

Case C-53/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 February 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

19 December 2019

Appellant on a point of law:

Hengstenberg GmbH & Co. KG

Respondent on a point of law:

Spreewaldverein e.V.

Subject matter of the main proceedings

Geographical indication of origin ‘Spreewälder Gurken’; application to amend the specification

Subject matter and legal basis of the reference

Interpretation of EU law, in particular the concept of ‘legitimate interest’ within the meaning of Article 49(3) and (4) of Regulation (EU) No 1151/2012; Article 267 TFEU

Questions referred for a preliminary ruling

1. In the procedure for a non-minor amendment of the specification, can any actual or potential — provided that it is not entirely implausible — economic effect on a natural or legal person be sufficient to establish the existence of the legitimate interest, within the meaning of Article 53(2), first subparagraph, in conjunction with Article 49(3), first subparagraph, and (4),

second subparagraph, of 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, that is necessary for the purposes of an opposition to the application or an appeal against the favourable decision on the application?

2. If Question 1 is answered in the negative:

In the procedure for a non-minor amendment of the specification, does a legitimate interest within the meaning of Article 53(2), first subparagraph, in conjunction with Article 49(3), first subparagraph, and (4), second subparagraph, of Regulation (EU) No 1151/2012 lie (only) with operators that produce products or foodstuffs comparable to those of operators for which a protected geographical indication is registered?

3. If Question 2 is answered in the negative:

- a) As regards the requirements governing a legitimate interest within the meaning of Article 49(3), first subparagraph, and (4), second subparagraph, of Regulation (EU) No 1151/2012, must a distinction be drawn between the registration procedure under Articles 49 to 52 of Regulation 1151/2012, on the one hand, and the procedure for amending the specification under Article 53 of Regulation (EU) No 1151/2012, on the other, and,
- b) in the procedure for a non-minor amendment of the specification, does a legitimate interest within the meaning of Article 53(2), first subparagraph, in conjunction with Article 49(3), first subparagraph, and (4), second subparagraph, of Regulation (EU) No 1151/2012 lie only with producers that produce or specifically intend to produce products in the geographical area which comply with the product specification, so that ‘non-local’ operators are automatically excluded from claiming a legitimate interest?

Provisions of EU law relied on

Provisions on protected geographical indications (PGI) (geschützte geografische Angaben (g.g.A.)), currently governed by 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, in particular Articles 5, 49 and 53

Provisions of national law relied on

Gesetz über den Schutz von Marken und sonstigen Kennzeichen (Markengesetz) (Law on the protection of trade marks and other signs (Law on Trade Marks)), Paragraphs 130 to 133

Brief description of the facts and the procedure

- 1 Since 19 March 1999, the designation ‘Spreewälder Gurken’ has been registered as a protected geographical indication for fresh and processed vegetables in the register of protected designations of origin and protected geographical indications kept by the Commission of the European Union.
- 2 The application for registration stated, inter alia, that over 70% of the processed product consists of gherkins grown in the Spreewald economic area in accordance with controlled integrated production methods, that fresh onions, fresh dill, herbs and horseradish are used in the product to obtain the desired flavour, and that processing in the Spreewald economic area is of particular importance because the traditional preservation and processing methods can be guaranteed there.
- 3 The applicant (and respondent on a point of law; ‘respondent’), in which all producers of ‘Spreewälder Gurken g.g.A.’ are organised as members, manages the protected geographical indication. On 18 February 2012, it applied to the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office; ‘DPMA’) for an amendment of the specification. The amendment is concerned primarily with making it permissible to use other additives and to use preservatives.
- 4 The application for amendment of the specification was published in the DPMA’s Markenblatt (Trade Mark Journal) of 22 August 2014. By document of 16 October 2014, the appellant on a point of law (‘appellant’) lodged an opposition. By decision of 10 September 2015, the DPMA found that the application for amendment was in accordance with Regulation (EU) No 1151/2012. The Bundespatentgericht (Federal Patent Court) dismissed the appeal brought against that decision and granted leave to bring an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice).
- 5 The Bundespatentgericht (Federal Patent Court) held that the appeal was inadmissible, since the appellant’s legitimate interest had not been affected. It stated that, in that regard, a distinction is to be drawn between an application for registration and an application to amend the specification. Non-local operators, who are not permitted to use the protected designation anyway, have no legitimate interest in an amendment of the specification. The mere fact that an operator trades in products bearing a protected geographical indication is not as such capable of establishing the existence of a legitimate interest. Any alleged devaluation of the protected geographical indication or damage to the reputation or prestige of the product concerns only producers established in the geographical area of origin. Moreover, it stated that the appeal is unfounded also on the ground that the specification currently in force does not support the inference of a general prohibition against additives. Even if the application for amendment led to ‘essential changes’ within the meaning of Article 53(2), [fourth] subparagraph, of Regulation (EU) No 1151/2012, these would be entirely objectively justified.

Brief description of the grounds for the reference

- 6 The requested amendment of the specification has been governed by Regulation (EU) No 1151/2012 since its entry into force, in conjunction with the national implementing provisions contained in the Markengesetz (Law on Trade Marks).
- 7 Article 49(3), first subparagraph, of Regulation (EU) No 1151/2012 states that, as part of the scrutiny, the Member State is to initiate a national opposition procedure that ensures adequate publication of the application for registration of protected designations of origin and protected geographical indications, and provides for a reasonable period within which any natural or legal person having a legitimate interest and established or resident on its territory may lodge an opposition to the application. In accordance with Article 53(2), first subparagraph, of Regulation (EU) No 1151/2012, applications for amendments to a specification that are not minor are also to follow the procedure laid down in Article 49 of Regulation (EU) No 1151/2012. If the proposed amendments are minor, a simplified procedure is carried out in the Member State and at EU level; there is no opposition procedure.
- 8 For the purposes of the appeal proceedings, it is to be assumed that the requested amendments of the product specification are not minor. In accordance with the relevant provisions of the Markengesetz (Law on Trade Marks) in conjunction with the first sentence of Article 9(2) of Regulation (EC) No 510/2006, in force at the time the application was made, the DPMA initiated the procedure for non-minor amendments.
- 9 In accordance with the Markengesetz (Law on Trade Marks), which transposes the relevant provisions of EU law, any person having a legitimate interest who is established or resident in the territory of the Federal Republic of Germany may lodge an opposition to the application for registration of a protected geographical indication, within two weeks of its publication, with the DPMA. The same applies *mutatis mutandis* to applications for specification amendments that are not minor. If the DPMA adopts a decision finding that the application for amendment of the specification meets the requirements laid down in Regulation (EU) No 1151/2012 and the provisions enacted to give effect to it, persons who have lodged an opposition to the application within the prescribed time limit or whose legitimate interests are affected by the decision [granting the application for amendment] on account of the amended particulars are entitled to appeal against that decision. Those conditions are met. The appellant lodged an opposition within the prescribed time limit.
- 10 However, the Bundespatentgericht (Federal Patent Court) rightly assumed that the appellant must also show that its legitimate interest is affected by the DPMA's decision granting the application for amendment of the specification. This follows from Article 49(4), second subparagraph, of Regulation (EU) No 1151/2012.
- 11 The answer to the question that must next be answered by the national authorities, which is to say what is meant by a 'legitimate interest' that confers standing to

seek judicial review, cannot be inferred from the provisions of EU law and calls for clarification from the Court of Justice of the European Union.

- 12 It follows from the case-law of the Court of Justice of the European Union, the constitutional traditions common to the Member States and Articles 6 and 13 of the ECHR that it must in principle be possible to obtain a judicial review (see Court of Justice, judgments of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491, paragraph 14, and of 6 December 2001, *Carl Kühne and Others*, C-269/99, EU:C:2001:659, paragraph 57, order of 30 January 2002, *La Conquête v Commission*, C-151/01 P, EU:C:2002:62, paragraph 46, and judgment of 2 July 2009, *Bavaria and Bavaria Italia*, C-343/07, EU:C:2009:415, paragraph 57). It follows that access to judicial review is also necessary in relation to a measure such as an application for amendment of a specification which constitutes a necessary step in the procedure for the adoption of an EU measure. National courts called upon to rule on the lawfulness of an application for registration of a protected geographical indication or — as in this instance — for amendment of a specification must do so on the same terms as those by which they review any other definitive measure adopted by the same national authority which is capable of adversely affecting the rights of third parties under EU law. An action brought for that purpose must therefore be regarded as admissible even if the domestic rules of procedure do not provide for this in such a case (see the judgments in *Oleificio Borelli v Commission*, paragraph 13, and *Carl Kühne and Others*, paragraph 58, and the order in *La Conquête v Commission*, paragraph 47).
- 13 The referring court takes the view that it does not follow from the foregoing that Article 49(4), second subparagraph, of Regulation (EU) No 1151/2012 imposes a requirement to provide for the right to bring an *actio popularis*. In accordance with Article 12(1) of Regulation (EU) No 1151/2012, however, the protected geographical indication may be used by any operator marketing a product conforming to the corresponding specification. This raises the question as to whether, in the procedure for a non-minor amendment of a specification, any actual or potential — provided that it is not entirely implausible — economic effect on a natural or legal person may be sufficient to establish the existence of the legitimate interest, within the meaning of Article 49(3), first subparagraph, and (4), second subparagraph, of Regulation (EU) No 1151/2012, that is necessary for the purposes of an opposition to the application or an appeal against the favourable decision on the application (Question 1).
- 14 Militating against such a broad definition of legitimate interest, in the view of the referring court, is the fact that this would render the requirement of a ‘legitimate’ interest meaningless because the right to lodge an opposition and bring an appeal would be insufficiently circumscribed.
- 15 The restriction of the right to lodge an opposition and bring an appeal which Article 49(3), first subparagraph, and (4), second subparagraph, of Regulation (EU) No 1151/2012 seeks to apply by imposing the requirement of a legitimate

interest could be taken into account by the fact that such a legitimate interest lies (only) with operators producing products or foodstuffs comparable to those for which a protected geographical indication is registered (Question 2). A potential basis for determining who such operators having a legitimate interest are might be the particular type of competitive relationship that is relevant under the law on fair trading practices. Regard would thus have to be had to whether those lodging an opposition, on the one hand, and producers from the geographical area, on the other hand, are competitors attempting to sell similar goods or services within the same circle of final consumers, and, therefore, whether the competitive conduct of one is capable of adversely affecting the other, in other words by hindering or disrupting sales.

- 16 Such an interpretation is supported by the need to protect fair competition. It is true that the objective of Regulation (EU) No 1151/2012, according to Article 1(1)(a) thereof, is to ensure fair competition for farmers and producers of agricultural products and foodstuffs having value-adding characteristics and attributes. Such (justified) support for a particular group of farmers and producers must not, however, confer an unfair competitive advantage over farmers and producers not forming part of that group. In the interests of the protection of fair competition, such competitors must be able to bring administrative or judicial proceedings where there is a risk that products to which a geographical indication of origin may be affixed no longer deliver the promises made to consumers about them in the product specification.
- 17 The appellant has conclusively argued that the product specification amendment sought by the respondent means that, contrary to the connection with the geographical area that justifies protection and is described in the product specification, products carrying the protected geographical indication would no longer be processed according to 'traditional preservation and processing methods' and this would have economic consequences for the appellant. If that objection were well founded (a question not for that matter material to the right to appeal), this would mean that producers established in the geographical area would benefit from a competitive advantage. Unlike the competitive advantage conferred on them by Regulation (EU) No 1151/2012, which is based on the particular nature of the products, a competitive advantage of this kind would be unfair. Such an amendment of the specification would allow producers from the geographical area to affix to their gherkins the promotional indication 'Spreewälder Gurken' and thus to reference the traditional methods of preservation and processing that justify that designation, even though the methods employed would not (any longer) be traditional.
- 18 The fact that the protected geographical indication affords protection only to certain beneficiaries does not mean that non-beneficiaries cannot call that protection into question. Thus, in a similar manner, an action for revocation of a trade mark can be brought by anyone; it does not even require a legitimate interest. Moreover, the geographical designation not only confers rights, it also obliges producers to comply with the requirements set out in the specification.

That obligation serves at least, among other purposes, to ensure fair competition and must be capable of being enforced by competitors not making their products in the geographical area.

- 19 Finally, a distinction might conceivably be drawn between the requirements governing a legitimate interest in the registration procedure, on the one hand, and in the context of an amendment of the specification, on the other, on the basis that, in the case of an application for amendment, only producers who produce or specifically intend to produce products in the geographical area which comply with the product specification are to be regarded as having a legitimate interest (Question 3).
- 20 The Bundespatentgericht (Federal Patent Court) proceeded on the premiss of just such a distinction between registration procedure and amendment procedure and assumed that, in the context of the registration procedure, the effects of which are far-reaching, the legitimate interest must be interpreted broadly. In the case of an amendment of the specification, on the other hand, non-local operators automatically have no legitimate interest because they are excluded from using the protected geographical indication.
- 21 That distinction could be precluded not least by the clear wording of the regulation. With regard to the procedure applicable to non-minor amendments of the product specification, Article 53(2), first subparagraph, of Regulation (EU) No 1151/2012 refers to the registration procedure provisions contained in Articles 49 to 52 of Regulation (EU) No 1151/2012, without defining the concept of 'legitimate interest' differently for the purposes of the amendment procedure. What is more, such a distinction would make it possible (in abuse of the law) to register a geographical indication with an initially complex or strict product specification, and then, later, to 'soften' that specification in an amendment procedure during which non-local operators would no longer be able to lodge an opposition. This too — notwithstanding that such an application is subject to two stages of official scrutiny, before the national patent office and the Commission — militates against an interpretation of the concept of 'legitimate interest' in the amendment procedure that differs from that applicable in the context of the registration procedure.
- 22 It is also not clear why, in the case of applications for amendment, only locally established producers should have a legitimate interest, and, consequently, the right to lodge an opposition and an appeal. In particular, a comparison with trade mark law as relied on by the applicant is not convincing in this regard. It is true that protected geographical indications are protected under trade mark law (see Court of Justice, judgments of 10 November 1992, *Exportur*, C-3/91, EU:C:1992:420, paragraph 37 et seq., of 20 May 2003, *Ravil*, C-469/00, EU:C:2003:295, paragraph 49, and of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, C-108/01, EU:C:2003:296, paragraph 64). However, unlike in the context of trade mark rights, where licensees or resellers do not usually have any influence over the quality of products marketed under the

trade mark, the protection of geographical indications is justified by the product's connection with the geographical area (see Article 5(2) of Regulation (EU) No 1151/2012), which is reflected and laid down in the product specification. The essential characteristics of the product bearing the geographical indication are prescribed by the product specification. Consequently, the registration of a protected geographical indication establishes not only rights but also the obligation to comply with certain requirements, first and foremost those set out in the product specification. Operators whose products are produced in the geographical area, carry the protected geographical indication and are advertised on the basis of that indication must adhere to the requirements of the product specification (see also in this regard recital 47 of Regulation (EU) No 1151/2012). In that case, however, 'non-local' operators too must be able to oppose a product specification amendment which carries a risk that the quality or reputation of the product will no longer be attributable to its geographical origin, contrary to Article 5(2) of Regulation (EU) No 1151/2012.