



Questions of the Standing Committee on Geographical Indications

National Group: The Netherlands

Title: Geographical indications and appellations of origin

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Questions

1) Are GIs and/or AOs protected under your Group's current law?

Yes, both on an international and a national level.

On an international level, GIs/AOs are protected under, among others, the TRIPs Agreement¹, to which the Netherlands is party. Protection in the European Union is granted under EU Regulation No. 1151/2012 on quality schemes for agricultural products and foodstuffs², EU Regulation No. 1308/2013 establishing a common organization of the markets in agricultural products³ and EC Regulation No. 110/2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks⁴.

On a national level, GIs/AOs are in particular protected under the Agricultural Quality Act ("AQA": in Dutch: "*Landbouw kwaliteitswet*"), which directly refers to EU Regulation No. 1151/2012 (also see below).

The AQA does not provide an additional layer of legislation, which is in line with the general principle in European law that EU Regulations are not to be incorporated in national legislation, as EU Regulations are directly applicable.

The aforementioned, current legislation only allows for GI/AO protection on a European level. National GIs/AOs registered before the existence of the EU legislation regarding GIs/

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

² 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, OJ L 343 (2012).

³ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347 (20-13) 671, p. 671, lastly amended by Regulation (EU) 2016/1226, OJ L 202 (2016).

⁴ Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89, OJ L 39/16.

AOs (the first being EEC Regulation No. 2081/92⁵) may, however, still exist under national laws (including bilateral agreements between nations) throughout Europe, so that they are protected on a smaller scale. For as far as the Dutch Group is aware, this is not applicable to the Netherlands, since the Netherlands never had a national system of registration of GIs/AOs.

Under Dutch law, GIs/AOs can also be 'indirectly' protected within the framework of other legislation, such as:

- Trade mark legislation: *inter alia* the Benelux Convention on Intellectual Property ("BCIP"), EU Regulation No. 2015/2424 on the European Union trade mark⁶ ("EUTMR") and EU Directive No. 2015/2436 to approximate the laws of the Member States relating to trade marks⁷ ("EUTMD").
- National unfair competition legislation:
 - as to misleading advertising: Article 6:194 of the Dutch Civil Code ("DCC", in Dutch: "*Burgerlijk Wetboek*");
 - as to unfair commercial practices: Articles 6:193a – 6:193j DCC;
- National trade name legislation: the Dutch Trade Name Act (in Dutch: "*Handelsnaamwet*"); and
- National criminal legislation: the Dutch Penal Code (in Dutch: "*Wetboek van Strafrecht*"), Articles 225, 328bis and 337.

2) If yes, please briefly describe the following:

a) How AOs and GIs are defined and the prerequisites (in particular the type, nature and intensity of link with a territory).

For these definitions, national legislation, i.e. the AQA, directly refers to EU Regulation No. 1151/2012. Article 5 (2) of EU Regulation No. 1151/2012 outlines with respect to GIs:

"For the purpose of this Regulation, 'geographical indication' is a name which identifies a product:

(a) originating in a specific place, region or country;

(b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and

(c) at least one of the production steps of which take place in the defined geographical area."

Article 93 of EU Regulation No. 1308/2013, provides for the definitions of GIs/AOs, particularly for the wine sector. This Article outlines:

⁵ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ EU 92, L. 208, p.1.

⁶ Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market; OJ L 341 (2015) p. 21.

⁷ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336 (2015) p. 1.

"(a) a designation of origin" means the name of a region, a specific place or, in exceptional and duly justifiable cases, a country used to describe a product referred to in Article 92(1) fulfilling the following requirements:

- (i) the quality and characteristics of the product are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors;
- (ii) the grapes from which the product is produced come exclusively from that geographical area;
- (iii) the production takes place in that geographical area; and
- (iv) the product is obtained from vine varieties belonging to *Vitis vinifera*;

(b) "a geographical indication" means an indication referring to a region, a specific place or, in exceptional and duly justifiable cases, a country, used to describe a product referred to in Article 92(1) fulfilling the following requirements:

- (i) it possesses a specific quality, reputation or other characteristics attributable to that geographical origin;
- (ii) at least 85 % of the grapes used for its production come exclusively from that geographical area;
- (iii) its production takes place in that geographical area; and
- (iv) it is obtained from vine varieties belonging to *Vitis vinifera* or a cross between the *Vitis vinifera* species and other species of the genus *Vitis*."

Article 15 of EU Regulation No. 110/2008, provides for the definitions of GIs/AOs, particularly for spirit drinks. This Article outlines:

For the purpose of this Regulation a geographical indication shall be an indication which identifies a spirit drink as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of that spirit drink is essentially attributable to its geographical origin.

Article 2 (1) of EU Regulation No. 110/2008 further outlines that 'spirit drink' means an alcoholic beverage intended for human consumption, possessing particular organoleptic qualities, having a minimum alcoholic strength of 15% and having been produced in a manner set out in paragraph d of said Article.

b) Whether that protection is provided by sui generis laws; solely as aspects of other laws, such as by registration as collective or certification marks; or by other (and if so, what) means.

Protection is granted under *sui generis* legislation, namely the aforementioned EU Regulations and the AQA.

As set out above, other legislation may also (indirectly) apply to (the use of) GIs/AOs, some examples of which are set out below.

Trade marks

It is a principle under Benelux trade mark law that trade marks consisting of signs(s) of such a nature as to deceive the public with regard to the nature, quality or geographical origin of the goods or services concerned, should not be susceptible of protection.

In the *Recticel/Swiss Sense*-case⁸, for example, the Court of Appeals of the Hague ruled with regard to certain trade mark registrations (comprising, among others, the element "swiss sense"), that such were valid, as even though the company and products concerned did not originate from Switzerland, the plaintiff did not sufficiently argue that the Swiss origin would be a relevant aspect for the purchase decision of the relevant public.

Furthermore, a trade mark may not exclusively consist of signs that can serve to designate the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or performance of the service, or other characteristics of the goods or services.

For this reason, the Court of Appeals of The Hague in the *Quilate/Foralways*-case⁹ annulled the word mark registration L'ARGENTINA (*inter alia* registered for clothing). The Court in short considered that because Argentina is a large country, known to the relevant public, and clothing can originate from Argentina, which the relevant public knows, the mark at stake exclusively comprises an indication of a geographical origin.

Finally, the BCIP¹⁰ outlines with respect to GIs/AOs and collective marks that:

"Any signs so designated at the time of filing and which serve in trade to designate the geographical origin of goods or services shall also be regarded as collective marks. Such a mark does not entitle the holder to prohibit a third party from using in the course of trade such signs, provided he uses them in accordance with honest practices in industrial or commercial matters; in particular, such a mark may not be invoked against a third party who is entitled to use a geographical name."

Trade names

Under the Dutch Trade Name Act, the use of a trade name is prohibited if as a result of such use, a likelihood of confusion (e.g. as to origin of the company or goods at stake) among the public arises.¹¹

Unfair competition

Under the rules pertaining to unfair competition, a commercial practice is misleading (unlawful) if incorrect information is provided which deceives or is likely to deceive the average consumer with respect to the geographical or commercial origin of the good concerned.¹²

More specifically, there is a case of misleading (unlawful) advertising in relation to goods when deceptive information is given with regard to (*inter alia*) *the nature, composition, quantity, quality, characteristics or possibilities for use and the origin (and/or) the way and the time of manufacturing* of said goods.¹³

⁸ The Hague Court of Appeals 22 July 2014, ECLI:NL:GHDHA:2014:2418 (*Recticel/Swiss Sense*)

⁹ The Hague Court of Appeals 16 December 2014, ECLI:NL:GHDHA:2014:4644 (*Quilate/Foralways*) as upheld by the Dutch Supreme Court by judgment of 9 September 2016, ECLI:NL:PHR:2016:920.

¹⁰ See Article 2.34 (3) BCIP.

¹¹ See Article 5b of the Dutch Trade Name Act.

¹² See Article 6:194 DCC.

¹³ See Article 6:193c (1) (b) DCC.

Under the rules pertaining to comparative advertising, a comparison is only allowed under the condition that such is not misleading and, regarding products with an AO, relates in each case to products with the same designation.¹⁴

c) If GIs and/or AOs are protected by sui generis laws, whether your Group's laws provide for a system of registration. If so, what are the steps of this procedure including the content of the application and the possibility of opposition by third parties.

As follows from the applicable EU Regulations, the respective Member State shall first assess the application for registration of GI/AO.

In the Netherlands, the registration procedure commences by lodging an application to the secretary of the advisory body *Adviescommissie Geografische aanduidingen, Oorsprongsbenamingen en Specificiteitscertificering* ("AGOS"). AGOS consists of nine members, nominated by several (diverse) organizations (e.g. the Consumer Bond (in Dutch: "*Consumentenbond*") and the Central Organization for the Meat sector (in Dutch: "*Centrale Organisatie voor de Vleessector*").

This application is, in accordance with article 7 of EU Regulation 1151/2012¹⁵ accompanied by a technical file. On the basis of the application submitted, AGOS (or, as the case may be, the Advisory Committee for GIs/AOs related to wines/spirit drinks) conducts, together with the Ministry of Economic Affairs, an assessment to check whether the technical file is in compliance with the applicable legislation. In case the advice of the Committee appears to be positive, a summary of the technical file will be published in the Governmental Gazette (in Dutch: "*Staatscourant*"). Subsequently, the national opposition period will commence: third parties with a legitimate economical interest are, within a period of four weeks, able to file objections against the registration of the GI/AO concerned. If there are no objections, the Minister of Economic Affairs will forward the application to the European Commission.

The European Commission will then assess the application. Following this second assessment, a second opposition period will commence. Upon lapse of this period, the European Commission will, following the steps set out in EU Regulation No. 1151/2012, make a final decision regarding the registration of the GI/AO.

3) If your country does not protect GIs and/or AOs, was this a deliberate decision and, if so, why?

N/A.

4) What are the grounds of invalidity/loss of rights for GIs and/or AOs under your Group's law (e.g. becoming generic, lack of use, not paying fees) and where can such be invoked (which court, office etc.)? Please specify the applicable

¹⁴ See Article 6:194a (2) DCC.

¹⁵ See also in relation to wines Article 94 of EU Regulation 1308/2013 and in relation to spirit drinks Article 17 of EU Regulation 110/2008.

test, how such is proven (e.g. consumer surveys, expert advice, dictionaries, etc.) and who bears the burden of proof.

The AQA does not contain provisions with regard to grounds of invalidity or loss of rights. However, Article 2 AQA outlines that by or pursuant to a general administrative measure (in Dutch: "*algemene maatregel van bestuur*"), detailed rules may be laid down with regard to product quality. Such rules could possibly contain grounds for the invalidity or loss of rights.

According to Article 54 of EU Regulation No. 1151/2012, the European Commission can decide, on its own initiative or at the request of any natural or legal person having a legitimate interest, to cancel a registration. This can be decided if compliance with the conditions of the product specifications is not ensured or when no product is placed on the market under the GI/AO for at least seven years.

5) What is the scope of protection of GIs/AOs under your Group's current law?

The scope of EU Regulation No. 1151/2012 covers agricultural products intended for human consumption listed in Annex I to the Treaty on the Functioning of the European Union¹⁶ and other agricultural products and foodstuffs listed in Annex I to said Regulation.

The scope of EU Regulation No. 1308/2013, insofar as GIs/AOs in relation to wines are concerned, covers the products referred to in points 1, 3 to 6, 8, 9, 11, 15 and 16 of Part II of Annex VIII of said Regulation.

The scope of EU Regulation No. 110/2008 covers 'spirit drinks' (see definition as set out in the answer to Question 2A).

The AQA has the same scope.

It is noted that the European Parliament is in favor of broadening the scope of protection of GIs/AOs to other product categories (see answer to Question 12)

6) Against what kind of conduct are GIs/AOs protected? For example, against use misleading consumers, parasitism and free riding.

The protection granted under the AQA is the same as the protection granted under the aforementioned EU Regulations. A GI/AO is protected against the unauthorized exercise of all acts listed in Article 13 of EU Regulation No. 1151/2012:

"(a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient;

¹⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 (2007).

(b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar, including when those products are used as an ingredient;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product."

As an alternative (in case an action based on a GI/AO registration is unsuccessful), unlawful (most notably misleading) use of a GI/AO can also be acted against on the basis of the legal provisions pertaining to unfair commercial practices, misleading advertising and unfair comparative advertising (see above).

7) Who has legal standing to protect a GI/AO. For example, individual producers, consortiums and associations, public bodies.

In the Netherlands, the holder of a GI/AO registration has a legal standing to invoke it vis-à-vis third parties. In addition, producers of goods under a registered GI/AO (not being the holder of the registration) can also rely on the GI/AO, e.g. in relation to a claim for revocation of a trade mark registration or a claim based on unfair competition (see below).

EU Regulations

It follows from the applicable EU Regulations that a GI/AO registration can be obtained by 'groups' (i.e. any association, irrespective of its legal form, mainly composed of producers or processors working with the same product) that work with the products with *the name* to be registered. In the case of a name that designates a trans-border geographical area or in the case of a 'traditional specialities guaranteed' name, several groups from different Member States or third countries may lodge a joint application for registration. Article 95 of EU Regulation 1308/2013 for example further stipulates that *any* interested group of producers, or in exceptional and duly *justifiable* cases a single producer, may apply for the protection of a GI/AO and other interested parties may participate in the application.

Unfair competition

As follows from the above, competitors (as well as consumers) can also take action against, in short, unlawful use of a GI/AO or incorrect statements as to the origin of a certain product on the basis of Dutch unfair competition legislation, as set out above.

Criminal law

Under the Dutch Penal Code¹⁷, deception as to the origin of a product and forgery in this regard may constitute criminal acts. Also under other specific Dutch product legislation, such conduct may constitute a criminal act.¹⁸

¹⁷ Article 225, 228bis and 237 of the Dutch Penal Code.

¹⁸ See e.g. the criminal acts as mentioned throughout the Dutch Commodities Act (in Dutch: "*Warenwet*").

Administrative measures

The administrative authority, the Dutch Food and Consumer Product Safety Authority (In Dutch: "Voedsel en Warenautoriteit") may also apply administrative measures (e.g. fines) in case certain product regulations (e.g. as to misleading the purchaser) are not complied with.

8) What remedies are available in the case of violation of rights in a GI/AO?

Article 14 AQA specifically addresses the rights and remedies of the holder of a GI/AO registration in relation to unlawful use of the GI/AO. First of all, the party entitled to the GI/AO can claim that the unlawful use of the GI/AO is ceased. It may also be claimed that the services of involved intermediaries are ceased. Damages can be claimed if the respective act(s) were deliberate. Instead of compensation, a Court can also order the defendant to surrender the profit made by violating the rights in a GI/AO. The party entitled to the GI/AO can ask for a recall, as well as information on the respective products' origin and distribution channels.. but may also claim ownership of all movable objects, materials and tools involved in the unlawful conduct. The entitled party may also claim to have the respective goods destroyed or rendered unusable. In the assessment of such a claim, the gravity of the violation, the claimed measures and the interests of third parties are considered. Finally, the party entitled to the GI/AO can claim that information on the legal decision is made public.

9) How does your Group's law regulate the conflict between a GI/AO and a prior trade mark? Does the GI/AO or the trade mark prevail or do they coexist? Under what conditions?

National legislation does not contain any provision with regard to a conflict between a younger GI/AO and a prior trade mark. A conflict between a trade mark and a GI/AO is regulated in Articles 14 and 6 (4) of EU Regulation No. 1151/2012¹⁹. Article 14 of EU Regulation No. 1151/2012 *de facto* relates to the situation of a conflict between a *prior GI/AO* and a *younger trade mark*. However, from this provision, especially in combination with Article 6 (4) of Regulation No. 1151/2012, rules for the opposite situation (younger GI/AO vs. prior trade mark) can be derived.

According to Article 14 (1) of EU Regulation 1151/2012, an application for a trade mark registration shall be refused in case this application is submitted to the respected trade mark office (such as the EUIPO or the Benelux Office for the Intellectual Property) *after* the date of submission of an application to the European Commission of a conflicting GI/AO (within the meaning of the aforementioned provisions).²⁰ The current EU legislation related to trade

¹⁹ See also in relation to wines Articles 102 and 101 (2) of EU Regulation No. 1308/2013 and in relation to spirit drinks Article 23 of EU Regulation 110/2008, which regulations will not be further discussed below

²⁰ This rule only applies in case the exact GI/AO, as described in the written certificate, is used and is similar to a trade mark. On the other hand, a proprietor of a prior trade mark right can object to the use of a translation of a GI/AO in case the aforementioned use conflicts with the trade mark right and likelihood of confusion exists (see WTO Panel Case WT/ds 174/4). On the other hand, a GI/AO is protected against any younger trade mark that is a translation of a GI/AO if such constitutes mis-use, imitation or evocation of the GI/AO (see Article (13 (1) (b) of EU Regulation No. 1151/2012 and Article 103 (3) of EU Regulation No.1308/2013).

marks is in line with the aforementioned rules.

Both the EUTMR and the EUTMD (which will have to be implemented in national legislation throughout the EU) qualify a conflict between a younger trade mark and a prior GI/AO as an absolute and relative ground for refusal of the trade mark²¹. On the other hand, in the situation of a prior trade mark registered in good faith and a younger GI/AO, the concerning trade mark and GI/AO will *coexist* if the following cumulative conditions²² are met:

- An application for a trade mark registration is submitted to the concerned trade mark office in good faith *before* the date on which the registration for a GI/AO is submitted to the European Commission;
- The prior trade mark is applied for within the territory of the European Union;
- The prior trade mark relates to a product of the same product type for which the younger GI/AO aims to offer protection;
- In case the prior trade mark would be a younger trade mark, the use of the trade mark would fall under the scope of article 13 (1) of EU Regulation 1151/2012 (see the answer to Question 6); and
- There are no grounds for invalidity or revocation of the trade mark under the EU legislation regarding trade marks.

Therefore, in principle, a GI/AO and a prior trade mark coexist. However, Article 6 (4) of EU Regulation 1151/2012 provides an exception to the rule of coexistence; in case an application of registration of a younger GI/AO that, in light of a prior trade mark's reputation, renown and the amount of time the trade mark has been used, may mislead the consumers as to the true identity of the product, the trade mark right will prevail. In such a situation, the GI/AO will not be registered.

It is interesting to note that the most important case law regarding coexistence between a prior trade mark and a GI/AO concerns two cases before the European Court of Justice ("ECJ") in which the conflict between a trade mark rights of the Dutch brewery Bavaria and the GI of the German Bayerisches Brauerbund eV were assessed. The GI 'Bayerisches Bier' was registered according to the 'simplified procedure' of Article 17 of the then applicable EC Regulation No. 2081/92.²³ This was a fastened procedure, without a possibility for third parties to file objections, to register an already nationally registered GI/AO, effective in Member States that had a national registration system, as an 'EU GI/AO' under the applicable EU legislation. During this simplified procedure, the priority between a trade mark right and a GI/AO was decided by the date upon which objections were filed against the GI/AO registra-

²¹ See Article 7 (1) (j) and (k) and Article 8 (4a) of the EUTMR and Article 4 (1) (i) and (j) and 5 (3) (c) of the EUTMD.

²² See Article 14.

²³ Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L 208 (1992)).

tion. This was the practice until EC Regulation No. 692/2003²⁴, in which it was decided that the reference date, for deciding the priority, should be the date when the registration for a GI/AO is submitted to the European Commission.

The first case concerns a preliminary ruling by the ECJ on the basis of preliminary questions raised by the Italian courts (the 'Italian Bavaria decision').²⁵

Bavaria argued that the GI 'Bayerisches Bier' was in conflict with its prior trade mark rights related to the sign 'Bavaria'. In this case, the ECJ held that the registration of GI coexisted with the aforementioned prior trade mark rights, since the GI concerned would not, in light of the reputation and renown of the prior trade mark rights and the length of time used, mislead consumers as to the true identity of the products. During the proceedings, Bavaria argued that, during the national registration phase, the question whether the GI did become a generic name was unlawfully not taken into account. Since this national registration phase did not contain any possibility for third parties to file objections at that time (see answer to question 14), these objections were filed during the procedure before the European Commission. However, the ECJ held, in line with the decision of the European Commission and invoking the *Spreewälder Gurken* case²⁶, that the European Commission did not have the possibility to decide on such questions, since the European Commission only undertakes a simple formal examination to check whether the requirements of the (then applicable) article 4 of Regulation (EC) 2081/92 are fulfilled and shall not rule over other questions and the lawfulness of an application for registration. A solution for the problem in the aforementioned case is provided by the current EU legislation (see also question 14).

The second case concerns a preliminary ruling by the ECJ on the basis of preliminary questions raised by the German Supreme Court (*Bundesgerichtshof*) (the 'German Bavaria decision').²⁷

One of the questions that was subject of debate in this case was the question which reference date is applicable in deciding the priority between a trade mark right and a GI. The concerned German trade mark right was registered prior to the publication of the application of the GI (and registration of the GI) but after the filing with the European Commission of the application of the GI (Before EU Regulation 692/2003 came into force. the relevant date for trade mark priority was the date on which the application for a GI was published. However, in a simplified 'article 17-procedure' for GI's existing nationally such publications were not foreseen.) The question was therefore whether the rules of EC Regulation 692/2003 should be applicable in retrospective in such cases. The ECJ held that this was not the case. However, the ECJ further considered that, since the registration GIs and AOs registered according to an 'article 17-procedure' did not contain a publication and possibility for objections, the priority between a trade mark and such a GI/AO is decided by the date on which the GI/AO was registered.

10) Is there any specific provision or practice concerning the inclusion of a GI/AO in a domain name?

Neither the AQA, nor the EU legislation regarding GIs/AOs contains a provision regarding to the inclusion of a GI/AO in a domain name. Furthermore, there is no case law regarding this subject for as far as the Dutch Group is aware.

Frequently, domain name disputes regarding generic top level domains ('gTLD's') – such as .com, .coop, .org, .net – are settled by means of alternative dispute resolution of the WIPO

²⁴ Council Regulation (EC) No. 692/2003, amending Regulation (EEC) No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L. 124 (2003) p.17).

²⁵ CJ EU 2 July 2009, case C-343/07 (*Bavaria NV & Bavaria Italia Srl vs Bayerisches Brauerbund eV*).

²⁶ CJ EU 6 December 2001, case C-269/99 (*Spreewälder Gurken*).

²⁷ CJ EU 22 December 2010, in case C-120/08 (*Bavaria NV/Bayerischer Brauerbund eV*).

Arbitration and Mediation Center according to the Uniform Domain Name Dispute Resolution Policy ("UDRP"). This policy regulates the conflict between a domain name and a registered or unregistered trade mark (Article 4 UDRP). In a case in 2011 of the WIPO Administrative Panel²⁸, the Panel had to rule on the question whether the protection of GIs/AOs falls within the scope of the UDRP. In this case, the name "*Champagne*" was included in a domain name. The Panel explicitly held, with a reference to two WIPO Reports²⁹, that the protection of GIs/AOs is deliberately excluded from the scope of the UDRP and a GI/AO cannot be seen as an unregistered trade mark, since a trade mark must be capable of distinguishing the goods or services of an individual undertaking from those of other undertakings.

Often, domain name disputes regarding .nl-domain names are settled by the alternative dispute resolution of the Internet Domain Registration Netherlands Foundation authority (In Dutch: "*Stichting Internet Domeinregistratie Nederland*"). Also here, alternative dispute resolution rules do not provide explicit protection for GIs/AOs.

Instead of using alternative dispute resolution, parties may also present their domain name dispute before Dutch courts. In such an event, it may be argued that the inclusion of a GI/AO in a domain name does not fall within the scope of Article 13 (1) of EU Regulation 1151/2012.

11) Is there anybody that administers GIs/AOs in your country and/or is responsible for the verification of compliance of goods bearing a GI/AO? Please briefly describe the relevant processes, e.g. the process by which compliance with product specifications is verified before such goods are put on the market and/or the subsequent market controls on such goods?

Yes; there are several organizations responsible for the compliance of goods bearing registered GIs/AOs with the applicable regulations. At the time of registration of a GI/AO, the supervisory organization responsible for the product concerned must be mentioned in the technical file.

Examples of such organizations are the Central Organ for Quality Aspects in Dairy Products (the supervisory organization related to for example cheese products, in Dutch: "*Centraal Orgaan voor Kwaliteitsaangelegenheden in de Zuivel*") and the Foundation for the Quality Control of Vegetables and Fruits (in Dutch: "*Kwaliteits-Controle-Bureau*"). All these supervisory organizations are under the control of the aforementioned Dutch Food and Consumer Product Safety Authority.

These supervisory organizations ensure that the product specifications and (further) conditions mentioned in the technical file are met and the authenticity of the products concerned is guaranteed. The supervisory organizations operate according to their own procedures. These procedures vary from organization to organization.

²⁸ WIPO Administrative Panel Decision, Case No. DCO2011-0026 (*Comité Interprofessionnel du vin de Champagne (CIVC) vs. Steven Vickers*).

²⁹ Final Report of the WIPO Internet Domain Name Process of 30 April 1999, No. 439 & Report of the Second WIPO Internet Domain Name Process of 3 September 2001, No. 843.

For example, in relation to 'Gouda Holland' and 'Edam Holland' cheeses, the regulations of the Central Organ for Quality Aspects in Dairy Products set out procedures for assessing compliance with product specifications before the products are put on the market; checks (e.g. examinations/inspections, possibly on the basis of samples) may be performed during the different stages of production and may relate to characteristics such as the maturing temperature, the nutrition content and the smell and taste of the product.³⁰

12) Please describe any other developments in your country in relation to GIs or AOs, which you consider relevant, including any proposals for reform. For example, to the extent that your country has been involved in any negotiations or discussions regarding the protection of GIs and AOs in any fora, such as multi-lateral, regional or bilateral agreements, please specify whether your country is negotiating or has signed any agreement with other countries that includes provisions on AOs/GIs and whether it was necessary to amend domestic legislation as a result of such agreements.

Before 1992, the Netherlands did not have any registration system for GIs/AOs. There are currently, especially in comparison with Southern European Member States, very few GIs/AOs for products originating from the Netherlands. The Netherlands is not independently engaged in any bilateral agreements with regard to GIs/AOs for as far as the Dutch Group is aware.³¹ Every involvement of and/or development in the Netherlands in relation to GIs/AOs is related to involvements of and/or developments in the European Union.

An example of a recent development is that in October 2015, a majority of the Member States in the European Parliament expressed, by means of a non-binding resolution, the desire for an extension of the EU-wide protection of GIs for other than agricultural products, including locally manufactured foods and handicraft products. This was in response to the Green Paper of the European Commission of 15 July 2014 on the protection of geographical indications for non-agricultural products.³² So far, no concrete steps have been made to pursue this desire. However, if such an extension would be realized, an amendment of national legislation may be necessary in the future.

13) Should there be harmonised definitions of AOs and GIs? If so, please propose appropriate definitions and prerequisites.

Yes; the Dutch Group believes that harmonized definitions contribute to uniformity in global trade and create legal certainty. In the Netherlands, the applicable definitions are set out in the aforementioned EU Regulations, which have unified the definition for GIs/AOs at an EU-level. These regulations are (*inter alia*) based on the aforementioned TRIPs Agreement. Considering that many countries have already accepted those definitions, the Dutch Group would like to maintain using the EU definitions as set out in the answer to Question 2.

³⁰ See <<http://cokz.nl/wp-content/uploads/2016/09/Controlereglement-COKZ-BGA-Gouda-Holland-en-Edam-Holland.pdf>>.

³¹ This contrary to a lot of other Member States that did have a national registration system. Before 1992, there were several bilateral agreements in relation to GIs/AOs between, among others, Germany, Italy and Spain.

³² COM (2014) 469 final.

14) Should there be a registration procedure for AOs and GIs? If so, what should its key features be? For example, content of the application, examination by competent bodies, possibility of opposition by third parties

Yes, and the Dutch Group considers the current EU registration procedure as described above to be adequate. Such a system, however, must provide sufficient opportunity for third parties to file objections against the application/registration concerned.

As mentioned in the answer to Question 2C, the EU registration procedure of a GI/AO starts with the submission of an application in the respective Member State. The possibility for third parties to file objections against the application for the registration of a GI/AO during the national procedure, however, previously did not exist (see also the answer to Question 9). The consequence was that in case an error was made in the application during the national procedure, the European Commission did not have the possibility to correct such.

According to the ECJ, the European Commission is only to undertake a simple formal examination to check whether the requirements of the (then applicable) Article 4 of EC Regulation No. 2081/92 are met on the basis of the technical file, but it does not have an obligation to conduct research with regard to the details of the technical file and the degree of legal protection for third parties at a national level. The European Commission will not rule on other questions or the lawfulness of an application for registration.

The aforementioned gap, causing problems such as those in *Spreewälder Gurken*- and the Italian *Bavaria*-cases, resulted in many objections. Current legislation therefore provides a solution, by creating the possibility for third parties to file objections during the national procedure: Article 49 (3) of EU Regulation 1151/2012 stipulates that a national 'opposition procedure' must be observed, during which third parties with a legitimate interest in the Member State concerned, can raise their objections against the application. In the Netherlands, this means that during the national procedure, when the advisory committee decides positively with regard to the application, the technical file or a summary thereof will be published in the Governmental Gazette. Subsequently, third parties with a legitimate interest have the opportunity to, within a limited period of time, file objections against the proposed registration.

15) What should the grounds of invalidity/loss of rights for GIs and or AOs be? For example, becoming generic, lack of use, not paying fees. Please specify what the applicable test should be, how such should be proven and who should bear the burden of proof.

GIs/AOs inform consumers about a geographical origin, quality and/or characteristics of certain products bearing the GI/AO. The indication is linked to the origin of the product and is not connected to a certain company. Therefore, the grounds of invalidity/loss of rights, can only occur if the GI/AO itself has lost or has never possessed a certain aspect as given in the definitions (see the answer to Question 13) of the GI/AO. The Dutch Group considers the current GI/AO-system to be quite arbitrary in this regard (see e.g. the *Feta*-case).³³

³³ CJ EU 25 October 2005, joined cases C-465/02 and C-466/02, ECLI:EU:C:2005:636, *Germany and Denmark/Commission*.

Reference is also made to the answer to Question 4, in which the grounds for invalidity/loss of rights have been outlined and where reference is made to Article 54 of Regulation 1151/2012.

Lack of use should in the opinion of the Dutch Group not be an immediate ground for invalidity, as this ground does not relate to a conflict between the GI/AO and a specific trade mark, but concerns the question whether a GI/AO provides correct information to and in the eyes of the consumer. Taking into account the rule laid down in Article 54 of EU Regulation No. 1151/2012, however, the Dutch Group considers it advisable for legal systems to include a rule stating that a lack of use for *more than 7 years* will lead to a loss of rights.

The Dutch Group considers that in case of not paying fees, the central authority should decide at its own initiative whether this should lead to invalidity/loss of rights.

According to the Dutch Group, any stakeholder should be able to file a request for invalidation with the central authority. With respect to the burden of proof, the Dutch Group considers that any party claiming invalidity/loss of rights should file the relevant proof for its statements. The necessary evidence, if any, can be of any form and may be based on expert reports, market surveys and/or witness statements.

16) How should conflicts between GIs/AOs and prior trademark rights be regulated?

The Dutch Group deems the solutions provided by EU law as set out under Question 9 to be adequate.

17) What scope of protection should GIs/AOs have and should it matter if these are domestic or foreign? Against which conduct by third parties should they be protected?

The Dutch Group deems the solutions provided by EU law as set out above to be adequate.

18) Who should have legal standing to protect a GI/AO and which remedies are appropriate?

The Dutch Group considers the current system, in which the holder of a GI/AO-registration, as well as other third parties (including governmental authorities, see above), can invoke or rely on the GI/AO, to be adequate.

However, the Dutch Group notes that there is a (substantial) threshold for an admissible appeal in case a party objects to the registration of a GI/AO. This threshold follows from Article 263 (4) of the Treaty on the Functioning of the European Union ("TFEU"), which provides criteria for private parties to bring an appeal before the EU General Court. Article 263 (4) TFEU reads as follows:

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings (1) against an act addressed to that person or which is of direct and individual concern to them, and (2) against a regulatory act which is of direct concern to them and does not entail implementing measures." (numbers and underlining added)

In view of the case law of the ECJ and the General Court of the EU, it is uncertain whether a private party can successfully appeal a registration of a GI/AO. There are examples of case law in which appeals have been declared inadmissible. These concern, however, judgments rendered before the Treaty of Lisbon came into force on 1 December 2009, i.e. when the second option in the text of Article 263 TFEU was introduced. In the case law regarding to the first option, the ECJ and the General Court of the EU held several times that competitors of the applicant of the registered GI/AO, cannot bring an action since this action is not of an 'individual concern' to them: the decision with regard to the registration of the GI/AO only concerned these competitors in their objective capacity of undertakings producing the concerned products in the defined (geographical) area and marketing such on the same basis as any other economic operator currently or potentially in the same position. The decision therefore does not individually affect certain economic operators, but all economic operators producing the products concerned.³⁴

Since the coming into force of the Treaty of Lisbon, the (new) Article 263 (4) TFEU also provides an opportunity for a natural/legal person to appeal against and to argue the unlawfulness of a 'regulatory act' (not comprising implementing measures, see last sentence of Article 263 (4) TFEU) which not individually but only directly affects that party. There seems to be no current case law with regard to the question whether an act regarding the registration of a GI/AO can be qualified as an 'regulatory act'. According to case law with regard to the definition of 'regulatory act' within the meaning of Article 263 (4) TFEU, 'regulatory acts' are all acts of general application, excluding legislation acts.³⁵ Based on the aforementioned considerations, 'regulatory acts' seem to include delegated and implemented acts of general application (see Articles 290 and 291 TFEU). Acts adopted according to the 'normal legislative procedure' as described in Article 294 TFEU therefore do not qualify as a 'regulatory act'. Based on this, private parties may successfully argue the unlawfulness of an act under which a GI/AO is registered.

19) Should there be a specific provision or practice concerning the inclusion of a GI/AO in a domain name?

No. The Dutch Group considers that the party that would like to take legal action against an (unlawful) inclusion of a GI/AO in a domain name, would have sufficient legal instruments at its disposal under the current system (see above with regard to the rules pertaining to unfair commercial practices), so that a specific provision for domain names is not necessary.

³⁴ See for example CJ EU 26 October 2000, in case C-447/98 P (*Molkerei Grossbraunshain and Bene Nahrungsmittel v. Commission*); GC EU 26 March 1999, in case T-114/96 (*Biscuiterie-confiserie LOR SA/Confiserie du Tech SA*); GC EU 13 December 2005, in case T-397/02 (*Arla Foods AMBA and Others v Commission of the European Communities*).

³⁵ CJ EU 3 October 2013, in case C-583/11 P (*Inuit Tapiriit Kanatami and Others v. European Parliament and the Council of the European Union*); GC EU 25 October 2011, in case T-262/10 (*Microban International and Microban (Europe) v. Commission*).