislative and decision making powers will be transferred from the Commission to appropriate UK public authorities.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this statutory instrument as its purpose is to maintain existing regulatory standards and so there is expected to be minimal impact on business.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses (employing up to 50 people). However this legislation places no additional burdens upon them, so no specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

14.1 As this statutory instrument is made under the powers in the European Union (Withdrawal) Act 2018, no review clause is required. Defra will however monitor and review the impact of the statutory instruments as part of its standard policy-making procedures.

15. Contact

15.1 Simon Crabbe, Head of Geographical Indications, at the Department for Environment, Food and Rural Affairs – Telephone: 020 8026 4088 or email: Simon.Crabbe@defra.gov.uk can be contacted with any queries regarding the statutory instrument.

15.2 Ananda Guha, Deputy Director, Exports and EU Exit, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Zac Goldsmith MP, Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a negative procedure SI.	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees.
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA 2018 SIs.	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence.	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under s. 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA 1972, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under s. 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, Zac Goldsmith MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate".

1.2 This is the case because the amendments made by this instrument are the minimum required to ensure that existing UK legislation remains operable after the UK leaves the EU. The amendments are predominantly technical in nature and do no more than is strictly necessary to ensure that UK law continues to function effectively. See section 7 in the main body of this Explanatory Memorandum.

2. Good reasons

2.1 The Minister of State for International Environment and Animal Welfare, Zac Goldsmith MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: that without this instrument, the EU Regulations in section 6 of this explanatory memorandum, which are converted into UK law by the European Union (Withdrawal) Act 2018, and the UK regulations also mentioned there will not work properly, and that it is appropriate, after EU Exit, for UK public authorities to exercise the legislative functions within this instrument that are currently carried out by the Commission.

3. Equalities

3.1 The Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, Zac Goldsmith MP has made the following statement(s):

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

3.2 The Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, Zac Goldsmith MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Zac Goldsmith MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.

5. Legislative sub-delegation

5.1 The Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, Zac Goldsmith MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view it is appropriate to create relevant sub-delegated powers in The Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019."

5.2 For GIs this instrument concerns an existing EU process, which is exercised through delegated legislation, which is being replaced by powers in UK law which are exercised administratively with decisions published on a publicly accessible register. This relevant sub-delegated power is appropriate because it is desirable for the Secretary of State to exercise the power to determine applications for geographical indications relating to spirit drinks and wine traditional terms by administrative means rather than by statutory instrument given that:

i. there may be a large volume of such decisions depending on the number of applications which are made, and a requirement for all such decisions to be made by statutory instrument would require additional resource and could cause delay in ensuring that decisions are made and come into force promptly;

ii. scrutiny and awareness of the decisions made by the Secretary of State will be sufficiently provided through the requirement for decisions to be published on a register.

6. Urgency

6.1 Minister of State for International Environment and Animal Welfare at the Department for Environment, Food and Rural Affairs, Zac Goldsmith MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view by reason of urgency, it is necessary to make The Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019, without a draft of the instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament."

6.2 This is because: the amendments described in section 2 of the main body of this Explanatory Memorandum need to be in place on the day of EU Exit, otherwise the respective legislation would not be fully operable and would be consistent with government policy.