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GREEN PAPER

Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products

Text with EEA relevance

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Introduction

In today's globalised world, the range of products offered to the consumer is almost unlimited. To make an informed choice, consumers need to gather and compare information on the price and characteristics of an increasing number of goods. Price and basic features of a product may not be the sole deciding factors. Consumers also look for ways to identify authentic, original quality products, and expect that the quality and specific features advertised provide the qualities that they value, for which they are often willing to pay a premium.

To achieve this, the reputation and/or given quality features associated with products due to their particular origin may be crystallised in what is termed a 'geographical indication' characterising the product. Geographical indications (GIs) are indications that identify goods as originating in a country, region or locality where a particular quality, reputation or other characteristic of the product is essentially attributable to its geographical origin, for example Bordeaux (wine), Vetro di Murano (glass) or Prosciutto di Parma.

GIs are self-evidently relevant to agricultural products, foodstuff, wines and other alcoholic beverages, where their geographical origin is linked with qualities stemming either directly from the soil or climate (e.g. wines) or from a combination of natural factors and traditional processing methods applied in the region (e.g. Bayerisches Bier). However, the use of GIs is not limited to agricultural products. A GI may also highlight specific qualities of a product that are due to human factors found in the product's place of origin, such as specific manufacturing skills and traditions. This is the case, for instance, for handicrafts, which are generally handmade using local natural resources and usually embedded in the traditions of local communities.

The European Union (EU) is rich in such authentic, non-agricultural products, based on traditional knowledge and production methods, which are often rooted in the cultural and social heritage of a particular geographical location, e. g. Český křišťál (Bohemian crystal), Scottish tartans, Marmo di Carrara (marble) or Meissner Porzellan (porcelain). All these products form part of Europe's traditional knowledge and skills, and so are important to its cultural heritage and contribute to the cultural and creative economy. They also have a considerable economic potential, given the right conditions of their exploitation are met. Innovation and technological progress are instrumental in making the best out of local expertise and heritage.

The EU is bound by rules on protecting GIs under the agreement on trade related aspects of intellectual property rights (TRIPS), which applies to all 159 members of the World Trade Organisation (WTO), and covers both agricultural and non-agricultural products. In all WTO member countries, GIs have to be protected to avoid misleading the public as to the origin of goods and to prevent unfair competition. WTO members are allowed to use different legal instruments to achieve this. Some WTO members, including 15 EU Member States, have *sui generis* legislation on GI protection for non-agricultural products.

At EU level, unitary GI protection is currently provided for wines, spirit drinks, aromatised wines and for agricultural products and foodstuffs. There is currently no harmonisation or unitary GI protection in place for non-agricultural products at EU level. Instead, national legal instruments apply, resulting in varying levels of legal protection across Europe. Non-agricultural producers who wish to protect a GI throughout the EU need to ensure that they

have separate protection in each Member State, which does not seem to be in line with the objectives of the internal market.

The Commission identified the issue in its 2011 Communication *a single market for intellectual property rights*¹ and proposed a thorough analysis of the existing legal framework for GI protection of non-agricultural products in the Member States, and its implications for the internal market.

The *study on geographical indications protection for non-agricultural products in the Internal Market* ('the Study') was commissioned to follow up on this in 2012². The Study, published by the Commission in March 2013, takes the view that existing legal instruments available for producers at national and at European level are insufficient. The Commission organised a public hearing on 22 April 2013 to discuss the results of the Study and provide a platform for a wide debate on the need for more efficient GI protection of non-agricultural products at EU level. Many of the stakeholders taking part supported the study's call for better GI protection of non-agricultural products at EU level.

In light of the results of the Study and the outcome of the public hearing, the Commission decided to pursue its analytical work through this Green Paper. It aims to consult with all stakeholders in the broadest possible manner on whether there is a need, in the EU, to increase GI protection for non-agricultural products, and if so what approach should be taken. All interested parties are invited to comment on the issues raised in this Green Paper, by responding to the specific questions listed. The Commission will take the results of this consultation into account when deciding whether further action is appropriate at EU level.

¹ http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf.

² The Study was conducted prior to the accession of Croatia to the European Union and does not cover it.

I — Making the most out of GIs: potential benefits from extending EU GI protection to non-agricultural products

1. GIs in the EU: current state of play

1.1 What is a GI?

A GI is a sign, usually a name, used on goods that have a specific geographical origin and possess qualities, characteristics or a reputation essentially attributable to that place of origin. Typically, a geographical indication includes or consists of the name of the place of origin of the goods. This name can be collectively used by all enterprises from the given area which manufacture a given product in a prescribed way. Champagne and Prosciutto di Parma are examples of some world-famous GIs.

The purpose of protecting a GI as an intellectual property right is to ensure fair competition for producers and to provide the consumer with reliable information on the place and /or method of production and the quality of the product.³ The protection GIs give is instrumental in preserving traditional and high-quality products and the know-how and jobs relating to them. Protecting GIs therefore supports small and medium-sized businesses and manufacturers (SMEs). GIs emphasise the relationship between human activity, culture, land and resources, and help to protect intangible assets such as reputation and quality standards.

GI protection is also an incentive for investing in new technologies and innovation to protect the high quality of the products while maintaining competitiveness.

GIs have special features that distinguish them from other intellectual property rights: they are generally not the property of one single entity, as is usually the case for trade marks or patents. GIs belong to a whole community, that is, to all producers whose products originate in the defined geographical area and comply with the specifications set out for the GI.

1.2 The legal framework for GI protection

1.2.1 International legal framework

A number of treaties administered by the World Intellectual Property Organisation (WIPO) provide for the protection of GIs, most notably the 1883 Paris Convention for the Protection of Industrial Property,⁴ and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration.⁵ In addition, Articles 22 to 24 of the TRIPS agreement deal with the international protection of geographical indications within the WTO.⁶

³ As with any other products, those bearing a GI name have to comply with the existing EU system of ‘essential requirements’ and product safety requirements which ensure the proper functioning of the internal market, safety of products for individuals and protection of certain other public interests, e.g. protection of environment or energy efficiency.

⁴ The Paris Convention refers generally to ‘indications of source’ and ‘appellations of origin’ as objects of industrial property, but does not define these concepts. All Member States of the EU are parties to this Convention.

⁵ Ten Member States of the EU are parties to the Lisbon Agreement. Seven EU MS ratified it: Bulgaria, the Czech Republic, France, Hungary, Italy, Portugal and Slovakia. Three signed it but never ratified it: Spain, Greece and Romania.

⁶ Article 22 TRIPS sets out the definition of a GI and contains a general obligation for WTO members to provide protection against misleading use of a GI and against use constituting an act of unfair competition. It also requires parties to refuse or invalidate the registration of trademarks that contain or consist of a GI for goods that do not originate in the territory

These international agreements allow for GI protection to be granted to all product types, both agricultural and non-agricultural. They differ significantly, however, as to the definition, scope, related enforcement measures and other aspects of GI protection.

1.2.2 The legal framework in the EU

In Europe, GI protection is available for both agricultural and non-agricultural products. Agricultural products and foodstuffs (wines, spirits) can enjoy unitary protection granted exclusively at EU level. Non-agricultural GIs are protected only at national/regional level, through various national legal frameworks.

1.2.2.1 Unitary protection at EU level limited to agricultural and food products

At EU level, unitary GI protection has been established for wines (1970), spirits (1989), aromatised wines (1991) and other agricultural products and foodstuffs (1992). The main objective of these systems is to promote quality, variety and value in the food chain, preserve traditional know-how in the sector and stimulate diversification and employment in rural areas. Through these systems, protected names for the products covered enjoy far-reaching unitary protection throughout the EU, with just one application process. At the end of April 2014, 336 names of spirits, 1577 names of wines and 1184 names of foodstuff and agricultural products were registered at EU level. The estimated sales value for EU GIs in 2010 amounted to EUR 54.3 billion, including EUR 11.5 billion of export sales (15% of EU food and drink industry export).

The Court of Justice of the European Union has confirmed that a GI constitutes an intellectual property right.⁷ The EU system for protecting them is exclusive and prevents Member States from running separate, parallel national or regional schemes (as in case with trade marks, for example).⁸ National systems exist to regulate the first step of the application process for EU GI registration and to ensure their administrative enforcement (i.e. making official checks on compliance with the product specifications set by producers, and monitoring use of a GI in the market).⁹

The EU system of GI protection for agricultural products is generally considered a success story, as illustrated by a recent study commissioned by the European Commission.¹⁰ It has brought tangible benefits for consumers and producers, such as detailed information and a quality guarantee for consumers, more stable profit margins for producers, improved visibility, often resulting from participation in trade fairs, access to new domestic and/or export markets, better access to promotion funds and investment aid for producers. GI protection also helps maintain local infrastructure and employment, especially in poorer areas, thus benefiting society as a whole.

indicated, if using the indication in the trademark for such goods might mislead the public as to the true place of origin. Article 23 TRIPS accords a higher level of protection to GIs for wines and spirits. Article 23(1) sets a standard of absolute protection which requires parties to prevent registration of a wines/spirits GI for wines or spirits that do not originate in the relevant geographical location, even if the true origin of the goods is also indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like. GIs for wines and spirits must be protected, even if misusing a GI name would not mislead consumers.

⁷ See C-3/91, Turrón de Jijona, para. 37, or Prosciutto di Parma, C-108/01, para 64.

⁸ See C-478/07 Budějovický Budvar, para. 114.

⁹ See Case C-35/13, Felino, para. 28.

¹⁰ The study on the *Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication (GI)* is available under http://ec.europa.eu/agriculture/external-studies/value-gi_en.htm.

1.2.2.2 Differing national legal frameworks for non-agricultural products

Member States' laws on protecting non-agricultural GIs have not yet been harmonised. The relevant national frameworks therefore vary significantly from one Member State to another. There are significant differences in definitions, registration procedures and cost, scope of protection, and enforcement means. As a result, non-agricultural GIs are subject to varying levels of protection, depending on their country of production, building on the basic protection set out in the TRIPS agreement.

In all the Member States, non-agricultural products are covered by laws on unfair competition or consumer deception. This is also the case for trade mark law, which may also provide a degree of protection. *Sui generis* systems providing GI protection to non-agricultural products are currently operating in 15 Member States.¹¹ These laws take various forms, ranging from regional or national regulations on specific crafts (e.g. ceramics), to specific laws on a certain product (e.g. Solingen knives) or to regional or national laws that protect all non-agricultural GI products.¹²

Question:

1. Do you see advantages or disadvantages in the currently diverse levels and means of GI protection for non-agricultural products in the different Member States of the EU? Please explain your response.

2. Potential economic, social and cultural benefits of extending GI protection to non-agricultural products at EU level

2.1 The economic potential of non-agricultural GIs

There seem to be two main potential benefits of a harmonised EU GI system for producers of non-agricultural products. Increasing the distinctiveness and attractiveness of their products thanks to guaranteeing quality and origin throughout the EU could boost sales¹³ and there would be more effective and uniform EU-wide protection against losses caused by, counterfeiting and imitation.

GI protection may apply to all kinds of non-agricultural products and methods of production, from low- and medium-tech products, e.g. Český křišťál (Bohemian crystal), to more high-tech ones. Recently, the Study estimated that direct and indirect employment in the non-agricultural GI sector in Europe provides up to 4.08 million jobs.¹⁴ These jobs are predominantly in SMEs located in poorer regions.¹⁵ Two thirds of the regions from which

¹¹ Belgium (Wallonia), Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Latvia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain (region of Murcia), see the Study, p. 30.

¹² Study on geographical indication protection for non-agricultural products in the internal market, p. 29-73, http://ec.europa.eu/internal_market/indprop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf

¹³ Moreover, the GI status plays a significant role in allowing producers to start supplying large-scale retailers and to find new customers outside the areas where the products were traditionally known and appreciated by consumers. Additionally, as consumers in foreign markets see GIs as an additional guarantee of product quality, checked by an external body, a GI title helps producers to obtain access to new export markets.

¹⁴ The Study, p.133.

¹⁵ source: European statistics on poverty and unemployment for NUTS 2 Region. This is the case for example with dentelles de Binche (lace –Belgium-) or louça de barro preto de Olho Marinho (Black Clay of Olho Marinho -Portugal) .

non-agricultural GI products originate have a poverty rate or an unemployment rate above 20%.

Guaranteeing the reputation and/or quality of a non-agricultural product enjoying GI protection throughout the EU could help producers access promotion funds and investment aid from public authorities and facilitate better access to trade fairs. The chance to join an EU-wide harmonised GI scheme could also improve collective organisation and management of the protected name by associations of producers.

A famous GI could also bring more publicity to the place or region of origin and provide multiplying effects for example in encouraging tourism,¹⁶ trade fairs and cultural activities and, consequently, creating more job opportunities.¹⁷

Employment generated by a given product under a GI typically cannot be moved to other locations, due to its inherent links to a territory. From this perspective, improving the prosperity of certain regions by granting GI protection to non-agricultural products could help keep jobs and wealth in certain economically fragile areas.

Questions:

2. Do you think that enhanced and harmonised EU GI protection for non-agricultural products, at EU level, could have positive economic effects in the internal market as set out above?
3. Do you see adverse effects such protection could have on the EU economy?

2.2 Consumer benefits

GIs enable consumers who pay attention to the geographical origin of products, are sensitive to the culture or tradition enshrined in them, or care about specific characteristics or quality present in the goods to make informed, safe choices, based on reliable information.¹⁸ GIs aim to provide consumers with certainty that a product has a particular quality, characteristics, and/or reputation due to its particular place of origin, if this is something they value.

Official checks or monitoring mechanisms to ensure that products using a protected GI comply with the product specifications are a key feature of the current EU GI systems in the agricultural sector. GI protection is a tool to prevent fraudulent use of a GI name in the market place. It does not intend to limit the choice of products available to consumers, but instead reserves a specific denomination for use by goods that meet the product specifications and have a clear geographical link. It does not prevent other producers from marketing the same type of goods under a different name. In essence, GIs are designed to protect consumers from ending up with goods which do not have the qualities and features they expect and for which they may be ready to pay a price premium.¹⁹

¹⁶ e.g. The European Route of Ceramics (certified as « Cultural Route » of the Council of Europe since May 2012) which aims at improving the attractiveness of ceramic territories as sustainable tourism destinations.

¹⁷ See: *Geographical Indications, An introduction*, WIPO,

http://www.wipo.int/export/sites/www/freepublications/en/geographical/952/wipo_pub_952.pdf

¹⁸ According to a survey held by Eurobarometer (298) in 2008, 26% of consumers said they were interested in the country of origin of non-food products (not GIs as such), 4th highest-ranked aspect after price, safety and brand.

¹⁹ Only when consumers learn about the quality of products, it is meaningful for producers to invest in manufacturing high-quality products. If a firm decides to produce high quality products, the returns from that decision will be secured in the

Questions:

4. Do you consider that a harmonised EU GI protection for non-agricultural products could benefit consumers?
5. Do you see potential negative consequences for consumers?

2.3 Supporting EU's international efforts to enhance the protection of GIs

Creating unitary protection for GIs for non-agricultural products in the EU may also have a positive impact on negotiating trade agreements with third countries interested in securing better protection for their non-agricultural GIs in the EU. The absence of a harmonised and coherent EU system of GI protection for non-agricultural GIs affects the EU's capacity to negotiate the issue bilaterally, and to achieve better protection in those countries for EU agricultural GIs. The protection of third countries' non-agricultural GIs in the EU market has increasingly become a significant factor in a number of bilateral negotiations with EU trading partners. These often have a remarkably rich tradition in well-known handicrafts and non-agricultural products: for instance, India protects certain non-agricultural GIs related to sarees, silk paintings and shawls.

At multilateral level in the WTO, the EU's negotiating efforts to improve the level of protection for GIs could also benefit from a unitary European system of protection for non-agricultural GIs. In the WTO's Doha development agenda negotiations, the EU has acted to extend to all products the high level of protection currently granted only to wine and spirits.

Question:

6. Do you see potential benefits or disadvantages of harmonised EU GI protection for non-agricultural products on EU trade relations with third countries? If so, where?

2.4 Preserving and valuing European traditions, know-how, the diversity of cultural expression²⁰ and cultural heritage

The best way for typical GI-eligible non-agricultural products to effectively compete is through their authenticity, distinctive quality, and other features valued by consumers. They are under constant pressure from products usurping their reputation, and these products are often of lower quality and are sold at lower prices. The GI-eligible products can succeed if competition is based on fair practices; however, if imitations benefit from the reputation, authenticity and quality expectation of the original products by using the geographic name around which the reputation has crystallised, then the original products may ultimately cease to be produced, and disappear e.g. the Lithuanian flax textile industry. GI products keep traditional and precious know-how alive and are passed on from generation to generation. Their production methods and ancillary activities provide an identification point for local

future, as a result of long-term investment by the producer in building a well established reputation. For that reason, only when consumers are aware of quality, the firm has an incentive to invest in its reputation and in consequence, receive price premiums. The consumer, in exchange, receives a broad choice of high quality and safe products.

²⁰ The European Union since 2006 is Party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and according to Article 167 of the EU treaty the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

society that has been built over a long time. GI products sustain cooperation networks among producers and between producers and other local interested bodies, e.g. public bodies and tourist organisations. They therefore help build social capital in a region. Ultimately, a significant element of Europe's historical, cultural and social heritage may be damaged if GI products disappear due to a lack of appropriate protection.

Questions:

7. Do you believe that harmonised protection for non-agricultural GIs at EU level would help preserve the traditional cultural and artistic heritage reflected in the eligible products? Please explain your response.
8. Would such protection contribute to building social capital in the areas of production?

3. Issues and challenges in making non-agricultural products potentially eligible for GI protection

The stronger the reputation and recognition of a GI, the more likely it is that competitors will try to take advantage of it and misuse the name on goods that do not originate in the specific geographical area and/or do not meet the relevant product specifications or quality features that the name implies. Misusing a GI leads to loss of revenue and market share for legitimate traders as well as potential reputational damage and additional legal costs.

According to the Study, 57.4% of examined products (n=94) reported major problems and losses due to misuse of their GI.²¹ These include:

- imitation products coming from the same country,²² other EU countries²³ or third countries, especially from Asia;²⁴
- evocation of the protected name by unrelated products, for example the wording 'Belgian stone' for fake Pierre bleue de Belgique (stone), Turkish marbles marketed under the denomination 'Botticino Royal' and 'The New Botticino';²⁵ or
- evocation of the protected name by products that are not the same type of product, e.g. Chinese granite, Indian slate and limestone from other countries that use the name 'natural stone from Castile and Leon'.²⁶

The costs of legal action against infringers may be a significant financial burden for a company. For example, the estimated cost for Český granát (Czech Republic) of bringing a case before the court or administrative bodies are 200 000 CZK (around 7770 euro) per year, and for Solingen it is about 50 000 euro per year.²⁷ Depending on the situation, the costs of ensuring effective protection may be significantly higher.

The Study shows that producers adopt numerous strategies to protect themselves against infringements, such as letters of protest (e.g. Harris Tweed, Schwarzwälder Kuckucksuhr),

²¹The Study, p. 97.

²²Tapiserie d'Aubusson (tapestry), faïence de Moustiers (earthenware), Pierre de Bourgogne (stone) etc.

²³For example: Italian imitations of Pierre de Bourgogne (stone), Romanian imitations of vetro di Murano (glass).

²⁴E.g. dentelles de Binche (lace), Marmo di Carrara (marble), Vetro di Murano (glass), Horezu ceramics, natural stone from Castile and Leon.

²⁵ Botticino is a town in the province of Brescia, Italy.

²⁶The Study, p. 99.

²⁷*Ibid*, p. 109.

anti-counterfeiting campaigns (e.g. Swiss Watches), registering trade marks (e.g. the Ceramica Artistica e tradizionale di Vietri sul Mare) or taking legal action (e.g. Deruta ceramics, Murano).

The Study concludes that the outcome of all these actions is, however, often uncertain, as a result of the lack of an EU unitary legal framework for non-agricultural GI protection, leading to various systems with different degrees of protection, enforcement and no clear universal framework.

Questions:

9. Do you believe that harmonised EU GI protection for non-agricultural products could help producers defend themselves against imitations and abuse? Please explain your response.

10. How could competing producers protect themselves against an over-reach of GI?

4. Alternatives to EU harmonised protection

The Study found that the existing national instruments provide a certain level of protection when used for the purpose of providing GI protection at EU level for non-agricultural products.

Laws on unfair competition²⁸ and consumer deception, which exist in all EU Member States, provide protection against unfair commercial practices, including misleading information as to the main characteristics of a product, such as its geographical origin.²⁹ In practice, however, these laws are limited in the extent to which they can provide effective protection against the misuse of non-agricultural names.

Moreover, these laws still differ significantly from one Member State to another. For example, different national, regional or local bodies³⁰ (e.g. in Spain), or private consumer associations (e.g. Germany) are responsible for enforcing these laws, which implies different costs, procedures and formal requirements. According to the Study,³¹ in countries where enforcement is available through such bodies, no example of action to protect non-agricultural GIs has been found.

²⁸Unfair competition may be defined as ‘any act of competition contrary to honest business practices and industrial commercial matters’.

²⁹Directive 2005/29/EC defines the unfair commercial practices which are prohibited in the European Union (EU) and the other 3 EEA countries. Article 6 emphasises that a commercial practice must be regarded as misleading if it contains false information which deceives or is likely to deceive the average consumer notably with regard to the main characteristics of the product, such as geographical or commercial origin. Article 11 provides specific redress, as Member States and other EEA countries must ensure that adequate and effective means exist to combat such practices. These means must include provisions allowing persons or entities having a legitimate interest (consumers and competitors) to take legal action against these unfair practices and/or to bring these practices before an administrative authority.

³⁰Administrative authorities in Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Italy, Latvia, Luxembourg, Poland, Portugal, Romania and Slovenia have an obligation to investigate the complaints that they receive. The majority of competent authorities are able to dismiss complaints on varying grounds, e.g. in Belgium for rationalisation purposes, 40% of all complaints are dismissed and only ones involving significant financial losses involved are dealt with.

³¹ The Study, p. 35.

Furthermore, it appears from the Study that producers often do not open civil proceedings against unfair practice, as costs can be significant and evidence is often hard to establish.³²

Trade mark protection also has its limits. It gives its owner the right to exclude all others from using the trade mark. The trade mark (name, logo, etc.) chosen does not have to have any link with the products or their origin. In contrast, a protected GI aims to provide a guarantee to consumers that goods are produced in a certain place and have specific qualities as a result. A trade mark therefore typically cannot provide the same information and guarantees as a GI.

In some cases, a GI may obtain some protection under trade mark law, more specifically through collective or certification marks. Collective marks are owned collectively by a group of producers (e.g. an association), and may be used by more than one person, as long as the user is a member of the group and complies with the rules it has set out. A certification mark is owned by a certifying legal entity that checks that the mark is used according to certification standards. The certifier controls use of the mark and has the exclusive right to prevent unauthorised use. The certifier typically cannot make use of the mark itself, and use is open to anybody that meets the certification standards. These kinds of protection provide some of the features of GI protection. However, general trade mark law does not provide for any predefined standards, in particular a link to a specific geographical area, and leaves the holder entirely free to define its own rules of use. Consequently, collective and certification marks lack the core guarantee features of a GI scheme.³³ The current EU trade mark system does not cover certification marks but allows GI producers to register their name as a collective Community trade mark.

In the majority of cases, regional or national regulations on specific crafts deal only with collective strategies to promote or protect individual local crafts. Specific laws on products actually set out product specifications (e.g. Solingen knives, Harris Tweed, Bordado da Madeira). Existing regional and national laws on industry-wide protection are not harmonised, differing considerably in key aspects, such as the definition of a GI, scope of protection, registration procedures, fees, controls and enforcement. In addition, protection *via* national laws can only ensure that the GI is respected in the relevant Member State. It does not provide protection across the EU or guarantee a level playing field for protection in the single market.

Question:

11. What do you think of current alternatives to harmonised protection for non-agricultural GIs?

II — Options for GI protection at EU level

An EU-level response to the challenges outlined above could take various forms. Better protection for GIs would need to be compatible with the existing European and international legal framework and need to meet both economic and stakeholder needs. The existing system for agricultural GIs is a clear point of comparison. In this following section of the paper, the

³² The Study, p. 34-35.

³³ See 'Guide to geographical indicators linking products and their origins' by Daniele Giovannucci, Tim Josling, William Kerr, Bernard O'Connor, May T. Yeung (International Trade Centre).

Commission is seeking the views of interested parties on several parameters considered key to designing a possible EU initiative on GI protection for non-agricultural products.

1. Objectives and criteria for protection

The possible objectives for any new measures range from fulfilling the minimum requirements on GI protection set up by TRIPS, to providing additional criteria, like those that are included in the EU legislation on agricultural GIs.

1.1 What label: names and symbols

The label most frequently used to refer to a product eligible for a GI protection is its name. This very often includes the name of a geographical area (specific place, region or country e.g. Herend³⁴), possibly associated with the name of the goods themselves, for example Scottish tartan³⁵ or tapisserie d'Aubusson.³⁶

But a non-geographical name can also constitute a GI denomination, provided it is unambiguously associated with the place of origin. Extending the definition of a GI to this kind of name would allow more products to be covered. This solution was also adopted by the EU system relating to agricultural GIs, under which feta cheese³⁷ and Spanish sparkling wine Cava³⁸ are protected as GIs, for example.

Another option, which would allow even wider coverage, would be GI protection of non-text signs or symbols which are unambiguously associated to a certain region, specific place or country, such as for example the contours of a geographical area.³⁹

Questions:

12. If a new system was developed at EU level, should this protect GIs that cover non-geographical names which are unambiguously associated with a given place?
13. If so, how could be the system ensure that such protection does not affect the rights of other producers?
14. Should similar protection also cover symbols such as the contours of a geographical area? If so, under what conditions?

1.2 Which indications should be excluded from GI protection?

³⁴A well-known name used to designate porcelain tableware and decorative objects named after the town of Herend in Hungary.

³⁵“Tartan” is a traditional Scottish cloth pattern of stripes in different colours and widths that cross each other to form squares see <http://www.merriam-webster.com/dictionary/tartan>. The Scottish Tartans Society (founded 1963) maintains a register of all known tartans, numbering about 1,300.

³⁶Aubusson carpets are floor coverings, hand-woven in the villages of Aubusson and Felletin, in the département of Creuse in central France.

³⁷There is no region named ‘Feta’ in Greece but the indication ‘Feta’ has, by long-term and consistent use, developed a strong link with the geographical area where it is produced.

³⁸Cava is produced in Catalunya, Castilla y León, Aragón, Navarra, La Rioja, Extremadura and Valencia.

³⁹A typical example would be the cartographic outline of the (US) state of Florida for ‘oranges’.

The TRIPS agreement provides for several possible exemptions from the obligation to ensure protection for a GI. These include generic terms,⁴⁰ cases where there is a conflicting prior trade mark⁴¹ and, to a certain extent, cases involving homonymous geographical indications.⁴² A term is considered generic if it is the common name for the kind of product or service (rather than a specific example of a good or service) in the relevant territory of the country where protection is requested. For example, the term ‘eau de cologne’ now denotes a certain kind of perfume, regardless of whether or not it is produced in the region of Cologne, in Germany. Homonymous GIs are those that are spelled or pronounced alike, but which identify products originating in different places, usually in different countries. There is no reason, in principle, why these should not be entitled to co-exist. However, conditions may be placed on such coexistence to prevent consumers from being misled.

These exceptions are reflected in the EU Regulations on GIs for agricultural products.⁴³ The Regulations add other exemptions from registration, when names conflict with the name of a plant variety or an animal breed⁴⁴ and are likely to mislead the consumer as to the true origin of the product. While these specific cases are not likely to be relevant in the context of non-agricultural products, it would be necessary to determine whether the specificities of non-agricultural products would justify adding other exceptions to those set out in the TRIPS agreement.

Question:

15. Do you see a need to add any further exceptions to GI protection other than those already provided in TRIPS? Please explain your response.

2. To what should GI protection be applied: a cross-cutting vs. a sectoral approach?

A sectoral approach would establish specific rules for different categories of products, for instance those for which the presence of raw materials is particularly important (e.g. stone). This is currently the structure at European level in the agricultural area (where there are separate GI regulations for wine, spirits, aromatised wines, and agricultural products and foodstuffs), but the split seems mainly to be for historical reasons. Alternatively, a cross-

⁴⁰TRIPS Agreement Article 24(6): ‘Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. (...)’.

⁴¹Article 24(5) of the TRIPS Agreement provides that ‘where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith before the geographical indication is protected in its country of origin; measures adopted to implement the TRIPS provisions related to GIs shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.’.

⁴²Article 23(3) of the TRIPS Agreement provides ‘In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.’

Article 22(4) of the TRIPS Agreement establishes that ‘The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate falsely represents to the public that the goods originate in another territory.’.

⁴³For example, Article 6(1), (4) and (3) of Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs.

⁴⁴Article 6(2) of Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs.

cutting approach would set out the core elements of the system generally, to apply to any category of product.

Questions:

16. Do you see a need to differentiate between various protection schemes depending on the categories of non-agricultural products involved (sectoral approach)? If so, please explain why.
17. Do you think some products should be excluded from GI protection at EU level? If so, please specify.

3. The link between product and territory

3.1 How strong should the link with the territory be?

A GI must identify a product as originating in a specific territory, region or locality, where a given quality, reputation or other characteristic of the goods is a result of its geographical origin. A GI is used when trading to establish a connection between product quality, reputation or other characteristics and the place of origin. A specific ‘causal link’ between the product’s quality, reputation or other characteristics and their designed geographical origin is required, as those qualities depend on the natural conditions (specific geological, hydrological, soil and climate characteristics) of the place of production and/or the ways human societies work with them (i.e. know-how developed by the people in this area /particular skills developed over the years by local experts).

The natural link can take different forms. Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on a quality scheme for agricultural products and foodstuffs,⁴⁵ for example, provides for two types of GI labels for agricultural products and foodstuffs: the ‘protected geographical indications’ (PGI) and ‘protected designations of origin’ (PDO). The difference is based on the strength of the connection with the geographical area. For a PGI, one of the production steps, processing or preparation must take place in the area, while the raw material may come from another area. For a PDO, the entire production process must take place in the defined geographical area, and the raw materials must also come from the same area. Natural links based on the strictly defined concept of ‘*terroir*’⁴⁶ is even stronger in the wine sector, where, for both GI signs, all the production stages must take place in the geographical area. In the case of a PDO, 100% of the grapes must exclusively originate from that area; this figure is set at 85% or more for a PGI.

This link to a geographical location can also apply to non-agricultural products. In some cases, such as marble and stone, the strength of the link is comparable to that for agricultural products. The same variables set out above would apply. In principle, the stronger the link, the more credible and authentic a product will be in the eyes of the consumer. However, certain GIs may be based entirely on human rather than natural inputs, or on reputation. The Study

⁴⁵ OJ L 343, 14.12.2012, p. 1.

⁴⁶ *Terroir* is a concept in viticulture which relates the attributes of a wine to the environmental conditions in which the grapes are grown.

suggests that few non-agricultural products identified as candidates for GI protection would meet the strict 'PDO requirements'.⁴⁷

Questions:

18. How strong should the link be between non-agricultural products and their place of origin, in order to qualify for GI protection in any new system?
19. Should a new system allow for two types of link (one stronger than the other) between non-agricultural products and their area of origin?
20. Should there be differences depending on different types of products? Please explain.

3.2 Quality and product specification

A GI is predominantly a quality commitment to consumers and a guarantee of a level playing field for producers. A system granting GI protection therefore requires the specific core features of the product and its production process to be set out. In EU agricultural GI legislation, all the technical information necessary to describe the product, its method of production and the geographical area relating to the product should be provided by the producers when they apply for registration. The product specification is a determining factor in registering for GI protection.

Requiring the description of product features ensures stable product quality, but does not require a particular level of quality. This can only be achieved by requiring a minimum quality level. However, identifying a meaningful quality benchmark may not work for all products, and setting a particular level of quality requires an element of discretion.

The added value GIs bring is based on consumer trust. A GI scheme has to guarantee to the consumer that the specific characteristics, given quality or reputation of GIs are maintained during the whole period of protection. To achieve this goal, the cross-EU GI system for agricultural products put in place numerous requirements for checks after registration, to ensure products were meeting the product specifications and the name was being properly used in the market place. These checks are normally carried out by a designated public authority or a selected and certified private body. Specific characteristics and quality should, however, not be set out in an overly restrictive way. An overly detailed description could slow down product innovation and, while traditional products do not change very frequently, they do evolve to reflect developments in processes and technology. The focus should be on quality, allowing creativity to interact with traditional know-how. As an example, the designer Carlo Scarpa worked closely in the 1940's with master glassblowers on pioneering techniques that are now a full part of the Vetro di Murano (glass) tradition.

Questions:

21. Would a quality benchmark make sense for non-agricultural products?
22. How could such benchmark be defined?
23. Do you agree that there would be a need to check whether the specific characteristics, quality and origin of a GI are maintained during the whole period of protection? Please explain.
24. How do you think specific characteristics of the product should be defined to ensure

⁴⁷The Study, p.298.

quality and geographic origin meets the required standards, while not limiting innovation?

3.3 Reputation attached to the product

Reputation attributable to geographical origin could be used as a criterion in addition to, or as an alternative to, a particular quality or inherent characteristic of the product. This would allow GI protection to be extended only to products that have already developed a recognised reputation among consumers. This kind of solution would, however, disadvantage new or developing products which — by definition — do not already have any reputation.

Questions:

25. Should ‘quality, reputation and other characteristics’ be required in order to obtain GI protection for non-agricultural products? If not all, which of these elements do you think should be required? Please explain your choice.
26. What should a product specification include? Should minimum requirements be set? (For example, relating to frequency, method for selecting products, and parties involved in different production and distribution stages.)

4. How to enhance protection

4.1 Harmonising national laws

Harmonising national legislation on GIs would mean that a GI protection system would need to be created in some Member States that currently do not have such a system. For GIs to be effectively protected, a particular indication would have to be protected throughout the internal market, or else consumers risk being confused through identical GIs for different products from different Member States.

On this basis, harmonisation would require mutual recognition and protection of GIs, excluding duplication. To avoid duplication, Member States would need to be able to detect potentially conflicting GIs, including in foreign languages. This would be difficult, especially if there is no supranational-level objection process. A mechanism to resolve conflicts between similar indications from different Member States would also need to be established.

To ensure a uniform approach to implementing and enforcing GI protection, a relatively high degree of procedural harmonisation would be necessary, including on enforcement provisions. This option has been considered, but was discarded, in the agricultural policy area, where protection of GIs exclusively at EU level has been put in place through regulations.

4.2 Creating a single EU-wide system

Instead of harmonising EU Member States' national laws, a single EU-wide system could be set up. This would provide a coherent system across the internal market and could provide more efficient delivery of the service through one-stop shops, creating protection applicable across the entire EU.

If this is introduced, the question remains as to whether existing national systems protecting GIs should co-exist with the new EU-level system. Parallel systems like these already exist, for example in trade marks, and will exist in the future in patents. They take a toolbox approach, allowing users to choose the relevant level and scope of protection according to their needs.

An exclusive EU system would be simpler, but it also means that protection for names which are commercially relevant only in a single Member State or a region within a Member State would nevertheless have to be extended to all other Member States as well.

If parallel systems are used, various safeguards would be needed to ensure smooth functioning, including a minimum level of harmonisation of national laws in their interaction with EU law.

Potential friction would be avoided if an exclusive and exhaustive EU-level system was introduced, similar to the system currently in place in the agricultural sector. As there would be no EU-wide protection granted at national level, transitional arrangements would have to be arranged for pre-existing national GIs.

Questions:

27. Would harmonising national legislation be sufficient to effectively protect GIs for non-agricultural products across the internal market, or do you consider that a single EU-level protection system is required?
28. If you are in favour of a single EU system, should national systems of protection (e.g. the current *sui generis* national laws) continue to coexist? Please explain.

5. Registration

In principle, GIs could be protected without the need for registration. Without registration, there is no need to organise administrative procedures to grant protection. Systems that protect GIs without registration exist in one Member State (Latvia) and also in Switzerland where the law provides for specific measures and penalties to protect consumers from misleading use of non-registered GIs.

The absence of a registration system means that there would be no public registry that could be searched to identify pre-existing GI names and identify the relevant owners. This could lead to uncertainty about the existence or scope of the protection. This would also make it more difficult to enforce the protection granted. An EU-level registration process could follow the example of agricultural GI systems (for which a registration system at EU level already exists). This would provide more certainty, especially on implementing rights, in the event of

a dispute. A system with a registration process would obviously require that companies carry out administrative tasks (filing an application, objections, possible fees, etc.) linked to this process. This would generate some administrative costs. Additional costs would also arise from the subsequent management (e.g. enforcement, litigation) of the GI granted.

5.1 Role for national administrations in an EU registration system

If a registration system is agreed, this would raise the question of setting up a registration process. GI registration applications will need to be analysed against the relevant local context (including knowledge of the characteristics of local raw materials, local traditions etc.). It may be difficult to leave these tasks exclusively to a single central EU body. However, if it were left to local experts to decide on how to examine conditions for granting protection, there is a risk that diverging local practices develop. This could damage the overall cohesion and credibility of the system.

For agricultural products, this challenge was solved *via* a two-step system where the central authority entrusts this aspect of the analysis to the national authorities closest to the particular geographical environment and human factors. Under this model, a clear distinction would be drawn between common EU-wide criteria to be checked by the central authority, and local specificities that more local bodies would check.

5.2 Administering an EU register

For agricultural products, an EU-wide GI register is currently managed by the European Commission. This kind of register for non-agricultural GIs could be managed similarly, or delegated to a new or existing EU agency.

Questions:

29. If a new system were to be developed, do you think there should be a registration process to protect a non-agricultural GI?
30. Do you think that the potential costs of a system of registering GIs outweigh the costs of a system without registration?
31. Do you think the registration process should involve a national element, e.g. checking compliance with product specifications, indicated geographical area, quality, reputation etc.?

5.3 Content of the process

5.3.1 Applicants

If a process for registering GIs at EU level were to be put into place, the first issue would be to determine who should be entitled to apply for protection.

In the current agricultural EU-level GI system, typically, a group of producers (or, exceptionally a single producer) may file applications to register a GI name relating to areas

inside or outside the EU. There are no reasons that would justify a different approach for non-agricultural products.

However, the results of the Study highlight that in some Member States, chambers of commerce, local communities, state bodies or consumer associations are able to apply for GI protection.⁴⁸ Allowing consumer associations and state bodies to seek GI protection may strengthen the quality aspect of the product specifications. However, producers must remain directly involved in setting the rules which are going to be applied to their production process.⁴⁹

Questions:

32. If a new system is created, should producers and their associations be the only people allowed to apply to register non-agricultural GIs, or should other bodies be allowed to apply? If so, which ones?
33. Should individual producers be allowed to apply?

5.3.2 Objecting to the registration of a GI

For the credibility and legal certainty of a system, it would seem important to allow interested parties to object to the registration of a label as a GI. The objection process could first aim to ensure that the GI label meets the required conditions (for example, that it is not a generic name) and that the protection to be granted would not jeopardise pre-existing rights (e.g. homonymous GIs, trade marks). EU agricultural legislation currently allows objections from Member State or third-country authorities, or any natural or legal person with a legitimate interest who is established in a third country, or established or resident in a Member State other than that from which the GI application was submitted.⁵⁰

Question:

34. If a new system were to be created, would you agree that an objection process should be included and that it should be open to the same type of interested parties as under the agricultural GI rules?

5.3.3 Fees

Around the world, there is typically a fee for registering trade marks and patents and, as reported in the Study, nine national authorities collect fees for registering GIs⁵¹, increasing to ten with the accession of Croatia. Fees can help to cover the costs of managing the registration of GIs, and they help limit registration requests to serious and solid business projects. On the other hand, fees may particularly discourage small producer groups from using the system. Registering GIs at EU level in the agricultural sector is currently free of charge.⁵²

⁴⁸ The Study, p. 302.

⁴⁹ *Ibid*, p. 303.

⁵⁰ Article 51(1) of Regulation (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs.

⁵¹ See Annex I to The Study.

⁵² In the case of agricultural products and foodstuffs, the possibility is offered to Member States to charge a fee to cover their costs of managing the system at their level (Article 47 of Regulation (EU) No 1151/2012).

Questions:

35. Should protecting non-agricultural GIs at EU level by registration require the payment of a fee?
36. What level of registration fee would you consider to be fair?

6. Scope of protection

6.1 Level of protection granted

To bring about the intended results, the legal protection granted must offer proper protection against a whole range of behaviours and practices that could be harmful for the GI holder and the consumer. However, such protection must not constitute an unjustified impediment to competition in the internal market.

The TRIPS agreement provides for two types of protection: a general scheme, setting minimum standards of protection for all types of products (Article 22) and a specific scheme, establishing a higher level of protection, for wines and spirits only (Article 23).

Article 22 TRIPS contains a general obligation for WTO members to provide protection against misleading use of a GI and against use that constitutes an act of unfair competition. The EU has already granted a much higher level of protection for agricultural GIs. As a result, it could be difficult to justify different treatment for non-agricultural products if we were to develop a new system. Doing so could also have a negative impact on the EU strategy to secure higher levels of protection for EU GIs in third countries.

Article 23 TRIPS, however, provides for a much higher level of protection, requiring WTO members to prevent any use of a GI to identify wines or spirits that do not originate in the place indicated by the GI, even if the true origin of the goods is also indicated or the GI is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’. Wine and spirits GIs have to be protected even if misuse would not cause the public to be misled.

Such increased protection would bring considerable benefits to non-agricultural GI producers. They would also benefit from protection being given to the name used in translation in all official EU languages or accompanied by expressions such as ‘type’ and ‘kind’. However, the risk of disputes between producers would increase, as there might be conflict not only on the use of a GI name, but also relating to its use in translation and in certain expressions.

Questions:

37. What scope of protection should be granted for non-agricultural GIs in the EU?
38. Should the protection granted to non-agricultural GIs match the safeguards already provided to agricultural GIs at EU level. If so, how closely?

6.2 Monitoring and enforcing GI rights

GIs are special intellectual property rights in their legal nature, i.e. they are not primarily individual private property but they belong to a whole community of producers who meet a predefined set of product specifications and have a link to a geographical location. They may

also embody certain values which are vital for the entire community, for example local traditions and cultural heritage. For that reason, public authorities often support local GI producers in monitoring and enforcing their rights. The EU, for example, has established *ex officio* protection of agricultural GIs, where public authorities are responsible for putting in place a system to check compliance with the legal requirements and ensure the smooth functioning of the system. However, introducing a system like this for non-agricultural GIs would impose additional obligations and generate costs for public authorities.

Question:

39. Would you prefer a system to monitor and enforce non-agricultural GI rights that was exclusively private, public, or a combination of public and private? Please explain, taking into account, if possible, the effectiveness and costs of action to enforce rights.

6.3 Duration of non-agricultural GI protection

For some intellectual property rights, e.g. patents and designs, maintaining a monopoly for a very long period would not be beneficial to society. As a result, their legal protection has a limited duration. This appears not to be the case for trade marks and GIs that protect certain names. A registered community trade mark, for example, is valid for ten years from the date the application was filed, and it can be renewed indefinitely for further periods of ten years. A unitary GI for agricultural products — the rationale of which is to preserve regional/local heritage, traditions and know-how — is protected indefinitely, with no renewal requirement. The majority of Member States which have established a *sui generis* system to protect GIs for non-agricultural products also provide for indefinite protection, without the need for renewals.

Question:

40. In your opinion, should GI protection for non-agricultural products be unlimited in duration, or limited with the possibility of renewal? If you suggest a limited duration, how long should this be?

7. After registration

7.1 Cancellation of the protection

There might be circumstances in which the protection granted should end, even if the GI protection is granted for an indefinite period or if the prescribed time limit has not yet elapsed. This could be the case, as in the agricultural GI field, where products do not meet the conditions set out in the relevant specification or where no product is placed on the market under the GI for a significant period of time.⁵³ A cancellation process could be administered by the body in charge of registration, or alternatively directly by a court. This process would provide an additional layer of control, and would contribute to the overall credibility of the

⁵³ Article 54 of Regulation (EU) No 1151/2012.

potential system. However, it might create uncertainty for rights holders and increase costs for the body responsible for the process.

Questions:

41. Do you agree that there should be the possibility to cancel a GI after registration?
42. Who should be allowed to apply to cancel the GI?
43. If a new system were to be established, would you agree that a cancellation process should be introduced, with the same terms and conditions as for agricultural GIs?

7.2 Potential conflicts between GIs and trade marks

A clear relationship between a potential GI system for non-agricultural products and trade mark law would need to be defined, to avoid legal uncertainty and confusion in relation to conflicting names.

The general principle of intellectual property law, applicable to trade marks, designs, patents etc., is that, the prior right prevails (i.e. the ‘first in time, first in right’ principle). Applying this principle to the relationship between trade marks and non-agricultural GIs could help simplify the whole system.

The unitary GI system for agricultural products contains specific provisions on the relationship between GIs and trade marks. They are as follows:

- a) a pre-existing trade mark’s reputation may prevent a GI from being registered, if registering the GI may mislead consumers as to the true identity of the product;
- b) any trade mark which does not fall into this situation and which has been applied for, registered or established by use in good faith before the date of application to register a GI at EU level should coexist with the registered GI;
- c) registration of a GI should prevent registration of a trade mark which was applied for after the GI, if allowing this would conflict with the protection granted to the GI. In this case, national or European trade mark offices should refuse *ex officio* to register the trade mark.

To ensure clarity and consistency at EU level, it could be argued that the same rules should apply to the GI protection of non-agricultural products.

Questions:

44. Do you think that GIs and trade marks should be subject to the pure ‘*first in time, first in right*’ principle (i.e. the prior right always prevails)?
45. Should GIs prevail, in certain circumstances, over trade marks? Please explain.

Conclusion

All interested parties are invited to comment on the issues raised in this Green Paper by responding to the specific questions set out in it. Responses should be sent by email to the following address to reach the Commission by 28 October 2014: MARKT-CONSULTATION-GIs@ec.europa.eu.

Responses received will be published on the DG Internal Market and Services website unless you request otherwise. It is important to read the specific privacy statement attached to this consultation document for information on how your personal data and consultation response will be handled.