

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION WITHIN THE SCOPE OF THE UK/EU WITHDRAWAL AGREEMENT AND THE WINDSOR FRAMEWORK

Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753

Submitted by the Intellectual Property Office, an executive agency of the Department for Science, Innovation and Technology on 19 February 2024.

SUMMARY

1. The following explanatory memorandum relates to the EU's adoption of a new geographical indication (GI) scheme for craft and industrial products. It is subject to the decision of the United Kingdom (UK) on whether to agree that the relevant rules will apply in Northern Ireland (NI) under the 13(4) procedure at the Withdrawal Agreement Joint Committee, subject also to the democratic safeguards contained within the Windsor Framework.

SUBJECT MATTER

2. On 18 October 2023 the EU adopted a Regulation for the provision of a new GI scheme for craft and industrial products, also more commonly known as non-agricultural geographical indications (NAGIs), which would sit separately from the EU's existing agricultural GI schemes. Examples include handicraft and artisanal products such as Italian Murano glass or French Limoges porcelain. The Regulation for this new intellectual property scheme entered into force on 16 November 2023 and will be applicable from 1 December 2025.
3. A GI is a form of intellectual property right used to indicate that a product has a specific geographical origin and possesses a certain reputation or qualities due to that place of origin. The EU already has GI schemes for agricultural, food, wine and spirit products and the UK was a member of these existing schemes pre-Brexit. These existing schemes continue to have some application in NI. However, they are disapplied in relation to goods moved from Great Britain (GB) to NI under the NI Retail Movements Scheme established by the Windsor Framework, under which agrifood retail products move on the basis of UK food and drink safety standards, including marketing standards. Following Brexit, the UK established its own agricultural GI schemes, which are administered by the Department for Environment, Food and Rural Affairs and protect registered agricultural, food, wines and spirits GIs in GB.

4. In the UK, NAGIs are protected via collective and certification marks, which are a well-established and specialised sub-set of the trade mark system. This is a common way to provide protection with similar systems operating in the US, Australia, and Canada. There are certain differences between the protection provided through trade marks and GIs, including whether the right requires renewal to remain in force, and how enforcement is provided. The regime for agricultural GIs and the trade mark regime operate alongside one another in the UK.
5. This Regulation introduces a unitary EU NAGI scheme (including registration, verification and enforcement system) and extends the eligibility of EU GI protection to craft and industrial products. This is intended to replace existing schemes at a Member State level that protect NAGIs through domestic trade mark systems, sui generis GI schemes or a combination of these.
6. The EU has notified the UK, in accordance with Article 13(4) of the Windsor Framework, that it considers the measure to be within scope of the Windsor Framework, but the measure does not amend or replace any of the Acts listed in its Annexes. As such it proposes that it be added to the Framework through agreement at the UK-EU Joint Committee. Unless there is explicit agreement of the UK, the measure will not be applied in NI.
7. Were it to be added to the Windsor Framework, this would mean the NAGI regime would apply to goods placed on the market in NI. Protection offered via the UK trade marks system would continue to apply in NI for goods for a transitional period until 2 December 2026. The grant of future UK trade marks which conflict with NAGIs protected in NI might have to be subject to a territorial limitation.

SCRUTINY HISTORY

8. The EU has been assessing the feasibility of introducing a sui generis NAGI scheme for over a decade. An EM considered the proposal in 2022:
 - EM on EU law on geographical indications 8205/22, COM(2022)174
9. Regarding the amendments being made by the legislation:
 - 2017/1001: EU document COM(16)702 was a codification proposal and exempt from scrutiny.
 - 2019/1753: scrutinised as EU document 11515/18, COM(18)365.

MINISTERIAL RESPONSIBILITY

10. The Secretary of State for the Department for Science, Innovation and Technology is responsible for intellectual property policy, including trade marks

and NAGIs.

11. The Secretary of State for the Department for Environment, Food and Rural Affairs has responsibility for GI policy which relates to wines, spirits and agri-food products.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

12. Intellectual property, including agricultural GIs and NAGIs, is a reserved matter under the devolution settlements.

LEGAL AND PROCEDURAL ISSUES

13. i. EU Legal Basis

Article 118(1) on intellectual property and Article 207(2) on common commercial policy of the Treaty on the Functioning of the European Union.

i. Voting Procedure

Qualified Majority Voting.

iii. Timetable for adoption and implementation

The Regulation for this new intellectual property scheme entered into force on 16 November 2023 and will be applicable from 1 December 2025.

14. This measure falls within Article 13(4) of the Windsor Framework, as a measure which falls within the scope of the Framework, but which neither amends nor replaces a Union act listed in its Annexes. As such, whether it applies in NI is a decision subject to the express agreement of the UK Government at the UK-EU Joint Committee.
15. In making any such decision, UK Government Ministers are subject to the constraints applied by Regulation 18 of the Windsor Framework (Democratic Scrutiny) Regulations 2024. The Government will therefore make the appropriate notification to the NI Assembly to enable consideration by the Assembly of an applicability motion.

POLICY IMPLICATIONS

Intent and focus

16. This Regulation harmonises NAGI protection across the EU through the creation of a new unitary European intellectual property right for craft and industrial products. It is anticipated that the system will be mainly used by micro, small or medium-sized enterprises. The EU foresees relatively low uptake, estimating only 300 registrations from its Member States in the 10 years after it comes into force. However, in some circumstances registrations may be made from third countries.

For example, it is estimated that 400-800 NAGIs registered in China and India could gain protection in the EU if eligible - though in practice only the subset of these NAGIs which seek protection, and which interact with the NI market, would be of relevance for monitoring and enforcement purposes in NI.

17. The approach taken (including for eligibility and protection afforded to registered rights) follows that established by the existing GI schemes for agri-food, wines and spirits and the ongoing reform of this regime (EM 7639/22, COM(2022) 134). The Regulation includes an increased role for the European Union Intellectual Property Office (EUIPO) who would have overall responsibility for running the scheme (including for instance managing appeals of decisions made concerning applications). The Regulation also includes an obligation on Member States to designate competent national authorities to manage applications and enforcement for NAGI products at national level.
18. The Regulation provides an element of flexibility, where Member States may opt-out from the registration commitments at a national level. In practice, this would mean the EUIPO would manage applications on the behalf of the relevant Member State, but monitoring and enforcement activity would continue to be the responsibility of the Member State.
19. Regarding enforcement, Member States will provide necessary measures, procedures and remedies to protect this intellectual property right. Member States are required to have suitable controls based on risk analysis, as well as take appropriate administrative and judicial steps to enforce these rights. If this Regulation is applied in NI, NAGI producers could take action for the infringement of their rights through the UK courts. There would also be targeted enforcement for products that infringe NAGI rights. If applied in NI, this would include enforcement activity as goods enter NI, though this would remain at the discretion of UK authorities and would be based on risk.
20. The Regulation includes provisions which underpin the interaction between the new NAGI rights and trade marks. Our analysis suggests that the provisions largely maintain the established status quo regarding the relationship between trade marks and GIs.
21. The Regulation provides for the EU's participation in the Lisbon system, formed by the Lisbon Agreement and Geneva Act of the Lisbon Agreement (the international framework provided by the World Intellectual Property Organization for registration and protection of GIs) in relation to craft and industrial GIs. The EU acceded to Lisbon in 2019 but only in relation to GI protection where they had exercised competence, i.e. wines, spirits and agri-food products. A unitary NAGI system will therefore open up the Lisbon system to NAGIs, allowing EU producers to claim NAGI protection through the mechanisms provided by the Lisbon system. This will also operate in the reverse direction, where producers

from third countries (who are signatory) will be able to use the Lisbon system to secure protection for their NAGIs in the EU. The UK is not a member of the Lisbon system as we decided not to accede in our own right post EU-exit. NI would not participate in the Lisbon Agreement as Articles 63 and 64 of the Regulation would not apply in NI even if the Regulation as a whole was applied. In a similar vein, the Regulation may also provide the possibility for more detailed NAGI provisions within the EU's bilateral free trade agreements (FTAs). Until now, these provisions have been permissive or high level due to the lack of harmonisation across EU Member States.

Impact of the proposal in the United Kingdom (including Northern Ireland)

22. As noted, this Regulation would apply only if subject to agreement in the UK-EU Joint Committee. This section considers potential policy implications were it to be applied.
23. The UK operates a trade mark-oriented approach for protection of NAGIs, which offers a similar level of protection to that afforded by the EU NAGI scheme. The UK will continue to operate this scheme in relation to NAGIs in GB in any scenario, meaning GB NAGIs will continue to have a route to seek protection, and NI NAGIs would continue to have a route to seek protection across the UK. Where products are placed on the market across the UK, again in any scenario they will need to conform with requirements of the trade mark scheme alongside any relevant GI schemes. It is not anticipated that this would create insurmountable practical issues - as demonstrated by coexistence of trade marks with the existing GI scheme for agricultural products. The presence of an existing GB trade mark scheme offering equivalent protection for NAGIs in GB is also likely to limit the potential impact of the scheme on the UK internal market, because in practice we expect very few products could be marketed in GB but then not in NI (discussed further at paragraph 30 below). It is worth noting that there is no intention to introduce any new scheme for NAGIs in GB, with there being no widespread calls amongst stakeholders for change.
24. A 2019 EU study on NAGIs¹ identified a total of 7 potential UK NAGIs (one of which would be in NI) and 16 Republic of Ireland NAGIs that could benefit from the scheme. Compared to many other countries assessed in the report, the UK has far fewer potential NAGIs. For example, the report found Italy to have 51 already protected and an additional 39 as potential candidates for protection. Analysis of UK responses to earlier EU consultations suggests limited understanding of the benefits and risks of further GI protections.

¹ See pages 38- 40 of [EPRS_STU\(2019\)631764_EN.pdf \(europa.eu\)](#)

25. UK producers would be able to submit applications under the sui generis EU NAGI scheme, in a similar manner as is the case currently with the existing EU GI schemes and the EU's unitary trade mark system. However, the EUIPO will only consider applications of non-EU countries that don't have an agreement with the EU on the protection of NAGIs if "*legal proof of protection of the geographical indication in its country of origin*" is provided. The Regulation does not make clear whether UK collective or certification marks with a geographical reference would sufficiently demonstrate such 'legal protection'. However, it is understood that this is acceptable legal proof for the EU agricultural GIs scheme and so, it may be possible that the scheme provides protection for NAGIs from across the UK—for instance, "Harris Tweed" or "Sheffield steel".
26. NI producers would be able to draw upon the core mechanism envisaged in the Regulation for securing NAGI protections irrespective of whether the scheme is applied in NI, though as noted above only one NI NAGI is likely to be in scope of protection. We would therefore expect low take-up of the scheme by NI producers (whether or not it is applied in NI).
27. As a reserved policy area, a competent authority would need to be appointed by the UK Government with responsibility for monitoring and enforcement of the regime as well as managing any new applications to the NAGI scheme. Monitoring and enforcement activities would be similar to those conducted for the existing agricultural GI scheme, that is via an intelligence-led and risk-based approach, including responding to reports about suspected non-compliance. However, the NAGIs scheme places greater enforcement obligations on Member States than the existing agricultural GI scheme. For example, Member States must monitor the use of NAGIs in physical and electronic marketplaces, whether the products are in storage, transit, or being offered for sale at the wholesale or retail level. While existing UK systems in place in relation to agricultural GIs could be expanded to cover this new regime for NAGIs, access to EU systems would also be required in order to administer the scheme effectively.
28. With low interest from NI producers anticipated, and a small cohort of UK producers more broadly liable to draw on the scheme, we would expect the primary beneficiaries would be EU and third country producers, who would gain protection for their NAGIs in NI.
29. While these protections are expected to concern around 300 NAGIs over the next decade, along with any NAGIs protected under the scheme via FTAs, where goods are protected under the scheme, if the Regulation was applied in NI it would mean relevant products could not be placed on the market using the protected designations unless it meets the relevant criteria. For example, were

“Murano glass” to become protected, products on the NI market could not use that designation if not meeting the criteria for the NAGI.

30. In principle, this could have implications for the movement of goods from GB to NI - though in practice we expect this effect to be limited, as explained below. Consider for instance a GB good indicated to be “Murano glass” and placed on the GB market in line with GB standards. If that good does not meet the criteria to be categorised as “Murano glass” under the EU NAGI scheme, then it could not be moved from GB and placed on the NI market - unless it were to be relabelled, so as not to indicate itself to be “Murano glass”. However, given that the UK’s collective and certification marks offer broadly similar protection to that of a GI scheme, we expect there would be few products marketable in GB but not NI.
31. Applying the Regulation in NI could also interact with UK-Rest of World trade negotiations, wherein the UK has so far resisted requests to protect NAGIs (a position we have seen adopted by other countries in trade negotiations, including the USA). The EU could also in future negotiate agreements on mutual recognition of NAGIs with individual trading partners directly (e.g. outside the structures of the Lisbon Agreement)—meaning those NAGIs would be automatically entered into the EU’s NAGI register.

Prior engagement with the EU

32. The UK Government submitted one of two UK responses to the EU’s public consultation which closed in July 2021. Our response supported the need for effective protection mechanisms for NAGIs, but argued that the evidence provided was not sufficient to advocate the introduction of an EU-wide sui generis scheme.

CONSULTATION

33. EU consultations started in 2013 and intensified in 2020 and 2021. This has included stakeholder surveys and face-to-face interviews, public consultations (in 2014, 2020 and 2021), workshops and targeted meetings with Member States followed by further written consultation with their intellectual property offices. In 2022, after the draft NAGI Regulation was published, the Commission sought further feedback from the public.
34. The EU reports that NAGI producers, the European Parliament, the European Committee of the Regions, the European Economic and Social Committee, nine Member States and academia strongly supported the establishment of a specific sui generis GI scheme. Four Member States supported the baseline “do nothing” option of maintaining the status quo and considered that existing trade mark protection is sufficient.

FINANCIAL IMPLICATIONS

35. As noted above, we expect that, if accepted, the introduction of this scheme in NI would have limited cost implications with respect to the administration of the scheme, given low anticipated uptake by NI producers and the fact that systems are already in place in UK Government in relation to GIs more broadly which could be straightforward to expand to cover NAGIs. However, access to relevant EU systems would also be required to ensure the effective functioning of the scheme. It is expected that any cost would largely arise from enforcing EU and third country NAGIs. As these matters are substantively reserved within the context of the devolution settlement, there would be no financial implications for NI public authorities.

MINISTERIAL NAME AND SIGNATURE

A handwritten signature in black ink, appearing to be 'Camrose', written in a cursive style.

Viscount Camrose

Parliamentary Under Secretary of State (Minister for AI and Intellectual Property)

Department for Department for Science, Innovation and Technology