

2021

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Recommended Citation

Bardenhagen, C. J., Howard, P. H., & Nozières-Petit, M. (2022). France's Organisme de Défense et de Gestion: A Model for Farmer Collective Action Through Standard Development and Brand Management. *Journal of Food Law & Policy*, 17(2). Retrieved from <https://scholarworks.uark.edu/jflp/vol17/iss2/3>

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—Journal of—
FOOD & LAW
—POLICY—

Volume Seventeen

Number Two

2021

FRANCE'S ORGANISME DE DÉFENSE ET DE GESTION: A MODEL
FOR FARMER COLLECTIVE ACTION THROUGH STANDARD
DEVELOPMENT AND BRAND MANAGEMENT
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A PUBLICATION OF THE UNIVERSITY OF ARKANSAS SCHOOL OF LAW

France's Organisme de Défense et de Gestion: A Model for Farmer Collective Action through Standard Development and Brand Management

Christopher J. Bardenhagen^{*}, Philip H. Howard^{**} & Marie-Odile Nozières-Petit^{***}

Abstract^{****}

Quality-based food production, often with a regional dimension, can provide farmers with new, value-added markets. It can also provide consumers with access to place-based high-quality products, and may benefit local economies through increased commerce. French Organismes de Défense et de Gestion (ODGs) illustrate a mode of quality-based agri-food business organization. ODGs focus on the development of production standards, as well as management of the intellectual property related to those standards. This mode, which is commonly used in Europe, has not often been used in the United States, despite its potential for regional food system development. The ODG mode may provide certain advantages, such as the ability to assemble farmers and value chain actors in a collective food product branding effort, while also remaining in compliance with anti-trust laws—an ODG does not actually buy or sell the products it certifies. Here we describe French ODGs, their legal requirements, and their institutional supports and development processes. We compare relevant French corporate law to that of the United States, using Michigan as an example, and describe how the ODG mode can be organized using existing state statutes, provided steps are taken to ensure compliance with anti-trust laws. We discuss how certain French institutional supports can be

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^{****} **Note:** The aspects of this study involving human participants were reviewed and approved by the Michigan State University Human Research Protection Program, Exempt Category 2: MSU Study ID: STUDY00001089.

replicated by adding specific provisions to organizational documents, and how others can be replicated by utilizing private institutional structures, such as a nonprofit umbrella brand. Finally, we discuss the circumstances for which the ODG mode could fit well, and conversely describe specific situations where an ODG may be less ideal. The ODG model has significant potential for branding of value-added farm and food products, but as with any mode of organization or business entity, it is not a panacea.

I. Introduction

Quality-based food production may bring a number of benefits to farmers and consumers alike. Farmers may develop alternatives to commodity markets by focusing on qualities that consumers are increasingly seeking out at a wide variety of levels.¹ One type of quality arises from using particular plant or genetic varieties that have a specific flavor.² Another type relates to products grown or raised in particular ways, such as pastured poultry or grass-fed beef, which speak to growing consumer interests in animal welfare, omega-3 nutritional profiles, and environmental concerns.³

Depending on the product, these may be marketed at the local, regional, or global level, with information about the product often communicated through food labeling.⁴ There are many place-

¹ See generally Aimé L. Aumaître, *Quality and Safety of Animal Products*, 59 LIVESTOCK PROD. SCI. 113, 113-24 (1999); Catherine Mariojouis, *Introduction to Quality: Quality Concepts, Quality Perception by Producers, Clients and Consumers; Quality Signs (Geographic Origin, Ecolabelling, etc.); Translation of Quality Concepts into Products, Procedures and Services*, 51 CAHIERS OPTIONS MÉDITERRANÉENNES 15, 15-22 (2000); Bertil Sylvander et al., *Establishing a Quality Convention, Certifying and Promoting the Quality of Animal Products: The Case of Beef*, in LIVESTOCK FARMING SYSTEMS: PRODUCT QUALITY BASED ON LOCAL RESOURCES LEADING TO IMPROVED SUSTAINABILITY 61, 61 (2006).

² See, e.g., François Casabianca & Claude Beranger, *Le Lien au terroir des viandes: Une construction originale [The Link to the Meat Terroir: An Original Construction]*, in UNE HISTOIRE DES VINS ET DES PRODUITS D'AOC : L'INAO DE 1935 À NOS JOURS 147 (2015) (Fr.) (discussing localized production and genetic factors leading to quality differences).

³ See, e.g., Kevin Romig, *Impetus for Grass-Fed Beef Production in the Beef Belt*, 103 GEOGRAPHICAL REV., 112, 112-20 (2013); Philip H. Howard & Patricia Allen, *Beyond Organic and Fair Trade? An Analysis of Ecolabel Preferences in the United States*, 75 RURAL SOCIO. 244, 244-69 (2010); Imen Oueslati et al., *Virgin Olive Oil (VOO) Production in Tunisia: The Commercial Potential of the Major Olive Varieties from the Arid Tataouine Zone*, 112 FOOD CHEMISTRY 733, 733-41 (2009).

⁴ See generally Jean-Christophe Bureau & Egizio Valceschini, *European Food-Labeling Policy: Successes and Limitations*, 34 J. FOOD DISTRIBUT. RSCH., Nov. 2003, at 70, 70-76; Danielle Ufer et al., *Information and Consumer Demand for Milk Attributes: Are Redundant Labels an Effective Marketing Strategy?*, APPLIED ECON. PERSP. POL'Y, 1, 1-2 (2021).

based foods that have a particular quality due to the localization of their production, marked by the use of local genetic material and/or traditional know-how. Geographical Indications (GIs), for example, establish an association and connection between the quality of the products and a region, such as with Champagne wine, Idaho Potatoes, and Roquefort Cheese.⁵ The production for each of these quality types usually arises from local-based efforts (at different scales: micro regional, regional or national), in contrast to commodities which may be aggregated from many points around the world. Quality-based food production may increase choice and availability of healthy food options for consumers.⁶ It may also provide farmers with a larger share of the food dollar, either through shorter supply chains or value-added premiums,⁷ thereby contributing to the agricultural economy (rural and urban) through food business development.⁸

In Europe, farmers have developed multitudes of products that incorporate production standards with the intellectual property associated with quality signs. While not exclusive to Europe, quality signs have been promoted at the European Union (EU) level for decades as a strategy for rural development and one means of cultivating and protecting the agricultural sector.⁹ Groups of farmers can use quality signs as a method for creating added value and increased sales through developing reputation. Quality signs can be

⁵ Luke Owen et al., *Place-Based Pathways to Sustainability: Exploring Alignment between Geographical Indications and the Concept of Agroecology Territories in Wales*, SUSTAINABILITY (June 15, 2020), <https://www.mdpi.com/2071-1050/12/12/4890/htm>. See also M. Julien Frayssignes, *L'ancrage territorial d'une filière fromagère d'AOC. L'exemple du système Roquefort [The Territorial Anchoring of an AOC Cheese Sector: The Example of the Roquefort System]*, 264 ÉCONOMIE RURALE 89, 90 (2001) (evaluating the relationship of Roquefort cheese production to its territory over time).

⁶ See Micaela Fischer et al., *Food Hubs: Definitions, 10 Expectations, and Realities*, J. HUNGER & ENV'T NUTRITION 92, 93-94 (2015).

⁷ See, e.g., Marko Nousiainen et al., *Are Alternative Food Systems Socially Sustainable? A Case Study from Finland*, 33 J. SUSTAINABLE AGRIC. 566, 581-82 (2009).

⁸ See Henk Renting et al., *Understanding Alternative Food Networks: Exploring the Role of Short Food Supply Chains in Rural Development*, 35 ENV'T & PLAN. A: ECON. & SPACE 393, 392-95 (2003).

⁹ Council Regulation 2081/92, art. 2, 1992 O.J. (L 208) 1, 2-3 (EC) (repealed by Council Regulation 510/2006, O.J. (L 93) 12, 12-13 (EC), and further repealed by Regulation 1151/2012 O.J. (L 343) 1, 1-2 (EU)).

an effective means of protecting against dilution of quality or co-optation by the larger industry.¹⁰

A variety of types or modes of organization are used to develop quality-based food production at the regional level in the United States. These include farmers markets, community supported agriculture arrangements, food hubs, cooperatives and other social entrepreneurship-focused business entities, standard business entities, and other governance modes such as state or federal marketing orders. Due to the many complexities to local and regional food system development, it is important for legal practitioners and other business advisors to identify the best mode to fit a particular effort that will match the specific needs of farmers and other actors involved.

Particular methods of business organization are often shared by practitioners across states or countries through research and networking. For example, the Limited Liability Company (LLC) form was created by legislation in Wyoming in 1977¹¹ and provides multiple benefits over traditional corporations, such as pass-through taxation and a high degree of organizational flexibility. LLC legislation was later adopted by the other states, and now LLCs are one of the most frequently used forms used to start a business,¹² due to their value for small business development. Although the specifics of using a particular method or mode of organization will vary from one legal system to another, the underlying purposes can usually be translated to other contexts. France has adopted a similar form called the *Société à responsabilité limitée* (SARL).¹³ New forms and methods of organization in many cases require enabling legislation to be passed, such as with the LLC. However, some new forms and

¹⁰ See Lawrence Busch, *Is Resistance Futile? How Global Agri-Food Attempts to Co-opt the Alternatives*, in *RESISTANCE TO THE NEOLIBERAL AGRIFOOD REGIME: A CRITICAL ANALYSIS* 21, 21-22 (Alessandro Bonnano & S. A. Wolf eds., 2018).

¹¹ Wyoming Limited Liability Company Act, WYO. STAT. ANN. §§17-15-107(a)(viii)-(ix), 17-15-113, 17-15-122 (Westlaw through 2021 General Session of Wyoming Legis.) (repealed 2010). See also Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 *BUS. LAW.* 375, 383 (1992).

¹² For example, in Michigan during January 2021, 12,148 new LLCs were created versus 1,080 new corporate entities. *FY 2020/2021 New Corporation and Limited Liability Company Monthly Totals*, MICH. DEP'T OF LICENSING & REGUL. AFFS., [HTTPS://WWW.MICHIGAN.GOV/LARA/0,4601,7-154-89334_61343_35413-544867--,00.HTML](https://www.michigan.gov/lara/0,4601,7-154-89334_61343_35413-544867--,00.html) (last visited Sept. 23, 2021). Total number of Michigan domestic LLCs in good standing as of October 1, 2020 is 623,400, versus 159,799 for-profit corporations. *Total Business Entities as of October 2020*, MICH. DEP'T OF LICENSING & REGUL. AFFS., (Oct. 2020), https://www.michigan.gov/lara/0,4601,7-154-89334_61343_35413-114907--,00.html.

¹³ See Code de Commerce [C. com.] [Commercial Code] arts. L. 223-1–223-43, R. 223-1–223-36 (Fr.).

methods of organization can be utilized in a specific jurisdiction using its existing laws.¹⁴

EU regulations require applicants seeking to use a quality sign to be a “group” made up of “mainly producers.”¹⁵ This group must develop production rules called “specifications,” oversee production controls, and manage the defense of the sign.¹⁶ However, these groups do not actually commercialize the products—their members do. Countries within the EU can have additional requirements for these collective management organizations.

France is the birthplace of quality signs from both an intellectual property and an institutional programming perspective.¹⁷ Legislation to protect place-based quality products dates back to 1919,¹⁸ and several quality sign programs have been created since then. The first official quality sign created in France was the famous appellation d’origine contrôlée (AOC), which provided intellectual property protection and brand labeling for products having a connection to *terroir*, loosely translated as a “taste of the earth” or the “taste of place” that a product was grown and produced.¹⁹ Another quality sign program France developed is the Label Rouge. Started in 1965,²⁰ Label Rouge is well-known by French consumers.²¹ The Label Rouge is held as a certification mark by the

¹⁴ For examples, worker cooperatives can often be organized using a state’s general cooperative statutes or even using other entities, depending on the state; and benefit corporations can be created on an ad-hoc basis in Michigan due to the specifics of Michigan corporate law. However, legislation creating a statutory basis for a new form provides structure and legal clarity for practitioners and regulators, which can lower the costs of organization for businesses.

¹⁵ Regulation No. 1151/2012 of the European Parliament and of the Council of 21 Nov. 2012 on Quality Schemes for Agricultural Products and Foodstuffs, 2012 O.J. (L. 343) 8.

¹⁶ *Id.* at 9-12.

¹⁷ Scholarly articles describing GIs frequently provide introduction to French legal history; for examples, see articles cited *infra* in notes 18, 19, and 24.

¹⁸ For a comprehensive legal history of French, European, and international intellectual property related to place-based quality food products, see Lilian V. Faulhaber, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 COLUMBIA J. EUR. L. 623 (2005).

¹⁹ See Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 131 (2003).

²⁰ See generally Randall E. Westgren, *Delivering Food Safety, Food Quality, and Sustainable Production Practices: The Label Rouge Poultry System in France*, 81 AM. J. AGRIC. ECON. 1107, 1107-1111 (1999) (describing the origins and characteristics of the Label Rouge program).

²¹ See Daniel Hassan & Sylvette Monier-Dilhan, *National Brands and Store Brands: Competition Through Public Quality Labels*, 22 AGRIBUSINESS, 21, 21-30 (2006).

French Ministry of Agriculture, and permission to use it is granted to applicants that can prove that their product is considered to be of higher quality than the standard version of a product in consumer taste tests and organoleptic lab testing.²² Label Rouge products are marketed almost exclusively domestically, with many products found only in certain French *régions*. The Label Rouge program is unique to France and has not been replicated by other countries, but it has been the subject of study by researchers in other countries.²³

The French AOC program became the model for the EU's Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI) programs created in 1992.²⁴ The PGI program requires a link between a product and the place it originates, whereas qualification for the PDO program requires that all steps of production, including processing and further transformation such as cheese ripening, occur in the designated region.²⁵

Each of the abovementioned official quality sign programs serve as “umbrella” brands, and an institutional structure for development and approval of products is provided by governments both at the member state and the EU level. However, the quality products themselves are managed within the private sector, by the groups of farmers and other agricultural businesses involved in production. Hence, in addition to the official quality sign logos, these products are marketed under specific private brands.

Often referred to as quality groups, collective organizations are used to manage quality sign projects. These quality groups must comply with certain program regulations, which have experienced

²² See *id.* at 22; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-1 (Fr.); Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. R641-9 (Fr.).

²³ See, e.g., Westgren, *supra* note 19, at 1110; Myra Clarisse Ferrer & Glenn C. W. Ames, *Food Quality Certification: Is the Label Rouge Program Applicable to the U.S.?*, 43 J. FOOD DISTRIB. RSCH., 114, 114-115 (2012).

²⁴ ²⁴ Regulation 1151/2012 of the European Parliament of the Council of 21 Nov. 2012 on quality schemes for agriculture products and foodstuffs, 2012 O.J. (L 343) 1, 1-4. Council Regulation (EEC) 2081/92 of July 14, 1992 on the protection of geographical indications and designations of origin agricultural products and foodstuffs, 1992 O.J. (L 208) 1, 1-8 (repealed by Council Regulation (EC) 510/2006, and further repealed by Regulation (EU) 1151/2012). See also Delphine Marie-Vivien et al., *Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France*, 98 WORLD DEV. 25, 25-27 (2017).

²⁵ *Quality Schemes Explained*, EUR. COMM'N, https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en (last visited Sept. 19, 2021). The European Commission has a webpage dedicated to explaining these “quality schemes” available in multiple languages. *Id.*

changes over the years. Prior to the passing of European Standard EN 45011 in 1998, quality groups could perform product controls internally, certifying their own members to be able to use the quality sign logo.²⁶ However, EN 45011 required quality groups to use independent organizations for certifying their members' products.²⁷ In France, this meant that groups managing Label Rouge and PGI signs had to begin to work with third party control organizations quickly, whereas the holders of the AOC/PDO sign were able to continue to be overseen by a special department of the French Ministry of Agriculture until 2006, after which each of the signs were required to use control organizations for certification.²⁸

A French ordinance passed in 2006 restructured the Institut National de l'Origine et de la Qualité (INAO), making it the main institutional support for each of the quality signs in France.²⁹ Groups seeking quality signs were then required to organize their collective management body as an Organisme de Défense et de Gestion (ODG) and to apply for use of a quality sign through the INAO.³⁰

For reasons described in this paper, French ODGs represent perhaps the most legally advanced, institutionally supported version of collective management body used for the quality sign mode of agri-food organization. Our comparative research addresses the question of whether this mode can be readily replicated in the United States, and furthermore, what additional mechanisms are needed to meet the standards of the French ODG.

²⁶ Christopher J. Bardenhagen, Qualitative Research Data Set Based on 42 Semi-Structured Interviews (compiled January 2021) (unpublished data set) (on file with author, available upon reasonable request). Interview data was coded and separated into 5 thematic areas for analysis (summary 1, control mechanisms; summary 2, defense, marketing supports, and other subsidies; summary 3, institutional support, development, and oversight; summary 4, law and program regulations; summary 5, missions and purposes of ODG.

²⁷ Int'l Org. for Standardization, *General Requirements for Bodies Operating Product Certification Systems*, Guide 65/1996 (April 16, 1998) (replaced more recently by Guide 17065/2012).

²⁸ Bardenhagen, *supra* note 26, summaries 1 and 4. *See also* Marie-Vivien et al., *supra* note 24, at 27.

²⁹ Marie-Vivien et al., *supra* note 24, at 27. Loi 2006-1537 du 7 décembre 2006 relative au secteur de l'énergie [Law 2006-1547 of December 7, 2006 Relating to the Energy Sector] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Dec. 8, 2006, p. 180.

³⁰ Loi 2006-1537 du 7 décembre 2006 relative au secteur de l'énergie [Law 2006-1547 of December 7, 2006 Relating to the Energy Sector] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Dec. 8, 2006, p. 180. Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-17 (Fr.).

In order to understand and consider the ODG mode and its applications, this paper will proceed in three further sections. Chapter II will describe the characteristics of ODGs—their function and purpose, unique legal requirements, and the institutional support they receive for development and oversight. Chapter III will compare the method of organizing an ODG under French corporate law with that of the United States to develop and manage a set of production standards—more specifically, organizing an ODG in Michigan.³¹ For this chapter, three levels of organization building will be considered: a) meeting base minimum purposes and requirements b) incorporation of certain aspects and benefits of the French model and c) replication of a variety of institutional supports. Chapter IV will explore the “organizational fit” for ODGs in the U.S.—under which circumstances would the ODG mode be appropriate, and in which situations would it not be a good fit?

A mixed methods approach was used for this research. Legal research of French codified law, statutes, and regulation was conducted. Among the resources used were statutory code books, online code via Legifrance,³² European Commission information,³³ programmatic informational documents, and INAO *directives* and guides. Our description of ODGs structure and functioning is also strongly informed by the perspectives gained from extensive interviews conducted in France in 2018 and 2019 with farmers, managers and value chain operators from 12 ODGs, government staff and INAO outreach agents, consultants, and researchers (42 total interviews).³⁴ We also reviewed the organizational documents (*statutes*) from the 12 ODGs researched (note: the term “operators,” which will be further defined below, refers to farmers and any other value chain actors such as processors and packers whose actions are implicated by any of the production rules of the quality sign).

II. Description of Organismes de Défense et de Gestion

Qualification as an ODG is a necessary step for collective management organizations to utilize French quality signs programs, and there are statutory requirements imposed on ODG structures. As such, ODGs have many of the characteristics of a business entity (or

³¹ Michigan was chosen as the first author is a Michigan attorney and member of the State Bar of Michigan.

³² See generally Codes, LÉGIFRANCE,

https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF (last visited Sept. 18, 2021).

³³ See generally EUR. COMM’N, <https://ec.europa.eu/> (last visited Sept. 18, 2021).

³⁴ The aspects of this study involving human participants were reviewed and approved by the Michigan State University Human Research Protection Program, Exempt Category 2: MSU Study ID: STUDY00001089.

quasi-entity). Here we provide information regarding the basic functions and purposes of ODGs, their legal requirements, development process and oversight.

A. *Functions, Purposes, and Missions*

As France's chosen form for a collective management body, the main function of ODGs is to develop and manage a quality sign product or products.³⁵ France's very specific outlines for the functioning of ODGs relate to the basic purposes of its quality sign programs: rural development and farm viability (especially in remote and rugged areas), enable equitable sharing of the profits within the supply side of the value chain,³⁶ and farm competitiveness in the national and international marketplace.³⁷ There are varying requirements for each of the programs, but at the heart of each is the purpose of providing consumers information about the quality of products.³⁸ As such, ODGs create production standards and promote their brand, however, ODGs do not produce or sell the products themselves—it is their farmer, cooperative, or processor members who actually commercialize the products.³⁹

The definition of quality also varies for each of the programs. Quality for the Label Rouge program effectively means a better sensory experience based on taste tests, whereas quality for the AOP/PDO program is based on the “taste of place” or *terroir*, and quality for the PGI program relates to the fact of being raised or processed traditionally in a particular place.⁴⁰ As stated by an INAO

³⁵ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-642-22(Fr.). See also Bardenhagen, *supra* note 26, summaries 4 & 5.

³⁶ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-640-1 (Fr.). As one development researcher/practitioner stated, quality sign organization is intended to be “...a type of bottom-up labélisation ... that is original because it is rooted in local elements, ... it is up to the local group of stakeholders to define the contents of the code of practice [specifications] ...” See Interview by French research group with anonymous researcher performed under promise of confidentiality (April 2, 2019).

³⁷ A national strategy of increased farmer adoption of or inclusion in quality sign projects is being promoted under the current administration. There are some who have concerns, however, that such a policy could lead to a watering down of quality.

³⁸ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L640-1(Fr.); Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-1– 641-13 (Fr.) (defining the details of the “signes d’identification de la qualité et de l’origine,” the Label Rouge program’s focus on “qualité supérieure,” and the AOC/PDO and PGI programs’ focus is on qualities that are specifically connected to a place).

³⁹ Bardenhagen, *supra* note 26.

⁴⁰ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L-641-11(Fr.). See also Regulation 1151/2012 of the European Parliament and of

agent (translated from French), “It has to be a product that is genuinely specific. You need to be careful: it doesn’t necessarily have to be a quality product in the sense... how can I put this? It must satisfy certain organoleptic specificities, but it’s not a product that will please everyone.”⁴¹ While each quality sign product might not be preferred by all consumers, one of the main public purposes behind the programs is to efficiently transmit knowledge about these high-information cost goods.⁴² For farmers and other operators of ODGs, this leads to increased product reputation, which further translates into new markets, increased sales, and/or higher prices.⁴³

The statutory missions for ODGs are clearly defined in the French Rural Code.⁴⁴ These include development of the product specifications, putting in place a control and inspection plan, and defending and promoting the name of the product as intellectual property⁴⁵ (each of these are visited in more detail below). Also included are requirements to communicate with the INAO for oversight purposes, such as to transmit a current list of operators and provide relevant budget information at INAO’s request.⁴⁶ The missions outlined in the Rural Code were normally included in the ODG’s organizational documents.

the Council of Nov. 21, 2012 on the Quality Schemes for Agricultural Products and Foodstuffs 2012 O.J. (L 343) 1; Barham, *supra* note 19.

⁴¹ Interview with anonymous regional agent performed under promise of confidentiality, Institut National de l’origine et de la qualité (Jan. 18, 2019).

⁴² See generally, Riccarda Moser et. al., *Consumer Preferences for Fruit and Vegetables with Credence-Based Attributes: A Review* 14 INT’L FOOD & AGRIBUSINESS MGMT REV. 121, 122, 126 (2011) (describing experiential goods as those that can’t fully be evaluated before purchase, and credence products as those that require trust in information provided, because consumers can’t fully determine the nature of the good before or after the purchase (e.g., the attribute of origin)); See also Interview with anonymous member of the Board of Directors performed under promise of confidentiality, French ODG (Mar. 15, 2019) (“There’s a real demand from society as a whole for us to explain how we work,” (translated from French)).

⁴³ As one small farm-market-oriented vegetable farmer described, “... it’s just the same as being organically certified, you don’t have to justify yourself.” – Interview with anonymous farmer member performed under promise of confidentiality, French Organismes de Defense et de Gestion (June 17, 2019).

⁴⁴ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22(Fr.).

⁴⁵ *Id.*

⁴⁶ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-23–642-25.

i. Development of Production Specifications

Creating and managing product specifications form the core of the ODG's functions.⁴⁷ Referred to as "*cahier des charges*" in French, the "specifications" are the body of agreed upon production rules for a particular product, describing all the steps needed for the manufacture of the product, from the origin of the raw materials to the packaging.⁴⁸ The specifications become the intellectual property of the ODG, and essentially are what are promoted, defended, and controlled by the control plan.⁴⁹ To meet its obligation, an ODG will provide a space for communication and negotiation between the farmers and other value chain operators. The more the product is processed, the more downstream operators will be involved in the process of developing the specifications.⁵⁰ For the cases we studied, many times the baseline of the specifications was simply the methods that farmers were already using for production, as the main idea is to include the practices and genetics that result in the typical product. However, for AOP/PDOs and PGIs, delineation of the geographical area is also part of the specification-building process, using criteria which that might include micro-climates within a territory, geological aspects, and cultural dimensions.⁵¹ While simple in concept, the specifications can become quite complex, and ultimately include requirements for sizing, shape conformation, packaging, storage box sizes, and even sucrose (brix) levels.⁵²

⁴⁷ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22. See also Bardenhagen, *supra* note 26, at summary 5.

⁴⁸ Westgren, *supra* note 20, at 1108; see examples of *cahier des charges* for different products by using the product search function, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr> (last visited Oct. 31, 2021).

⁴⁹ Because the specifications form the rules of production that are advertised to and/or largely accessible by consumers, they are the basis of branding and reputational development.

⁵⁰ Christopher J. Bardenhagen, Data Set Comprised of 12 Organizational Statutes, Numerous cahiers des charges and Control Plan (2018-2019) (on file with author). Information obtained upon condition of confidentiality.

⁵¹ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L641-6 (Fr.); Council Regulation 1151/2012, 2012 O.J. (L 343) 1-2, 8-9 (EU); Bardenhagen, *supra* note 26.

⁵² Bardenhagen, *supra* note 50. Our qualitative research indicates that ODGs are increasingly adding specifications related to sustainability and environment, in order to boost reputation with consumers. However, some practitioners advise to keep the specifications focused on the production methods and situations that make the product unique.

ii. Control Mechanisms

Once the specifications are drafted, the control plan (“*plan de contrôle*”) can be created.⁵³ The control plan is based on the important points of the specifications. It is the basis of verification that a product is actually produced in line with the rules—enabling a consumer to trust that a product is what the label says it is. The types of items controlled for vary by product type and the particulars of the specifications. They can include checking the documentation of harvest dates, confirmation of appropriate storage and drying facilities, and visual inspection of plant and animal variety, such as the breed of cattle used for milk production for cheese products.⁵⁴ Other control points include amount of pasture per animal and the density of trees per acre to stay within agreed-upon limits.⁵⁵

There are several levels of control: self-control by the operators, consisting of checks and form filling; internal control by the ODG, which conducts control checks on operators and audits operators’ self-control forms; and external control by a third-party control organization (CO), which conducts control checks of operators in the field, and audits the ODGs’ control regularly (two to four times a year).⁵⁶ This inclusion of an independent third-party controller to help draft the control plan and provide inspection services is required by the Rural Code.⁵⁷ The CO will perform both planned and surprise visits along the value chain in order to help ensure compliance with the specification.

The INAO mandates a minimum amount of external control, the level of which can vary by sector.⁵⁸ However, the remainder of controls can be split between the ODG and the CO in a manner that fits a group’s particular circumstances.⁵⁹ A greater amount of internal control will minimize external control needs; this enables those ODGs that have the capacity and resources to manage a larger part of the control, while allowing other ODGs to delegate certain tasks

⁵³ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-2 (Fr.). An overview of the principle or most notable control points will also be listed in the specifications documents (*cahier des charges*). *Id.*

⁵⁴ Bardenhagen, *supra* note 26; Bardenhagen, *supra* note 50.

⁵⁵ Bardenhagen, *supra* note 26; Bardenhagen, *supra* note 50.

⁵⁶ Bardenhagen, *supra* note 26, at summary 1.

⁵⁷ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-27–L642-35 (Fr.). Additionally, the CO must be approved and overseen by INAO per Code Rural L642-34 and R642-41, and all third party-certification organizations in France are overseen and approved by the *Comité Français d’Accréditation* (COFRAC). *Id.* L642-34, R642-41.

⁵⁸ Bardenhagen, *supra* note 26, at summary 1.

⁵⁹ *Id.*

to the third-party CO. The ODG's proposed split of control duties must be approved by the INAO.⁶⁰ As an example, one ODG controls 30% of its operators each year, with the CO inspecting 10%. The ODG and CO coordinate to make sure they control different operators in a particular year, and that each operator is inspected relatively frequently.

The control plan also outlines what will be done in the case of non-conformity. There are three levels of non-conformity: minor, major, and severe (“grave”).⁶¹ Each has different consequences for a particular control point that must be answered by the operator in a different length of time (24 hours for severe, 1 week for major, etc.).⁶² For example, harvesting the crop before specified dates might be a minor charge where a warning is given, whereas utilizing an unauthorized variety would be a severe issue that, if repeated, could lead to suspension of the use of the ODG's brand for the farmer. Normally, ODG managers and the CO will work to help an operator come back into compliance with the specifications.⁶³ Sanctions can include excluding the operator from use of the ODG's branding label, but this is rare and nearly always the result of inaction on the operator's part.⁶⁴

The costs of third-party certification are usually covered by the ODG, but charged to operators via annual fees (“cotisations”) in order to spread the costs evenly over time, though in some groups the individual operators pay the CO directly when they are controlled.⁶⁵

iii. Defense of Intellectual Property and Brand Management

As the name implies, one of the main purposes for the ODG as a collective management organization is to defend the quality sign against fraud and usurpation.⁶⁶ Fraudulent use of the sign can occur at two levels—the local/regional level and the larger national or international commerce level. Locally, fraud tends to happen in the form of individual farmers who are not part of the ODG marketing their products using the quality sign name brand or logo, often at farmer's markets, local shops, or at roadside stands. Most ODGs that

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bardenhagen, *supra* note 26, at Summary 1.

⁶⁴ *Id.*; Bardenhagen, *supra* note 50. Note that the control organizations do not inspect for food safety compliance; it is only for the specification points. However, COs are obliged to report serious food safety issues if they see them.

⁶⁵ Bardenhagen, *supra* note 26, at summary 1; Bardenhagen *supra* note 50.

⁶⁶ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-22 (Fr.); Bardenhagen, *supra* note 26, at summary 5.

we interviewed have these issues with some frequency,⁶⁷ and managers will talk to the farmer or send a cease-and-desist letter. Usually such action is sufficient, but if not, ODGs can get the INAO involved, or even file an action at the local court.

At the extra-regional or foreign level, the positive reputation that an ODG develops can lead outside businesses to infringe on the name. When this occurs, ODGs can work with INAO and the French consumer fraud authority, DGCCRF,⁶⁸ which can provide assistance and legal support.⁶⁹ Most ODGs do not get involved with litigation frequently, but when it does occur INAO provides substantial support, including sharing the costs of legal services.⁷⁰

ODGs carry out a variety of promotional activities for the quality sign, with some being more involved with marketing and promotion efforts than others. ODGs promote their quality sign brand in a general way, rather than particular products of their individual members.⁷¹ Managers often attend regional food fairs and *salons* where they can educate people about their production practices and hand out promotional materials. Some ODGs are involved with agri-tourism, setting up farm visit days with maps of farmer stops on a trail or around a region, as well as supermarket promotions, usually within the relevant farming region.⁷² However, some of the larger volume ODGs have initiated media campaigns,

⁶⁷ Ideally, all the farmers in a particular region will eventually begin to produce under the specifications and become official members of the ODG, especially with the regionally-oriented AOP/PDO and PGI programs. This 100% saturation can happen as an ODG develops its reputation, gains sales, and adds producers over time.

⁶⁸ *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes*, <https://www.economie.gouv.fr/dgccrf> (last visited Sept. 20, 2021).

⁶⁹ *See Id.*; INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ (INAO), <https://www.inao.gouv.fr> (last visited Sept. 20, 2021). The INAO has authority to take action/litigate based on France's intellectual property code (Code de la Propriété Intellectuelle) whereas the DGCCRF takes action based on the consumer code (Code de la Consommation). *See* Code de la propriété intellectuelle [Intellectual Property Code] art. L711-1–L731-4 (Fr.); Code de la consommation [Consumer Code] art. L511-1–L541-3 (Fr.).

⁷⁰ As stated by an INAO agent (translated from French): "If we observe that someone is doing this, we can... not necessarily take them to court straight away, it generally starts with official letters, but it can end up in court if there's no other way of finding a solution. In that case, we have lawyers who support the ODG. And the cost – because lawyers aren't free! – is shared between the ODG and the INAO." – Interview with anonymous regional agent performed under promise of confidentiality, Institut National de L'origine et de la Qualité (Jan. 18, 2019).

⁷¹ Bardenhagen, *supra* note 26, at summaries 2 and 4. ODGs do not buy, sell, or otherwise commercialize quality sign products themselves; more on this in the "Legal Requirements" section below.

⁷² Bardenhagen, *supra* note 26, at summary 2.

such as advertisements in the Paris Metro.⁷³ ODGs often receive subsidies from the EU or regional French authorities in order to promote their products, sometimes in collaboration with businesses that do the direct marketing of the products.⁷⁴

B. Legal Requirements

The definition and main legal requirements for quality sign programs and ODGs are outlined in Book Six, Title IV of the French Rural code.⁷⁵ However, multiple areas of the law apply to ODG functioning, in particular French corporate and nonprofit law, and the French Intellectual Property code related to trademarks and geographical indications.⁷⁶ This subsection *B* will focus on the specific laws and regulations that help to shape and define ODGs.⁷⁷

i. Entity Considerations and Membership Definitions

A very important aspect of ODGs is that they must not have a commercial purpose, meaning that they do not buy, sell, or themselves produce the goods they manage.⁷⁸ Because of this, only certain forms of business entities are permitted for organizing an ODG,⁷⁹ namely, “syndicates”⁸⁰ (farmer’s unions), or associations

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L640-1–L644-15, R641-1–D646-37 (Fr.) (“*La valorisation des produits agricoles, forestiers ou alimentaires et des produits de la mer.*”).

⁷⁶ Trademark laws are similar in France and the U.S., but geographical indications have a separate legal regime in France, found in the CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L721-1–L722-17, R721-1–R. 722-7.

⁷⁷ Many of the main requirements for ODGs are spelled out in Chapter II, Section III of Title IV (Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-17–L. 642-26, R642-33–R642-36), titled *Les organismes de défense et de gestion* [Defense and Management Organizations].

⁷⁸ Bardenhagen, *supra* note 26. This admonition against commercial purpose, while not found in French codes or accessible regulations, is detailed in the INAO’s guidance publication for ODGs. INSTITUT NATIONAL DE L’ORIGINE ET DE LA QUALITÉ, GUIDE DU DEMANDEUR POUR LA RECONNAISSANCE EN QUALITÉ DE DÉFENSE ET DE GESTION [APPLICANT’S GUIDE FOR RECOGNITION AS A DEFENSE AND MANAGEMENT ORGANIZATION] 16 (2017). It was also mentioned and emphasized by multiple INAO agents and other interviewees officially connected to the INAO. For this reason, it is either a de facto regulation, or, we hypothesize, a per se regulation codified in an INAO *Circulaire*, which are not publicly accessible.

⁷⁹ See *id.*

⁸⁰ Syndicates are organized under the French labor code. Code du travail [C. trav.] [Labor Code] art. L2131-1–L2131-6. Code du travail art. R2131-1 requires a syndicate to file their statutes at the local Mayor’s office.

organized under the *Loi du 1^{er} juillet 1901*,⁸¹ the main nonprofit law used in France.⁸² For-profit corporations and cooperatives are prohibited from use due to their commercial nature, though certain “interprofessions” organized prior to 2007 can be approved to act as ODGs, provided they split their ODG missions and finances from their other activities.⁸³ While a baseline business entity must be used to organize an ODG, we posit that the ODG form can be considered as a “quasi”-business entity due to the statutory and regulatory requirements that apply to the form. ODGs can manage more than one quality product,⁸⁴ for example a poultry ODG might manage different quality signs for the chicken, duck, and eggs that its farmers raise.

The flexible, if complicated, French legal platform for ODGs gives all the relevant value chain actors implicated by the production rules the power to get involved. ODGs can involve farmers, packers, processors, slaughterhouses, and potentially other upstream and downstream actors, collectively defined as “operators.” The Rural Code, in seeking to ensure that all relevant producers have a voice in decision-making about the production rules, define an operator as “... each person that actually participates in the activities of production, transformation, processing, or packing planned for in the production specifications ...”⁸⁵ In other words, any actor who is involved in a production step outlined by the production rules is an operator and has certain rights and obligations under the Rural Code.

Operators are deemed to be members of the ODG as a matter of law,⁸⁶ but membership in the underlying entity – the association or syndicate – can be further defined in their organizational

⁸¹ This association law is an important standalone law that has not been incorporated into one of the French statutory codebooks but is instead regulated by the law of contracts. *Loi du 1er juillet 1901 relative au contrat d’association* [Law of July 1, 1901 relating to the Association Contract] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 2, 1901, p. 1. Associations must file their statutes at the local Prefecture, found at the head of the department (akin to a county seat in the United States; there are 101 departments in France). *Id.* Statutes are publicly available by request, but not online.

⁸² However, ODGs are not charitable organizations.

⁸³ *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-19 (Fr.).

⁸⁴ *Id.* art. L642-17.

⁸⁵ *Id.* art. L642-3. Similar to Michigan state law, “persons” can include corporations and other legal entities under French law. *See e.g.*, MICH. COMP. LAWS § 450.2108 (Westlaw through P.A. 2021, No. 81, of the 2021 Reg. Sess., 101st Legis.).

⁸⁶ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-21 (Fr.).

documents, following laws applicable to that entity.⁸⁷ Operators can be represented by delegates, provided there is some democratic mechanism for selection of delegates and that the operators are kept informed about ODG matters.⁸⁸ In some ODGs, for example, cooperatives are the main members, but this is acceptable because the farmer operators are involved in the democratic processes at the cooperative level.⁸⁹ However, ODGs must provide a means for individual operators to become part of the ODG, for example farmers that are not members of a member cooperative.⁹⁰

ii. Financing

Regarding financing, an ODG is free to determine how to calculate a fee structure for the funding of its activities.⁹¹ Sometimes these fees (*cotisations*) will be flat, but they are often calculated on a per-unit basis. The decision to set fee levels must be decided on annually by the General Assembly, which is the whole body of the members, and the details of this vote must be provided to the INAO.⁹² This provides the operators a direct vote on the fees as a matter of law, ensuring a small board of directors cannot control the financial decisions affecting all the operators. Operators are obligated to provide the information necessary to calculate their fees to the ODG,⁹³ though in some situations not all operators in an ODG are necessarily liable to pay the fees, for example where a cooperative pays on a farmer's behalf.

iii. Organizational Documents and Structural Requirements

The basic fee structure, details on membership, and missions are all set forth in the ODGs "statutes" and "règlement intérieur," which are organizational documents similar to corporate articles of incorporation and bylaws in the United States.⁹⁴ In order to apply for

⁸⁷ For example, the groups statutes might require the annual fees to be paid as a condition or confirmation of membership.

⁸⁸ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 8.

⁸⁸ *See id.*

⁸⁹ *See* Bardenhagen, *supra* note 26; Bardenhagen *supra* note 50.

⁹⁰ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITE, *supra* note 78, at 8.

⁹¹ Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-24 (Fr.).

⁹² *Id.* *See id.* art. L642-25.

⁹³ *See id.* art. L642-24.

⁹⁴ An organization's *statutes* contain many of the operational rules concerning membership and the board of directors *inter alia*, that would be contained in bylaws in the U.S. However, while bylaws in the U.S. are a private document, the statutes are a semi-public document, accessible by the general public, but only upon request (not held online like articles of incorporation can be in the U.S.). As

recognition as an ODG, the group must provide their statutes (and règlement intérieur if they have one) to the INAO for approval.⁹⁵ Groups have a high degree of flexibility with how to structure the ODG, but among other things, INAO checks to see if the relationship between the operators passes scrutiny regarding three statutory and regulatory factors:

- representativeness of the operators (*représentativité des opérateurs*)⁹⁶
- democratic functioning (*fonctionnement démocratique*)⁹⁷
- balanced representation (*représentation équilibrée*)⁹⁸

These factors, detailed below, broadly seek to implement fairness, which is a concept that is perhaps uniquely operationalized in various areas of French law including contracts.⁹⁹ Overall, deference is given to the group organizing the ODG, but INAO outreach agents and National Committee members¹⁰⁰ check to ensure that the power relationship between actors is not too out of balance.

Representativeness of the operators. The factor of representativeness of operators relates to the basic rule that all operators potentially implicated by the ODG's product specifications

such, the statutes are somewhat of a cross between articles and bylaws. The *règlement intérieur* is a private document, however, which can add more specifics and rules to the statutes but cannot contradict the statutes on any matters. A règlement intérieur is optional – many ODGs do not have one. *See Guides Pratiques [Practical Guides]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/Espace-professionnel-et-outils/Produire-sous-signes-de-qualite-comment-faire/Guides-pratiques> (last visited Sept. 15, 2021).

⁹⁵ *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-33 (Fr.).

⁹⁶ *See id.* L642-18; INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, INAO-DJR-2009-03 RÉV. 1, SUIVI DES CONDITIONS DE RECONNAISSANCE ODG [MONITORING OF ODG RECOGNITION CONDITIONS] (2011).

⁹⁷ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ *See* Code Civil [C. Civ.] [Civil Code] art. 1171 (Fr.) (deeming certain side-clauses that create a “significant imbalance” between parties to be “unwritten” (essentially non-enforceable)); Code Civil [C. Civ.] [Civil Code] art. 1195 (Fr.) (allowing a judge to revise a contract when unforeseen circumstances make it onerously costly for a party to perform); Code Civil [C. Civ.] [Civil Code] art. 1221 (Fr.) (allowing specific performance unless it would be extraordinarily costly to the obliged). Fairness is a concept incorporated into contract law in United States as well, but the French mechanisms seem to provide stronger safeguards against greatly disadvantageous outcomes.

¹⁰⁰ The Rural Code creates several national committees to provide oversight of quality sign programs and approve applications for ODG status. *See* Code rural et de la pêche maritime [Rural Fisheries and Maritime Code] art. L642-6–L642-11 (Fr.).

must have a voice.¹⁰¹ To assess this, INAO agents work to determine how many operators are involved with the ODG relative to the total number of operators currently working in the production of that product, as well as the volume of product the group organizing the ODG produces relative to the whole.¹⁰² For example, the organizers of an ODG for a GI identifying a particular variety of pears should make sure that at least 80% of the growers of that variety in that region are represented and involved in the discussions, and similarly that most of the volume of production is represented. In this way, an ODG should mirror fairly closely the extant industry, so that the ODG does not become an exclusive club.¹⁰³ As intellectual property, the quality sign becomes a common good among the producers and operators involved, and therefore an ODG should not be created in such a way as to allow one or more firms to monopolize it.¹⁰⁴ In a practical sense, this does not mean all operators will participate in the ODGs production rules from the start. Often the membership grows once the ODG is more established and the operators involved experience more benefits, with some PGI and PDO ODGs eventually adding all the farmers from the region onto its membership list.

Some scholars, however, question the value of representativeness, noting that this requirement can duplicate already-existing inequalities or unfair situations between ODG actors.¹⁰⁵ For example, a group of smaller cheese producers might seek a quality sign for their products that requires the use of certain artisanal practices, but representativeness enables larger companies of cheese in their area to enter the ODG and water down the rules. In

¹⁰¹ See, e.g., *id.* art. L642-18. The rules, regulations, and practice surrounding ODG development provide multiple layers of assurance that any of the farmers and other value chain operators involved in production can have a place in the development of the ODG and the production rules, even if through another democratic entity such as a cooperative.

¹⁰² INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

¹⁰³ In the case of GIs, a delineated region is created, and all growers inside that region are implicated. However, the rules of Label Rouge allow for farmers or other food producers to create a product that is different from the standard, without regional constriction and reputational history, and so some Label Rouge ODGs illustrate exceptions to this rule. For example, several producers of a new, special variety of wheat could work together, potentially span different regions, provided they create a collective (ODG) that enables other producers that comply with the product specifications to join.

¹⁰⁴ For further reading related to the concept of common ownership, see Stéphane Fournier et al., *Les indications géographiques au regard de la théorie des communs [Geographical Indications with Regard to the Theory of Commons]*, REVUE INTERNATIONALE DES ÉTUDES DU DÉVELOPPEMENT 139, 141 (2018).

¹⁰⁵ See Delpine Marie-Vivien et al., *Controversies Around Geographical Indications: Are Democracy and Representativeness the Solution?*, 121 BRIT. FOOD J. 2995, 3006 (2019).

this way, the reputation that may have been built by artisanal producers over many years can become exploited by processors working with essentially commodity milk.

Democratic functioning. The factor of democratic functioning requires there to be democratic processes underlying all important decisions for the ODG. All operators must be able to have a voice individually or to elect members through some democratic mechanism.¹⁰⁶ This means that even though farmers are operators in an ODG, cooperatives can be *per se* members and vote in the General Assembly because there is a method for electing the delegates through the cooperative.

To create a democratic form, ODGs can organize different classes of operators into colleges or sections.¹⁰⁷ This enables the different classes to have representation on the board of directors (*conseil*), which provides flexible structuring that can fit nearly any value chain situation and number of operators. Some ODGs may have hundreds of farmers, multiple processors, and a college of farmers that process on farm, whereas more simple ODGs have only farmers as members. As such, the ODG model can allow for significant complexity, as opposed to the cooperative form, which is normally more limited to one member, one vote, and single levels of membership, even for different product areas (though capital contributions can vary). Democratic functioning in an ODG is not limited to one member, one vote, and structures where the downstream actors (e.g., processors, slaughterhouses) have as many board seats as the upstream operators (e.g., farmers) are not uncommon and are found to be acceptable by INAO.¹⁰⁸

Relevant to the concept of democratic functioning, it is up to the ODG to spell out the process of creating the product specifications, and the body that is charged with developing it.¹⁰⁹ Although the structure must be approved by INAO, which presumably ensures that the voices of the operators are heard, in some cases the main process of product rule creation can be delegated to the board.¹¹⁰ While this surely adds practicality to the development of the production rules, there is a risk of decision-making being skewed towards more concentrated actors, such as

¹⁰⁶ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

¹⁰⁷ *See id.* at 13.

¹⁰⁸ Bardenhagen, *supra* note 50.

¹⁰⁹ INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 12.

¹¹⁰ Bardenhagen, *supra* note 26, at summary 3.

cooperatives and processors, even if those results are ratified at the General Assembly of operators.

Balanced representation. The factor of balanced representation relates to the different categories of the operators along the value chain that are involved.¹¹¹ While this factor is ostensibly meant to ensure that *farmers* have significant voice, this principle goes both ways, also requiring that there be representation from the processors, packers, and other downstream operators. This factor is closely tied to the representativeness and democratic functioning of an ODG. What is considered to be balanced representation can vary widely, again with deference usually given to the ODG. INAO will step in when they determine there is a significant imbalance or lopsidedness, such as a situation where a small number of downstream operators hold a clear majority of the decision-making power.¹¹²

C. Institutional Support and Oversight

Two significant areas of support for ODGs are related to support during the application process, including applications for changes to existing production rules, and to subsidies that help save resources for ODGs.

i. Application Process and Continuing Oversight

The INAO is main supporting organization for ODG development and ongoing changes with production specifications, with approximately 21 INAO regional offices serving the different French regions.¹¹³ Interested groups will come to these agents for information and guidance on the process. Three important areas for which INAO agents provide support and oversight are the development of the ODG organizational structure, the development or modification of specifications, and communications with the INAO National Committee¹¹⁴ that ultimately decides on the ODGs application.

The organizational structure is of first order importance because it is the ODG that creates the specifications via a democratic

¹¹¹ See INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 12.

¹¹² Bardenhagen, *supra* note 26, at summary 3.

¹¹³ *L'INAO sur le Territoire [INAO on the Territory]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/The-National-Institute-of-origin-and-quality-Institut-national-de-l-origine-et-de-la-qualite-INAO/L-INAO-sur-le-territoire> (last visited Oct. 29, 2021).

¹¹⁴ See Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-6–642-11 (Fr.) (establishing the INAO National Committee structure).

process; therefore, it is important to ensure that the appropriate stakeholders have a voice and a sufficient level of voting power in the ODG. To accomplish this, when working with a new group INAO will evaluate whether the appropriate stakeholders are involved in the process, per the *représentativité* or representativeness factor mentioned above. Usually, local agents already have familiarity with the sector involved, but will also go to the local Chamber of Agriculture to cross reference information given to them by the ODG organizers regarding the volume of product and percentage of the implicated operators they represent.¹¹⁵ To help institute the factors of *fonctionnement démocratique* and *représentation équilibrée*, INAO agents can provide advice to groups on the internal structure during the development of their *statutes*,¹¹⁶ with some agents being more involved in statute development than others. Groups are encouraged to connect with existing ODGs to gather experience and examples of statutes that can help them create their organizational structures. Industry groups and cooperatives also help with statutes development in some circumstances. Local INAO agents can send difficult questions regarding the statutes or internal structure on to the legal department at the central INAO office in Paris for an opinion. Overall, INAO agents guide groups in creating a structure that will pass the scrutiny of the INAO National Committee.

As the production rules or specifications are being written by the ODG, a Commission of Inquiry is created from members selected from the INAO National Committee.¹¹⁷ Both this commission and an ODG's local INAO agent will provide expertise on items that should be included (or alternatively, excluded).¹¹⁸ They also will advise groups to consider the corresponding control measure for any item that will be included in the specifications, as control measures are based on important points in the specifications. Both INAO agents and members of Commission of Inquiry can ask for help from university or government research units to provide assistance on an ad hoc basis with writing specifications, such as with drafting a comprehensive definition of the product.¹¹⁹ Additionally, agents from control organizations (COs) will advise groups on

¹¹⁵ Bardenhagen, *supra* note 26, at summary 3.

¹¹⁶ As mentioned above, the *statutes* are similar to bylaws in the U.S., setting out provisions for the governance structure for the organization (e.g., board membership and voting rules). The statutes document is the main organizational document for ODGs and many other corporate organizations.

¹¹⁷ Bardenhagen, *supra* note 26, at summary 3.

¹¹⁸ *Id.*

¹¹⁹ Marie-Odile Nozières-Petit, Comment (June 3, 2021). Dr. Nozières-Petit is a member on the Label Rouge/PGI National Committee, serving as a *personnalité qualifiée*.

specifications and items to consider for the control plan if they are able to connect early on with an ODG.¹²⁰

Where specifications involve defining areas of production, as with PDOs and PGIs, INAO will provide experts to help delimit and define the areas, including geographers.¹²¹ These definitions will eventually become part of the specifications.

Once an ODG's dossier is ready, it is sent to the appropriate INAO National Committee, which oversees and approves applications both for new quality signs and for modifications to an existing quality sign's specifications.¹²² The National Committee structure is an important institutional pillar for the French quality sign programs, providing a clear decision-making process for recognition of products and oversight to ODGs.¹²³ The appropriate committee will look at the ODG's statutes (and *règlement intérieur* if the group has one) to ensure it complies with the Rural Code requirements for structure.¹²⁴ The committee will also review and comment on the specifications or modification of the specifications. The French fraud and consumer protection agency (DGCCRF) is part of the committee process and can provide ODGs input on labelling and other items on behalf of consumers.

The INAO agents and members of the Commission of Inquiry serve as liaisons for ODGs at the National Committee meetings.¹²⁵ After helping a group to prepare their dossier for committee approval, the local agent and the members of the Commission of Inquiry will attend the meetings (held in Paris) in order to explain the ODGs case, acting both as an advocate for the ODG and as a communication messenger from the National Committee to the ODG.¹²⁶

The process of quality sign development can be quite long, with final approval taking anywhere from two years, to longer than a decade.¹²⁷ It can take four or more years to make seemingly simple modifications of the production rules.¹²⁸ This is perhaps both a

¹²⁰ Bardenhagen, *supra* note 26, at summary 1.

¹²¹ Bardenhagen, *supra* note 26, at summary 3.

¹²² Bardenhagen, *supra* note 26, at summaries 2 and 3; *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-6 (Fr.)

¹²³ For more about the National Committee structure, including details about the composition of the subcommittee, see *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. R642-1–642-12 (Fr.).

¹²⁴ Bardenhagen, *supra* note 26, at summary 3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

weakness and a strength of the quality sign programs—while practical amendments related to technological advances require an onerous process, consumers are essentially provided a higher guarantee that the level of quality will not be eroded. INAO has a policy to not approve any change in specifications that will have a negative impact on the quality of the product, however it is debatable whether this has been adhered to in certain cases.¹²⁹

Once approved, local INAO agents will continue to work with and provide oversight to ODGs. They are invited to the General Assembly meetings, where they can confirm the voting process for annual fees required by law.¹³⁰ ODGs are required to annually submit to the local INAO agents the minutes of the General Assembly meetings and a current list of operators.¹³¹ Local agents are normally in frequent communication with ODGs because they regularly seek to make modifications to the production rules, including sometimes minor changes, such as storage container size.

ii. Defense and Marketing Support and Other Subsidies

While there is little direct government aid for farmers to adopt quality label production, ODGs and quality signs are supported in a numerous ways. Common agricultural subsidies and farm aid from the EU and France can help farmers to get started with quality sign production, as with other types of production.¹³² In some cases regional authorities help farmers in these systems, for example, to make equipment purchases relevant to the region's production. Regional bodies, such as the Chamber of Agriculture, sometimes provide office space and other office support for ODGs.¹³³ Cooperatives often offer programs for new farmers, who might be edged towards quality signs as viable avenues of production. However, in most cases it seems to be the price premium or

¹²⁹ For example, in one cheese group, the rules were changed to allow pasteurized milk to be used to make the cheese, enabling much larger farmers to enter the ODG and produce large volumes of cheese, but damaging the reputation of the quality sign and putting downward pressure on quality. See Marie-Vivien et al., *supra* note 105, at 3001-02.

¹³⁰ Bardenhagen, *supra* note 26, at summary 3.

¹³¹ *Id.* See also Code rural et de la pêche maritime [Rural and Maritime Fisheries Code], art. L642-25.

¹³² See *Commission Staff Working Document Evaluation of the Impact of the CAP Measures on the General Objective 'Viable Food Production,'* SWD (2021) 106 final (May 11, 2021). For example, the EU has subsidized 50% or more of the cost of tree plantings in certain areas, and for certain varieties – but these are not limited to quality sign varieties. See *Commission Staff Working Document on the 3 Billion Tree Planting Pledge for 2030,* SWD (2021) 651 final (July 16, 2021).

¹³³ Bardenhagen, *supra* note 26, at summary 3.

reputational edge of quality signs that attracts farmers to work with ODGs in their area.¹³⁴

One of the most important areas of support at the level of the ODG is assistance with defense. As mentioned above, ODGs can write cease and desist letters to people inside and outside their region based on the intellectual property they have been granted in the form of a quality sign. However, when that isn't effective, the ODG can ask INAO to send a cease-and-desist letter, which is backed up by threat of litigation—INAO will share the legal costs with groups.¹³⁵ It would be impossible to quantify the value of having a government agency backing up an ODG's intellectual property, but in addition to staff time and the sharing of lawyer's fees that occur from time to time in higher profile cases, many infringers are likely deterred by INAO's cease and desist letters at the outset.

Another area where ODGs garner a significant amount of support is promotion. The EU regularly provides funding that can be used for building reputation for an ODG's products.¹³⁶ The amounts can represent a significant percentage of an ODG's marketing budget and provide money for advertisements, such as for national radio spots. Regional authorities also provide substantial support to ODGs, for promotion of the brand, as well as products associated with the region.¹³⁷

In closing this section, it should be emphasized that one of the largest sources of support, which saves substantial ODG resources, is the INAO itself. This institutional framework provides groups a starting point and assistance that would normally have to be undertaken by an entrepreneur, and in an ad-hoc manner, which would likely be less efficient without tested models and processes to adopt. Salient to the topic of marketing supports, INAO agents help with development and oversight using programmatic rules that serve to keep a high level of quality for the products. The umbrella nature of the quality sign labels (Label Rouge, PGI, PDO/AOC) creates a framework that significantly lowers the cost of developing reputation for a group, because of the existing recognition and credibility of the label.

¹³⁴As stated by one ODG manager (translated from French): "Objectively speaking, it's not the subsidies that incite farmers to produce. ... What does encourage them is the added value of having a Label Rouge [product] in relation to standard production." – Interview with Anonymous, Business Manager, French Organisme de Défense et de Gestion (Jan. 29, 2019).

¹³⁵ Bardenhagen, *supra* note 26, at summary 2.

¹³⁶ *Id.*

¹³⁷ *Id.*

III. Legal Methods of Organization of the ODG Mode in the United States

The central aspect of this model—the development of production specifications and the management of resulting intellectual property—can be accomplished using existing state-level law. Here we use Michigan as an example state legal system and statutory regime. However, there are several important aspects of the French model that would require modifications or special provisions to be put into the organizational documents. Furthermore, there are many benefits stemming from the quality sign programs and other French institutional supports that would require the development of oversight mechanisms. This paper will visit each of these levels in turn.

A. *Establishing the Core Purpose of Development and Management of Specifications*

Creating an organization that replicated the core purpose of the ODG model in the United States would be relatively simple. However, additional steps need to be taken in order to ensure compliance with anti-trust laws.

In Michigan, the most appropriate entity to use would be a nonprofit association created under the Nonprofit Corporation Act.¹³⁸ This act can be used to create a wide range of nonprofit businesses.¹³⁹ By electing to use a non-stock membership structure, the group can create an appropriate form based on the circumstances and the value chain actors involved.¹⁴⁰ The organization can be managed on a one member, one vote basis, which is the default basis provided in the law,¹⁴¹ or different classes of members can be given different voting rights.¹⁴² This would allow for operators to be organized into colleges, each of which has a defined level of representation on the board of directors.

¹³⁸ Nonprofit Corporation Act, MICH. COMP. LAWS § 450.2101-3192 (Westlaw through P.A.2021, No. 81, of the 2021 Reg. Sess., 101st Legis.).

¹³⁹ These include nonprofit cooperatives. *See id.* § 450.2123(2)(a). However, due to the commercial nature of the cooperative form, even a nonprofit cooperative would not be appropriate for the ODG mode, particularly if value chain actors other than farmers will be involved, due to antitrust concerns. *See generally* 26 U.S.C.A. § 501; *see also* 7 U.S.C.A. §§ 291-292.

¹⁴⁰ *See* MICH. COMP. LAWS § 450.2302 (Westlaw through P.A. 2021, No. 81, of the 2021 Reg. Sess., 101st Legis.1983); *see generally id.* § 450.2304.

¹⁴¹ *Id.* § 450.2304(3).

¹⁴² *Id.* § 450.2304(2).

It is necessary to elaborate the basic purposes for the organization in the articles of incorporation.¹⁴³ While this statement can be somewhat broad (e.g., “...organized for the purpose of branding agricultural products”), it may be prudent to narrow to the main purposes of the ODG mode in order to help clarify the non-commercial nature of the organization: the purpose of the organization is to create of production standards, develop of intellectual property and branding, and promote and defend the brand.¹⁴⁴ While non-commercial, an ODG-mode business is not a charitable organization and therefore would not qualify as a 501(c)3 organization for federal income tax purposes.¹⁴⁵

A nonprofit association that has value chain actors other than farmers for members will not be exempt from anti-trust regulations under the Capper-Volstead act,¹⁴⁶ making it important to ensure that members are not using the organization to engage in any sort of price setting. Provisions should be included in the articles of incorporation that prohibit real time price fixing or quantity coordination across members. The bylaws should also have a provision that explicitly prohibits discussions regarding prices or efforts to affect quantity at all meetings of the organization. French ODGs similarly comply with antitrust laws by not engaging in commercial activities, and by not allowing members to use ODG meetings and venues to discuss price.¹⁴⁷

In regard to antitrust and competition law, however, it is sometimes argued that certain production specifications can ultimately affect quantity—directly or indirectly. A full analysis of related French and EU anti-trust jurisprudence is outside of the scope of this article,¹⁴⁸ but production rules that provide direct constraints

¹⁴³ See *id.* § 450.2202(b).

¹⁴⁴ This suggestion is made both in keeping to the French ODG model and in providing a safeguard against violation of anti-trust regulations.

¹⁴⁵ See 26 U.S.C.A. § 501(c)(3). However, an ODG-mode business organized as a Michigan nonprofit corporation might qualify as a 501(c)6 trade association. See *id.* § 501(c)(6).

¹⁴⁶ See 7 U.S.C.A. §§ 291-292. An exception lies with organizations managing federal and state marketing orders, which can include processors in addition to farmers; they are exempt as a result of the Agricultural Marketing Act of 1937. See *id.* § 608b(a).

¹⁴⁷ Bardenhagen, *supra* note 26.

¹⁴⁸ For more on this topic, see Emmanuel Raynaud & Egizio Valceschini, *Collectif ou Collusif? [Collective or Collusive?]*, 2 *Revue Internationale de Droit Économique* 165, 195 (2005); Stéphan Marette & Emmanuel Raynaud, *Applications du Droit de la Concurrence au Secteur Agroalimentaire [Applications of Competition Law to the Agri-Food Sector]*, 277 *Économie Rurale* 2, 3 (2003); Emmanuel Raynaud & Egizio Valceschini, *Competition Regulation Against Quality Policy: The «Label Rouge» in the French Poultry Industry*, in

on quality, such as limiting the amount of acreage or limitations to entry of new participants, can sometimes survive scrutiny in France and the EU. However, such product specifications should be avoided in the United States until/unless there is clear legislation and/or case law enabling them to be used, or unless there is an applicable legal exemption that a group is working under (for example, a federal marketing order).¹⁴⁹ Production rules that are established in order to develop a particular quality of product, such as geographical origin, varietal or genetic selection, or grading and uniformity rules, do not directly limit quantity and should therefore be safe from an anti-trust perspective.¹⁵⁰ Similarly, production rules that focus on conservation or other sustainable practices should be allowable, given that third-party certifications, ecolabels, and food safety rules are widely adopted across farmers without issue, even if these rules have (usually limited) indirect consequences on quantity. However, rules that are ostensibly quality-oriented, but are actually a guise for limiting quantity should not be used; the ODG mode would not protect a group or industry from anti-trust actions in such a situation.¹⁵¹

B. Incorporating Other Benefits Resulting from French law

An organization in the United States seeking to replicate the multiple aspects of fairness prescribed in French law can do so by adding specific provisions to their organizational documents. One of the central tenets of the French quality sign programs is accessibility to the ODG and the resulting brand.¹⁵² All farmers and other actors that comply with the rules should be able to join the ODG, have some level of voice in the decision-making, and utilize the brand or quality

TYPICAL AND TRADITIONAL PRODUCTS: RURAL EFFECT AND AGRO-INDUSTRIAL PROBLEMS 529, 530 (F. Arfini & C. Mora, Eds., 1997).

¹⁴⁹ Limitations to acreage have been used as a cause of action in the United States.

See John C. Monica, Jr., *Agricultural Antitrust Liability: What About the "Reasonable Farmer?"*, 22 Drake J. Agric. L. 1, 13 (2017) (discussing agricultural antitrust litigation in the United States).

¹⁵⁰ While price leads antitrust discussion, quality is also a metric that is considered in antitrust actions. See ORG. FOR ECON. COOP. & DEV., *THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS 1* (2013). The United State's brief for the OECD roundtable quotes the U.S. Supreme Court: "The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices . . ." *Id.* at 120 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007)).

¹⁵¹ See generally Monica, *supra* note 94.

¹⁵² See discussion *supra* Section II.B.iii; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-18, L642-21 (Fr.); INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78.

sign resulting from the work. To accomplish this using a nonprofit association in the U.S., provisions related to the concept of operators need to be included. “Operators” can be defined as all persons, natural and legal, that are involved in any step of product production that is specifically outlined by the production rules. This means that a processor that uses a specific process or ingredient outlined in the production rules would be considered an operator, whereas a distribution company that simply buys, transports, and sells the product to retailers would not. A bylaw giving operators the right to have input and voice in the organization should be included, as well as one providing the right to use the resulting brand if the operator is in compliance with the specifications.¹⁵³

Other important fairness aspects of the ODG mode include representativeness of the operators, democratic functioning, and balanced representation.¹⁵⁴ The first of these, representativeness, relates to the existing industry for a product. In France, a majority of the quality signs are related to geographic areas, so that a quality sign under the PGI or PDO/AOC programs will necessarily implicate the entire industry in that area.¹⁵⁵ This provides significant public policy justification for the ensuring that the industry is well-represented during the ODG development process. Other quality products, including some having Label Rouge status, are not necessarily from a defined region, but often arose from already existing production systems. When developing an organization following the ODG mode in the United States, however, the factor of representativeness may not be necessary nor desired in many circumstances, such as for the development of new products, or when a product is intended to be marketed for its higher quality or special production rules. For example, a farmer group that wanted to work together to grow a specific variety of potato such as fingerlings would not need to involve all of the potato farmers in the state in the development of their organization. However, for a quality product based on a geography and its existing reputation, representativeness would be

¹⁵³ Note that it is not necessarily the case that all operators need to be fee-paying members in order to enjoy these rights. A provision in French law establishes that all operators are members, but this may in fact be in opposition to certain EU public policies as well as impracticable in certain contexts. Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-21 (Fr.). See also Marie-Vivien et al, *supra* note 105, at 2996.

¹⁵⁴ See discussion *supra* at Section II.B.iii; Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-18 (Fr.); INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, *supra* note 78, at 1.

¹⁵⁵ See discussion *supra* Sections II.B.iii, II.C.i. The structural requirements for ODGs coupled with the programmatic requirements for the PGI and AOC/PDO programs result in the potential for inclusion of all operators in the industry in the delineated region, though participation is voluntary.

appropriate. Having no overarching institutional structure in the U.S., these decisions would be made in an *ad hoc* manner by the organizers.¹⁵⁶

A group can implement the factors of balanced representation and democratic functioning by creating provisions related to voting rights and board representation that seek to provide an appropriate balance of power between the actors involved. The characteristics of a fair structure will vary based on the circumstances of the operators and their production. Consideration of the amount of input by the different categories of actors should be made, for example, whether most of the work that adds value is done by farmers, processors, or other relevant actors. Representative equality can be implemented by providing decision-making weight to the different categories of actors based on the amounts of production rules and responsibility that falls on each of them, such as by allocation of board seats. However, to ascertain this, it is important for the organizers to create a process for gathering input from all of the relevant operators involved. Otherwise, operators not sufficiently included or heard can become disenfranchised, which may lead to declining quality.

C. Replicating Institutional Supports

Developing a governmental institutional framework similar to the INAO would likely be extraordinarily costly and politically infeasible, but many of the strengths of the French institutional arrangement could feasibly be replicated using private organizations, and potentially some level of public support. Three main areas of consideration are development support, quality sign programming, and defense. Each of these are detailed separately below, although they also intersect with each other.

i. Development Supports

One of the biggest strengths of the French system is the existence of INAO agents, who provide some level of assistance during the development process.¹⁵⁷ These agents work with farmers

¹⁵⁶ However, if an umbrella brand or oversight program is created to provide institutional support, representativeness could be instituted as a required factor. *See* Code rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L. 642-6–642-11 (Fr.).

¹⁵⁷ Interviews conducted with the French international development agency CIRAD identified this type of expertise as being one of the most desired, potentially beneficial institutional supports for work in developing countries. *See also* Delphine Marie-Vivien & Estelle Biénabe, *The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review*, 98 WORLD DEV.

in a similar manner as university agricultural extension agents in the United States, developing expertise in the area of farm business outreach over their careers. Similarly, there are cooperative development centers that provide educational outreach, training, and business development advice in the United States.¹⁵⁸ These are often associated with land grant universities and work in partnership with university extension agents.

If similar programming around the ODG mode was developed using these existing land grant resources or via a private organization, only a handful of agents would be needed to provide significant outreach, education, and developmental assistance to groups organizing as ODGs. For example, if a government program similar to cooperative development programming were to be created, training could focus with as few staff members as one agent per business development center, or one extension agent per state.¹⁵⁹

Agents with ODG mode expertise could help groups with the organizational process, ensuring that the right actors are involved and providing assistance with developing bylaws and production rules. During the development process, agents could work to ensure the principles of balanced representation, democratic functioning, and, where appropriate, representativeness of the extant industry. Agents could also recommend adoption of the principle that all operators who comply with the rules are eligible to join the quality sign organization and use the resulting brand, if that matches the policies promoted by the agents' institutions.

ii. Quality Sign Programming

Development of a quality sign program at the state level is possible in the United States, but funding and other issues may present significant obstacles that are not feasible to overcome in most states. However, it is possible that a private organization could be developed at to create an umbrella brand for groups of producers to develop products under. While a full assessment of the topic of

1, 1-11 (2017). See Delphine Marie-Vivien & Estelle Biénabe, *Institutionalizing Geographical Indications in Southern Countries: Lessons Learned from Basmati and Rooibos*, 98 *WORLD DEV.* 58, 58-67 (2017).

¹⁵⁸ For examples, the Michigan State University Product Center's Michigan Cooperative Development Program; the Mid-America Cooperative Council; University of Wisconsin's Center for Cooperatives.

¹⁵⁹ On the private side, a relevant example can be found with Cooperative Development Services, which provides consulting services for food cooperatives around the United States. They have several experts who travel to conduct feasibility studies and other food cooperative business development work; however, these agents have developed a specialized expertise that is indispensable. See *COOP. DEV. SERVS.*, <https://www.cdsus.coop> (last visited Sept. 18, 2021).

organizing an umbrella organization is outside the scope of this study, in this subsection I will visit a few of the key structural aspects needed to replicate important benefits of the French quality sign programs.

A quality sign umbrella organization could develop rules to help shape the ODG-mode organizations and to provide ongoing oversight. It might be beneficial to create a baseline set of standards, such as minimum animal welfare and sustainability practices, that could apply across products.¹⁶⁰ The organization could limit the program to a particular geographical area, such as a region within Michigan, or a wider foodshed such as the Great Lakes. However, any umbrella brand organization would need to define what is different about its products and require groups to define the specificities of their products. In a practical sense, the success of the brand might rest on having higher intrinsic levels of quality, in addition to any other qualities such as geography or being grown with sustainable practices.

Once the main rules were developed, this umbrella organization could develop logos and apply for a certification mark or a collective mark (both marks are types of trademarks) that would become the basis for a branding program. The organization would allow ODG-type farmer groups that comply with its rules to use the resulting logo for branding.

Such an umbrella organization would want to keep its standards high in order to develop its reputation and establish credibility. A significant amount of strength and detail of control is mandated for the French quality sign programs, presumably to ensure a high level of integrity, and that the signs and products can withstand scrutiny of policymakers and the consuming public. This justifies the use of third-party certification organizations. However, the level of control needed for an umbrella label in the United States could vary. For some efforts, third-party certification might be prudent to help provide legitimacy of the brand and program, whereas for others,

¹⁶⁰ The Label Rouge program in France has baseline production rules for a variety of product types, for example, beef, poultry and lamb. Groups seeking the Label Rouge quality sign must meet these rules at a minimum, and also create their own specific standards in order to develop a unique product. *See generally Label Rouge [Red Label]*, INSTITUT NATIONAL DE L'ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/eng/Official-signs-identifying-quality-and-origin/Label-Rouge-Red-Label> (last visited Sept. 18, 2021).

such as where consumer trust is high, control checks could be carried out by the umbrella brand itself.¹⁶¹

Developing financial capital for such an umbrella brand effort would present a substantial challenge. Due to the large amount of up-front funding that would be needed to help with the establishment and organization of the ODG-type production groups, as well as the resources for the promotion and advertising needed to successfully develop brand recognition in early years, the participation of an investment fund could be critical to the feasibility of the effort. The purpose of developing branding for farmers is not generally charitable (unless it is tied to another charitable purpose such as helping underserved communities), and for this reason, the involvement or creation of a community development financial institution (CDFI) to create a funding pool may be unlikely to be successful. Standard venture capital groups are unlikely to work either, because the venture capitalists will likely want some say in the programmatic rule development in order to allow flexibility to adjust to the market. However, this desire would be in direct opposition to the rigidity of standards needed for long-term brand development needed. Additionally, venture capitalists will likely demand relatively high rates of returns to their investment.

However, there are alternatives to CDFIs. One possibility is to utilize a Benefit Corporation, a burgeoning type of social-entrepreneurship entity, to garner investment from socially conscious individuals and impact investors who are interested in regional food system development. These investors may be willing to take a lower rate of return,¹⁶² and a Benefit Corporation can be used to ensure that the original purposes of the corporation (developing regional branding for farmers) are adhered to, even if it is less profitable than other ventures. However, the corporation would have to deal with securities registration and subsequent advertising of investment opportunities.

¹⁶¹ Participatory guarantee programs can provide an alternative to conventional third-party certification; see, for examples, Kornelia Kirchner, *Overview of Participatory Guarantee Systems in 2014*, in *THE WORLD OF ORGANIC AGRICULTURE: STATISTICS & EMERGING TRENDS 2015* 134, 134 (Helga Willer & Julia Lernoud eds., 2015). Patrick Mundler & Stéphane Bellon, *Les Systèmes Participatifs de Garantie : Une Alternative à la Certification par Organismes Tiers ?* [*Participatory Guarantee Systems: An Alternative to Third Party Certification?*], 5 *POUR* 57, 57-65 (2011). Paulo Niederle et al., *Social Movements and Institutional Change in Organic Food Markets: Evidence from Participatory Guarantee Systems in Brazil and France*, 78 *J. Rural Stud.* 282, 282-291 (2020).

¹⁶² See Philip Roundy et al., *Finance or Philanthropy? Exploring the Motivations and Criteria of Impact Investors*, 13 *SOC. RESP. J.* 491, 491-512 (2017).

If an umbrella organization manages to overcome these funding and brand development challenges, and eventually gets to the point where it is running smoothly with numerous member groups and products, the organization could be used to provide the expert agents mentioned in the subsection above. Per unit fees have potential as a sustainable source of funding for those agents and other operational needs, if the label results in price premiums and increased sales volumes that make these fees economically feasible to charge operators. The Label Rouge program, for example, is funded in part in this manner.¹⁶³

iii. Defense

ODGs in France enjoy a significant benefit in the form of government aid for the defense of intellectual property.¹⁶⁴ Both the sending of cease-and-desist letters, and assistance with litigation by INAO, act as deterrents to domestic and foreign usurpation, and provide support to ODGs in their defense efforts.

Similar support for intellectual property defense could be provided to some extent by an umbrella brand organization. An umbrella organization could centralize defense activities for each of its groups' products, writing cease and desist letters, and initiating the enforcement of US intellectual property laws where necessary. Template cease and desist letters could be drafted and used for different circumstances (for one example, local farmer usurpation in direct markets, in another example infringement of the logo or brand name by an outside business). If an umbrella organization is successful financially, per unit fees could be collected from groups to use for defense of the brand in courts when necessary. Such costs of litigation and/or mediation could be substantial.

State departments of agriculture (e.g., Michigan Department of Agriculture and Rural Development) provide another possibility. A single group or an umbrella organization could negotiate an arrangement to provide aid with defense efforts. Such a relationship with a state's agriculture department could be mutually beneficial, protecting the reputation of both the quality sign organization and the state's agricultural sector, especially if the umbrella organization uses state or an internal region geography as part of the label. This would likely require new legislation, which might be more feasible if it were applicable to other agricultural groups based in the state (for example, if the Michigan Apple Committee could also request

¹⁶³ Code rural et de la pêche maritime [Rural and Maritimene Fisheries Code] art. L642-13 (Fr.).

¹⁶⁴ See discussion *supra* Section II.C.ii.

state assistance when their label is being infringed upon). Cease and desist letters written by the state would be a relatively low-cost method of meeting these mutual goals,¹⁶⁵ and in a best-case scenario, assistance with funding the costs of litigation by the state could be provided.

IV. Appropriateness of the ODG Mode for Different Contexts in the United States

The utility of the ODG mode of organization will vary based on the particular circumstances of a value chain or producer group. Here we consider the “fit” of the ODG for various contexts in the United States, and conversely situations where the ODG mode would likely not be an appropriate fit.

A. More Ideal Contexts for the ODG Mode

The ODG mode has many strengths as an organizational tool and may be beneficial for groups to use in the right circumstances. First, as with any value-added food production effort, it is necessary to have a strong customer base and market for the group’s products, whether that is achieved through local proximity, shortness of supply chain, or access to a wide geography using conventional distribution channels. Additionally, the group of farmers must be amenable to cooperation. Below is a list of circumstances where the ODG model would have a more ideal fit:

i. Where groups of farmers want to work in common on branding a value-added product.

The branding could be intended to develop reputation for a specific quality of the product (region, variety, growing process), or could be used for highlighting sustainable practices, or some combination of these criteria. Take, for example, market gardener farmers in Southern Michigan, many of whom grow garlic, and use non-certified organic practices. Working with the assumption that many of these farmers have the capacity to grow more garlic, an ODG-mode organization could be formed to create rules and develop and manage a brand and logo. Farmers could use this label to signal quality attributes—the chosen variety, sustainable practices, and geography—to direct market and other types of purchasers. As consumer awareness of the label grows through, for example, regular promotion (e.g., posters or flyers) used by members during farmers

¹⁶⁵ After the initial development of a template cease and desist letter form, it may be fair to estimate about two to four hours of MDARD staff time would be needed, between communication about the issue with the stakeholder group representative and writing and sending the letter (for a simple matter.)

markets across the state, demand for the product could also grow, provided the high quality of the product is maintained.

ii. Where it would be beneficial to have other value chain actors besides farmers involved (e.g., upstream or downstream actors).

A strength of the ODG mode is that a variety of value chain actors can be organized in a manner that is not in opposition to antitrust laws. In contrast, cooperatives cannot normally have other value chain actors involved without violating antitrust laws, due in large part to their commercial nature.¹⁶⁶ One example of a product that would need downstream operators to be involved is Honeycrisp variety apples from Northwest Michigan, which are known to have a higher quality due to their coloration, taste, and other factors. In order to market a fairly uniform, high quality product, a group of farmers would need to create sizing, coloration, and sucrose content rules for apples to be sold under the label. Only a small percentage of regional farmers' Honeycrisps would make the grade, and the equipment facilities needed to do the sorting could run into the tens of millions of dollars in upfront costs. However, many or most apple farmers already work with packers that have this equipment, and have the ability to segregate and store apples for marketing over the year. The Northwest Michigan growers would want to work closely with one or more of these packers on production standards and management of ongoing operations.

iii. Where aggregation is required to meet the needs of large buyers, such as supermarkets and institutions.

Production standard development is conducive to the aggregation of farmer's products, because of the resulting consistency of quality, and the ability to create the sizing and grading uniformity rules acceptable to supermarkets.¹⁶⁷ The ability to aggregate numerous farmers' products should enable the distribution of larger product volumes and sales in wider geographical areas (statewide, nationally, internationally). Furthermore, the specific set of standards that is developed can be protected as intellectual property for purposes of branding and reputation development. This circumstance could apply to both the garlic and the Northwest Michigan Honeycrisp groups mentioned above. The Honeycrisp

¹⁶⁶ See John C. Monica, Jr., *Agricultural Anti-Trust Liability: What About the "Reasonable Farmer?"* 22 DRAKE J. AGRIC. L. 1, 1-2 (2017).

¹⁶⁷ See Getachew Abatekassa & H. Christopher Peterson, *Market Access for Local Food Through the Conventional Food Supply Chain*, 14 INT'L FOOD & AGRIBUSINESS MGMT. REV. 41, 41-60 (2011).

group likely will require a wider distribution than its growing region to make the effort feasible, so working with larger retailers in the Great Lakes region could be an ideal fit. The Southern Michigan garlic group might find that distribution around the state is feasible and within their aggregate capacity, given a sufficient price premium or net return.

iv. Where voluntary organizations are preferable to mandatory organizations (e.g., marketing orders¹⁶⁸).

Whereas marketing orders impose requirements and taxes on all the farmers in a region that are growing a particular product, the ODG mode could be used to set up an organization that is voluntary to join.¹⁶⁹ The garlic group mentioned above provides an illustrative example. The subset of garlic growers that are interested in creating a value-added product could organize without implicating all garlic growers in the delineated area, as a marketing order would. Furthermore, to ensure that the opportunity extends to all growers, ODGs are designed to have open membership for any new producers

¹⁶⁸ State and federal marketing orders in the United States impose fees (and rules in some circumstances) on all of the farmers in the area that grow the particular product. These are voted in often by a simple majority of producers, sometimes by slim margins. State marketing orders have oversight by the states (*See e.g.*, Michigan, see the Agricultural Commodities Marketing Act, MCL § 290.651-.674 (Westlaw current through P.A. 2021, No. 81, of the Reg. Sess., 101st Legis.)), and federal marketing orders are overseen by the US Department of Agriculture, who authority to approve or disapprove actions by the group or board managing the marketing order. 7 U.S.C.A. § 601. In relation to marketing orders, ODGs may be more farmer-centric and have less heavy ongoing political and government involvement once started (for example, members of the Michigan state agricultural marketing committees are appointed by the governor.)

Antitrust exemptions are made for marketing orders via the Agricultural Marketing Act of 1937, and processors are allowed to be involved (for example, the tart cherry federal marketing order is voted on by growers but creates duties for processors). 7 U.S.C.A. § 608(b). As such, one strength of marketing orders is that quantity control measures can legally be taken by the industry in an attempt to provide consistency of price, and in some cases such as tart cherries, availability of product inventory to ensure consistent supply to buyers. However, these quantity control measures require growers to ‘set aside’ or even dump product on the ground by law; and strong disagreements can occur within the industry.

ODGs are voluntary; while farmers and other operators are required to comply with the production rules and often to pay annual fees in order to market their products using the ODGs quality sign/brand name, farmers are free to sell their products in other markets, including commodities markets. Furthermore ODGs can have not only processors, but as many other upstream and downstream value chain actors as is practicable.

¹⁶⁹ This applies generally to development in the U.S., and to certain quality sign ODGs in France. However, while with PGI and PDO/AOC groups membership is not mandatory, farmers in the region cannot legally use the regional brand developed without following the specifications and joining the ODG.

willing to follow the production rules. The result is that the voluntary aspect of ODGs does not lead to an exclusive closed club.

v. Where fairness and equity between value chain actors is a need.

Fairness is an integral part of the French ODG model, due to specific requirements for a balance of power between actors in an ODG, and to an underlying focus on fairness in contracts under French law. As detailed in Section II above, these aspects could be infused into an ODG-mode organization in the United States using specific provisions in organizational documents and/or, if necessary, by creating oversight mechanisms (although these oversight mechanisms might have a significant cost). Take, for example, a product such as a type of cheese organized by Michigan milk producers, which is produced for larger-scale distribution in the Great Lakes region. Processors and/or transformers would need to be involved to process the milk, create, shape, and ripen the cheese, and then package it for distribution. Given that processors are often very concentrated in the dairy industry, farmers could use an ODG to both involve the downstream actors, and protect their decision-making voice and power within the organization.

B. Less Ideal Contexts for the ODG Mode

As with any mode or entity, the ODG mode would not be an ideal fit with every circumstance, and does not promise to be a panacea. Below are a few circumstances where the ODG mode should clearly be avoided:

1. The ODG mode would not work well for marketing a large number of individual products, because it would be difficult to create production standards for each product. An example would be a multiple-farm CSA collaboration for grouping numerous market garden products, whether through seasonal subscription or through a common online ordering system—instead, a cooperative or LLC would likely be better fit. However, a strong umbrella brand for market garden products could facilitate the creation of production standards for a large number of products over time.

2. The ODG mode would not be a good fit for the conventional version of commodity products such as corn, soybeans, or oranges. The ODG mode is mainly applicable to value-added products, because the production rules are intended to provide something different or additional in comparison to the commodity version of the product, such as varietal or regional qualities.

3. The ODG mode would not be a good fit for products that have a large variability in size, appearance, or variety, if the intent is to aggregate for larger-scope wholesale markets, such as supermarkets. This is because supermarkets normally require a significant amount of uniformity.¹⁷⁰ For example, if a group of farmers wants to work together to market a certain variety of peach, but there is great variability between size and color of peaches from each of the different farmers, an ODG mode would be less appropriate.

V. Conclusion

French ODGs provide one model for regionally-based food product organization. Geographical indications have been comprehensively studied as an intellectual property umbrella that farmers can gather under, boasting well-known products from France and around the world.¹⁷¹ However, less is known about the nature of the collective management organizations underlying those products. This research investigated the legal underpinnings as well as institutional supports that affect the structure of these collectively managed entities in France. France's statutory and regulatory regimes for ODGs have unique attributes and strengths, including a focus on fairness and balance in structure, and an ability to include not only farmers, but also packers, processors, cheese ripeners, and other value chain actors.¹⁷² Each of the relevant actors for a particular product can potentially be involved in determining the product rules that will apply to them.

Many of the strengths found in the French context can indeed be translated to the context of the United States. Some aspects of ODGs are relatively simple to replicate, given the relatively similar state background institutions, legal systems,¹⁷³ and property rights enforcement (rule of law). Other aspects of ODGs are more difficult

¹⁷⁰ Jennifer Jo Thompson & Julia Gaskin, *An Extension Specialist's Reflections from the Field: Discovering Ag of the Middle in the Shift from Direct Sale to Wholesale Vegetable Production*, 40 *CULTURE, AGRIC., FOOD & ENV'T*, 124, 124, 127 (2018).

¹⁷¹ See, e.g., Barham, *supra* note 19, at 127-30; Ulrike Grote, *Environmental Labeling, Protected Geographical Indications and the Interests of Developing Countries*, 10 *ETSEY CENTRE J. INT'L L. & TRADE POL'Y* 94, 96-100 (2009); William Van Caenegem et al., *Pride and Profit: Geographical Indications as Regional Development Tools in Australia*, 16 *J. ECON. & SOC. POL'Y* 1, 1, 7-10 (2014).

¹⁷² See discussion *supra* Section II.B.iii; Code R rural et de la pêche maritime [Rural and Maritime Fisheries Code] art. L642-3, L642-21.

¹⁷³ While France has a civil law system as opposed to the common law system used in the United States, contract, corporate, and commercial law are quite similar in each country.

to replicate due to their connection with unique institutions in France and the EU that are dedicated to quality sign products. Replicating these would therefore require the creation of oversight bodies for particular aspects, and development and funding of outreach experts for others. However, the benefits of these efforts could potentially outweigh the costs, if enough participation and volume were achieved.

A promising area of future research would be to investigate to what extent and how the strengths of ODGs could be replicated in other contexts that have weaker, or significantly different, government institutional support. In particular, it may be valuable to determine if the aspects of balanced representation and democratic functioning can effectively be replicated in order to provide farmer groups with more negotiating power vis-à-vis concentrated value chain actors such as processors.