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A Single Administrator for Geographical Indications in the Union

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Abstract

This brief note calls for a single instrument for geographical indications as a form of intellectual property and a single administrator for that law. As GIs will be the subject of extensive debate in the European Parliament and the Council over the next 12 to 18 months, now is the time to address this issue.

Introduction

In April and May 2022, the European Commission adopted two Proposals on geographical indications. The first, dated 13 April 2022, is on geographical indications for craft and industrial products (the CRAFT GI proposal).[1] The second, dated 2 May 2022 is on geographical indications for wines, spirit drinks and agricultural products (the AGRI GI proposal).[2]

Scope of the Instruments

By means of these two proposals, the Commission seeks to ensure that protection as GIs, as a form of intellectual property, is available for all goods. The AGRI GI proposal covers Chapters 1 to 23 of the Combined Nomenclature (plus some additional non-agricultural products derived from agriculture). The CRAFT GI proposal covers Chapters 1 to 99 of the Combined Nomenclature, in other words all goods (including agricultural goods). The two Proposals, however, do not overlap as the CRAFT GI Proposals excludes from its scope the products coming within the scope of the AGRI GI Proposal (i.e. Chapters 1 to 23 plus the extra products).[3]

The intention to ensure that the law of geographical indications can apply in relation to all goods, fulfils the EU's obligation under Article 22 of the WTO TRIPS Agreement that geographical indications are available in relation to all goods. Currently geographical indications for craft and industrial products are only protected on the basis of general consumer protection law which can differ from Member State to Member State.

[1] COM(2022) 174 final; 2022/0115 (COD) of 14 April 2022
[2] COM(2022) 134 final/2; 2022/0089 (COD) of 2 May 2022
[3] See Article 5 of the AGRI GI Proposal and Article 2 of the CRAFT GI Proposal

The extension of the scope of the goods which can be identified by a GI to Chapters 1 to 99 of the Combined Nomenclature, in other words, all goods within the Harmonised System for the classification of goods, removes the need for separate instruments. In early days of the Common Agricultural Policy there were 21 different instruments for the common organisation of the markets for 21 different agricultural goods. In 2007 a single instrument was created to organise all markets.[4] This single instrument retained some of the 21 specifics necessary for the different markets but brought them within a single instrument because the matters in common were greater than the differences. This is exactly the same situation in relation to GIs. The commonalities are greater than the specifics in relation to the different goods which can be identified by a geographical indication.

5 different Instruments for one form of Intellectual Property is not needed and could gives rise to confusion

The Commission did not take the opportunity to create a single instrument for the registration and protection of geographical indications in the EU. If both these Proposals are adopted the EU will have 5 instruments on GIs depending on the goods identified by the GI. There will be GI laws for i) Wines, for ii) Aromatised wines, for iii) Spirit Drinks, for iv) Agricultural products (and foodstuffs), and v) Craft and Industrial products.

The Commission approach leads to a confusion between the intellectual property and the goods identified by the intellectual property. Geographical indications are a form of Intellectual Property. This form of intellectual property identifies a good where a given quality, reputation or other characteristic is essentially attributable to its geographical origin. The intellectual property is not the good. It is the name, or the indication, only.

Having different GI instrument for different goods places too much emphasis on the good identified by the intellectual property rather than on the intellectual property itself. That being said, it is clear that technical competence in relation to the different goods is necessary to determine that the given qualities, reputation or other characteristics of the good are essentially attributable to the geographical origin.

In the balance between the two fundamental aspects of GIs, the intellectual property on the one hand and the characteristics or reputation of the good on the other hand, priority must be given to intellectual property. In the light of this consideration, there should be a single intellectual property instrument with a single administrator but that this single administrator should have an obligation to consult with the experts of the different goods to determine if the quality or characteristics or reputation is essentially attributable to the geographical origin.[5]

[4] Regulation 1234/2007 as replaced by Regulation 1308/2013

[5] Or, in the case of protected designations of origin, attributable to the geographical environment with its inherent natural and human factors.

A single administrator for the law of Geographical Indications

The Commission proposal for CRAFT GIs is that the EU Intellectual Property Office (the Office) should be the administrator of GIs for craft and industrial products. The Commission proposal for the AGRI GIs gives the Office certain functions in relation to the administration of the registration process and the dissemination of information about GIs.[6]

The Office is currently responsible for Trade Marks and Industrial Designs. Because of the demand for Trade Marks within the Union, and the level of the fees charged by the Office for its work, the Office has surplus funds which it appears to be making available to assist in the management of the different GIs instruments. Is it appropriate that the Office uses these surplus funds in relation to one form of intellectual property to finance the provision of services to the Commission and the Member States in relation to the registration and GIs. It is clear that the Office also has informatics systems which may be adaptable to the application for, registration of, and publicity in relation to, geographical indications at little or no cost. However, the question is whether the informatics are only available to the Office or could be reproduced elsewhere.

Which single administrator?

If, as this paper is arguing, there should be a single administrator for GIs, two questions arise: i) should that administrator be the Commission, the Office or a new GI Agency; and ii) if the single administrator is not the Commission, how can the necessary expertise in relation to the different goods be provided to the non-Commission administrator?

The simplest solution is to make the Commission the single administrator. The AGRI GI proposal confirms the Commission as the administrator in relation to agri products. The Commission also has the experience in CRAFT products. It has the experience in relation to the administration of GIs. Thus there is a logic that the Commission should be the single administrator.

From Annex 9 of the Commission's proposal on CRAFT GIs and provisions of the proposal on AGRI GIs, it appears that what the Office provides is an established framework for information technology systems, for decision making and appeals of decisions. It is not clear what other skills the Office provides besides, as seen above, the possibility of providing services on GIs to be paid for from the surpluses on its existing functions on trade marks and industrial designs. The linking to trade marks raises another substantive problem. Trade Marks and Geographical Indications are different. And different examination skills are needed to determine if applications for registration of trade marks or GIs are to be accepted. This is also the case in relation to appeals of those decisions. There is a concern that concepts more appropriate to trade marks might creep into evaluations of GIs. There is already confusion in the CRAFT GI proposal between the GI as a form of intellectual property and the good

[6] See in particular Articles 17, 19, 23, 25 and 47 of the AGRI GI Proposal.

identified by the GI.[7] In addition, there is no provision in the CRAFT proposal as to how the Office will access the necessary expertise on goods when examining applications for GIs.

The creation of a separate GI agency has the difficulty of its very establishment, its cost and location, and the balance between the cost of establishment and the amount of work that it would be required to do. Like the Office, it too would have the difficulty of access to expertise in relation to goods.

It is beyond the scope of this note to choose between these three options. What can be observed is that both the AGRI and CRAFT proposals give a significant role to the Office, without any examination, or public debate, of whether the Office is, or is not, the right solution or what changes in the Office would be necessary for it to carry out the roles foreseen for it.

Conclusions

This note concludes that geographical indications, as an independent form of intellectual property, merits a single instrument for the registration and protection of GIs. It also concludes that priority must be given to the intellectual property, and not the goods which might be identified by that intellectual property. The current Commission approach is to give priority to the goods.

This note calls for a debate on the issue of the need for a single administrator for GIs and suggests that in that debate a number of questions need to be addressed:

- Should the single administrator be the Commission, the EUIPO or a new GI agency;
- If the single administrator is not the Commission, how should expertise in relation to the different goods which might be identified by the GI be provided;
- If the single administrator is to be the EUIPO how is the separation between three distinct forms of intellectual property (GIs, Trade Marks and Industrial Designs) to be assured;
- How will the registration and protection of GIs be financed and is it in the public interest that distinct forms of intellectual property should subsidise each other.

The examination in the European Parliament and the Council of the two Commission proposals is an opportunity for this debate to start. Neither institution should reach conclusions on the Commission's proposal in the absence of such a debate even if it were to result in significant changes to those proposals.

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[7] See this author's observations on the CRAFT proposal.