
Geographical indications for non-agricultural products

Comparative analysis and proposal for regulation at EU level

ECTA AWARD

Núria Franqueza Pasamón

nuria.franqueza@gmail.com

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Dedicated to my mother and my brother for putting up with reading the same concept over and over again. Dedicated to my father and grandfather, for teaching me to love the countryside and the people. Dedicated to Anna for being my confidant in worries. Finally, dedicated to Oscar, thank you for making me breakfast and for being my support.

The Open University of Catalonia does not intend to give any approval or disapproval to the opinions expressed in this paper. These opinions are to be considered as their author's own.

Preliminary considerations

It should be noted that this paper was partially a final bachelor's degree project, tutored by Professor Encarnación García Escobar and submitted in May 2022. The content of this paper has been altered to reflect the latest development of this rapidly changing matter. Within this changes, a brief review of the publication of the Council general approach on the regulation of Geographical Indication for craft and Industrial Products has been incorporated, as well as other minor alterations needed to improve this paper's quality.

Summary and keywords

Geographical Indications for non-agricultural products: comparative analysis and proposal for regulation at EU level

Núria Franqueza Pasamón (nuria.franqueza@gmail.com)

Degree in Law - Commercial Law – Intellectual Property Law

Summary

The aim of this paper is to highlight the lack of regulation of non-agricultural geographical indications – or as termed by the recent draft regulation of the EU: Geographical Indication protection for Craft and Industrial Products (GIs for CI) –, both in Spain and in the European Union (EU). It will also define the legal nature of GIs for CI, considering them as rights that are part of industrial property. Subsequently, it will define and analyse the current status of the GIs for CI within the European Union, analysing in detail the French regulatory model, partially modelled on regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012, on quality schemes for agricultural products and foodstuffs.

It will also outline the issues that regulation of these intangible assets could address, such as providing legal certainty especially for artisans and small and medium-sized enterprises, preserving traditional processes, and boosting employment in rural areas.

Next, the competences of the EU to regulate on this issue will be analysed, as well as the Spanish competences at national level. Finally, the new proposal for a regulation made by the European Commission, published during the preparation of this work, will be briefly described.

In conclusion, in order to solve the lack of legal certainty and harmonisation, it is necessary to create a regulation for the GIs for CI, which has already been set in motion by the European Commission and has yet to be approved.

Keywords: Geographical Indication for craft and Industrial Products, Geographical Indications of Non-Agricultural Products, European Union, Industrial Property, Handicrafts

INTRODUCTION

As time goes by and notably with the entry into a globalised society, interest has shifted from craft products to mass-produced products. This trend, coupled with the loss of interest in the rural world, leads to the neglect of traditional craft practices and the lack of exploitation of natural resources that previously served the purpose of making handicrafts.

The return of production to Europe from third countries – because of externalization - together with the return of traditional techniques could mean greater sustainability, better use of natural resources and a return to rural areas suffering from depopulation across the European Union (EU).

The purpose of this paper is, on the one hand, to highlight the lack of regulation on non-agricultural geographical indication or, as named by the Commission, Geographical Indication Protection for Crafts and Industrial Products (GIs for CI), both at Spanish and EU level. On the other hand, with the intention of proposing an adequate regulatory model at EU level, the regulatory context of the EU Member States will be analysed, highlighting the most complete systems. The problems that the creation of a regulation for the GIs for CI could solve will be presented, and it will be distinguished which bodies have the capacity to regulate in this area, both at national and EU level.

The methodology used is deductive, as a conclusion will be drawn from a premise that is considered to be true, also using a comparative methodology as the state of regulation in various countries will be compared.

The main premise is that there is a lack of harmonisation in the legislation on GIs for CI within the EU, and that this high level of fragmentation hinders the proper functioning of the common market, as it distorts and undermines its development. Furthermore, the lack of homogeneous protection of GIs for CI prevents competition on equal terms for all users, hence a regulation at EU level would be beneficial for small and medium-sized enterprises (SMEs) in general, and those dedicated to crafts in particular.

Therefore, the interest of this work lies in the aforementioned fact that there is no mechanism at EU level to protect the qualities attributed to specific local skills and traditions related to non-agricultural craft products. This issue is of great interest at

present, being in line with the Intellectual Property and Industry Action Plan¹, and taking into account that the European Commission has been considering since 2011² the possibility of extending GI protection to non-agricultural products at EU level in order to harmonise a fragmented system at national level. As has been said, there is no doubt that this is a highly topical issue, as evidenced by the fact that, during the course of writing this paper, the European Commission has published a draft proposal for a Regulation on this matter³ and the subsequent publication of the Council general approach on the regulation of Geographical Indication for craft and industrial products, which will be discussed in the last point.

¹ European Commission (2020) Intellectual Property Action Plan to support EU recovery and resilience. [Online] Retrieved on 6 May 2022, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020DC0760>

² European Commission. Geographical Indications for non-agricultural products. [Online]. Retrieved 27 March 2022, available at: https://ec.europa.eu/growth/industry/strategy/intellectual-property/geographical-indications-non-agricultural-products_en

³ Intellectual and industrial property: Commission boosts protection of European craft and industrial products in the EU and beyond [online]. Retrieved 1 May 2022, available at: https://ec.europa.eu/commission/presscorner/detail/es/ip_22_2406

I. Legal nature of non-agricultural geographical indications

1. Legal nature of the GI

Products can be recognised as "Geographical Indications" (GIs) when they have a specific link to their place of production. Because of this, the GI designation evokes in consumers the ideas of quality, trustworthiness, and reputation, among others. GIs include "Protected Designation of Origin" (PDO), "Protected Geographical Indication" (PGI) and GIs for spirits and aromatized wines.⁴

Each of these protections has specific requirements and covers different products. In the case of PDOs, the product must originate from a specific place - a region or even a country exceptionally - its quality or characteristics must correspond to a particular geographical environment with the natural and human factors inherent to it, and all its production stages must take place in that defined geographical area.⁵ On the other hand, in the case of PGIs, although it coincides in the need for a certain geographical origin, in order to obtain this protection the product must possess a certain quality, reputation or other characteristic that can be attributed to its origin, and of the production stages it is sufficient that one takes place in the defined geographical area.⁶

In addition, there are also: traditional specialities guaranteed (TSG) which highlight the traditional aspects of the product without being linked to a specific geographical area; "mountain product" protection, which highlights products produced in mountain areas characterised by difficult natural conditions; and products from the outermost regions of the EU.⁷

Currently, all these types of protection are oriented towards agricultural or food products. The fundamental difference with GI protection for non-agricultural products is that the protection is quality-oriented based on local know-how and traditional techniques related to non-agricultural products.

⁴ Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019

⁵ REGULATION (EU) No 1151/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 November 2012 on quality schemes for agricultural products and foodstuffs

⁶ Ibid

⁷ European Commission. Quality schemes: other schemes. [Online]. Retrieved 28 March 2022, available at: https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_es

2. Consideration of GIs as industrial property rights

GIs are widely accepted by the doctrine⁸ as belonging to the category of industrial property rights (IP), being integrated in this field of protection and considered as distinctive signs.

For example, José António Hernández Rodríguez lists geographical indications and designations of origin as industrial property rights, when he states:

"These are not the only Community rights in the field of industrial property, but in addition to the two most important ones, others should be added, such as the following: [...] the protection of Protected Geographical Indications (PGI) and Protected Designations of Origin (PDO) for agricultural products and foodstuffs, created by EC Regulation 2081/92 of 14 July 1992, and recently amended by Council Regulation (EC) 510/2006 of 20 March 2006."⁹

Raquel Ceballos Molano and Isabel Cristina García Velasco also do so in the following quotation, further dividing the types of geographical indications:

"Industrial property law protects the distinctive signs of which geographical indications (GIs) are part, which in turn are divided into two types: 1) indications of provenance (IP) and 2) designations of origin (AO), two concepts that seem synonymous but are different".¹⁰

They are also recognised in this way by public institutions, as expressed by the Ministry of Agriculture, Fisheries and Food: "*Both geographical indications [Protected Designations of Origin (PDOs) and Protected Geographical Indications (PGIs)] and trademarks confer intellectual property rights on their owners or holders and are used to distinguish certain products from others in the marketplace*"¹¹. At the supranational level,

⁸ Among others, HERNÁNDEZ RODRÍGUEZ, J.A.. "La importancia de los Derechos de Propiedad Industrial" *Economía industrial*, ISSN 0422-2784, N 379, 2011 (Issue dedicated to: Industrial Property Rights and global competitiveness), Pp. 107-112; FERNÁNDEZ-N VOA, C., Otero Lastres, J.M, and Botana Agra, J.M. "Manual de la Propiedad Industrial", Marcial Pons, Madrid-Barcelona-Buenos Aires, 2009; CEBALLOS, R. & García, I. (2013), "Protección legal de las denominaciones de origen y las marcas frente a los TLC suscritos por Colombia". *Revista Prolegómenos. Derechos y Valores*, 16, 32, 175-189; MAYAL, A. & SPIEGELER, M. "Colisión de derechos entre indicaciones geográficas y marcas algunas consideraciones para resolverlos". *Auctoritas Prudentium Journal*, ISSN 2305-9729, No. 15, 2016. Pp. 93-125.

⁹ HERNÁNDEZ RODRÍGUEZ, J.A.. "La importancia de los Derechos de Propiedad Industrial" *Economía industrial*, ISSN 0422-2784, N 379, 2011 (Issue dedicated to: Industrial Property Rights and Global Competitiveness), p. 109.

¹⁰ CEBALLOS, R. & GARCÍA, I. (2013). Legal protection of appellations of origin and trademarks under the FTAs signed by Colombia. *Prolegómenos Journal. Derechos y Valores*, 16, 32. P. 180.

¹¹ Ministry of Agriculture, Fisheries and Food. [Online]. Retrieved 22 March 2022, available at: <https://www.mapa.gob.es/es/alimentacion/temas/calidad-diferenciada/marcas-comerciales/>

the EU Parliament, in a resolution on the possible extension of the protection of EU geographical indications to non-agricultural products, stated in its considerations 23 and 29¹² that:

"23. Stresses the importance of geographical indications in the broader framework of intellectual property rights, as a means of protecting local values, including infrastructure and employment, enhancing regional development, and strengthening comparability, transparency and consumer information.

"29. Considers that the protection of geographical indications for non-agricultural products must go hand in hand with a more effective strategy to protect and strengthen intellectual property rights in third countries, with the aim of strengthening measures to combat counterfeit products or imitations.

Likewise, the European Union Intellectual Property Office (EUIPO) considers the IGRIs to be industrial property rights of a *sui generis* nature.¹³

Although the determination of IGIPs as industrial property rights may seem an insignificant issue, this classification within IP is crucial, as it is a justification for EU intervention in this field, and the creation of a uniform regulation for all Member States. This is because Industrial Property is an exclusive competence of the EU, and therefore gives it the freedom to establish a *sui generis* legal regime for NGIIPRs within the framework of these rights¹⁴.

¹² European Parliament resolution of 6 October 2015 on the possible extension of the protection of EU geographical indications to non-agricultural products. Recitals 23 and 29.

¹³ EUIPO: Report on Infringement of Geographical Indications in the EU. 2016. [Online]. Retrieved 30 March 2022, available at: https://euipo.europa.eu/ohimportal/es/news?p_p_id=csnews_WAR_csnewsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&journalId=2909509&journalRelatedId=manual/.

¹⁴ On the basis of Article 114 in conjunction with Article 118 of the Treaty on the Functioning of the European Union.

II. Current state of regulation of GIs for CI in the European Union

1. Community level context

Protection for GIs for CI is provided in Member States through a variety of legal remedies, primarily through consumer protection laws and unfair competition laws - in this case the protection afforded in these laws is focused on consumers rather than producers - through trademark registration and finally through the *sui generis* system of Geographical Indications.¹⁵

A study commissioned by the European Commission and carried out by the consortium *Insight Consulting, REDD and OriGIn* in 2013¹⁶ concluded that all 26 countries of the current EU had unfair competition regulation, as well as the ability to protect products through trademark registration. Moreover, twelve countries had specific *sui generis* protection for non-agricultural products, thirteen if we count the case of Belgium where protection exists in the Walloon Region.¹⁷ The countries that had specific *sui generis* protection are: Belgium, Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Latvia, Poland, Portugal, Slovakia, Slovenia, Czech Republic and Romania.

Due to the limited scope of this work, an exhaustive analysis of the state of legislation in all these countries will not be carried out, as this would require a PhD analysis and study. At this point, it is worth highlighting the report of the Max Planck Institute entitled "*Institute analysis, Sui generis geographical indications for the protection of non-agricultural products in the EU: Can the quality schemes fulfil the task?*"¹⁸. This report is of great relevance in this section as it compares GIs for CI protection systems in France, Italy, and Portugal.

This report concludes that the Italian protection system would be more focused on the regulation, preservation, and promotion of the entire artisanal sector in the national economy, with less focus on distinguishing products on the market, as opposed to the French and Portuguese protection systems - although the latter to a lesser extent - which

¹⁵ Navarre, C., Thirion, E. (2019). *Geographical indications for non-agricultural products. Cost of non-Europe report*. European Parliament Research Service. P. 8

¹⁶ Thulan, D., Barjolle, D., O'Connor, B. (2013). *Study on geographical indications protection for non-agricultural products in the internal market*. https://www.uibm.gov.it/attachments/130322_geo-indications-non-agri-study_en.pdf.

¹⁷ Ibid. p. 30.

¹⁸ MAX PLANCK INSTITUTE: "*Institute analysis, Sui generis geographical indications for the protection of non-agricultural products in the EU: Can the quality schemes fulfil the task?*". [Online]. Accessed 22 April 2022, available at: <https://link.springer.com/article/10.1007/s40319-019-00890-1>

configure geographical names as distinctive signs¹⁹. The report states that France should be considered as the best practice, the French Consumer Law²⁰ being the only EU legislative act that explicitly mentions the protection of non-agricultural products through a specific *sui generis* GI. Due to this peculiarity, the French model will be dealt with more extensively in a separate sub-section.

In the case of Spain, the legal system does not contemplate a specific regulation for the protection of GIs for CI. To obtain similar protection, one can opt for the creation of collective marks - which identify the products or services of the members of an association²¹ - or for the creation of guarantee marks - used to distinguish the protected products through their materials, mode of manufacture or presentation of services, geographical origin and other characteristics²². While they may appear to be a good substitute for GIs for CI, collective marks and guarantee marks do not have the same requirements as the latter and may confuse the consumer if granted in a lighter form. For example, there would be no inconvenience in creating a guarantee or collective mark called "furniture from Novelda" and that it was manufactured in Soria without following the traditional processes. Furthermore, as established in the Trademark Law, Article 62, paragraph 3:

"the right conferred by a collective mark shall not entitle the proprietor to prohibit a third party from using such signs or indications in trade, provided that such use is in accordance with honest practices in industrial or commercial matters; in particular, such a mark may not be invoked against a third party authorised to use a geographical name".

This provision is equally applicable to guarantee marks, as it is so stipulated in Article 68(3). Thus, the ultimate mission of GIs for CI is prevented, and they are disqualified as "substitute" forms of protection with the same purpose.

¹⁹ Ibid. p. 20

²⁰ LOI n° 2014-344 du 17 mars 2014 relative à la consommation. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028738036/>. Commonly known as "Loi Hamon" after the name of its initiator: Benoît Hamon.

²¹ Law 17/2001, of December 7, 2001, on Trademarks. <https://www.boe.es/buscar/act.php?id=BOE-A-2001-23093>. Article 62.

²² Ibid., Article 68.

In any case, several studies such as the one carried out by the consortium *Insight Consulting, REDD, and OriGIn*²³ or the one carried out by the Max Planck Institute²⁴, both of which are mentioned above, highlight the existence of legislation at the regional level on crafts in Spain. It should be noted that these legislations at regional level do not constitute a protection similar to GIs for CI, as their objective is the promotion of crafts as an economic activity and its activities, not dealing with industrial property issues. Moreover, as they are regional-level legislations, protection is fragmented and unequal throughout the Spanish territory,²⁵ very similar to the case of Italian legislation in relation to crafts, mentioned above.

2. In depth revision of the French model

Based on the unequivocal position of the Max Planck Institute's report, its analysis of the French legislation, considered as best practice, will follow. The *Loi Hamon* first introduced the protection of GIs for CI through Chapter IV²⁶ in Article 73 amending the Intellectual Property Code (IPC) following the model set out in Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. This is mainly because the French legislation includes a definition of GIs for CI that mirrors that established by Regulation for PGIs, building the amendments made on this definition. A Single Section on Geographical Indications protecting industrial and artisanal products was also established (Article R721-1 to R721-12).

In addition, the definition of GIs for CI was introduced in Article L721-2:

"A geographical indication is the name of a geographical area, or a specific place used to designate a product, other than agricultural, forestry, food or maritime products, which originates there and which has a specific quality, reputation or other characteristics which can be attributed mainly to that geographical origin. The conditions of production or

²³ Thulan, D., Barjolle, D., O'Connor, B. (2013). *Study on geographical indications protection for non-agricultural products in the internal market*. P. 30. [Online] Retrieved 22 April 2022, available at: https://www.uibm.gov.it/attachments/130322_geo-indications-non-agri-study_en.pdf

²⁴ MAX PLANCK INSTITUTE: "Institute analysis, *Sui generis geographical indications for the protection of non-agricultural products in the EU: Can the quality schemes fulfil the task?*". P. 46. [Online]. Retrieved 22 April 2022, available at: <https://link.springer.com/article/10.1007/s40319-019-00890-1>.

²⁵ Due to space restrictions and the divergence in the subject matter of the work, no further discussion of the legislation on crafts in Spain will be given, but more information, legislation and a list of the administrations in charge of this subject can be found at the following link: <https://www.oficioyarte.org/directorio/administraciones/index.htm>. Accessed on 18 April 2022.

²⁶ Chapitre IV: Indications géographiques et protection du nom des collectivités territoriales (Articles 73 à 75)
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processing of this product, such as cutting, extraction or manufacture, comply with the specifications approved by decision taken pursuant to Article L411-4²⁷ ."

Contrary to Regulation 1151/2012, the French legislation does not refer to how many steps of production must be carried out in the geographical area in question²⁸ , as the only mandatory requirement is the conformity of the local producers' practices with the conditions approved by the French National Institute of Industrial Property (INPI)²⁹ . In addition, Article 721-7 complements the above provision in paragraph 5 by stating that it must be specified whether the transformation or production processes, or both, are carried out in the geographical area in question. However, it does not explicitly state that at least one production process must be carried out in the geographical area³⁰ .

Nor does it establish any particularity with regard to the origin of raw materials, which may be due, as argued in the Max Planck Institute report, to the desire to provide some flexibility in order to protect a wide variety of products³¹ .

As for the connection between the product and a given geographical area, Article L721-2 mentions the possession of "a specific quality, reputation or other characteristics that can be attributed to a geographical origin"³² . This provision refers to Article 5 of Regulation 1151/2012 where these same elements are mentioned and goes further the French legislation in Article L721-7, paragraph 4, referring further to traditional *savoir-faire* or other characteristics which may be essential attributes to a given geographical area or place, as long as a link can be established between this area and the characteristics in question³³ .

²⁷ Unofficial translation. Original text: [...] *constitue une indication géographique la dénomination d'une zone géographique ou d'un lieu déterminé servant à désigner un produit, autre qu'agricole, forestier, alimentaire ou de la mer, qui en est originaire et qui possède une qualité déterminée, une réputation ou d'autres caractéristiques qui peuvent être attribuées essentiellement à cette origine géographique. Les conditions de production ou de transformation de ce produit, telles que la découpe, l'extraction ou la fabrication, respectent un cahier des charges homologué par décision prise en application de l'article L. 411-4.*

²⁸ Indicated in Article 5 of Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012.

²⁹ *Ibid.* supra 14. P. 42

³⁰ Original text: La description du processus d'élaboration, de production et de transformation, dont les opérations de production ou de transformation qui doivent avoir lieu dans la zone géographique ou le lieu déterminé ainsi que celles qui garantissent les caractéristiques mentionnées au 4°.

³¹ *Ibid.*, supra 14

³² Original text: [...] which possesses a specific quality, reputation or other characteristics which may be essentially attributed to that geographical origin.

³³ The quality, reputation, traditional know-how or other characteristics possessed by the product concerned which may be essentially attributed to this geographical area or specific location, as well as the elements establishing the link between the product and the associated geographical area or specific location.

Thus, as the Max Planck Institute points out, French legislation is the first to recognise the link of a non-agricultural product with a specific geographical area, and this is done not through the connection with the raw material, but with the traditional methods of production, i.e., with the human factor and its know-how.

III. Problems a Regulation could solve

As discussed above, it is evident that currently the regulatory framework for the regulation of GIs for CI in the EU is highly fragmented. On the one hand, we can find that Member States have established national *sui generis* protection systems with different characteristics, and on the other hand, we find members that only use trademarks or unfair competition rules to protect these assets.

This fragmentation and deregulation lead to legal uncertainty, with the consequence that artisanal producers lose opportunities not only to register their brand, but also to take legal action. Moreover, there are insufficient incentives for a sector of the population to maintain traditional forms of production and creation through traditional processes that are geographically linked to a territory.

At the same time, an added problem is that sometimes sellers pass off their products, usually manufactured in third countries, as authentic. This threatens the collective commercial value of these regions, potentially eroding traditional quality standards and jeopardising the reputation of artisanal producers.

Thus, GIs for CI would not only help cultural preservation and the legal resilience of producers but would also enhance job creation in rural areas and attract workers and tourists to less populated areas³⁴. The protection of crafts and industrial products would incentivise innovation and investment in artisanal procedures, directly helping small producers and SMEs reach new targets and promote their product, while also protecting their traditional know-how at an EU level.

Although a Spanish perspective has been taken through this paper, this issue does not only affect Spanish producers, but all EU producers, which is why the Commission has proposed to regulate artisanal and industrial geographical indications. The Commission recognises that the lack of regulation does not allow producers of artisanal products to

³⁴ Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754. COM (2022) 174 final of 13 April 2022. P. 2. [Online]. Retrieved 6 May 2022, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:740589bd-bb3a-11ec-b6f4-01aa75ed71a1.0001.02/DOC_1&format=PDF

certify, at EU level, a connection between the quality and geographical origin attributed to certain traditional production methods³⁵ .

It should be added that, within the new proposal for a Regulation, the Commission sets out five lines of justification for its creation:

"[..]firstly, to ensure fair competition for producers of craft and industrial products on the internal market; secondly, to ensure the availability to consumers of reliable information concerning such products; thirdly, to safeguard and develop cultural heritage and traditional know-how; fourthly, to ensure effective registration of geographical indications for craft and industrial products both for the Union and internationally; fifthly, to provide for effective enforcement of intellectual property rights throughout the Union and in electronic commerce within the internal market; and finally, to ensure the link with the system of international registration and protection based on the Geneva Act."³⁶

This extract perfectly summarises the logic behind the Regulation, and why it is so necessary to create it precisely now.

³⁵ Ibid., supra 34

³⁶ Ibid., pp. 15-16

IV. Competence to regulate GIs for CI

1. Regulatory competence at EU level

EU intervention should be based on Article 118 of the Treaty on the Functioning of the EU (TFEU)³⁷, which establishes the legal basis for the creation of EU industrial property rights, so that they provide uniform protection throughout the Union. Such a regime would provide equal protection for authentic craft products throughout the EU.

Furthermore, following the EU's accession to the Geneva Act³⁸, the EU gained exclusive competence over the acts covered by the Act. Thus, it can be interpreted that the EU has an obligation, to a certain extent, to legislate on NGI APIs, and this can be seen as one of the main reasons for the existence of European regulation. This statement was validated by the Court of Justice of the European Union (CJEU) in its judgment of 25 October 2017 (Case C-389/15).³⁹ By virtue of that ruling the CJEU annulled Council Decision 8512/15 of 7 May 2015 authorising the opening of negotiations on the Revised Lisbon Agreement on Designations of Origin and Geographical Indications, as regards matters falling within the competence of the European Union (the "Contested Decision").⁴⁰ That Contested Decision was replaced by Council Decision (EU) 2018/416 of 5 March 2018 authorising the Commission exclusively to enter into negotiations under the Lisbon Agreement on Designations of Origin and Geographical Indications on behalf of the EU. Thus, the exclusive competence of the EU was established because the Geneva Act is intended to regulate and facilitate trade between the EU and third countries, this being an exclusive competence under Article 3(1) TFEU⁴¹.

Despite this, the EU's accession to the Geneva Act could not be interpreted as having created an obligation to create a system to protect GIs for CI, but to some extent a political obligation to ensure such protection.

³⁷ Treaty on the Functioning of the European Union. Official Journal of the European Union. C 202 of 7 June 2016, p. 47.

³⁸ Geneva Act of the Lisbon Agreement on Appellations of Origin and Designations of Origin Geographical Indications. World Intellectual Property Organization (WIPO) of 20 May 2015.

³⁹ Court of Justice of the European Union (CJEU) in its judgment of 25 October 2017 (Case C-389/15). <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A62015CJ0389>

⁴⁰ *Ibid.*, par. 1.

⁴¹ *Ibid.*, par. 48 et seq.

In the light of the draft regulation published by the Commission⁴², it should be noted that the EUIPO⁴³ could be the entity in charge of registering new GIs for CI as well as of monitoring compliance with quality standards and enforcement of these rights⁴⁴.

2. Regulatory competence at national level

At the national level, we must start from the fact that the regulation of PDOs and PGIs is complementary to the existing European regulation, and taking this into account, build an analogy. Regarding "the scope of competence, the first preamble of Law 6/2015, of 12 May, on Designations of Origin and Protected Geographical Indications of supra-autonomous territorial scope states the following:

"It is worth citing the ruling of the Constitutional Court (STC 112/1995) in which, in order to make a clear distribution of competences between the Autonomous Communities and the State in this matter, it establishes that "The State can, without doubt, dictate valid rules - with a basic or full character as appropriate - where the Autonomous Communities do not have exclusive competence. And it can also regulate designations of origin that cover the territory of several Autonomous Communities, an action that logically can only be carried out by the general organs of the State".

Accordingly, there are currently two ways to apply for a PDO or PGI: in the event that it affects a single Autonomous Community, it is requested from the competent body in the respective Autonomous Community, and in the event that it affects more than one Autonomous Community, it must be requested from the Ministry of Agriculture, Fisheries and Food. In spite of this, in accordance with the provisions of Article 149.1. 9 of the Spanish Constitution, the State has exclusive competence over industrial and intellectual property legislation. Consequently, the configuration of GIs for CI as industrial property rights would determine the possibility of exclusive competence for legislation at State level. In this way, the Autonomous Communities could only assume enforcement powers

⁴² Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754. COM (2022) 174 final of 13 April 2022. Pp. 3-14. [Online]. Retrieved 6 May 2022, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:740589bd-bb3a-11ec-b6f4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁴³ Formerly known as the Office for Harmonization in the Internal Market (OHIM).

⁴⁴ European Parliament. Committee on Legal Affairs (22 September 2015). Report on the possible extension of the protection of EU geographical indications to non-agricultural products. 2015/2053(INI). P. 12, paras. 51 and 52. Retrieved 1 May 2022, available at https://www.europarl.europa.eu/doceo/document/A-8-2015-0259_ES.pdf.

in this area, as occurs in the case of other industrial property rights such as trademarks, patents, or designs.

Regardless of the capacities Member States might have, the type of legal act chosen by the Commission is a Regulation. This implies it will be regulated at an EU level, but also that all EU producers will obtain EU wide protection.

V. Brief analysis of the proposal for regulation at an EU level

On 13 April 2022, the Commission "proposed a first framework to protect the intellectual and industrial property of artisanal and industrial products that are based on the originality and authenticity of the traditional practices of their regions"⁴⁵. As stated in the launch publication, the objective of the proposed Regulation is to provide producers of goods, which normally have a reputation, with EU-wide protection linking the reputation of their products to a geographical origin⁴⁶.

This proposal consists of an explanatory memorandum by way of *introduction*, followed by the proposal which would represent the form and content of the Regulation. The legal basis is set out in Article 118(1) TFEU on intellectual property, and Article 207(2) TFEU on commercial policy. As regards subsidiarity, it is established that regulating on the matter is an obligation of the EU, by virtue of the Lisbon Agreement, and that it falls under the common commercial policy, this being an exclusive competence of the EU.⁴⁷ On the other hand, with regard to the protection of GIs for CI, a competence shared between the Member States and the EU, it is established that only by regulating at Community level can the objective of harmonising the market and providing legal certainty to all citizens equally be achieved.

According to the explanatory memorandum, three possibilities for regulation were considered: 1. Extending the protection of the GI system for agricultural products to non-GI products; 2. A specific separate relationship for the protection of GIs for CI, in which several sub-items were envisaged⁴⁸; 3. A reform of the trademark regulation⁴⁹.

⁴⁵ Intellectual and industrial property: Commission boosts protection of European craft and industrial products in the EU and beyond. [Online] Retrieved 1 May 2022, available at: https://ec.europa.eu/commission/presscorner/detail/es/ip_22_2406

⁴⁶ Alongside the proposed Regulation, several documents are provided, including an impact assessment report [SWD (2022) 115 final]. It is highly recommended reading if you are interested in the subject matter of this paper. It can be found at the following link: https://ec.europa.eu/growth/publications/regulation-geographical-indications-craft-and-industrial-products-documents_en

⁴⁷ Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754. COM (2022) 174 final of 13 April 2022. P. 4. [Online]. Retrieved 6 May 2022, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:740589bd-bb3a-11ec-b6f4-01aa75ed71a1.0001.02/DOC_1&format=PDF

⁴⁸ Due to the length and scope of this work, no further analysis of the options considered will be made, but it is strongly recommended that the proposed Regulation be consulted.

⁴⁹ Ibid., supra 47 Pp. 6-7.

The Commission considered the second option and opted for the creation of an autonomous EU Regulation, in which protection will be granted through Geographical Indications (and not through appellations of origin). In addition, a two-stage system will be included, where national authorities will have to carry out the first examinations on product specifications and GI applications. The second stage would be at EU level, with an EU entity taking a decision on registration, where no fees would be charged. This entity, as already advanced above, would be the EUIPO⁵⁰, which would also be the competent authority under the Geneva Act. Furthermore, the EUIPO could carry out direct registration exceptionally for eligible Member States and for GI originating in third countries.⁵¹

Regarding the fees for registration, the Commission proposes to allow National Offices to change fees, but they should be proportionate and in accordance with specific businesses situations such as MSMEs. The EUIPO however should not change any fees unless the “direct registration” procedure applies.⁵²

This system, if the draft is adopted, would replace existing national regimes and titles, as the maintenance of these could lead to confusion among consumers and producers, being counterproductive and undermining legal certainty.⁵³ It would also bring with it a robust control and enforcement mechanism, as set out in the memorandum⁵⁴:

“this sub-option would introduce self-certification; random inspections by national authorities (or delegated certification bodies), together with a deterrent system of fines; streamline reporting obligations by national authorities; and introduce the currently revised agricultural GI enforcement system, with a domain name alert system to combat online GI abuses.”

Furthermore, the Commission’s draft proposes these elements to be paired with quadrennial reports by Member States to the Commission on the strategy and controls carried out⁵⁵.

Following the usual path of legislative procedures in the EU, the Council of the European Union (referred as “the Council”) published in December 2022, a general approach

⁵⁰ Ibid., supra 47. Pp. 3-14

⁵¹ Ibid., supra 47. P. 17

⁵² Ibid., supra 47. P. 9

⁵³ Ibid., supra 47. P. 28

⁵⁴ Ibid., supra 47. P. 7

⁵⁵ Ibid., supra 48, P. 10

based on the Commission's proposal.⁵⁶ There are some key elements that must be discussed in this regard. Firstly, the Council considered the need to define craft and industrial products, covering products that fall outside the scope of the existing regulations in the agricultural sector.⁵⁷ Secondly, the Council underlines the need to annotate the applicant figure, and although it agrees to the collective idiosyncrasy of the Geographical Indication rights, in order to reflect the important role of producer groups created by artisans, it concludes that geographical indications should, as a general rule, be submitted by a producer group.⁵⁸ There should be non the less an exception to this, allowing single applicants to exist, in the case of not being feasible for producers to form a group as a result of their number, geographical location or for other organizational reasons.⁵⁹ Lastly, the Council proposes a lighter control system than the one suggested the Commissions original proposal, significantly simplifying it and "with reduced involvement of public authorities and a stronger role for producers".⁶⁰ The default procedure would be based on self-declaration, reducing administrative burden on national authorities. Alternatively, a verification of compliance system would also exist, where Member States could provide for controls by a competent authority or a designated third party before and after a product is put on the market.⁶¹

The Council does however agree on some aspects of the Commission's draft, as it maintains the two-phase system, where the first examination of product specification is carried out at the National Office, and the second examination of the application and registration of the file is done at the Union level by the EUIPO. Moreover, the Council considers correct the direct application with the EUIPO initially proposed. This should be applied in limited cases where Member States lack the administrative structure needed or where there is a low level of local tradition and interest in protecting craft and industrial products.⁶²

⁵⁶ Council General approach on the Regulation on Geographical Indication (GI) protection for crafts and industrial products. [Online]. Retrieved 10 February 2023, available at <https://data.consilium.europa.eu/doc/document/ST-14703-2022-INIT/en/pdf>

⁵⁷ *Ibid.*, supra. P. 3

⁵⁸ *Ibid.*, supra 57. P. 4

⁵⁹ *Ibid.*, supra.

⁶⁰ *Ibid.*, supra 57. P. 6

⁶¹ *Ibid.*, supra.

⁶² *Ibid.*, supra 57. P. 5

Regarding fees, the Council provides the Member States with the option to charge fees for the national phase of the standard procedure. As for the EUIPO, no fees will be charged except with the case of direct applications.

Finally, an important aspect discussed in the general approach is the relationship of GIs with other intellectual property rights, notably with trademarks, as the differentiating lines of these rights can be sometimes blurred. Specifically, the Council focuses on the balance between NAGGI and trademarks with a reputation and a of well-known marks, “in particular in light of the fundamental right to property set out in the Charter of Fundamental Rights”⁶³. And, in addition, it stresses the clarification made by the compromise text⁶⁴:

“any application for a registration of a GI or of a trademark that would be in breach of this balance constitutes a ground for opposition or, in case a GI or a trade mark was erroneously registered in breach of that balance, a ground for cancellation.”

1. Some observations on the proposal

Geographical Indications are a crucial part of intellectual property, despite not being identified as significant by the general public, they do have a powerful visual impact representing the characteristics of products protected by them. Indeed, we can all visualise the blue and yellow seal that represent their protection, and we select the products because of it expecting a certain quality. Therefore, this very expected regulation is likely to have a significant impact on crafts and industrial products that can benefit from the GI protection.

Unsurprisingly, this proposal has borrowed from Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, not only at the level of definitions (Article 3 in both cases), but also at the level of requirements for establishing a geographical indication (Article 5 in both cases as well), and in product specifications to a certain extent (Articles 7 and 19 respectively). Broadly speaking, the proposed Regulations for GIs for CI are based on Regulation 1151/2012, as the *Loi Hamon* did before, although this time it has been done in an even more obvious way.

⁶³ Ibid., supra 57. P. 6

⁶⁴ Ibid., supra.

It should also be added that the choice to not generate a massive administrative mobilisation by Member States has been a wise one, choosing to split the process in two parts. National offices must be involved, as they will be better able to understand the social and cultural context of the applicant for GI, being such a delicate right, and in some degree collective. Regarding the discrimination in fee requirements, not allowing the EUIPO to demand any except in the case of direct registration, it is the most logical move. As expressed in the proposal, the EUIPO is fully self-financed and would oversee the registration processes at EU and international level, with no implications for either the applicant or the EU budget⁶⁵. However, we can only speculate on how the EUIPO will be able to keep up with the potential registration demand of GI, on top of those for trademarks and designs.

Another intriguing issue is the choice of only giving the capacity for protecting a product as a geographical indication, rejecting the idea of designations of origin. This probably responds to the fact that, in the latter case, products *owe* their quality or characteristics to the geographical environment, however this is *including* its natural and human factors. Could not an artisan procedure of furniture creation, transferred for generations in a particular village not qualify for this type of protection? Or, alternatively, a procedure for a product created around the overproduction of a plant on a certain area? If both Geographical Indications and Designations of Origin were contemplated in the regulations, producers and organizations could choose what right would be best suited to protect their crafts. The latter option would also give the products and crafts an extra protection and, in parallel, it would give the consumers the assurance that all stages of production are done in a defined geographical area.

Furthermore, if one of the intentions was to increase the job creation in rural areas, this could be better achieved through a quality scheme that guarantees that the whole production process takes place in a delimited area. Notwithstanding that all products comply for this protection, and that is why maintaining both GI and DO could be beneficial.

⁶⁵Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754. COM (2022) 174 final of 13 April 2022. P. 11. [Online]. Retrieved 6 May 2022, available from: https://eur-lex.europa.eu/resource.html?uri=cellar:740589bd-bb3a-11ec-b6f4-01aa75ed71a1.0001.02/DOC_1&format=PDF

In any case, this initiative has the potential to help revitalise deserted rural areas, a problem that grows exponentially all around the European Union. Artisans will hopefully be able to better protect and promote their crafts by taking advantage of the GIs quality mark. Nonetheless, this cannot be achieved by GIs for CI on their own, since as all intellectual property rights, they need a good planification to obtain results. This responsibility should not solely be the producers', but also the States and the competent agencies who must create and develop programs to accomplish GIs for CI full potential.

CONCLUSION

As has been argued throughout this paper, there is a pressing need to create some form of regulation for the GIs for CI, as there is currently a lack of legal certainty to the detriment of the interests and rights of local producers and artisans who follow traditional techniques linked to a geographical point. As stated above, this is due to the fact that there is no harmonised legislation, but rather a fragmented one, with no Community regulation in place.

Along these lines, during the drafting of this paper, the European Commission published a draft regulation that builds what could become, if approved, a new legal framework for the protection of GIs for CI. This supports the initial thesis, reaffirming the need for regulation and its necessity for the proper functioning of the EU common market.

In view of the proposed regulation, it is possible to draw parallels with the *Loi Hamon* and with Regulation 1151/2012, and it is also possible to intuit the role that the EUIPO will play in its implementation and monitoring at Community level, following in the wake of other industrial property rights such as the European Union trademark and Community designs.

It remains to be seen whether it will really serve to restore the population to rural and depopulated areas, and to revitalise crafts and artisan methods that were being forgotten. Thus, it is necessary to consider that a simple regulation – although it is nothing legally simple, being already an achievement – will not achieve great changes on its own, and it will be necessary to carry out public policies of promotion and dissemination, which will help to publicise this new form of protection, and which will encourage tourism in areas where Geographical Indications exist.

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