

# Spirit drink PDO versus trademark registration

24 May 2021 | Contributed by [Westerberg & Partners Advokatbyrå Ab](#)

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## Introduction

A recent Administrative Court of Malmö judgment (1079-20) sheds light on the balance between national registered trademarks and protected designations of origin (PDOs) in the spirit drink sector, which has been the subject of several recent cases.

In the present judgment, the court upheld a prohibition against placing a cider spirit on the Swedish market. The prohibition had initially been rendered by the building and environment committee of a municipality against a Swedish cider spirit producer.

The spirit producer marketed and sold a cider spirit under the name Kullados, which is also a national registered trademark. The court found that the use of the trademark KULLADOS for a cider spirit infringed the PDO Calvados and that the granted national trademark for KULLADOS did not prohibit a finding of infringement.

## Facts

In 2012 the cider spirit producer registered the national trademark KULLADOS for alcoholic beverages. The company sold the cider spirit via the government-owned monopoly retailer Systembolaget. The product gained attention from the French interprofessional association of cider-based controlled appellations (IDAC), which submitted a complaint to the Swedish government that the use of the trademark KULLADOS was in breach of EC Regulation 110/2008 – now replaced by the EU Spirits Regulation 2019/787/EU – and the PDO Calvados. The complaint was referred to the building and environment committee, which found that the trademark infringed the PDO Calvados. Consequently, the committee prohibited the producer from placing the cider spirit on the market under the product name Kullados. After losing an appeal to the County Administrative Board, the producer appealed the decision to the Administrative Court of Malmö.

## Decision

In its appeal, the producer stated, among other things, that the trademark registration procedure before the Swedish Patent and Registration Office (PRV) had included an examination of the absolute grounds for refusal, which includes infringement of a PDO. As the PRV had found that there were no absolute grounds for refusal, and consequently that the trademark KULLADOS did not infringe the PDO Calvados, the producer argued that the grant of the trademark constituted a beneficial decision (known as '*gynnande beslut*' in Swedish) that could not be re-assessed by another authority. The producer also argued that the legal basis for the protection of Calvados did not follow from the EU Spirits Regulation or the national laws which implement such regulation, but rather from the Trademark Act and, therefore, that the competent court should be the Patent and Market Court (PMC) and not the administrative court.

The court first stated that a trademark constitutes a right to prevent others from using a trademark, not an absolute right for the owner to use it if it violates other laws or regulations. The fact that the PRV had not found that the trademark infringed the PDO was thus not binding for the administrative court's assessment of the issue. Further, the court held that as the Trademark Act and the EU Spirits Regulation are parallel regulations, issues relating to the latter must be brought before the present court and not the PMC.

The producer also argued that there was no likelihood of confusion between Kullados and Calvados, nor any confusion regarding the origin of Kullados. Its reasons for this were that the prefix 'kulla' referred to a certain region in southern Sweden and that the suffix 'dos' had no linguistic meaning in French, but in Swedish

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referred to 'a dose of Kulla' – a phrase that had been used in marketing materials.

The court stated that it was undisputed in the case that Kullados was not in fact a Calvados, as the former was produced in Sweden. The court further declared that it was obvious that the trademark KULLADOS tried to allude to the PDO Calvados. In this regard, the court especially noted that the European Court of Justice had established that assessments must be made from the perspective of an average European consumer and thus the fact that a name refers to a national place of production known to consumers in that member state is irrelevant. Further, the court stated that any imitation of a PDO is unlawful, regardless of whether there is any confusion or whether it relates to the origin of the product. Consequently, the court found that the trademark infringed the PDO in accordance with Article 21(2)(b) of the EU Spirits Regulation.

Finally, the court stated that the prohibition was an adequate and proportionate measure to ensure that the producer ceased its infringement of the PDO Calvados. The appeal was thus rejected and the committee's decision upheld.

### **Comment**

One interesting issue discussed in this judgment is that the trademark regulations and the EU Spirits Regulation are to be seen as two parallel regulations and that a registration according to one does not necessarily mean that it cannot infringe the other.

The judgment gives companies within the spirits sector reason to consider the choice of product names and verbal trademarks carefully so as not to risk a conflict with any previous PDOs. Even if the PRV (or any other trademark registration office) has granted a trademark, this is insufficient to avoid infringement. Producers thus risk being prohibited from using their trademark if it is too similar to a PDO – especially since the EU Spirits Regulation does not require any likelihood of confusion between a trademark and a PDO for a finding of infringement.

Further, as the average European consumer is the basis for an assessment if a product name or trademark infringes a PDO, local producers must consider a wider range of consumers than just the local (and perhaps even actual) consumers. This narrows the scope for spirit producers to allude to local areas or names if it is in breach of a PDO.

The judgment has been appealed to the Administrative Court of Appeal. It remains to be seen whether leave to appeal will be granted.

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