



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

7 June 2018\*

(Reference for a preliminary ruling — Protection of geographical indications of spirit drinks — Regulation (EC) No 110/2008 — Article 16(a) to (c) — Annex III — Registered geographical indication ‘Scotch Whisky’ — Whisky produced in Germany and marketed under the designation ‘Glen Buchenbach’)

In Case C-44/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Hamburg (Regional Court, Hamburg, Germany), made by decision of 19 January 2017, received at the Court on 27 January 2017, in the proceedings

**Scotch Whisky Association**

v

**Michael Klotz,**

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger (Rapporteur) and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Scotch Whisky Association, by K.H. Reuer and W. Baars, Rechtsanwältinnen,
- Mr Klotz, by S.J. Mühlberger, Rechtsanwalt,
- the Greek Government, by G. Kanellopoulos, E. Leftheriotou, M. Tassopoulou and E. Chroni, acting as Agents,
- the French Government, by D. Colas, S. Horrenberger and E. de Moustier, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and F. Varrone, avvocato dello Stato,

\* Language of the case: German.

– the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,  
– the European Commission, by B. Eggers, D. Bianchi and I. Naglis, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 22 February 2018,  
gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 16(a) to (c) of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 (OJ 2008 L 39, p. 16).
- 2 The request has been made in proceedings between the Scotch Whisky Association and Mr Michael Klotz, an online distributor of whisky, concerning an action seeking an order that Mr Klotz cease to market a whisky produced in Germany under the designation ‘Glen Buchenbach’.

### Legal context

- 3 Recital 2 of Regulation No 110/2008 reads:

‘The spirit drinks sector is important for consumers, producers and the agricultural sector in the [European Union]. The measures applicable to the spirit drinks sector should contribute to the attainment of a high level of consumer protection, the prevention of deceptive practices and the attainment of market transparency and fair competition. ...’

- 4 Recital 4 of that regulation states:

‘To ensure a more systematic approach in the legislation governing spirit drinks, this Regulation should set out clearly defined criteria for the production, description, presentation and labelling of spirit drinks as well as on the protection of geographical indications.’

- 5 Recital 14 of that regulation is worded as follows:

‘Given that Council Regulation (EC) No 510/2006 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), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1),] does not apply to spirit drinks, the rules for protection of geographical indications on spirit drinks should be laid down in this Regulation. Geographical indications should be registered, identifying spirit drinks as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the spirit drink is essentially attributable to its geographical origin.’

- 6 Article 16 of Regulation No 110/2008, entitled ‘Protection of geographical indications’, provides:

‘... the geographical indications registered in Annex III shall be protected against:

- (a) any direct or indirect commercial use in respect of products not covered by the registration in so far as those products are comparable to the spirit drink registered under that geographical indication or in so far as such use exploits the reputation of the registered geographical indication;

- (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term;
  - (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation, or labelling of the product liable to convey a false impression as to its origin;
  - (d) any other practice liable to mislead the consumer as to the true origin of the product.’
- 7 Annex III to Regulation No 110/2008, entitled ‘Geographical indications’, states that ‘Scotch Whisky’ has been registered as a geographical indication relating to the second category of goods, namely ‘Whisky/Whiskey’, with the ‘United Kingdom (Scotland)’ listed as the country of origin.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 8 The Scotch Whisky Association is an organisation constituted under Scottish law. Its objectives include protecting the trade in Scottish whisky both in Scotland and abroad.
- 9 Mr Klotz markets, via a website, a whisky under the designation ‘Glen Buchenbach’, which is produced by the Waldhorn distillery in Berglen, located in the Buchenbach valley in Swabia (Germany).
- 10 The label on the whisky bottles in question includes, in addition to a stylised depiction of a hunting horn (*Waldhorn* in German), the following information: ‘*Waldhornbrennerei*’ (Waldhorn distillery), ‘Glen Buchenbach’, ‘Swabian Single Malt Whisky’, ‘500 ml’, ‘40% vol’, ‘*Deutsches Erzeugnis*’ (German product), ‘*Hergestellt in den Berglen*’ (produced in the Berglen).
- 11 The Scotch Whisky Association brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking an order that Mr Klotz, inter alia, cease to market that whisky, which is not Scotch whisky, under the designation ‘Glen Buchenbach’, on the ground that use of that designation infringes, in particular, Article 16(a) to (c) of Regulation No 110/2008, which protects the geographical indications registered in Annex III to that regulation, which include ‘Scotch Whisky’.
- 12 According to the Scotch Whisky Association, those provisions ensure that a geographical indication registered for a spirit drink is protected not only against the use of such an indication but also against any reference that suggests the geographical origin of that indication. It argues that because the designation ‘Glen’ is very widely used in Scotland instead of the word ‘valley’ and, in particular, as an element of the trade mark in the names of Scottish whiskies, it evokes in the relevant public an association with Scotland and Scotch Whisky despite the fact that other information is included on the label, which specifies that the product at issue is of German origin. Mr Klotz contends that the action should be dismissed.
- 13 The Landgericht Hamburg (Regional Court, Hamburg) states that whether the claim is to succeed depends on the interpretation to be given to Article 16(a) to (c) of Regulation No 110/2008. It has therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does “indirect commercial use” of a registered geographical indication of a spirit drink in accordance with Article 16(a) of [Regulation No 110/2008] require that the registered geographical indication be used in identical or phonetically and/or visually similar form, or is it sufficient that the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area?’

If the latter is sufficient: When determining whether there is any “indirect commercial use”, does the context in which the disputed element is embedded then also play a role, or can that context not counteract indirect commercial use of the registered geographical indication, even if the disputed element is accompanied by an indication of the true origin of the product?

- (2) Does an “evocation” of a registered geographical indication in accordance with Article 16(b) of [Regulation No 110/2008] require that there be a phonetic and/or visual similarity between the registered geographical indication and the disputed element, or is it sufficient that the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area?

If the latter is sufficient: When determining whether there is any “evocation”, does the context in which the disputed element is embedded also play a role, or can that context not counteract any unlawful evocation of the registered geographical indication, even if the disputed element is accompanied by an indication of the true origin of the product?

- (3) When determining whether there is any “other false or misleading indication” in accordance with Article 16(c) of [Regulation No 110/2008], does the context in which the disputed element is embedded play a role, or can that context not counteract any misleading indication, even if the disputed element is accompanied by an indication of the true origin of the product?

### **The request that the oral part of the procedure be reopened**

- 14 Following the presentation of the Advocate General’s Opinion, the Scotch Whisky Association, by a letter of 15 March 2018, requested the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court.
- 15 In support of that request, the Scotch Whisky Association argued, in essence, that the statements made by the Advocate General in points 66 to 68 and 107 and 108 of his Opinion are based on an incomplete and incorrect account of the factual background, as set out in the order for reference, with the result that those statements are erroneous. The Scotch Whisky Association would hope to be able, at an oral hearing, to address those statements and, at the same time, to correct and complete that factual background.
- 16 In this regard, it must be borne in mind that, under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.
- 17 That is not the case here. The Court considers, having heard the Advocate General, that it has sufficient information to give a ruling and that the present case does not need to be decided on the basis of arguments which have not been debated between the parties or the aforementioned interested persons.
- 18 Nor has it been argued that one of the parties to the main proceedings or one of those interested persons has, after the close of the oral part of the present proceedings, submitted a new fact of such a nature as to be a decisive factor for the decision of the Court.
- 19 The Scotch Whisky Association’s request for the reopening of the oral part of the procedure must therefore be rejected.

## Consideration of the questions referred

### *Preliminary observations*

- 20 In the present case, the two parties to the main proceedings have taken issue both with the wording and with the substance of the order for reference.
- 21 First, the Scotch Whisky Association complains that the referring court has not formulated the questions referred for a preliminary ruling correctly and suggests in its written observations that those questions should be reformulated.
- 22 On that point, it is sufficient to recall that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment of 4 April 2000, *Darbo*, C-465/98, EU:C:2000:184, paragraph 19). In particular, it is for the national court alone to determine and formulate such questions. The parties to the main proceedings may not change their tenor (judgments of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489, paragraphs 29 and 31 and the case-law cited, and of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic*, C-508/14, EU:C:2015:657, paragraph 28 and the case-law cited). Consequently, the Court cannot grant a request that the questions be reformulated in the terms which a party to the main proceedings indicates.
- 23 Second, Mr Klotz takes the view that the referring court gave a shortened and incomplete account of the facts in the main proceedings and he provides information intended to complete that account.
- 24 However, it must be reiterated that, in the procedure of cooperation established by Article 267 TFEU, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (judgments of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538, paragraph 13, and of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 119). Moreover, the Court of Justice must take account, under the division of jurisdiction between the EU Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set, (see, to that effect, judgments of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 10, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 27).

### *The first question*

- 25 By its first question, the referring court asks, in essence, whether Article 16(a) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is ‘indirect commercial use’ of a registered geographical indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it, or whether it is sufficient that that element evokes in the relevant public some kind of association with the indication concerned or the geographical area relating to it.
- 26 Should it be held that some kind of association of ideas with the registered geographical indication or the geographical area relating thereto is sufficient for there to be ‘indirect commercial use’ of that indication, within the meaning of Article 16(a) of Regulation No 110/2008, the referring court asks, in essence, whether that provision is to be interpreted as meaning that, in establishing that such use exists, account must be taken of the context surrounding the disputed element and, in particular, of

the fact that that element is accompanied by an indication of the true origin of the product, with the result that the information provided by that context would ultimately make it possible to refute the claim that there is indirect commercial use.

- 27 The Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, judgments of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraph 40, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 54).
- 28 In the first place, the wording of Article 16(a) of Regulation No 110/2008 makes clear that the provision protects registered geographical indications from ‘any direct or indirect commercial use in respect of products not covered by the registration in so far as those products are comparable to the spirit drink registered under that geographical indication or in so far as such use exploits the reputation of the registered geographical indication’.
- 29 As the Advocate General has stated in point 28 of his Opinion, the word ‘use’ in that provision requires, by definition, that the sign at issue make use of the protected geographical indication itself, in the form in which that indication was registered or, at least, in a form with such close links to it, in visual and/or phonetic terms, that the sign at issue clearly cannot be dissociated from it.
- 30 In that regard, the Court has already held that the use of a trade mark containing a geographical indication, or a term corresponding to that indication and its translation, with respect to spirit drinks which do not meet the relevant specifications, constitutes, in principle, a direct commercial use of that geographical indication, for the purposes of Article 16(a) of Regulation No 110/2008 (judgments of 14 July 2011, *Bureau national interprofessionnel du Cognac*, C-4/10 and C-27/10, EU:C:2011:484, paragraph 55, and of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, C-393/16, EU:C:2017:991, paragraph 34).
- 31 Accordingly, for a situation to be covered by Article 16(a) of Regulation No 110/2008, the sign at issue must use the registered geographical indication in an identical form or at least in a form that is phonetically and/or visually highly similar.
- 32 Nevertheless, in accordance with that provision, a distinction must be drawn between situations in which the use is ‘direct’ and those in which it is ‘indirect’. In that connection, as the Advocate General has stated in point 30 of his Opinion, unlike ‘direct’ use, which implies that the protected geographical indication is affixed directly to the product concerned or its packaging, ‘indirect’ use requires the indication to feature in supplementary marketing or information sources, such as an advertisement for that product or documents relating to it.
- 33 So far as concerns, in the second place, the context of Article 16(a) of Regulation No 110/2008, the Court notes that the scope of that provision must necessarily be distinguished from that of the other rules for the protection of registered geographical indications, which are set out in points (b) to (d) of Article 16. Point (a) must, in particular, be distinguished from the situation covered by point (b) of Article 16, which refers to ‘any misuse, imitation or evocation’, that is to say, situations in which the sign at issue does not use the geographical indication as such but suggests it in such a way that it causes the consumer to establish a sufficiently close connection between that sign and the registered geographical indication.
- 34 Thus, as the Advocate General has observed in point 32 of his Opinion, Article 16(b) of Regulation No 110/2008 would be devoid of practical effect if Article 16(a) were given a broad interpretation, as is envisaged by the referring court in its first question, in the sense that it would be applicable as soon as the sign at issue evokes in the relevant public some kind of association of ideas with a registered geographical indication or the geographical area relating thereto.

- 35 In the third place, an interpretation by virtue of which -- in order to establish that there is indirect commercial use of a registered geographical indication -- the disputed element must be used in a form that is either identical to that indication, or phonetically and/or visually similar to it, is better able to secure the objectives pursued by Regulation No 110/2008 and, in particular, by Article 16(a) thereof.
- 36 It must be recalled in that regard that the purpose of the system of registration of geographical indications of spirit drinks provided for by Regulation No 110/2008 is to contribute, as is noted in recital 2 of that regulation, to the attainment of a high level of consumer protection, to the prevention of deceptive practices and to market transparency and fair competition (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 24).
- 37 Furthermore, the Court has already made clear that the protection afforded by Article 16 of Regulation No 110/2008 to geographical indications must be interpreted in the light of the objective pursued by the registration of those indications, namely, as is apparent from recital 14 of that regulation, to allow the identification of spirit drinks as originating from a specific territory in situations where a given quality, reputation or other characteristic of those drinks is essentially attributable to that geographical origin (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 23 and the case-law cited).
- 38 Thus, as the Advocate General has noted in point 38 of his Opinion, the aim of the provisions of Regulation No 110/2008, in particular of Article 16, is to prevent the misuse of protected geographical indications, not only in the interests of consumers, but also in the interests of producers who have striven to guarantee the qualities expected of products lawfully bearing such indications (see, by analogy, judgments of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto*, C-56/16 P, EU:C:2017:693, paragraph 82, and of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, C-393/16, EU:C:2017:991, paragraph 38). In that context, Article 16(a) prohibits, more specifically, operators from making commercial use of a registered geographical indication in respect of products that are not covered by the registration, in particular with the aim of taking unfair advantage of that geographical indication.
- 39 In view of all the foregoing considerations, the answer to the first question is that Article 16(a) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is 'indirect commercial use' of a registered geographical indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it. Accordingly, it is not sufficient that that element is liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto.
- 40 Having regard to the answer to the first part of the first question, there is no need to answer the second part.

### ***The second question***

- 41 By its second question, the referring court asks, in essence, whether Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an 'evocation' of a registered geographical indication, the disputed element must be phonetically and/or visually similar to that indication, or whether it is sufficient that that element evokes in the relevant public some kind of association with the indication concerned or the geographical area relating to it.
- 42 Should it be held that some kind of association of ideas with the registered geographical indication or the geographical area relating thereto is sufficient for there to be an 'evocation' of that indication, within the meaning of Article 16(b) of Regulation No 110/2008, the referring court asks, in essence, whether that provision must be interpreted as meaning that, for the purpose of establishing such an

evocation, account is to be taken of the context surrounding the disputed element and, in particular, of the fact that that element is accompanied by an indication of the true origin of the product, with the result that the information provided by that context would ultimately make it possible to refute the claim of ‘evocation’.

- 43 In order to provide the referring court with a useful answer, it should be borne in mind that Article 16(b) of Regulation No 110/2008 protects geographical indications from any ‘evocation’, ‘even if the true origin of the product is indicated or the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term’.
- 44 According to the Court’s case-law, the notion of ‘evocation’ covers a situation in which the term used to designate a product incorporates part of a protected geographical indication, so that when the consumer is confronted with the name of the product in question, the image triggered in his mind is that of the product whose indication is protected (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 21 and the case-law cited).
- 45 Thus, for the purpose of finding there to be an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008, the Court has held that the national court must determine not only whether the term used to designate the product at issue incorporates a part of a protected geographical indication but also whether, when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose indication is protected. Therefore, the national court must essentially rely on the presumed reaction of consumers in the light of the term used to designate the product at issue, it being essential that those consumers establish a link between that term and the protected geographical indication (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 22).
- 46 It follows from the foregoing, as the Advocate General has stated in point 55 of his Opinion, that the partial incorporation of a protected geographical indication in the sign at issue is not an essential condition for Article 16(b) of Regulation No 110/2008 to apply. In assessing whether there is an ‘evocation’ within the meaning of that provision, it is therefore for the national court to determine whether, when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose geographical indication is protected.
- 47 In that regard, the national court must, in making that assessment, refer to the perception of an average European consumer who is reasonably well informed and reasonably observant and circumspect (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraphs 25 and 28).
- 48 In addition, the Court has held that it is legitimate to consider there to be an evocation of a protected geographical indication where, concerning products which are similar in appearance, the sales names are phonetically and visually similar (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 33 and the case-law cited).
- 49 However, as the Advocate General has stated in point 58 of his Opinion, identifying phonetic and visual similarity between the disputed designation and the protected geographical indication is likewise not an essential condition for establishing that there is an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008. It is only one of the factors to be taken into account by the national court when it assesses whether, when the consumer is confronted with the name of the product concerned, the image triggered in his mind is that of the product whose geographical indication is protected. Accordingly, it is possible that an ‘evocation’ may be found to exist even in the absence of such similarity.

- 50 In addition to the criteria relating to the incorporation of a part of a protected geographical indication in the disputed designation and to the phonetic and visual similarity between the designation and the indication, the Court has ruled that it is necessary, where appropriate, to take account of the criterion of ‘conceptual proximity’ between terms emanating from different languages, since such proximity, like the other criteria mentioned above, may also trigger an image in the consumer’s mind which is that of the product whose geographical indication is protected, when he is confronted with a similar product bearing the disputed name (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 35 and the case-law cited).
- 51 It follows from the foregoing that, for determining whether there is an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008, the decisive criterion is whether, when the consumer is confronted with a disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected, a matter which it falls to the national court to assess, taking into account, as the case may be, the partial incorporation of a protected geographical indication in the disputed designation, any phonetic and/or visual similarity, or any conceptual proximity, between the designation and the indication.
- 52 In the case in the main proceedings, the referring court will therefore have to determine whether an average European consumer who is reasonably well informed and reasonably observant and circumspect thinks directly of the protected geographical indication, namely ‘Scotch Whisky’, when he is confronted with a comparable product bearing the disputed designation, in this case ‘Glen’, that court taking account, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, of conceptual proximity between the protected geographical indication and the disputed designation.
- 53 However, the criterion set out by the referring court in its second question for the purpose of establishing ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008 — namely that the disputed element of the sign at issue should evoke in the relevant public some kind of association with the protected geographical indication or the geographical area relating thereto — cannot be used, as it does not establish a sufficiently clear and direct link between that element and the indication concerned.
- 54 Furthermore, as the Advocate General has observed in points 61 to 63 of his Opinion, if it were sufficient, for the purpose of establishing such ‘evocation’, that the consumer make an association of any kind whatsoever with a protected geographical indication, 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.
- 55 Secondly, the use of such a criterion would extend the scope of Regulation No 110/2008 in an unforeseeable way and would give rise to significant risks, particularly for the legal certainty of the economic actors concerned. Indeed, as stated in recital 4 of that regulation, the EU legislature has sought to ‘ensure a more systematic approach in the legislation governing spirit drinks’, by setting out ‘clearly defined criteria’ for, inter alia, ‘the protection of geographical indications’. Allowing a criterion as vague and far-reaching as that put forward by the referring court in its second question would not be consistent with that objective.
- 56 In view of all the foregoing considerations, the answer to the first part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an ‘evocation’ of a registered geographical indication, the referring court is required to determine whether, when the average European consumer who is reasonably well informed and reasonably observant and circumspect is confronted with the disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected.

In making that determination, the referring court, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, must take account of the conceptual proximity, if any, between the designation and the indication.

- 57 As regards the second part of the second question, which relates to the role that the context in which the disputed designation is embedded plays in the national court's assessment of whether there is an 'evocation' within the meaning of Article 16(b) of Regulation No 110/2008, the Court notes that it is apparent from the wording of that provision that there may be an 'evocation' even if the true origin of the product is indicated (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 43 and the case-law cited).
- 58 The order for reference indicates that Mr Klotz, the defendant in the main proceedings, maintains that the designation 'Glen Buchenbach' is a play on words consisting of the name of the place of origin of the drink at issue in the main proceedings (Berglen) and the name of a local river ('Buchenbach'). However, the Court has already held that it is immaterial, so far as Article 16(b) of Regulation No 110/2008 is concerned, that the disputed designation corresponds to the name of the undertaking and/or the place where the product is manufactured (see, to that effect, judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraphs 42 to 45).
- 59 Moreover, as the Advocate General has observed in point 81 of his Opinion, the Court has also made clear that the fact that the disputed designation refers to a place of manufacture that is known to consumers in the Member State where the product is manufactured is not relevant for the purpose of assessing the concept of 'evocation' within the meaning of Article 16(b) of Regulation No 110/2008, since that provision protects registered geographical indications against any evocation throughout the territory of the European Union and, in view of the need to guarantee effective and uniform protection of those geographic indications in that territory, it covers all European consumers (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 27).
- 60 In view of the foregoing considerations, the answer to the second part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an 'evocation' of a registered geographical indication, account is not to be taken either of the context surrounding the disputed element, or, in particular, of the fact that that element is accompanied by an indication of the true origin of the product concerned.

### *The third question*

- 61 By its third question, the referring court asks, in essence, whether Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is a 'false or misleading indication', as prohibited by that provision, account must be taken of the context in which the disputed element is used, in particular where that element is accompanied by an indication of the true origin of the product concerned.
- 62 It must be recalled that, under Article 16(c) of Regulation No 110/2008, a registered geographical indication is protected against 'any other false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation or labelling of the product, liable to convey a false impression as to its origin'.
- 63 First of all, the Court finds that, contrary to what has been argued by the European Commission, there is nothing in the wording of that provision to suggest that the intention of the EU legislature was that account should be taken of the context in which the disputed element is used in order to establish a 'false or misleading indication as to the provenance, origin, nature or essential qualities ... of the product'.

- 64 As the Advocate General has noted in point 92 of his Opinion, the expression ‘false or misleading indication ... on the description, presentation or labelling of the product’ amounts to a list of various mediums on which the indication suspected of being false or misleading may be found. That does not permit the inference that that indication must be examined in conjunction with any other information that may be included on the description, presentation or labelling of the product concerned.
- 65 Next, as has also been noted by the Advocate General in point 96 of his Opinion, Article 16 of Regulation No 110/2008 contains a graduated list of prohibited conduct in which point (c) of Article 16 must be distinguished from points (a) and (b) thereof. Point (a) of Article 16 is limited to use of the protected geographical indication and point (b) to misuse, imitation or evocation. Point (c), however, widens the scope of the protection to include ‘any other ... indication’ (in other words, information provided to consumers that is included on the description, presentation or labelling of the product concerned) which, while not actually evoking the protected geographical indication, is ‘false or misleading’ as regards the links between the product concerned and that indication.
- 66 In that regard, it must be stated, first, that the expression ‘any other ... indication’, used in Article 16(c) of Regulation No 110/2008, includes information that may be found in any form whatsoever on the description, presentation or labelling of the product concerned, inter alia in the form of words, an image or a container capable of providing information on the provenance, origin, nature or essential qualities of that product.
- 67 Secondly, it is sufficient that a false or misleading indication be included on one of the three mediums mentioned in that provision, namely ‘on the description, presentation or labelling’ of the product concerned, for it to be found that it is ‘liable to convey a false impression as to [the product’s] origin’ within the meaning of that provision.
- 68 It follows from the foregoing that Article 16(c) of Regulation No 110/2008 affords extensive protection to registered geographical indications. If a false or misleading indication could nonetheless be permitted because it is accompanied by additional information relating, in particular, to the true origin of the product concerned, that provision would be deprived of practical effect.
- 69 Finally, as has already been stated in paragraph 38 of this judgment, the purpose of Regulation No 110/2008 and, in particular, of Article 16 thereof, is to protect registered geographical indications, both in the interests of consumers who should not be misled by inappropriate indications, and in the interests of economic operators which bear higher costs in order to guarantee the quality of products that lawfully bear protected geographical indications. Those operators must be protected against acts of unfair competition.
- 70 As the Advocate General has observed in point 101 of his Opinion, attainment of those objectives would be jeopardised if the protection of geographical indications could be restricted by the fact that additional information is included alongside an indication which is false or misleading, within the meaning of Article 16(c) of Regulation No 110/2008, since accepting that interpretation would be tantamount to allowing the use of such an indication provided that it is accompanied by correct information.
- 71 In view of all the foregoing considerations, the answer to the third question is that Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is a ‘false or misleading indication’, as prohibited by that provision, account is not to be taken of the context in which the disputed element is used.

## Costs

<sup>72</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

- 1. Article 16(a) of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 must be interpreted as meaning that, for the purpose of establishing that there is ‘indirect commercial use’ of a registered geographical indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it. Accordingly, it is not sufficient that that element is liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto.**
- 2. Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an ‘evocation’ of a registered geographical indication, the referring court is required to determine whether, when the average European consumer who is reasonably well informed and reasonably observant and circumspect is confronted with the disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected. In making that determination, the referring court, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, must take account of the conceptual proximity, if any, between the designation and the indication.**

**Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an ‘evocation’ of a registered geographical indication, account is not to be taken either of the context surrounding the disputed element, or, in particular, of the fact that that element is accompanied by an indication of the true origin of the product concerned.**

- 3. Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is a ‘false or misleading indication’, as prohibited by that provision, account is not to be taken of the context in which the disputed element is used.**

[Signatures]