



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 10 January 2019¹

Case C-614/17

Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego
v
**Industrial Quesera Cuquerella SL,
Juan Ramón Cuquerella Montagud**

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Protection of geographical indications and designations of origin for agricultural products and foodstuffs — PDO ‘Queso Manchego’ — Use of signs likely to evoke the region that the PDO is associated with — Definition of the average consumer who is reasonably well informed and reasonably observant and circumspect)

1. A few months after the judgment of 7 June 2018, *Scotch Whisky Association* (C-44/17, EU:C:2018:415, ‘the *Scotch Whisky Association* judgment’), the Court of Justice has once again been asked to give a preliminary ruling on the interpretation of the term ‘evocation’ as a matter of EU law in the area of protected designations of origin (PDOs) and protected geographical indications (PGIs).² The referring court asks, in particular, whether the use of signs or images that refer to the geographical reference area of a PDO for the marketing of products similar to those covered by such a designation may constitute an evocation of a PDO, prohibited under Article 13(1)(b) of Regulation (EC) No 510/2006.³ This reference for a preliminary ruling also poses the sensitive and novel question of the possible limits to the use, by a producer established in the geographical reference area of the PDO, of signs which may evoke that area in relation to products (identical or similar) that are produced there but are not covered by the PDO.

Legal context

2. Article 13 of Regulation No 510/2006, entitled ‘Protection’, provides, in paragraph 1(b) as follows:

‘1. Registered names shall be protected against:

...

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected designation is translated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation” or similar;

¹ Original language: Italian.

² Hereafter, PDOs and PGIs will be referred to together as ‘protected names’ or ‘registered names’.

³ Council Regulation of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12). Regulation No 510/2006 was replaced from 3 January 2013 by Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

...'

3. Under the first subparagraph of Article 14(1) of Regulation No 510/2006, 'where a designation of origin or a geographical indication is registered under this Regulation, the application for registration of a trade mark corresponding to one of the situations referred to in Article 13 and relating to the same class of product shall be refused if the application for registration of the trade mark is submitted after the date of submission of the registration application to the Commission'. The second subparagraph states that 'trade marks registered in breach of the first subparagraph shall be invalidated'. Article 14(2) of the regulation provides that 'with due regard to Community law, a trade mark the use of which corresponds to one of the situations referred to in Article 13 which has been applied for, registered or, established by use, if that possibility is provided for by the legislation concerned, in good faith within the territory of the Community, before either the date of protection of the designation of origin or geographical indication in the country of origin ... may continue to be used notwithstanding the registration of a designation of origin or geographical indication ...'.⁴

The main proceedings and the questions referred for a preliminary ruling

4. Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego ('the Foundation'), the applicant in the main proceedings, brought proceedings against Industrial Quesera Cuquerella SL ('IQC') and Mr Juan Ramón Cuquerella Montagud, in a single claim,⁵ for the protection of the PDO 'Queso Manchego'⁶ for which it is responsible:

- an action seeking a declaration that the labels used by IQC to identify and market the cheeses 'Adarga de Oro', 'Super Rocinante' and 'Rocinante', not covered by the PDO 'Queso Manchego', and the use on the company's website of the words 'Quesos Rocinante' to indicate both PDO 'Queso Manchego' cheeses and cheeses not covered by the designation⁷ give rise to an infringement of the PDO by the latter under Article 13(1)(b) of Regulation No 510/2006;
- a direct action seeking partial annulment, on the grounds indicated in Article 14 of Regulation No 510/2006, of the trade name 'Rocinante' and of two verbal and figurative national trade marks⁸ that use the same word;
- an action for an injunction to prevent anticompetitive practices and nullify the consequences of such practices.

5. In the action for a declaration, in relation to which the questions referred have been raised, the defendants contested the claim that the word and figurative signs used on the labels and on the IQC website evoke the PDO 'Queso Manchego' and asserted the right of IQC, as an undertaking company established in the region of La Mancha, to use symbols connected with this region.

⁴ Article 13(1) and Article 14(1) of Regulation No 1151/2012, currently in force, contain substantially the same provisions, in so far as is relevant for the purposes of this reference for a preliminary ruling, to those in Article 13(1) and Article 14(1) of Regulation No 510/2006.

⁵ The documents in the main proceedings provided to the Court show that the proceedings were brought in 2012. In the absence of more detailed information, it is necessary to take due notice of the assessment of the referring court that Regulation No 510/2006 applies *ratione temporis* to the main dispute, not Regulation No 1151/2012, which is not disputed by the parties to the main proceedings. In any event, the provisions of Regulation No 510/2006 for which interpretation is requested, are, as already mentioned, substantially the same as the corresponding provisions of Regulation No 1151/2012.

⁶ The PDO 'Queso manchego' was registered by Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1).

⁷ In particular, the Foundation contested the use of the word 'Rocinante' in the domain name as well as in the content of the IQC website (www.rocinante.es) and the use of images of typical La Mancha landscape scenes.

⁸ In the trade marks in question, registered for 'cheeses and milk products' (Class 29 of the Nice classification) and 'transport, storage and distribution services for cheeses and milk products' (Class 39 of the Nice classification), the word 'Rocinante' forms part of a circular design showing a horse in the foreground and, in the background, a plain with a flock of sheep and windmills. In the order for reference it appears that both trade marks have later priority than the registration of the PDO 'Queso Manchego'.

6. The court of first instance dismissed the Foundation's action, finding that the figurative and word signs used by IQC are not in any way visually or phonetically similar to the terms 'queso manchego' or 'la Mancha' and that these signs evoke La Mancha, but not the PDO 'Queso Manchego'. The appeal lodged by the Foundation against the judgment at first instance was dismissed by the Audiencia provincial de Albacete (Court of Appeal of the Province of Albacete, Spain), which also held that it could not be concluded that there was evocation of the PDO 'Queso Manchego' in the absence of word signs that were visually, phonetically or conceptually similar to that designation. According to the Court of Appeal, the use by IQC of symbols that evoke the region of La Mancha, but not the products covered by the PDO in question, must be considered lawful, as the products using these symbols that are marketed by IQC are made in this region. The evocation of the quality and the reputation of La Mancha cheeses does not equate to the evocation of the quality and renown of the cheeses covered by the PDO 'Queso Manchego'.

7. The Foundation brought an appeal against the judgment of the Audiencia provincial de Albacete before the Tribunal Supremo (Supreme Court, Spain).

8. In the order for reference, the Tribunal Supremo (Supreme Court) provides the following information: (i) the term 'manchego' is the adjective used in Spanish to denote, amongst others, products originating from La Mancha, a region in Spain where the production of cheeses using ewe's milk in accordance with special production and maturing methods is an established tradition; (ii) La Mancha is the region where most of the action in the famous novel by Miguel de Cervantes *Don Quixote de la Mancha* is set;⁹ (iii) the physical description that Cervantes gives of the protagonist of his novel corresponds to the horseman depicted on the label of the cheese 'Adarga de Oro'; (iv) in Spanish, the term 'adarga' is an archaic term used by Cervantes to indicate Don Quixote's shield; (v) 'Rocinante' is a term that appears on the label of a number of cheeses marketed by IQC and is the name of Don Quixote's horse; (vi) in one of the most famous chapters of Cervantes' novel, Don Quixote fights with windmills, a characteristic element of the La Mancha landscape, which is reproduced on some of the labels used by IQC, as well as on its website.

9. The Tribunal Supremo (Supreme Court) is uncertain, in the first place, whether, as argued by the Foundation in the main proceedings, a PDO may be evoked through the simple use of figurative signs and such evocation is therefore essentially conceptual in nature. That court asks, in the second place, whether the use, for the marketing of cheeses, of figurative and word signs that evoke the region of La Mancha entails the evocation of the PDO 'Queso Manchego' and whether, as a result, the cheese products covered by that designation have a monopoly on the use of those signs, including in respect of producers established in this region whose products are not covered by the PDO in question. In this respect, the Tribunal Supremo (Supreme Court) points out that a positive answer to this question could give rise to a restriction on the free movement of goods, while a negative answer would be likely to weaken the protection enjoyed by PDOs and to affect the PDO's function of providing information on the quality of the products denoted by this designation. Lastly, the referring court puts a question to the Court concerning which group of consumers is to be taken into consideration for the purpose of determining whether there is evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006, in particular where the PDO products in question are intended to be consumed essentially in the Member State where they are produced.

⁹ Published in two parts in Madrid in 1605 and in 1615 with the original title '*El ingenioso hidalgo don Quijote de la Mancha*'.

10. That is the context in which, by decision of 19 October 2017, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Must the evocation of a protected designation of origin, prohibited by Article 13(1)(b) of Regulation 510/2006, necessarily be brought about by the use of a name visually, phonetically or conceptually similar to the protected designation of origin or may it be brought about by the use of figurative signs evoking the designation of origin?
- (2) When the protected designation of origin is of a geographical nature (Article 2(1)(a) of Regulation 510/2006) and when the products are the same or comparable, can the use of signs evoking the region with which a protected designation of origin is associated constitute evocation of the protected designation of origin itself, within the meaning of Article 13(1)(b) of Regulation 510/2006, which is prohibited even when the user of those signs is a producer established in the region associated with the protected designation of origin, but whose products are not protected by the designation of origin because they do not meet the requirements set out in the product specification, apart from the geographical provenance?
- (3) Must the concept of the average consumer who is reasonably well informed and reasonably observant and circumspect, to whose perception the national court has to refer in order to assess whether there is “evocation” within the meaning of Article 13(1)(b) of Regulation 510/2006, be understood to cover European consumers or can it cover only consumers of the Member State in which the product giving rise to evocation of the protected geographical indication is produced or with which the protected designation of origin is geographically associated and in which the product is mainly consumed?

Proceedings before the Court

11. Written observations were submitted pursuant to Article 23 of the Statute of the Court of Justice of the European Union by the parties in the main proceedings, the French, German and Spanish Governments as well as the European Commission. Those interested parties, with the exception of the German Government, were represented at the hearing on 25 October 2018.

Analysis

Overview of the relevant case-law

12. Before examining the questions referred, it is appropriate to give an overview of the salient points of the Court’s case-law concerning the protection of protected designations in cases alleging evocation.

13. The Court ruled for the first time on the concept of ‘evocation’ within the meaning of Article 13(1)(b) of Regulation (EEC) No 2081/92,¹⁰ which preceded Regulation No 510/2006, in the judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115). Ruling on a question referred by the Handelsgericht Wien (Commercial Court, Vienna, Austria), in connection with an application made by the body responsible for management of the PDO ‘Gorgonzola’ for an injunction prohibiting the distribution in Austria of a blue cheese with the designation ‘Cambozola’, and the cancellation of the related trade mark, which was registered before the date of application for registration of the PDO in question, the Court confirmed that the

¹⁰ Council Regulation of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1). The text of Article 13(1)(b) of this regulation is substantially the same as that of the corresponding provision in Regulation No 510/2006.

term ‘evocation’ within the meaning of the above provision of Regulation No 2081/92 ‘covers a situation where the term used to designate a product incorporates part of the protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected’, and stated that it is possible for a protected name to be evoked even where there is no likelihood of confusion between the products concerned.¹¹ The factors indicated by the Court as relevant for the purpose of determining whether there is evocation, include, in addition to the ‘phonetic and visual’ similarity between the names, resulting from the incorporation of part of the protected name in the disputed trade mark,¹² the similarity between the products in question, not only as regards the brand profile but also the way they are advertised,¹³ as well as the intentional nature of the phonetic similarities between the names at issue.¹⁴

14. This approach was confirmed in the judgment of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117), delivered in the context of an action for infringement against the Federal Republic of Germany brought by the Commission for its refusal to impose penalties in respect of the use on its territory of the name ‘parmesan’, in breach of the PDO ‘Parmigiano Reggiano’. The Court found there was evocation within the meaning of Article 13(1)(b) of Regulation No 2081/92 in view not only of the visual and phonetic similarities between the names at issue — assessment criteria that the Court had previously referred to in the judgment in *Consorzio per la tutela formaggio Gorgonzola*¹⁵ — but also, as the case entailed words belonging to different languages, of their ‘conceptual proximity’.¹⁶

15. The Court also ruled to that effect on the interpretation of Regulation (EC) No 110/2008¹⁷ on the protection of geographical indications of alcoholic beverages, which contains, in Article 16(b), a provision that is essentially the same as that in Article 13(1)(b) of Regulation No 510/2006. In the reference for a preliminary ruling that gave rise to the judgment of 14 July 2011, *Bureau National Interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484), the applicant in the main proceedings opposed the registration of two trade marks in Finland containing terms that reproduced, in full, the PGI ‘Cognac’, of which it was the proprietor, as well as its translation. In categorising the reproduction of those terms as evocation, the Court applied the same assessment criteria as those set out in the *Consorzio per la tutela del formaggio Gorgonzola* judgment¹⁸ and in *Commission v Germany*.¹⁹ In the judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 31), the Court stated that these criteria were intended to give the national court guidance in its decision, it being the latter, not the Court, that must evaluate whether, in the circumstances of the individual case, there is ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008. The main proceedings that gave rise to the reference for a preliminary ruling on which that judgment is based involve the use of the designation ‘Verlados’ for a ‘Cider spirit’ produced by the company Viiniverla, which is established in Verla in Finland. The court that made the reference, called upon to adjudicate on an action against the provision by which the Finnish authorities had banned the use of that designation for the protection of the PGI ‘Calvados’, questioned the Court of Justice concerning, inter alia, the relevance of certain factual circumstances for the purpose of determining whether there was evocation. The Court, after ruling on the concept of ‘relevant consumer’,²⁰ stated that the purpose of

11 Judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraphs 25 and 26).

12 Judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 27).

13 Judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 28).

14 Judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 28).

15 Judgment of 4 March 1999 (C-87/97, EU:C:1999:115).

16 Judgment of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117, paragraphs 47 and 48).

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

18 Judgment of 4 March 1999 (C-87/97, EU:C:1999:115).

19 Judgment of 26 February 2008 (C-132/05, EU:C:2008:117). See paragraphs 56 to 58 of the judgment of 14 July 2011, *Bureau National Interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484).

20 The principles laid down by the Court in relation to the concept of ‘consumer’, will be returned to in my examination of the third question.

the examination to determine whether there is evocation is to ascertain ‘that there is not created in the mind of the public an association of ideas regarding the origin of the product, and that a trader does not take undue advantage of the reputation of the protected geographical indication’.²¹ In this context, neither the fact that the designation ‘Verlados’ refers to the name of the producer and to the actual geographical origin of the product, which is well known to and recognised by the Finnish consumer, nor the fact that the drink bearing this designation is marketed only locally and in limited quantities, was considered by the Court to be relevant for the purpose of that examination.

16. Lastly, in the recent *Scotch Whisky Association* judgment, delivered after the end of the written procedure in the proceedings that are the subject of this Opinion,²² the Court confirmed, first of all, that neither the partial incorporation of a protected geographical indication in the disputed designation, nor any phonetic and visual similarity between the PGI and that designation constitutes an essential requirement for the purpose of assessing whether there is ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008,²³ finding that, in the absence of any such incorporation or similarity, there may be evocation as a result of the simple ‘conceptual proximity’ between the PGI and the disputed sign.²⁴ Moreover, the Court has ruled out that, for a finding of ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008, it is sufficient that the disputed element of the sign in question should evoke in the relevant public some kind of association with the PGI or with the geographical area relating thereto. According to the Court, such a criterion cannot be used, as it does ‘not establish a sufficiently clear and direct link’ between that element and the PGI²⁵ and it is ‘too vague and far-reaching’ to meet the requirements of legal certainty of the economic operators concerned.²⁶

17. It is clear from the case-law that has just been reviewed that the protection against evocation provided for by various quality schemes established by EU law²⁷ constitutes a kind of *sui generis* protection,²⁸ not governed by the criterion of being misleading — which presupposes that the sign that conflicts with the registered name is likely to mislead the public as to the geographical origin or the quality of the product — and not affording protection simply based on the likelihood of confusion. As a result, the main objective of protection against evocation is to protect the traditional

21 See judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 45). Similarly, with reference, however, not only to evocation but to all the situations covered by Article 16(a) to (d) of Regulation No 110/2008, see the judgment of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 46).

22 The parties to the main proceedings and other interested parties for the purposes of Article 23 of the Statute of the Court of Justice of the European Union that participated in the written phase of the procedure were invited by the Court at the hearing held on 25 October 2018 to present their oral observations on the effect of that judgment for the purposes of answering the questions referred by the Tribunal Supremo (Supreme Court).

23 The *Scotch Whisky Association* judgment (paragraphs 46 and 49).

24 The *Scotch Whisky Association* judgment (paragraph 50).

25 The *Scotch Whisky Association* judgment (paragraph 53).

26 The *Scotch Whisky Association* judgment (paragraph 55). Furthermore, according to the Court, ‘if it were sufficient, for the purpose of establishing such “evocation”, that the consumer makes an association of any kind whatsoever with a PGI, that would result, first, in point (b) of Article 16 of Regulation No 110/2008 encroaching on the scope of the following provisions of that article, namely points (c) and (d), which cover situations in which the reference to a protected geographical indication is even more subtle than an “evocation” of that indication’ (paragraph 54, see also the Opinion of Advocate General Saugmandsgaard Øe in *Scotch Whisky Association* (C-44/17, EU:C:2018:111, points 61 to 63).

27 For the wine sector, see Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347 p. 671), for aromatised beverages see Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91 (OJ 2014 L 84, p. 14) and, for spirit drinks, the aforementioned Regulation No 110/2008.

28 In this regard, I would recall that Article 4 of the Lisbon Agreement for the Protection of Appellations of Origin and on their international registration of 1958, on which Article 13(1)(b), of Regulation No 510/2006 is based, mentions only ‘misuse’ and ‘imitation’, but not ‘evocation’.

quality and reputation of registered names against parasitic acts rather than to protect consumers against misleading conduct, which is more specifically dealt with in the situations described in Article 13(1)(c) and (d) of Regulation No 510/2006 and in the corresponding provisions in the European Union instruments for protection of protected designations.²⁹

18. Although included in the same section of the aforementioned Article 13, evocation differs both from ‘imitation’, characterised by the reproduction of essential elements of the registered name, and from ‘misuse’, which presuppose the undue and intentional use of the registered name for products not covered by the latter, with the consequent appropriation of the values associated with traditional methods of production that the name denotes.³⁰ In addition, as observed by Advocate General Jacobs in his Opinion in *Consorzio per la tutela del formaggio Gorgonzola*,³¹ concerning Article 13(1)(b) of Regulation No 2081/92, the very wording of the provision militates in favour of the idea that protection against evocation requires different and less stringent conditions of application from those required for a finding of imitation or misuse. The legal contours of the concept of evocation must therefore be defined autonomously, without seeking, in spite of the fact that they are listed together in the same provision, to impose a uniform set of requirements to both ‘evocation’ and the different criteria of ‘imitation’ and ‘misuse’.

19. From a semantic viewpoint, evoke means ‘to bring to mind’.³² In transposing that concept to the protection of registered names, the Court requires, as a condition for a finding of unlawful evocation, that exposure to an ordinary product³³ is likely to engender in the consumer’s mind an associative cognitive response that ‘brings to mind’ the products covered by the registered name. While this necessarily presupposes a reprocessing of the information transmitted by the perceptual/cognitive stimulus produced by such exposure, the Court clarified, in the *Scotch Whisky Association* judgment, that there will be evocation only if the associative connection is sufficiently ‘clear and direct’.³⁴ That clarification is, in my opinion, to be understood both in terms of immediacy (the associative cognitive process must not require a complex reprocessing of information) and impact (the association with the image of the product covered by the registered name must have sufficient impact) as regards the consumer’s response to the stimulus.

20. Despite the clarifications given by the *Scotch Whisky Association* judgment, it seems clear, in my view, from the case-law of the Court of Justice and the General Court that there is a tendency to interpret ‘evocation’ broadly, in line with the broad protection afforded to designations of origin by the EU legislature and also with the public interest aspect of the objective of protecting quality products.³⁵ In that regard, I would recall that the protection of such designations not only constitutes part of the strategy of the European Union economy, as expressly stated in the first recital of Regulation No 1151/2012, but also forms part of the objective of safeguarding European cultural heritage, as referred to in Article 3(3), fourth subparagraph, of the EU Treaty.

21. In the light of the principles examined above, I will now examine the questions submitted by the referring court.

²⁹ From this point of view, protection against evocation reflects that afforded to trade marks that have a reputation. On the possibility of evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006, including in respect of products which are not comparable, see judgment of 18 September 2015, *Federación Nacional de Cafeteros de Colombia v OHIM — Hautrive (COLOMBIANO HOUSE)* (T-387/13, not published, EU:T:2015:647, paragraphs 55 and 56).

³⁰ See as regards the concepts of misuse and imitation, judgment of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne* (C-393/16, EU:C:2017:991, paragraph 57).

³¹ C-87/97 (EU:C:1998:614, paragraph 33).

³² *Enciclopedia Treccani* online.

³³ By this expression, I shall refer from now on to products that are not covered by a protected designation or geographical indication.

³⁴ See, inter alia, paragraph 53 of the *Scotch Whisky Association* judgment.

³⁵ See, in that respect, for an illustration of the objectives of EU legislation, judgment of 8 September 2009, *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraphs 109 to 111 and the case-law cited). See also judgments of 21 January 2016, *Viniverla* (C-75/15, EU:C:2016:35, paragraph 24), and of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:693, paragraphs 80 and 81).

The first question

22. By the first question referred, the Tribunal Supremo (Supreme Court) asks the Court in essence whether evocation, within the meaning of Article 13(1)(b) of Regulation No 510/2006, may be brought about through the use of figurative signs or whether only the use of names that are visually, phonetically or conceptually similar to the PDO in question may give rise to such evocation.

23. I agree with the applicant in the main proceedings and the French, German and Spanish Governments that the answer to this question must be in the affirmative.

24. The case-law examined above shows that, for the purpose of determining whether there is ‘evocation’, the decisive criterion is that of the consumer’s perception, which must be ascertained with reference to the ability of the disputed sign to trigger an *association of ideas* between the ordinary product and the product covered by the registered name.³⁶ Furthermore, it is clear from the *Scotch Whisky Association* judgment that the possible incorporation in the disputed sign of elements of the protected designation and any visual and/or phonetic similarity between the latter and the sign are only *indications* to be taken into consideration in determining whether, in the presence of the ordinary product, the consumer will be led to make such an association of ideas.³⁷ In other words, according to the Court, evocation may also be established on the basis of the mere ‘conceptual similarity’ between the contested sign and the protected name, if that similarity is capable of triggering in the mind of the public the products covered by that name.

25. If the existence of a visual and, above all, phonetic similarity does not constitute an ‘essential condition’³⁸ for establishing evocation, this means that the mental association between the ordinary product and the product covered by the name in question, required for the purpose of establishing evocation, does not necessarily presuppose the use of verbal language. An image, a symbol and, more generally, a figurative sign can, like a name, convey a concept and therefore be capable of triggering in the consumer a mental association with the protected name, which in this case will be ‘evoked’, not visually or phonetically, but by reference to its conceptual content.

26. Admittedly, as noted at the hearing by the Commission, in almost all the grounds of the *Scotch Whisky Association* judgment, as in all the earlier case-law in this field mentioned above, the evoking function refers to the *designation* of the ordinary product.³⁹

27. However, unlike the Commission, I do not think that from this it can be inferred that the Court’s intention was to limit cases entailing evocation to those where the mental association with the product covered by a registered name derives from the use of word elements. Quite apart from the fact that two paragraphs of the grounds and Section (ii) of paragraph 2 of the operative part of the judgment refer more generally to the ‘disputed element’ of the sign in question, the terminology used by the Court must be seen in the context of the dispute in the main proceedings which gave rise to the *Scotch Whisky Association* judgment, in which the discussion was focused on the evocative power of a term included in the name of the ordinary product.⁴⁰

³⁶ See, to that effect, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 22) and the *Scotch Whisky Association* judgment (paragraph 51). See also the Opinion of Advocate General Saugmandsgaard Øe in *Scotch Whisky Association* (C-44/17, EU:C:2018:111, point 60).

³⁷ See also the Opinion of Advocate General Saugmandsgaard Øe in *Scotch Whisky Association* (C-44/17, EU:C:2018:111, point 58).

³⁸ The *Scotch Whisky Association* judgment (paragraphs 46 and 49).

³⁹ The terms or phrases ‘designation’, ‘name of the product’, ‘term used to designate the product’ ‘sales name’ are alternatively used by the Court; see, in particular, paragraphs 44, 45, 46, 48, 49 to 53 and 56 of the *Scotch Whisky Association* judgment.

⁴⁰ The same applies as regards the other earlier case-law referred to above.

28. Furthermore, if conclusive guidance as to interpretation were to be drawn simply from the terminology used in that judgment, it would also have to be concluded that the Court's intention was to limit the concept of 'evocation' to cases where the required connection of association is triggered by terms contained in the sales name of the ordinary product, to the exclusion of any other word element (such as generic, descriptive, laudatory expressions, etc.) appearing on the label or packaging of that product. However, such an interpretation is, in my view, excluded by the very wording of Article 13(1)(b) of Regulation No 510/2006, in which certain expressions (such as 'style', 'type', 'method', 'as produced in', 'imitation') that generally do not form part of the sales name of the product, but accompany it are expressly mentioned.

29. More fundamentally, it is apparent from the Court's case-law referred to above, in particular from the *Bureau National Interprofessionnel du Cognac*⁴¹ and *Viiniverla*⁴² judgments, that the analysis as to whether there is an evocation must take into account any implicit or express reference to the registered designation, whether they be word or, indeed, figurative elements included on the label of the ordinary product or that appear on its packaging, or elements concerning the form or presentation to the public of that product. This analysis must also consider whether the products in question are identical or the degree of similarity between the products and the way they are marketed, including their respective sales channels, and elements that make it possible to establish whether the reference to the product covered by the protected name was intentional or, conversely, unintentional. The national court is therefore required to assess a set of indications, without the presence or absence of any such indication — for example a visual, phonetic or conceptual similarity between the designations in question — entitling it alone to establish or rule out the existence of evocation.

30. I would also point out that, in the *Scotch Whisky Association* judgment, the Court stated that there may be evocation only where the sign at issue evokes in the relevant public a sufficiently 'direct' and 'clear' link between the sign and the registered name,⁴³ thus establishing a limit to the scope of the concept of 'evocation' in terms of immediacy and impact of the consumer's response — as indicated in point 19 of this Opinion — rather than in terms of the type of perceptual stimulus.

31. Such a limit is, in my opinion, in itself capable of containing the scope of unlawful evocation — and, consequently, the restriction on the freedom of manufacturers of ordinary products as regards how they choose to present their products to the public — within limits that do not go beyond what is necessary for the effective protection of registered names and to meet the requirement of legal certainty as regards the economic operators concerned.⁴⁴

32. Accepting, as I suggest the Court should, an interpretation that there may be evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006 also through the use of figurative signs and in the absence of any visual, phonetic or conceptual similarity between the PDO or the PGI and the sales name of the ordinary product, in addition to finding solid support in the Court's case-law, is, in my opinion, in line both with the intention of the EU legislature to grant broad protection to such names and with the importance of the objectives pursued through the conferment of such protection, as referred to in point 20 of this Opinion.

41 Judgment of 14 July 2011 (C-4/10 and C-27/10, EU:C:2011:484).

42 Judgment of 21 January 2016 (C-75/15, EU:C:2016:35, paragraph 27).

43 The *Scotch Whisky Association* judgment (paragraph 53).

44 The need for that limit to be consistent with the requirement of legal certainty is addressed by the Court itself in paragraph 55 of the *Scotch Whisky Association* judgment.

33. Lastly, I would observe that the proposed interpretation does not entail any interference by Article 13(1)(b) of Regulation No 510/2006 with the scope of the subparagraphs (c) and (d) of that article, which refer to ‘indications’ or ‘practices’ prohibited not because they evoke a registered name,⁴⁵ but because they provide false or misleading information concerning the origin, nature or essential qualities of the product or are otherwise liable to mislead the consumer.

34. On the basis of the foregoing considerations, it is my view that the answer to the first question is that there may be evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006 also as a result of the use of figurative signs and in the absence of any visual, phonetic or conceptual similarity between the registered name and the sales name of the product in question, provided that, when the consumer is confronted with the signs at issue, the image triggered directly in his mind is that of the product whose indication is protected.

The second question

35. The second question referred may be divided into two parts. In the first, the referring court essentially asks the Court whether the use of signs evoking the region with which a PDO is associated, within the meaning of Article 2(1)(a) of Regulation No 510/2006, for identical or similar products to those covered by the PDO, constitutes unlawful evocation within the meaning of Article 13(1)(b) of that regulation. In the second part, the Tribunal Supremo (Supreme Court) asks whether there is also unlawful evocation when such signs are used by a producer established in that region in respect of products that do not meet with the PDO requirements.

36. The answer to the first part of this question may be ascertained from the considerations set out above.

37. Given the association between PDO products and the region they originate from,⁴⁶ the use of figurative and/or word signs which evoke that region as regards ordinary products identical or similar to those covered by a PDO is likely to trigger in the mind of the public the image of such products and consequently to give rise to unlawful evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006. On the basis of the considerations set out above, however, that may occur only if the association of ideas with the geographical area of the PDO, created by the use of evocative signs, is such as to trigger *directly* in the mind of the consumer, the products which are protected by the PDO.

38. As stated by the Court on many occasions, it is for the national court to determine, in relation to the case on which it is required to adjudicate, whether the conditions for unlawful evocation are met.⁴⁷ The considerations that follow are therefore intended simply to provide some indications for the guidance of the referring court (or the court hearing the substance of the case which may be required to rule on the matter) in that analysis.

39. In the main proceedings, although the questions referred mainly focus on the figurative signs on the labels at issue, the case also involves a number of elements, some of which are words elements (the words ‘Rocinante’ and ‘adarga de oro’) and others figurative (illustrations that reproduce the physical characteristics of certain characters of the famous novel by Cervantes as well as elements considered typical of the La Mancha landscape), which the referring court considers to be evocative of the region associated with the PDO ‘Queso manchego’. The terms ‘manchego’ or ‘Mancha’ are not

⁴⁵ See the *Scotch Whisky Association* judgment (paragraph 65).

⁴⁶ The link between the PDO and the reference territory is closer than the link between that territory and a PGI. Article 2(1) of Regulation No 510/2006 requires, for the former, that the production, processing and preparation of the relevant products take place within the defined geographical area (point (a)), while for the latter, it is sufficient that only one of these stages takes place in that area (point (b)).

⁴⁷ See, in particular, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 22 and 31), and the *Scotch Whisky Association* judgment (paragraphs 45, 46, 51, 52, 56 and paragraph 2 of the operative part).

reproduced, even partially, in the word signs⁴⁸ at issue and there is no visual or phonetic similarity between those signs and the PDO in question. It follows that, as the referring court points out, in the circumstances of the main proceedings, any evocation, if established, would be purely conceptual in nature.

40. If considered in isolation or in conjunction with one other, the figurative signs at issue appear, *prima facie*, to be incapable of giving rise to unlawful evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006, as interpreted by the Court in the *Scotch Whisky Association* judgment. Indeed, as noted by the Commission and the German Government, some of those signs seem to be too generic to trigger in the mind of the consumer a ‘clear’ association with the La Mancha region,⁴⁹ while the images which refer to characters from the novel *Don Quixote de la Mancha* or famous places or scenes from this novel do not seem capable of establishing a sufficiently ‘direct’ association with the geographical area in question, which would be triggered in the consumer’s mind only if he were in a contemplative mood, through a succession of associations of ideas.

41. That said, I do not rule out the possibility that evocation may nevertheless be established in the circumstances of the main proceedings if the conditions for such a finding are established on the basis of an overall examination that takes into account all the elements having the potential to evoke elements, whether word or figurative, which appear on the labels at issue, on the basis of the fact that the products in question are identical or similar and the manner in which those products are presented, advertised and marketed.⁵⁰

42. The second part of the question being examined concerns the possible impact of the fact that signs evoking a region associated with a PDO are used for products not covered by such a designation, but which have been produced, prepared and processed in that region.⁵¹

43. In that regard, I would observe, like the applicant in the main proceedings, the French, German and Spanish Governments and the Commission, that Article 13(1)(b) of Regulation No 510/2006 does not exclude from its scope any situation where the geographical origin of evocative products coincides with that of PDO or PGI products. That is, furthermore, in line both with the nature of protection from evocation — which, as we have seen, although it also covers situations entailing a likelihood of confusion, applies, regardless of the existence of an error on the part of the consumer, including as to the geographical origin of the evocative products — and with the objectives pursued by Regulation No 510/2006. In fact, allowing producers which operate in the geographical area associated with a given PDO, but do not comply with the relevant requirements, to use signs evoking that geographical area for products identical or similar to those covered by the PDO would weaken the assurance of quality conferred by that name,⁵² a guarantee that, although essentially related to the geographical origin of PDO products, requires compliance with all the provisions governing the matter. Furthermore, not to extend the protection from evocation to conduct by local producers that do not comply with the requirements would undermine the rights that must be reserved for producers who

48 On the labels at issue there is only the term ‘queso’ which, being generic, is not protected; see Article 13(1), second subparagraph, of Regulation No 510/2006.

49 I refer in particular to the representations of a flock of sheep, a plain, the figure of a horse and windmills which appear on the labels at issue and on the figurative elements of the disputed trade marks.

50 Including the confusion between PDO products and non-PDO products brought about, as reported in the order for reference, by certain information on the IQC website. In this regard, I note that the fact that that information, which, if misleading, would fall within the scope of Article 13(1)(c) of Regulation No 510/2006, does not mean that it is not possible to take such information into consideration as an indication of evocation within the meaning of point (b) of that provision.

51 That is to say, products that do not comply with the PDO requirements in respects other than that of their geographical origin.

52 A guarantee that constitutes the ‘essential function of rights conferred pursuant to Regulation No 510/2006’, see, to that effect, judgment of 8 September 2009, *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraph 112).

have made a genuine effort to improve quality in order to be able to use a registered designation of origin under Regulation No 510/2006, exposing them, as the French Government points out, to the consequences of unfair competition which, precisely because they come from producers established in the same geographical area, are potentially more harmful.⁵³

44. On the basis of the foregoing considerations, the answer to the second question referred by the Tribunal Supremo (Supreme Court) must, in my view, be that the use, for products identical or similar to those covered by a PDO within the meaning of Article 2(1)(a) of Regulation No 510/2006, of signs that evoke the region with which the designation is associated may constitute evocation within the meaning of Article 13(1)(b) of that regulation even where such signs are used by a producer established in the region for products that are not covered by the PDO.

The third question

45. By the third question submitted for a preliminary ruling, the referring court asks the Court whether the concept of a ‘consumer who is reasonably well informed and reasonably observant and circumspect’, to which the national court must refer for the purpose of establishing whether there is evocation within the meaning of Article 13(1)(b) of Regulation No 510/2006 refers to European consumers or may be limited to consumers of the Member State in which the evocative product is manufactured and mainly consumed.

46. As mentioned above and as all the parties that have submitted observations to the Court have maintained, the answer to that question can be inferred from the judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35). In that judgment, concerning the interpretation of Article 16(b) of Regulation No 110/2008, the Court stated that, in the light of the need to ensure effective and uniform protection of geographical indications throughout the Union, the concept of the ‘consumer’, to whose perception reference must be made in order to determine whether there is evocation within the meaning of that provision, covers ‘European consumers and not merely consumers of the Member State in which the product giving rise to the evocation of the protected geographical indication is manufactured’.⁵⁴ The same interpretation must, in my view, be applied in the context of protection against evocation, as provided for by Regulation No 510/2006.

47. The circumstances of the main proceedings are, however, different from those of the proceedings giving rise to the judgment in *Viiniverla*.⁵⁵ If reference had been made only to local Finnish consumers — who are able to recognise, in the name ‘Verlados’, the place of production of the evocative product — rather than to European consumers — that could have meant, that there could be no finding of evocation in that case.⁵⁶ On the other hand, if only the perception of Spanish consumers was taken into account in the main proceedings, a finding of possible evocation would be easier, but likely to be ruled out, if, instead, European consumers were taken into account (excluding the Spanish consumer), since the link between the region of La Mancha and the figurative and word signs of the labels at issue would necessarily be more tenuous for such consumers.

⁵³ As regards the argument raised at the hearing by the defendant in the main proceedings and based on the requirement of legal certainty as to the lawfulness of the use of signs registered as trade marks before registration of a designation of origin under Regulation No 510/2006, I would point out that Article 14(2) of that regulation provides that the use of a trade mark corresponding to one of the situations referred to in Article 13 of the regulation, registered before the date of protection of the designation of origin or geographical indication in the country of origin may continue to be used notwithstanding the registration of a designation of origin or a geographical indication. It is for the referring court to determine whether the conditions for the application of that provision are satisfied in the main proceedings.

⁵⁴ See judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 27).

⁵⁵ Judgment of 21 January 2016 (C-75/15, EU:C:2016:35).

⁵⁶ Although on the basis of an interpretation of the concept of evocation limited to the likelihood of confusion between the products in question and the misleading of the consumer, which was in any event rejected by the Court, see judgments of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 26); of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117, paragraph 45); and of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 44).

48. It is for this reason that the referring court asks the Court to clarify whether, in circumstances such as those in the main proceedings, it must consider European consumers or only Spanish consumers.

49. It is clear that the concept of ‘European consumer’ has inherent limits, since it is in any event a *fictio juris* which tends to reduce to a common denominator situations which are very varied and hardly uniform. In the context of protection of registered designations against unlawful evocation — in which what matters for the purposes of the assessment is the presumed perception of the consumer of a mere association of ideas and not as to whether there is a likelihood of confusion — that concept, as, more generally, that of the ‘average consumer who is reasonably well informed and reasonably observant and circumspect’, must also be applied with particular caution.

50. That said, as stated by the Court in the judgment in *Viiniverla*,⁵⁷ the use of the concept of a ‘European consumer’ meets the need to ensure the effective and uniform protection of designations registered throughout the European Union.

51. While such a requirement means that, even for products intended for local trade, circumstances that may *preclude* the existence of unlawful evocation only in respect of the consumers in one Member State cannot be taken into account, it does not, on the other hand, mean that an unlawful evocation *established* by reference to the consumers of a single Member State is insufficient to trigger the protection provided for by Regulation No 510/2006.

52. On the basis of the foregoing considerations, it is, in my view, necessary to answer the third question referred by the Tribunal Supremo (Supreme Court) to the effect that, in order to determine whether there is ‘evocation’ of a registered name within the meaning of Article 13(1)(b) of Regulation No 510/2006, the national court must refer to the perception of the average European consumer who is reasonably well informed and reasonably observant and circumspect; that concept must be understood as also referring to the consumers of the Member State in which the products giving rise to evocation are made or with which the registered name is geographically associated.

Conclusion

53. On the basis of all the foregoing considerations, I propose that the Court answer as follows to the questions referred by the Tribunal Supremo (Supreme Court, Spain):

Article 13(1)(b) of Council Regulation No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs must be interpreted as meaning that there may be evocation within the meaning of that provision also as a result of the use of figurative signs and in the absence of any visual, phonetic or conceptual similarity between the registered name and the sales name of the product in question, provided that when the consumer is confronted with the signs at issue the image triggered directly in his mind is that of the product whose indication is protected.

The use, for products identical or similar to those covered by a protected designation of origin, within the meaning of Article 2(1)(a) of Regulation No 510/2006, of signs that evoke the region with which the designation is associated may constitute evocation within the meaning of Article 13(1)(b) of that regulation even where such signs are used by a producer established in the region for products that are not covered by the protected designation of origin.

In order to determine whether there is ‘evocation’ of a registered name within the meaning of Article 13(1)(b) of Regulation No 510/2006, the national court must refer to the perception of the average European consumer who is reasonably well informed and reasonably observant and

⁵⁷ Judgment of 21 January 2016 (C-75/15, EU:C:2016:35, paragraph 27).

circumspect; that concept must be understood as also referring to the consumers of the Member State in which the products giving rise to evocation are made or with which the registered name is geographically associated.