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Accompanying the document

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} - {SEC(2022) 193 final} - {SWD(2022) 115 final} - {SWD(2022) 116 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
Article 118(1) of the Treaty on the Functioning of the EU (TFEU): Measures for the creation of European intellectual property rights Article 207(2) TFEU: Measures defining the framework for implementing common commercial policy obligations stemming from EU accession to the Geneva Act of the Lisbon Agreement
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of Article 207(2) TFEU, the Union has exclusive competence. In addition to the shared competence that is analysed in the subsidiarity grid, the proposal also relies on exclusive competencies for which subsidiarity naturally does not need to be further analysed. In the case of Article 118(1) TFEU, the Union and the Member States share competence.
*Subsidiarity does not apply for policy areas where the Union has **exclusive** competence as defined in Article 3 TFEU[1]. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU[2] sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU[3] sets out the areas for which the Unions has competence only to support the actions of the Member States.*
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[1]: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
There has been a wide consultation before proposing the Regulation concerning geographical indication (GI) protection for craft and industrial (CI) products. A 2013 **survey** consulted stakeholders on their needs and expectations with regard to a possible legal protection for the names of geographically linked CI products. Then followed the **results of a 2014 public consultation** published in 2015, an October 2016 **workshop** on the "contribution of non-agricultural geographically rooted products to regional inclusive economic development" organised in the framework of the European Week of Regions and Cities 2016, an 18 November 2019 **workshop** presenting the results of the "Study on Economic aspects of geographical indication protection for non-agricultural products at EU level, and a panel in the framework of the 25 November 2020 online **Conference** on Strengthening Geographical Indications. In 2020, the Commission consulted also interested circles on its 2020 Inception Impact Assessment on an EU-wide initiative on geographical indications for CI products. On 13 July 2021, a workshop presented and discussed the preliminary findings of the "Study on Control and Enforcement Rules for geographical indication (GI) protection for non-agricultural products in the EU". A **public consultation** on EU-wide protection of geographical indication for non-agricultural

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

products run from 29 April 2021 to 22 July 2021. The explanatory memorandum and the impact assessment (chapter 3) contain a section on the principle of subsidiarity and refer to question 2.2 below.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Yes. The explanatory memorandum which summarizes the content of Chapter 3 of the Impact assessment report, provides that apart from its general objective to enable the effective fulfillment of obligations stemming from the EU accession to the Geneva Act of the Lisbon Agreement, which falls under the common commercial policy and is an exclusive competence of the Union, this proposal also aims at creating a well-functioning internal market for CI geographically linked products. In this regard, it provides for an adequate and harmonised regulatory framework for CI GIs, whose protection falls under the shared competence between the EU and the Member States in the area of the internal market. This objective cannot be effectively achieved by the Member States alone due to a patchwork of divergent rules, which have developed at national level and are not mutually recognised. National approaches will only result in legal uncertainty for producers seeking protection, mislead consumers, affect intra-Union trade, and make way for unequal competition in marketing GI protected CI products. A solid European regulatory framework can provide for equal protection conditions in all Member States, thus creating legal certainty and incentives for investment in geographically rooted CI products. This objective can be better achieved at Union level.'

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

Since the accession of the EU to the Geneva Act in 2019, it is not possible for EU Member States to join the international system on their own, due to the EU's exclusive competence. The problem of regulatory fragmentation cannot be solved by the Member States alone. Various GI protection systems for CI products have developed at national level. These frameworks are not mutually recognised; hence producers face legal uncertainty and costly and complex administrative burdens to protect and enforce their GI product across the internal market.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

Due to a complex landscape of available protection routes in the EU (EU trade mark, EU collective mark, national GI right where available, national collective mark, national certification mark where available), it is hard for producers to navigate towards obtaining and enforcing protection throughout the EU. Discrepancies among various protection routes result in complicated and costly ways of securing protection that are unworkable for a typical cluster of small firms producing CI products. Moreover, the variety and divergence of national initiatives results in legal uncertainty for producers, may mislead consumers, weaken intra-Union trade, and make way for abuses of GI infringements offline and online. On top of that, obtaining protection in third countries using WIPO's Lisbon system for international registration is not available in most Member States. Only seven EU Member States are party to the Lisbon Agreement and only two of those EU Member States are

party to the Geneva Act (having acceded after the EU joined).
In 2019 the European Parliamentary Research Service published a Cost of Non-Europe report[2] in which costs arising from the lack of EU legislation protecting GIs for CI products are quantified. In addition, the Impact assessment report as far as possible quantifies, or at least qualifies, e.g. via case studies, consequences of missed opportunities for European CI producers (foregone revenues, free-riding and lost revenues), consumers (increase of consumers search cost) or regions.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[3] or significantly damage the interests of other Member States?

The absence of the EU level action would **conflict with core objectives of the Treaty**[4]. In accordance with Article 3 of the Treaty, the EU aims in particular at establishing an internal market, promote economic, social, and territorial cohesion, and ensure that Europe's cultural heritage is safeguarded and enhanced. However, building on the trend identified in the 2020 Study[5], whereby many CI GI products have disappeared from the list identified in the 2013 Study, many producers may be discouraged from continuing to produce CI products, thus negatively affecting regions and their possible recovery, the attractiveness of craft, and limiting the preservation of cultural heritage. With the current fragmentation at national level and the lack of an EU scheme and registration for CI products, producers will continue to have difficulties to protect their GI at EU level and globally, facing unnecessary administrative burdens and costs, as well as less effective enforcement remedies.

In addition, in relation to the wider world the EU Treaty aims at strict observance of international law. **The EU is obliged under international law to protect all GIs (not only agricultural GIs) to comply with the Geneva Act.** Discretion exists only about *how (the legal vehicle)* to protect the remaining (non-agricultural) products. Therefore, creating EU- level protection for CI GIs is necessary to meet the EU's international obligations under the Geneva Act. Furthermore, the absence of the EU level action would **significantly damage the interests of Member States not already party to the Lisbon Agreement**. Since the EU's accession to the Geneva Act in 2019, it is not clear whether it is possible for EU Member States (in particular, for those not party to the Lisbon system already under the Lisbon Agreement) to join the Geneva Act on their own. Due to the EU's exclusive competence, the possibility of EU Member States to join the Geneva Act is notably still pending (CJEU case C-24/20). Therefore, producers in Member States currently outside the Lisbon system could only have a chance to benefit from access to the international system if they could obtain protection at EU level, as only based on such registration would it become possible for them to seek protection in all countries party to the Geneva Act.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

Members States could freely:
- establish national protection systems to certify the link between specific product qualities and the origin of CI products;
- or decide further to approximate their national laws on the protection of GIs for CI products, for example as regards the term and scope of protection, the territorial link, or procedural aspects such as application and registration. They could also decide to make the listing of all national GIs

[2] European Parliament (2019). Geographical indications for non-agricultural products. Cost of non-Europe report. Study by European Parliamentary Research Service (EPRS).
[3] https://europa.eu/european-union/about-eu/eu-in-brief_en
[4] https://europa.eu/european-union/about-eu/eu-in-brief_en
[5] VVA et al. (2020), supra note.

titles in the EU public and/or to mutually recognise a national decision to protect a GI for a specific CI product.

- However, besides the current seven members of the Lisbon Agreement (Bulgaria, Czechia, France, Hungary, Italy, Portugal, and Slovakia), no other Member State could join after the EU joined in 2019. Finally, Member States would do not have the possibility on their own to set up an EU-wide GI protection scheme.

(d) How does the problem and its causes (e.g., negative externalities, spill-over effects) vary across the national, regional, and local levels of the EU?

The problem of missed opportunities for European CI producers and its causes (EU accession to the Geneva Act, divergent national IP protection rules across Member States and existing EU laws not suitable) vary across the national, regional, and local levels of the EU.

At **national level**, the lack of an EU protection system for GIs relating to CI products results in **the impossibility for CI producers from 20 Member States (all except Bulgaria, Czechia, France, Hungary, Italy, Portugal, and Slovakia) to benefit from the EU's accession to the Geneva Act by means of obtaining protection for their GIs in third countries** members of the Geneva Act. Indeed, currently, producers of CI products in the EU may or may not have access to protection through the international registration system depending on which EU Member State they are based in. Producers in such Member States (e.g. French or Czech producers), after obtaining GI protection in their own country, can request the filing of an international application and possibly obtain protection in all other countries party to the Lisbon Agreement (for example, Mexico or Tunisia). However, producers in all other EU Member States (for example, German, Belgian, Spanish, or Polish producers) do not have any opportunity to use the Lisbon system – not even if they can register a geographical indication in their home country. Since the accession of the EU to the Geneva Act in 2019, it is not possible for EU Member States to join the international system on their own, due to the EU's exclusive competence.

The **existence of divergent national IP protection rules across** Member States affects them to a different extent. Currently producers who wish to protect product names in their own country, can take two major routes. They can either file an application for a geographical indication, or file an application for trade mark protection. Through the first route GI protection will be broader, as such protection is provided for by legal provisions tailor-made to suit this special kind of intellectual property, whereby the public authorities play a stronger monitoring role. However, this route being not available in eleven EU Member States (Austria, Cyprus, Denmark, Finland, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Sweden), producers based in these Member States will not benefit from this fitted protection and public authority support.

At **local level**, some EU regions are more affected than others. As highlighted in Annex 5 of the Impact assessment report, regions with CI GIs are today characterised with GDP per capita below or employment rate below the EU average. CI GI products are found in predominantly non-urban regions characterised by higher vulnerability to the tourism sector.

(e) Is the problem widespread across the EU or limited to a few Member States?

As shown in the Impact assessment report, the problem is widespread across the local regions of the EU. However, there are less CI GIs products in Nordic countries like Finland or Denmark, while Mediterranean countries like Spain, or Italy or central east countries like Slovakia or Hungary have more CI GI candidates. This reflects also why views/preferred courses of action of authorities differ across the EU (see below reply to question g).
In addition, the existence of divergent national IP protection rules across Member States affects

producers from Austria, Cyprus, Denmark, Finland, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Sweden who do not have any opportunity to use the Lisbon system to a different extent than other EU producers as already mentioned above (under reply to question d).

(f) Are Member States overstretched in achieving the objectives of the planned measure?

The planned measure does not impose heavy burdens on Member States. The future EU protection system for 'craft and industrial' geographical indications consist of a two-stage procedure. First, national authorities would assess producers' applications; in a second stage, an existing EU agency, the EUIPO will handle the registration and appeals. Managing the new title at national level, to assess the applications, could be handled by e.g., existing IP office infrastructures and would only require extremely limited extra resources (not even necessarily one full time examiner). Member States would be face limited reporting only every four years, with no auditing obligations. They could either delegate control to national third parties entities or even further totally exclude using third-party certification, as producers would be able to self-certify compliance with GI requirements. In addition, measures have been taken to offer Member States that comply certain criteria (see article 15 of the Commission proposal) ways to limit their intervention even further in achieving the objectives of the planned measure by creating a registration system whereby national authorities do not participate in the examination and registration, and local producers go directly either to another interested national competent authority or to the EU level (EUIPO) for registering their GIs.

(g) How do the views/preferred courses of action of national, regional, and local authorities differ across the EU?

Since 2013 (see consultations under 2.1 above), a large majority of EU stakeholders (producers, public authorities, or governments) have called on the European Commission to create a regulatory framework for the protection of geographically linked CI products. In 2021 Bulgaria, Czechia, France, Hungary, Italy, Poland, Portugal, Slovakia and Germany expressed their strong support for a forthcoming legislative proposal on EU-wide specific (*sui generis)* protection of GIs for CI products.

Denmark, Finland, the Netherlands, and Sweden instead have expressed their reluctance to establish such protection system at EU level. They fear that a new *sui generis* system would be too burdensome for public administrations and may increase the price of the product, and assume that the existing trade mark system already provides sufficient protection.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The problem of regulatory fragmentation would be effectively solved at EU level. An EU initiative could provide for equal protection conditions in all Member States, thus creating legal certainty and incentives for investment in geographically linked CI products. In comparison, the variety and divergence of national initiatives results in legal uncertainty for producers seeking protection, mislead consumers, impede intra-Union trade, and make way for unequal competition in marketing GI protected products.
An EU-wide approach for GI protection would also enable the EU to fully benefit from the opportunities offered by the international system of appellations of origin and GIs (Lisbon system).

(a) Are there clear benefits from EU level action?

An EU initiative will allow the EU to fulfil its obligations following accession to the Lisbon/Geneva act. It could provide for equal protection conditions in all Member States, thus creating legal certainty and incentives for investment in geographically linked CI products. It will provide a single registration

point at the EU level and uniform protection that will enable producers to protect and signal quality of their products due to geographical origin in the internal market. It will allow all EU producers to obtain GI protection in third counties via Lisbon/Geneva route.
Such protection should unlock the potential for additional sales, contributing to the increased profitability and attractiveness of the craft professions that often belongs to the EU cultural heritage. Producers of CI products will benefit from additional enforcement actions that will be carried out by public bodies.[6]

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

Number of potential CI GIs in the EU is limited and estimated between 300 and 800. Consequently, economies of scale are also limited. However, a single EU wide system should provide additional benefits in terms of registration and enforcement for the whole territory of the EU. Additionally, such a single EU wide registration authority for Geneva Act was already given to the EU (either Commission or its agency) by Regulation (EU) 2019/1753 of 23 October 2019 on the action of the Union following its accession to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.

The functioning of the internal market will be improved. EU-wide GI protection will allow craftsmen to capture price premium that consumers are willing to pay for quality that comes with the territorial link (See section 2.2 of the impact assessment report). Such scheme encourages investments in innovation and quality. Case studies for agricultural products in Italy, Germany and Belgium demonstrate that product characteristics protected by geographical indications do not remain static but evolve both with regard to the production and to the marketing.[7] CI GI producers innovate by developing new designs.[8]

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

Benefits are high considering the current fragmented approach. The EU policy approach allows to **link the quality of the product with its territorial origin at the EU level**.

It provides a **single registration point at the EU level** and **uniform protection** that will enable producers to protect and signal to consumers quality of their products due to geographical origin in the internal market. The relevant EU body in charge of managing the EU-level stage of the registration process could be the Commission services or a specialised EU body like the EU IP Office (EUIPO) which have already an experience in dealing with case-by-case administration of applications or amendments procedures related to specific rights.

To the opposite, a meaningful approximation of GI protection at national level would practically imply from certain Member States to establish a full new regulatory system for national GIs in addition to complying with the new EU sets of rules aiming to establish the EU GI title and system. Harmonisation might therefore create a disproportionate amount of regulatory and administrative burden, particularly on these Member States that would have less incentives to put in place a

[6] EUIPO (December, 2017) Protection and Control of Geographical Indications for Agricultural products in the EU.
[7] Gocci, A., Luetge, C., & Vakoufaris, H. (2020). Between Tradition and Sustainable Innovation: Empirical Evidence for the Role of Geographical Indications. *International Business Research*, 13(9), 101-101.
[8] VVA et al (2020) supra note. Annex.

national infrastructure to handle national GIs. In addition, harmonisation would also **require continuous investment to maintain convergence between national protection systems** as the establishment of the harmonised trade mark system has shown.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional, and local levels)?

Various cases arise depending on whether the Member State has already a specific competence in place or not to protect GIs for CI products. Member States where there was no specific protection in place do not lose competence. They will have an additional one that they will either exercise directly (when they create a specific system) or transfer to the EUIPO or another Member State (when they decide to appoint a national authority from another Member State or the EUIPO for the management of the applications of geographical indications for craft and industrial products). The other EU Member States will lose competence to grant the title at national level, however they will keep exclusive competence on scrutinizing the conditions for granting the future EU protection title in particular its essential criterion of checking the link between the quality of the product and its territorial origin. In any event, the specific protection title will be granted at EU level.

At international level, only an EU-wide specific GI title will fully enable EU producers who seek international protection to benefit from equivalent protection in other parties to the Geneva Act and enables third countries or organisations parties to the Geneva Act to obtain specific GI protection in the entire EU for their CI products.

(e) Will there be improved legal clarity for those having to implement the legislation?

There will be improved clarity for the persons or authorities having to implement the legislation. First, the rules that create a common EU protection system are clearly laid down in the regulation. Second, the EU and/or its agency in charge of registration will provide guidance.

Improved clarity will be achieved by i) allowing a path for companies from all Member States to obtain CI GI protection throughout the EU and in third countries via Lisbon/Geneva route; ii) allowing applicants from third countries to obtain CI GI protection in the EU as per obligations stemming from the EU's accession to the Lisbon system.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The proposal has been designed to minimise the administrative burden and compliance costs for producers and public authorities, while ensuring equal treatment throughout the Union. As highlighted in the Impact assessment report, the scope of chosen policy option does not go beyond what is necessary to achieve the identified problems/objectives. It is limited to the aspects that Member States cannot achieve satisfactory on their own and where the Union can do better.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed action is an appropriate way to achieve the intended objectives.
The proposal aims at establishing a directly applicable GI protection for craft and industrial products at EU level. It aims at improving the position of producers to protect their craft and industrial products throughout the EU against counterfeiting and to give them incentives to invest in these products. Also, the proposal has the objective of enhancing the visibility of authentic craft and industrial products on the markets and hence benefit consumers. The regions in which producers operate should benefit from the protection of typical products and be able to develop the potential for tourism, to keep and attract qualified work force as well as to preserve their cultural heritage. The proposal is based on the so-called *sui generis* (specific) GI protection, which implies that producers as well as public authorities collaborate on the development of product specifications. This approach intends to help especially SMEs which lack resources.
Finally, the proposal has the objective of ensuring that producers can fully benefit from the international framework for the registration and protection of geographical indications ('Lisbon system').

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The problem of regulatory fragmentation cannot be solved by the Member States alone. Various GI protection systems for CI products have developed at national level. These frameworks are not mutually recognised, hence producers face legal uncertainty and costly and complex administrative burdens to protect and enforce their GI product across the internal market. The EU can do better. As highlighted in the Impact assessment report, the initiative is proportioned. It does not go beyond what is necessary to achieve the identified problems/objectives. Its scope is limited to the aspects that Member States cannot achieve satisfactory on their own and where the Union can do better.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g., choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The preferred instrument choice is the adoption of a self-standing EU Regulation establishing a *sui generis* system based on an EU title to protect GIs for CI products. This choice favours a legal regime that is simple and coherent with its main objective which is to enable the effective fulfilment of international obligations by establishing a system at EU level that allows for the protection of third countries' CI GIs within the EU and the protection of EU CI GIs in the contracting states of the Lisbon system.

As far as the instruments of its implementation is concerned (e.g., self-standing EU Regulation) the form of EU action is justified with view to the fragmented national regulatory framework and the necessity of having a single title due to international obligations.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g., is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

The Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set. As already mentioned above (under 2.3 f) Member States are not overstretched in achieving the objectives of the planned measure. As already mentioned above (under 3.2) the proposed action is an appropriate way to achieve satisfactorily the intended objectives.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators, or citizens? Are these costs commensurate with the objective to be achieved?

The initiative creates financial or administrative cost for the Union, national governments, regional or local authorities, economic operators, or citizens. However, the corresponding costs commensurate with the objective to be achieved.

The costs at national level are estimated on average at EUR 11,500 per CI GI. This includes approximate registration cost of EUR 7,500, verification/random control cost of EUR 100, enforcement and management cost of around EUR 3,900. The costs for sixteen Member States with existing national CI GI systems (Belgium, Bulgaria, Croatia, Czechia, Estonia, France, Germany, Hungary, Italy, Latvia, Poland, Portugal, Romania, Spain, Slovakia and Slovenia) should be minimal with potential savings on registration and new cost in enforcement of a higher number of CI GI. The remaining Member States will be able to choose whether to set up their own system or to delegate application process to another Member State or allow for a direct application at the EU level. National authorities will be able (as is currently in national systems) to charge fees to CI GI applicants. At the EU level the European Union Intellectual Property Office (EUIPO) will handle the registration and management of CI GIs. All activities will be finance out of the EUIPO budget, thus creating no additional cost for the EU budget. There will be no fees at the EU level.

For CI GI producers, application is free of charge at the EU level, but national authorities may set up application fees. EU fees may only be applicable when national authorities opt to apply for the "direct application" procedure, handled by EUIPO. There will be no renewal or other maintenance fees. While registration should be free the producers will face costs connected to preparation of registration documents, control (limited due to self-certification approach) and enforcement (as part of private/public enforcement system, e.g., proactive screening for potential infringements). These cost for a producer group are estimated on average at EUR 23,700 including EUR 15,000 for registration, EUR 5,700 for verification and control and EUR 3,000 for enforcement and management.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

The proposal considers special circumstances in individual Member States, while respecting Union law. This effort is particularly reflected in the flexibilities offered to Member states not having a specific protection system in place like the option to create a registration system whereby national authorities do not participate in the examination and registration, and local producers go directly either to another interested national competent authority or to the EU level (EUIPO) for registering their GIs (see above under 2.3 f).