

European Court of Justice, 8 September 2009, Budvar v Ammersin



### DESIGNATIONS OF ORIGIN

In order to assess whether the designation 'Bud' can be classified as a simple and indirect indication of geographical provenance the national court must:

- Ascertain whether that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product comes from a particular place or region of that Member State;

– in order to determine whether a designation can be considered to constitute a simple and indirect indication of geographical provenance protection of which under the bilateral instruments at issue is capable of being justified on the basis of the criteria laid down in Article 30 EC, the national court must ascertain whether, according to factual circumstances and perceptions prevailing in the Czech Republic, that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State;

- Ascertain whether the designation has not become generic in that Member State

– the national court must, in addition, ascertain, once again in the light of factual circumstances and perceptions prevailing in the Czech Republic, whether, as stated in paragraph 99 of that judgment, the designation at issue in the main proceedings has not, either at the time of the entry into force of the bilateral instruments at issue or subsequently, become generic in that Member State, the Court having already held, in paragraphs 99 and 100 of that judgment, that the aim of the system of protection introduced by those instruments falls within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC;

- Decide whether a consumer survey should be commissioned for the purpose of clarifying factual

circumstances and perceptions prevailing in the Czech Republic

– in the absence of any Community provision in that regard, it is for the national court to decide, in accordance with its own national law, whether a consumer survey should be commissioned for the purpose of clarifying factual circumstances and perceptions prevailing in the Czech Republic in order to ascertain whether the designation 'Bud' at issue in the main proceedings can be classified as a simple and indirect indication of geographical provenance and has not become generic in that Member State. It is also in the light of that national law that the national court, if it finds it necessary to commission a consumer survey, must determine, for the purposes of making the necessary assessments, the percentage of consumers that would be sufficiently significant; and

- Determine whether there are requirements as to the quality and duration of the use made of a designation to be justified in the light of Article 30 EC

– Article 30 EC does not lay down specific requirements as to the quality and the duration of the use made of a designation in the Member State of origin for its protection to be justified in the light of that article. Whether such requirements apply in the context of the dispute in the main proceedings must be determined by the national court in the light of the applicable national law, in particular the system of protection laid down by the bilateral instruments at issue.

**Regulation No 510/2006 is exhaustive in nature**

- The Community system of protection laid down by Regulation No 510/2006 is exhaustive in nature

with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.

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**European Court of Justice, 8 September 2009**

(V. Skouris, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, P. Küris, E. Juhász, L. Bay Larsen and P. Lindh)

JUDGMENT OF THE COURT (Grand Chamber)

8 September 2009 (\*)

*(Bilateral agreements between Member States – Protection in a Member State of a geographical indication of provenance of another Member State – Designation 'Bud' – Use of the mark 'American Bud' – Articles 28 EC and 30 EC – Regulation (EC) No 510/2006 – Community system of protection of geographical indications and of designations of origin – Accession of the Czech Republic – Transitional measures – Regulation*

(EC) No 918/2004 – Scope of the Community system – Exhaustive nature)

In Case C-478/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Handelsgericht Wien (Austria), made by decision of 27 September 2007, received at the Court on 25 October 2007, in the proceedings

Budějovický Budvar, národní podnik

v

Rudolf Ammersin GmbH,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas and K. Lenaerts, Presidents of Chambers, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2008,

after considering the observations submitted on behalf of:

– Budějovický Budvar, národní podnik, by C. Petsch, Rechtsanwalt,

– Rudolf Ammersin GmbH, by C. Hauer, B. Goebel and C. Schulte, Rechtsanwälte,

– the Czech Government, by T. Boček and M. Smolek, acting as Agents,

– the Greek Government, by I. Chalkias and K. Marinou, acting as Agents,

– the Commission of the European Communities, by B. Doherty, B. Schima and M. Vollkommer, acting as Agents,

after hearing the [Opinion of the Advocate General at the sitting on 5 February 2009](#),

gives the following

### Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC and 30 EC, of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; ‘the Act of Accession’), of Commission Regulation (EC) No 918/2004 of 29 April 2004 introducing transitional arrangements for the protection of geographical indications and designations of origin for agricultural products and foodstuffs in connection with the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2004 L 163, p. 88) and of 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).

2 The reference was made in proceedings between Budějovický Budvar, národní podnik (‘Budvar’), a brewery established in the town of České Budějovice (Czech Republic), and Rudolf Ammersin GmbH

(‘Ammersin’), a firm established in Vienna (Austria) which distributes beverages, with regard to Budvar’s application to prohibit Ammersin from marketing under the mark ‘American Bud’ beer produced by the brewery Anheuser-Busch Inc. (‘Anheuser-Busch’), established in Saint Louis (United States), on the ground that, by virtue of bilateral agreements between the Czech Republic and the Republic of Austria, the use of the designation ‘Bud’ in that Member State is reserved for beer produced in the Czech Republic.

### Legal context

#### International law

3 Article 1 of the Lisbon Agreement for the Protection of Appellations of Provenance and their International Registration, adopted on 31 October 1958, revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (United Nations Treaty Series, Vol. 828, No 13 172, p. 205; ‘the Lisbon Agreement’), provides:

‘(1) The countries to which this Agreement applies form a Special Union within the framework of the Union for the Protection of Industrial Property.

(2) They undertake to protect on their territories, in accordance with the terms of this Agreement, the appellations of origin of products of the other countries of the Special Union, recognised and protected as such in the country of provenance and registered at the International Bureau of Intellectual Property ... referred to in the Convention establishing the World Intellectual Property Organisation [WIPO]’.

4 Under Article 2 of the Lisbon Agreement:

‘(1) In this Agreement “appellation of origin” means the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

(2) The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.’

5 The appellation of origin BUD (appellation of origin No 598) was registered with WIPO on 10 March 1975 for beer, pursuant to the Lisbon Agreement.

#### Community law

##### The Act of Accession

6 Article 20 of the Act of Accession states:

‘The acts listed in Annex II to this Act shall be adapted as specified in that Annex.’

7 In Annex II to the Act of Accession, entitled ‘List referred to in Article 20 of the Act of Accession’, point 18 of Part A of Chapter 6 provides:

‘31996 R 1107: 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), as amended by:

...

– 32002 R 1829: Commission Regulation (EC) No 1829/2002 of 14 [October] 2002 (OJ [2002] L 277, ... p. 10).

(a) In Article 1, the following subparagraph is added:

“The names ‘Budějovické pivo’, ‘Českobudějovické pivo’ and ‘Budějovický měšťanský var’ shall be registered as protected geographical indications (PGI) and listed in the Annex in accordance with specifications submitted to the Commission. This is without prejudice to any beer trademark or other rights existing in the European Union on the date of accession.”

(b) In the Annex, Part B, the following is inserted under the heading “Beer”:

“CZECH REPUBLIC:

- Budějovické pivo (PGI)
- Českobudějovické pivo (PGI)
- Budějovický měšťanský var (PGI).’

Regulation (EEC) No 2081/92

8 The seventh recital in the preamble to Council Regulation (EEC) No 2081/92 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) states:

‘... there is diversity in the national practices for implementing registered designations of origin and geographical indications; whereas a Community approach should be envisaged; whereas a framework of Community rules on protection will permit the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers’ eyes.’

9 Articles 5 to 7 of Regulation No 2081/92 lay down the procedure for registration of the geographical indications and designations of origin referred to in Article 2 thereof, known as the ‘normal procedure’. In accordance with Article 5(4) of that regulation, the application for registration is to be sent to the Member State in which the geographical area is located. Pursuant to the first subparagraph of Article 5(5) thereof, that State is to check that the application is justified and forward the application to the Commission of the European Communities.

10 Since examination of an application for registration by the Commission takes a certain amount of time and since, pending a decision on registration of a designation, it is appropriate to permit the Member State to grant temporary national protection, Council Regulation (EC) No 535/97 of 17 March 1997 amending Regulation (EEC) No 2081/92 (OJ 1997 L 83, p. 3) inserted the following text after the first subparagraph of Article 5(5) of Regulation No 2081/92:

‘That Member State may, on a transitional basis only, grant on the national level a protection in the sense of the present Regulation to the name forwarded in the manner prescribed, and, where appropriate, an adjustment period, as from the date of such forwarding; ...

Such transitional national protection shall cease on the date on which a decision on registration under this Regulation is taken. ...

The consequences of such national protection, where a name is not registered under this Regulation, shall be the sole responsibility of the Member State concerned. The measures taken by Member States under the second subparagraph shall produce effects at national level only; they shall have no effect on intra-Community trade.’

11 Article 17 of Regulation No 2081/92 sets up a registration procedure, known as the ‘simplified procedure’, applicable to the registration of names already in existence on the date of entry into force of that regulation. It provides, inter alia, that within six months of the entry into force of Regulation No 2081/92, Member States are to inform the Commission of the names they wish to register under that procedure.

12 In order to take account, inter alia, of the fact that the first proposal for registration of geographical indications and designations of origin which the Commission was to draw up pursuant to Article 17(2) of Regulation No 2081/92 was not submitted to the Council of the European Union until March 1996, when most of the transitional period of five years provided for by Article 13(2) of that regulation had already elapsed, Regulation No 535/97, which entered into force on 28 March 1997, replaced Article 13(2) with the following:

‘By way of derogation from paragraph 1(a) and (b), Member States may maintain national systems that permit the use of names registered under Article 17 for a period of not more than five years after the date of publication of registration, provided that:

- the products have been marketed legally using such names for at least five years before the date of publication of this Regulation,
- the undertakings have legally marketed the products concerned using those names continuously during the period referred to in the first indent,
- the labelling clearly indicates the true origin of the product.

However, this derogation may not lead to the marketing of products freely within the territory of a Member State where such names were prohibited.’

13 Article 1(15) of Council Regulation (EC) No 692/2003 of 8 April 2003 amending Regulation (EEC) No 2081/92 (OJ 2003 L 99, p. 1) provides:

‘Article 13(2) and Article 17 shall be deleted. However, the provisions of these Articles shall continue to apply to registered names or to names for which a registration application was made by the procedure provided for in Article 17 before this Regulation entered into force.’

#### **Regulation No 510/2006**

14 Regulation No 2081/92, as most recently amended by Council Regulation (EC) No 806/2003 of 14 April 2003 (OJ 2003 L 122, p. 1), was repealed pursuant to Article 19 of Regulation No 510/2006. That regulation entered into force on the day of its publication in the Official Journal of the European Union, namely, 31 March 2006.



15 Recital 6 in the preamble to Regulation No 510/2006 states:

‘Provision should be made for a Community approach to designations of origin and geographical indications. A framework of Community rules on a system of protection permits the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework ensures fair competition between the producers of products bearing such indications and enhances the credibility of the products in the consumer’s eyes.’

16 Pursuant to recital 19 in the preamble to that regulation:

‘The names already registered under ... Regulation ... No 2081/92 ... on the date of entry into force of this Regulation should continue to be protected under this Regulation and automatically included in the register. ...’

17 Article 1(1) and (2) of that regulation, entitled ‘Scope’, provides:

‘1. This Regulation lays down the rules on the protection of designations of origin and geographical indications for agricultural products intended for human consumption listed in Annex I to the Treaty and for foodstuffs listed in Annex I to this Regulation and for agricultural products listed in Annex II to this Regulation.

...

2. This Regulation shall apply without prejudice to other specific Community provisions.’

18 Annex I to that regulation, entitled ‘Foodstuffs referred to in Article 1(1)’, mentions ‘Beers’ in its first indent.

19 Article 2(1) and (2) of Regulation No 510/2006, entitled ‘Designation of origin and geographical indication’, provides:

‘1. For the purpose of this Regulation:

(a) “designation of origin” means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country,
- the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and
- the production, processing and preparation of which take place in the defined geographical area;

(b) “geographical indication” means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country, and
- which possesses a specific quality, reputation or other characteristics attributable to that geographical provenance, and
- the production, processing and preparation of which take place in the defined geographical area.

2. Traditional geographical or non-geographical names designating an agricultural product or a foodstuff which fulfil the conditions referred to in paragraph 1 shall also be considered as designations of origin or geographical indications.’

20 Article 4(1) of that regulation provides:

‘To be eligible for a protected designation of origin (PDO) or a protected geographical indication (PGI), an agricultural product or foodstuff shall comply with a product specification.’

21 Articles 5 to 7 of Regulation No 510/2006 lay down the procedure for the registration of geographical indications and designations of origin referred to in Article 2 of that regulation. In accordance with Article 5(4) thereof, where the registration application relates to a geographical area in a given Member State, the application is to be addressed to that Member State. Under Article 5(5) of that regulation, the Member State is to initiate a national objection procedure and then take a decision on that application. In the event of a favourable decision, that Member State is to forward to the Commission the documents referred to in Article 5(7) thereof for a final decision taken following the procedure governed by Articles 6 and 7 of Regulation No 510/2006 which includes, inter alia, an objection procedure.

22 Under Article 5(6) of that regulation:

‘The Member State may, on a transitional basis only, grant protection under this Regulation at national level to the name, and, where appropriate, an adjustment period, with effect from the date on which the application is lodged with the Commission.

The adjustment period provided for in the first subparagraph may be granted only on condition that the undertakings concerned have legally marketed the products in question, using the names concerned continuously for at least the past five years and have made that point in the national objection procedure referred to in the first subparagraph of paragraph 5.

Such transitional national protection shall cease on the date on which a decision on registration under this Regulation is taken.

The consequences of such transitional national protection, where a name is not registered under this Regulation, shall be the sole responsibility of the Member State concerned.

The measures taken by Member States under the first subparagraph shall produce effects at national level only, and they shall have no effect on intra-Community or international trade.’

23 Article 13(1) of that regulation provides:

‘1. Registered names shall be protected against:

(a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name;

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression

such as “style”, “type”, “method”, “as produced in”, “imitation” or similar;  
...’.

#### **Regulation No 918/2004**

24 Recitals 2 to 4 of Regulation No 918/2004 state:

‘(2) Article 5(5) of Regulation (EEC) No 2081/92 provides, however, that geographical indications and designations of origin may be given transitional national protection by Member States from the date on which applications for registration of such names are sent to the Commission. The consequences of such national protection in cases where a name is not registered at Community level are entirely the responsibility of the Member State concerned.

(3) Following the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, the geographical indications and designations of origin of these countries (hereinafter “the new Member States”) may therefore be registered at Community level under Article 5 of Regulation (EEC) No 2081/92 and protected under Article 13.

(4) In order to facilitate the submission of applications to the Commission from the new Member States and ensure continuing protection of the relevant geographical indications and designations of origin, provision should be made for these Member States to uphold the national protection existing on 30 April 2004 until a decision has been taken under Article 6 of Regulation (EEC) No 2081/92, provided that an application for registration under that Regulation has been sent to the Commission by 31 October 2004.’

25 Article 1 of Regulation No 918/2004 provides:

‘The national protection of geographical indications and designations of origin within the meaning of Regulation (EEC) No 2081/92 existing in the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia on 30 April 2004 may be upheld by those Member States until 31 October 2004.

Where an application for registration under Regulation (EEC) No 2081/92 is forwarded to the Commission by 31 October 2004, such protection may be upheld until a decision has been taken in accordance with Article 6 of that Regulation.

The consequences of such national protection in cases where the name is not registered at Community level are entirely the responsibility of the Member State concerned.’

#### **National law**

##### **The bilateral convention**

26 On 11 June 1976, the Republic of Austria and the Czechoslovak Socialist Republic concluded an agreement on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products (‘the bilateral convention’).

27 Following approval and ratification, the bilateral convention was published in the Bundesgesetzblatt für die Republik Österreich of 19 February 1981 (BGBl. No 75/1981). Pursuant to Article 16(2) thereof, the bi-

lateral convention came into force on 26 February 1981 for an indefinite period.

28 Article 1 of the bilateral convention provides:

‘Each of the contracting States undertakes to take all the necessary measures to ensure effective protection against unfair competition in the course of trade for indications of source, designations of origin and other designations referring to the source of the agricultural and industrial products in the categories referred to in Article 5 and listed in the agreement provided for in Article 6, and the names and illustrations referred to in Articles 3, 4 and 8(2).

29 Under Article 2 of the bilateral convention:

‘Indications of source, designations of origin and other designations referring to the source within the meaning of this agreement mean all indications which relate directly or indirectly to the source of a product. Such an indication generally consists of a geographical designation. However, it may also consist of other information, if in the relevant consumer circles of the country of origin this is perceived, in connection with the product thus designated, as a reference to the country of production. In addition to the indication of source from a particular geographical area, the abovementioned designations may also contain information on the quality of the product concerned. These particular features of the product shall be determined solely or predominantly by geographical or human influences.’

30 Article 3(1) of the bilateral convention provides:

‘... the Czechoslovak designations listed in the agreement provided for in Article 6 shall in the Republic of Austria be reserved exclusively for Czechoslovak products.’

31 Point 2 of Article 5(1)B of the bilateral convention refers to beers as one of the categories of Czech products concerned by the protection established by that convention.

32 Under Article 6 of the bilateral convention:

‘Designations of the individual products meeting the conditions laid down in Articles 2 and 5 which enjoy protection under the agreement and which are therefore not generic names will be listed in an agreement to be concluded between the Governments of the two contracting States’.

33 Article 7 of the bilateral convention is worded as follows:

‘1. If the names and designations protected under Articles 3, 4, 6, and 8(2) of this agreement are used contrary to those provisions commercially for products, in particular for their presentation or packaging, or on invoices, waybills or other business documents or in advertisements, then all judicial and administrative measures for acting against unfair competition or otherwise suppressing prohibited designations which are available under the legislation of the contracting State in which protection is claimed shall be applied in accordance with the conditions laid down in that legislation and with Article 9.

2. Where a risk of confusion in commerce exists, paragraph 1 is also to be applied if the designations protected under the agreement are used in modified

form or for products other than those to which they are allocated in the agreement referred to in Article 6.

3. Paragraph 1 is also to be applied if the designations protected under the agreement are used in translation or with a reference to the actual source or with additions such as “style”, “type”, “as produced in”, “imitation” or the like.

4. Paragraph 1 does not apply to translations of designations from one of the contracting States where the translation is a colloquial word in the language of the other contracting State.’

#### **The bilateral agreement**

34 In accordance with Article 6 of the bilateral convention, an agreement on its application (‘the bilateral agreement’ and, together with the bilateral convention, ‘the bilateral instruments at issue’) was concluded on 7 June 1979.

35 Annex B to the bilateral agreement states: ‘Czechoslovak designations for agricultural and industrial products

...  
B Food and agriculture (except wine)

...  
2. Beer  
Czech Socialist Republic  
...  
Bud  
Budějovické pivo  
Budějovické pivo Budvar  
Budějovické Budvar  
...’.

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

36 The dispute in the main proceedings has already given rise to the judgment in [Case C-216/01 Budějovický Budvar \[2003\] ECR I-13617](#), by which the Court, hearing a reference for a preliminary ruling made by the same national court as in the present case, held:

‘1 Article 28 EC and ... Regulation ... No 2081/92 ..., as amended by ... Regulation ... No 535/97 ..., do not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country under which a simple and indirect indication of geographical source from that non-member country is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

2 Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country under which a name which in that country does not directly or indirectly refer to the geographical source of the product that it designates is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.

3 The first paragraph of Article 307 EC is to be interpreted as permitting a court of a Member State, subject to the findings to be made by that court having

regard inter alia to the criteria set out in this judgment, to apply the provisions of bilateral agreements such as those at issue in the main proceedings, concluded between that State and a non-member country and according protection to a name from the non-member country, even where those provisions prove to be contrary to the EC Treaty rules, on the ground that they concern an obligation resulting from agreements concluded before the date of the accession of the Member State concerned to the European Union. Pending the success of one of the methods referred to in the second paragraph of Article 307 EC in eliminating any incompatibilities between an agreement predating that accession and the Treaty, the first paragraph of that article permits that State to continue to apply such an agreement in so far as it contains obligations which remain binding on that State under international law.’

37 In paragraphs 28 to 42 of the judgment in *Budějovický Budvar*, the dispute in the main proceedings was summarised as follows:

‘28 Budvar markets beer, in particular under the names Budějovický Budvar and Budweiser Budvar, and exports a beer called “Budweiser Budvar”, in particular to Austria.

29 Ammersin markets inter alia a beer called American Bud, produced by the brewery Anheuser-Busch, which it buys from Josef Sigl KG (“Josef Sigl”), a company established in Obertrum (Austria) which is the sole Austrian importer of that beer.

30 By act of 22 July 1999, Budvar brought proceedings before the national court requesting that Ammersin be ordered to refrain from using on Austrian territory, in the course of its commercial activities, the name Bud, or similar designations likely to cause confusion, for beer or similar goods or in connection with such goods, save where Budvar products were concerned. In addition, Budvar also sought the suppression of all designations conflicting with that prohibition, the rendering of accounts and publication of the judgment. The action was accompanied by an application for interim measures.

31 Budvar’s action in the main proceedings is essentially based on two different pleas in law.

32 First of all, Budvar submits that the name American Bud, which is registered as a trade mark in favour of Anheuser-Busch, bears a similarity, likely to cause confusion within the meaning of the legislation on unfair competition, to its own priority trade marks protected in Austria, namely Budweiser, Budweiser Budvar and Bud.

33 Second, Budvar asserts that the use of the designation American Bud for a beer from a State other than the Czech Republic is contrary to the provisions of the bilateral convention because, pursuant to Article 6 of that convention, the designation Bud, referred to in Annex B to the bilateral agreement, is a protected designation and is therefore reserved exclusively for Czech products.

34 On 15 October 1999, the national court granted the interim measures sought by Budvar.

35 The appeal brought by Ammersin before the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) against those measures was not successful and leave to appeal to the Oberster Gerichtshof (Supreme Court) (Austria) was refused. Now that the interlocutory proceedings have ended, the Handelsgericht Wien is hearing the main application.

36 The national court observes that before bringing the action in the main proceedings, Budvar had already brought an action before the Landesgericht Salzburg (Regional Court, Salzburg) (Austria) which was identical with regard to both its purpose and its legal basis, but which was directed against Josef Sigl.

37 In that parallel case, the Landesgericht Salzburg ordered the interim measures sought by the claimant, and the Oberlandesgericht Linz (Higher Regional Court, Linz) (Austria) dismissed the appeal brought against that order. By order of 1 February 2000, the Oberster Gerichtshof dismissed the appeal brought on a point of law against the order made in the initial appeal proceedings, and upheld the interim measures.

38 The national court states that the order of the Oberster Gerichtshof is essentially based on the following considerations.

39 The Oberster Gerichtshof, which confined its examination to the plea related to the bilateral convention, held that the injunction sought against Josef Sigl, the defendant, could constitute an obstacle to the free movement of goods for the purposes of Article 28 EC.

40 However, it held that that obstacle is compatible with Article 28 EC because the protection of the designation Bud provided for in the bilateral convention constitutes protection of industrial and commercial property within the meaning of Article 30 EC.

41 According to the national court, the Oberster Gerichtshof held that the designation Bud is “a simple geographical indication or ... an indirect reference to source”, in other words an indication for which it is not necessary to respect the guarantees associated with designations of origin – such as production in compliance with the quality or manufacturing standards adopted and monitored by the authorities, or the specific product characteristics. Moreover, the designation Bud enjoys “absolute protection”, that is to say, irrespective of whether there is any risk of confusion or of consumers being misled.

42 In the light of the arguments submitted to it, the national court considers that there is reasonable doubt as to the correct answers to the questions of Community law raised in the main proceedings, in particular because it is not possible to ascertain from the Court’s case-law whether “simple” indications of geographical source, which do not carry any risk of consumers being misled, also come within the scope of the protection of industrial and commercial property within the meaning of Article 30 EC.’

38 In the order for reference, the national court summarises the developments which have taken place since delivery of the judgment in *Budějovický Budvar* as follows.

39 By a judgment of 8 December 2004, the national court dismissed Budvar’s action, holding that the designation ‘Bud’ is not an indication of provenance since the Czech public would not associate the designation ‘Bud’ with a particular place in the Czech Republic and it had never been used in that country to designate a place. The national court concluded therefrom that protection of that designation by the bilateral instruments at issue was incompatible with Article 28 EC. That judgment was upheld by a judgment of the Oberlandesgericht Wien of 21 March 2005.

40 However, by a decision of 29 November 2005, the Oberster Gerichtshof set aside the decisions of the previous courts and remitted the case to the national court for a fresh decision after further proceedings.

41 In the view of the Oberster Gerichtshof, whether the designation ‘Bud’ designated a region or place in the Czech Republic must be considered together with the criteria for a simple or indirect indication of provenance.

42 In the light of paragraphs 54 and 101 of the judgment in *Budějovický Budvar*, it should be ascertained whether the designation ‘Bud’ is at least capable of informing the consumer that the product bearing it came from a particular place, a particular region or a particular country. The question to be asked is thus whether consumers understand that designation, linked with beer, as a simple or indirect geographical designation of provenance. The national court has not yet considered that question.

43 Next, by a judgment of 23 March 2006, the national court, basing its finding primarily on the results of a consumer survey submitted by Anheuser-Busch, once again dismissed Budvar’s action on the ground that Czech consumers do not understand ‘Bud’, in connection with beer, as an indication of provenance.

44 However, the Oberlandesgericht Wien (Higher Regional Court of Vienna) (Austria), by judgment of 10 July 2006, set aside that judgment and once again remitted the case to the Handelsgericht Wien (Commercial Court of Vienna) (Austria), on the ground, essentially, that that court at first instance had to conduct further proceedings, since it had not allowed an application by Budvar for evidence to be taken by obtaining an opinion of a court expert after carrying out a survey of the relevant group of the public, which survey was to be limited to the questions:

- whether Czech consumers associate the designation ‘Bud’ with beer;
- whether Czech consumers, if there is a connection – be it spontaneous or provided by the expert – between the designation ‘Bud’ and beer, understand that designation as an indication that the beer comes from a particular place, a particular region or a particular country, and
- if the answer to the preceding question is in the affirmative, with which place, region or country they mentally associate the designation ‘Bud’ in connection with beer.

45 The national court regards it as necessary to ask the Court of Justice afresh for a preliminary ruling.



46 First, as demonstrated by the course of the proceedings after delivery of the judgment in *Budějovický Budvar*, uncertainties remain as regards the scope of that judgment.

47 The question arises first of all whether paragraphs 54 and 101 of that judgment are to be understood as meaning that, in order to determine whether a designation can be considered to constitute a simple and indirect indication of provenance likely to be compatible with Article 28 EC, all that matters is whether the designation ‘Bud’, according to the factual circumstances and perceptions prevailing in the Czech Republic, designates a region or place in that State, or whether it must be ascertained whether that designation in conjunction with the product bearing it, in the present case beer, is capable of informing consumers that the product bearing it comes from a particular place, a particular region or a particular country, without it being necessary for that designation in itself, according to those factual circumstances and perceptions, to designate, as such, a particular region, a particular place or a particular State.

48 Next, uncertainty remains as to the method to be used by the national court to determine whether, in the light of the criteria which it is to apply, the designation at issue constitutes a simple and indirect indication of provenance. The question arises in particular whether a consumer survey is necessary and the degree of assent required.

49 Finally, the national court takes the view that, in the light of the reference at paragraph 101 of the judgment in *Budějovický Budvar* to the factual circumstances in the Czech Republic, the question arises whether specific requirements must be laid down as to both the quality and the duration of the use made of the designation ‘Bud’. In particular, the question should be raised whether that designation has been used as a geographical indication or as a trade mark. According to the national court, it is established in that regard that no undertaking established in the Czech Republic other than *Budvar* has used the designation ‘Bud’ and that it was used as a trade mark and not as an indication of provenance.

50 Secondly, according to the national court, the factual and legal context of the dispute in the main proceedings has undergone fundamental changes compared to that which existed when that court made its reference for a preliminary ruling to the Court which gave rise to the judgment in *Budějovický Budvar*.

51 In that regard, the national court takes the view that, in the circumstances in the country of origin, namely, the Czech Republic, the designation ‘Bud’ is protected as a designation of origin. Following registration of that designation with WIPO under the Lisbon Agreement, that protection was extended to other States which are also parties to that Agreement.

52 The conditions under which that designation of origin is protected correspond to those from which designations of origin, as defined in Article 2(1)(a) of Regulation No 510/2006, benefit. It is therefore no longer permissible to take the view that the designation

‘Bud’ constitutes a simple and indirect indication of provenance which falls outside the scope of that regulation.

53 That is confirmed by the Act of Accession since that Act protects three indications of provenance concerning beer produced in the town of *Česke Budějovice*, namely ‘*Budějovické pivo*’, ‘*Českobudějovické pivo*’ and ‘*Budějovický měšťanský*’, designating a strong beer called ‘*Bud Super Strong*’.

54 In the light of those new circumstances, two questions arise.

55 In the first place, the question, on which the Court has not yet ruled, arises whether Regulation No 510/2006 is definitive in the sense that it precludes protection laid down by national law or a bilateral agreement on designations, such as the designation of origin ‘Bud’, registration of which has not been sought in accordance with that regulation but which in principle falls within the material scope thereof (the ‘exhaustive’ nature of Regulation No 510/2006).

56 The national court takes the view that Regulation No 918/2004, since it provides for a transitional period of protection during which national protection of designations of origin and geographical indications may be maintained, is plainly exhaustive in nature.

57 Nevertheless, if it were found that Regulation No 510/2006 is not exhaustive in nature, the national court takes the view that it remains necessary to ascertain whether, in any event, that regulation precludes the extension of that protection to other Member States since the view would have to be taken that it is exhaustive in nature as regards cross-border protection within the European Union.

58 In the second place, the question arises whether the protection granted by the Act of Accession to beer produced in the town of *Česke Budějovice* bearing the geographical indications ‘*Budějovické pivo*’, ‘*Českobudějovické pivo*’ and ‘*Budějovický měšťanský*’, protected under Regulation No 510/2006, is exhaustive in nature. If it is exhaustive in nature, that would mean that the existence of that protection precludes the maintenance of another designation such as ‘Bud’, which also designates beer produced in that town and which is protected as a designation of origin under national law.

59 Even if it were not accepted that that protection is exhaustive in nature, it should still be ascertained whether the existence of the protection of those three designations precludes, at the very least, extension of national protection of another geographical indication such as ‘Bud’ to other Member States by way of bilateral agreements concluded between Member States.

60 In those circumstances, since it took the view that resolution of the dispute before it depended on the interpretation of Community law, the *Handelsgericht Wien* decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) In its judgment [in *Budějovický Budvar*] the Court of Justice defined the requirements for the compatibility with Article 28 EC of the protection of a designation as a geographical indication which in the



country of origin is the name neither of a place nor of a region, namely that such a designation must:

- according to the factual circumstances and
- perceptions prevailing in the Czech Republic, designate a region or a place in that State,
- and that its protection must be justified there on the basis of the criteria laid down in Article 30 EC.

Do those requirements mean:

- that the designation as such must fulfil a specific geographical indication function referring to a particular place or a particular region, or does it suffice that the designation is capable, in conjunction with the product bearing it, of informing consumers that the product bearing it comes from a particular place or a particular region in the country of origin;
- that the three conditions are conditions to be examined separately and to be satisfied cumulatively;
- that a consumer survey is to be carried out for ascertaining perceptions in the country of origin, and, if so, that a low, medium or high degree of recognition and association is required in order for protection to be available;
- that the designation must actually have been used as a geographical indication by several undertakings, and not just one undertaking, in the country of origin and that use as a trade mark by a single undertaking precludes protection?

(2) Does the fact that a designation has not been notified or its registration applied for either within the six-month period provided for in Regulation No 918/2004 or otherwise in terms of Regulation No 510/2006 mean that existing national protection, or in any case protection that has been extended bilaterally to another Member State, becomes void if the designation is a qualified geographical indication, within the meaning of Regulation No 510/2006, under the national law of the State of origin?

(3) Does the fact that, in the context of the Act of Accession ... a new Member State, the protection of several qualified geographical indications for a foodstuff has been claimed by that Member State in accordance with Regulation No 510/2006 mean that national protection, or in any case protection that has been extended bilaterally to another Member State, for another designation for the same product may no longer be maintained, and Regulation No 510/2006 [is exhaustive in its effect] to that extent?

### **The questions referred**

#### **The first question**

##### **Admissibility**

61 According to Budvar, it is necessary to ask whether the first question is not hypothetical and therefore inadmissible since, in the view of the national court, the basis of that question, that is to say, the fact that the word 'Bud' as protected by the bilateral instruments at issue constitutes a simple and indirect geographical designation of provenance which is not a designation falling within the scope of Regulation No 2081/92 – which, moreover, is the view already adopted by the Oberster Gerichtshof and therefore accepted by the Court as forming the national legal basis

on which the first question referred in Budějovický Budvar was predicated (see paragraphs 41, 54 and 77 of that judgment) – can no longer be accepted.

62 As has already been stated in paragraphs 51 and 52 of the present judgment, the national court takes the view that its starting point must now be the premiss that, in the Czech Republic, the designation 'Bud' is protected as a qualified geographical indication, that is to say, a designation of origin falling within the scope of Regulation No 510/2006, which scope is identical in that regard to that of Regulation No 2081/92, since it is on that basis that the designation was registered with WIPO under the Lisbon Agreement and only qualified designations of origin can be so registered.

63 In that regard, it should nevertheless be borne in mind that, according to settled case-law, questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-333/07 Régie Networks [2008] ECR I-0000, paragraph 46 and the case-law cited).

64 The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (see, *inter alia*, Case C-350/07 Kattner Stahlbau [2009] ECR I-0000, paragraph 29 and the case-law cited).

65 In that regard, the new approach adopted by the national court, namely, that the designation 'Bud', as protected by the bilateral instruments at issue, must be classified as a designation of origin, an interpretation of national law which forms the basis of the second and third questions referred in the present reference for a preliminary ruling, constitutes a premiss which, it is true, is significantly different from that which underlay the first question referred in Budějovický Budvar and is also reflected in the first question referred in the present reference for a preliminary ruling, that is to say, whether what is involved is a simple and indirect indication of geographical provenance.

66 However, the possibility cannot be ruled out that, in reality, those are two distinct and, a priori, possible theories and that, at this stage, the national court does not wish definitively to discard that of a simple and indirect indication of geographical provenance, with the result that it referred the first question in order to allow for the possibility that it might, none the less, accept that theory.

67 In addition, classification as a designation of origin of the designation 'Bud' as protected by the bilateral instruments at issue raises a question which concerns only national law and which can be challenged before the higher courts, which, moreover, have given decisions in the past, some of which expressly adopted a different classification.

68 In those circumstances, it must be held that it has not been established that the first question is hypothetical in nature. Accordingly, the presumption of relevance enjoyed by references for a preliminary ruling has not been rebutted by the doubts expressed by Budvar.

69 It follows that the first question referred for a preliminary ruling is admissible.

#### **Substance**

70 By its first question, the national court asks, essentially, for paragraph 101 of the judgment in *Budějovický Budvar* to be clarified.

71 As a preliminary point, it should be noted that the first question concerns the protection of the designation 'Bud' as a simple and indirect indication of geographical provenance pursuant to the bilateral instruments at issue, which were concluded on 11 June 1976 and 7 June 1979 between the Republic of Austria and the Czechoslovak Socialist Republic. Those bilateral instruments were therefore concluded well before the accession of the Czech Republic to the European Union. Accordingly, the main proceedings do not involve the situation of bilateral instruments concluded at a time when the States in question were actually Member States.

72 In order to answer that question, it is necessary to place paragraph 101 of the judgment in *Budějovický Budvar* in the context of the Court's analysis, of which that paragraph forms an integral part.

73 In that regard, it must be borne in mind that, in paragraph 54 of the judgment in *Budějovický Budvar*, the Court observed that the first question referred in that case dealt with the hypothesis that the name 'Bud' constitutes a simple and indirect indication of geographical provenance, that is to say, a name in respect of which there is no direct link between a specific quality, reputation or other characteristic of the product and its specific geographical origin, so that it does not come within the scope of Article 2(2)(b) of Regulation No 2081/92 (see [Case C-312/98 Warsteiner Brauerei \[2000\] ECR I-9187, paragraphs 43 and 44](#)), and which, moreover, is not in itself a geographical name but is at least capable of informing the consumer that the product bearing that indication comes from a particular place, region or country (see [Case C-3/91 Exportur \[1992\] ECR I-5529, paragraph 11](#)).

74 On the basis of that hypothesis, the Court examined whether absolute protection, that is to say, irrespective of whether there is any risk of confusion, of a simple and indirect indication of geographical provenance such as that conferred on the designation 'Bud' by the bilateral instruments at issue can, since it is likely to constitute a restriction on the free movement

of goods ([Budějovický Budvar, paragraph 97](#)), be justified under Community law.

75 In paragraph 99 of the judgment in *Budějovický Budvar*, the Court recalled, in relation to the protection of an indication of source granted under a bilateral agreement of essentially the same kind as the one at issue in the main proceedings, that the aim of such an agreement, which is to prevent the producers of a contracting State from using the geographical names of another State and thereby taking advantage of the reputation of the products of undertakings established in the regions or places indicated by those names, is to ensure fair competition, since such an objective may be regarded as falling within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC, provided that the names in question have not, either at the time of the entry into force of that agreement or subsequently, become generic in the country of origin (see [Exportur, paragraph 37](#), and [Case C-87/97 Consorzio per la tutela del formaggio Gorgonzola \[1999\] ECR I-1301, paragraph 20](#)).

76 In paragraph 100 of the judgment in *Budějovický Budvar*, the Court held that, as is clear from, in particular, Articles 1, 2 and 6 of the bilateral convention, that objective forms the basis of the system of protection established by the bilateral instruments at issue.

77 It was in the light of those considerations that the Court held, in paragraph 101 of the judgment in *Budějovický Budvar*, that, if the findings of the national court show that according to factual circumstances and perceptions prevailing in the Czech Republic the name 'Bud' designates a region or a place located on the territory of that State and its protection is justified there on the basis of the criteria laid down in Article 30 EC, that does not preclude such protection from being extended to the territory of a Member State such as, in this case, the Republic of Austria.

78 With regard, first, to the reference at paragraph 101 of that judgment to factual circumstances and perceptions prevailing in the Czech Republic, that expression is to be understood in the particular context of the mechanism for protection of the designation 'Bud' under the bilateral instruments at issue, which rests in the fact that that mechanism, like, for example, that at issue in *Exportur*, is based on an extension of the protection provided in the Member State of origin, in the present case the Czech Republic, to the importing Member State, here the Republic of Austria.

79 Such a mechanism is distinguished by the fact, derogating from the principle of territoriality, that the protection conferred is determined by the law of the Member State of origin and by factual circumstances and perceptions in that State ([Exportur, paragraphs 12, 13 and 38](#)).

80 Accordingly, whether the designation 'Bud' constitutes a simple and indirect indication of geographical provenance must be ascertained by the national court in the light of those circumstances and perceptions prevailing in the Czech Republic.

81 In particular, as the Court noted at paragraph 54 of the judgment in *Budějovický Budvar*, a simple des-

ignation of geographical provenance is indirect if it is not in itself a geographical name but is at least capable of informing the consumer that the product bearing that indication comes from a particular place, region or country.

82 It must therefore be found that, in order to determine whether a designation can be considered to constitute a simple and indirect indication of geographical provenance, protection of which under the bilateral instruments at issue is capable of being justified on the basis of the criteria laid down in Article 30 EC, the national court must ascertain whether, according to factual circumstances and perceptions prevailing in the Czech Republic, that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State.

83 However, if such an examination were to show that the designation at issue is not at least capable of evoking the geographical provenance of the product, its protection cannot be justified on the grounds of protection of industrial and commercial property within the meaning of Article 30 EC and would in principle run counter to Article 28 EC unless it could be justified on another basis ([Budějovický Budvar, paragraphs 107 to 111](#)).

84 Secondly, with regard to the reference at paragraph 101 of the judgment in *Budějovický Budvar* to the fact that protection of the designation 'Bud' must be justified on the basis of the criteria laid down in Article 30 EC, it follows from the above that the national court must, in addition, ascertain, also in the light of factual circumstances and perceptions prevailing in the Czech Republic, whether, as mentioned in paragraph 99 of that judgment, the designation at issue in the main proceedings has not, either at the time of the entry into force of the bilateral instruments at issue or subsequently, become generic in that Member State, the Court having already held, in paragraphs 99 and 100 of that judgment, that the aim of the system of protection introduced by those instruments falls within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC.

85 Furthermore, it can also be stated that, if, after the national court has reached a view on the matters referred to in paragraphs 82 and 84 of the present judgment, it proves to be the case that, according to factual circumstances and perceptions prevailing in the Czech Republic, the designation 'Bud' at issue in the main proceedings is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State and that, according to those circumstances and perceptions, that designation has not, either at the time of the entry into force of the bilateral instruments at issue or subsequently, become generic in that Member State, it would follow that Articles 28 EC and 30 EC do not preclude national protection of such a simple and indirect indication of geographical source, nor, moreover, the extension of that protection by way of a

bilateral agreement to the territory of another Member State (see, to that effect, [Budějovický Budvar, paragraphs 101 and 102](#) and the case-law cited).

86 By the third part of the first question, which it is appropriate to consider at this point, the national court asks the Court whether, in the context of the assessment to be undertaken by that court, a consumer survey should be carried out for ascertaining perceptions prevailing in the Czech Republic and, in addition, asks what degree of recognition and association should be required.

87 In that regard, it is established that, on those points, Community law does not lay down any particular provision.

88 In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effects of Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, inter alia, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 57 and the case-law cited).

89 Accordingly, in the absence of any Community provision in that regard, it is for the national court to decide, in accordance with its own national law, whether a consumer survey should be commissioned for the purpose of clarifying the factual circumstances and perceptions prevailing in the Czech Republic in order to ascertain whether the designation 'Bud' can be classified as a simple and indirect indication of geographical source and has not become generic in that Member State. It is also in the light of that national law that the national court, if it finds it necessary to commission a consumer survey, must determine, for the purposes of making the necessary assessments, the percentage of consumers that would be sufficiently significant (see, by analogy, [Case C-210/96 Gut-Springenheide and Tusky](#) [1998] ECR I-4657, paragraphs 35 and 36).

90 Finally, by the fourth part of the first question, which it is appropriate to consider last, the national court asks whether it follows from paragraph 101 of the judgment in *Budějovický Budvar* and, in particular, from the reference there to the factual circumstances and perceptions prevailing in the Czech Republic, that specific requirements must be laid down as to both the quality and the duration of the use made of a designation, so as to mean that that designation must actually have been used as a geographical indication in the Member State of origin by a number of undertakings and not, as is the case of the designation at issue in the main proceedings, solely as a trade mark by a single undertaking.

91 In that regard, it must be noted that paragraph 101 of the judgment in *Budějovický Budvar*, particu-

larly if put back into the context of the reasoning behind the answer to the first question referred in that case (see paragraphs 73 to 77 of the present judgment), does not provide support for the view that Article 30 EC contains specific requirements as to both the quality and the duration of the use made of a designation in the Member State of origin for its protection to be justified on the basis of the protection of industrial and commercial property within the meaning of that article.

92 It is apparent from paragraph 54, read together with paragraphs 99 to 101, of the judgment in *Budějovický Budvar* that Article 30 EC does not preclude the extension conferred by the bilateral instruments at issue of the specific protection provided for the designation 'Bud' to the territory of another Member State than the Czech Republic since the aim of that protection falls within the sphere of the protection of industrial and commercial property within the meaning of that article, provided, however, that it be ascertained that, according to the factual circumstances and perceptions prevailing in the Czech Republic, that designation can be classified as a simple and indirect indication of geographical provenance and has not become generic in that Member State.

93 Accordingly, Article 30 EC, as interpreted in paragraph 101 of the judgment in *Budějovický Budvar*, does not lay down specific requirements as to the quality and the duration of the use made of a designation in the Member State of origin for its protection to be justified in the light of that article. Whether such requirements apply in the context of the dispute in the main proceedings must be determined by the national court in the light of the applicable national law, in particular the system of protection laid down by the bilateral instruments at issue.

94 In the light of the foregoing, the answer to the first question is that it follows from paragraph 101 of the judgment in *Budějovický Budvar* that:

– in order to determine whether a designation can be considered to constitute a simple and indirect indication of geographical provenance protection of which under the bilateral instruments at issue is capable of being justified on the basis of the criteria laid down in Article 30 EC, the national court must ascertain whether, according to factual circumstances and perceptions prevailing in the Czech Republic, that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State;

– the national court must, in addition, ascertain, once again in the light of factual circumstances and perceptions prevailing in the Czech Republic, whether, as stated in paragraph 99 of that judgment, the designation at issue in the main proceedings has not, either at the time of the entry into force of the bilateral instruments at issue or subsequently, become generic in that Member State, the Court having already held, in paragraphs 99 and 100 of that judgment, that the aim of the system of protection introduced by those instruments falls within the sphere of the protection of industrial

and commercial property within the meaning of Article 30 EC;

– in the absence of any Community provision in that regard, it is for the national court to decide, in accordance with its own national law, whether a consumer survey should be commissioned for the purpose of clarifying factual circumstances and perceptions prevailing in the Czech Republic in order to ascertain whether the designation 'Bud' at issue in the main proceedings can be classified as a simple and indirect indication of geographical provenance and has not become generic in that Member State. It is also in the light of that national law that the national court, if it finds it necessary to commission a consumer survey, must determine, for the purposes of making the necessary assessments, the percentage of consumers that would be sufficiently significant; and

– Article 30 EC does not lay down specific requirements as to the quality and the duration of the use made of a designation in the Member State of origin for its protection to be justified in the light of that article. Whether such requirements apply in the context of the dispute in the main proceedings must be determined by the national court in the light of the applicable national law, in particular the system of protection laid down by the bilateral instruments at issue.

#### The second question

95 By its second question, the national court asks, essentially, whether the Community system of protection laid down by Regulation No 510/2006 is exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.

#### Preliminary observations

96 As a preliminary point, it should be noted, first, as has been stated in paragraphs 51 and 52 of the present judgment, that, according to the national court, the present question concerns the theory that, in the Czech Republic, the designation 'Bud' is protected as a designation of origin and not as a simple indication of geographical provenance.

97 Secondly, since the Court delivered its judgment in *Budějovický Budvar*, the Czech Republic has acceded to the European Union.

98 It follows that, since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty, in particular the rules on the free movement of goods (see, to that effect, Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 37 and the case-law cited).

99 In addition, it must be pointed out that Article 307 EC does not apply to such agreements since no



third country is party to them (Case 235/87 Matteucci [1988] ECR 5589, paragraph 21).

100 Thirdly, it must be recalled that, according to the national court, it is as an appellation of origin that that designation has been registered and remains protected under the Lisbon Agreement.

101 In that regard, unlike the Czech Republic, the Republic of Austria is not a party to that Agreement, with the result that the protection provided under that Agreement cannot be claimed in that Member State.

102 Accordingly, the question whether the fact that Regulation No 510/2006 is exhaustive in nature precludes protection of the designation at issue in the main proceedings under the Lisbon Agreement does not arise in the main proceedings.

103 Since the definition of the concept of appellation of origin laid down in Article 2(1) of the Lisbon Agreement is essentially identical to that of a designation of origin in Article 2(1)(a) of Regulation No 510/2006, in the view of the national court it follows that the designation 'Bud' constitutes a designation of origin within the meaning of that regulation.

104 It is common ground that, to date, no application for registration of that designation has been made under Regulation No 510/2006. Nor is it disputed that no application for registration of that designation has been sent to the Commission pursuant to Regulation No 2081/92 under the transitional arrangements introduced by Regulation No 918/2004 concerning designations of origin and geographical indications existing in the ten States which became Member States of the European Union at the time of its enlargement in 2004.

105 Accordingly, the second question is based on the premiss that the protection of the designation 'Bud' claimed in the Republic of Austria by Budvar on the basis of the bilateral instruments at issue is based on the extension to that Member State of the protection of that designation as an existing appellation of origin in the Czech Republic, a designation which also corresponds to the definition of a designation of origin within the meaning of Regulation No 510/2006.

106 The question therefore arises more precisely whether Regulation No 510/2006 is exhaustive in nature so that it precludes such national protection and, consequently, also precludes extension of that protection under the bilateral instruments at issue to the territory of another Member State.

#### **Answer of the Court**

107 In accordance with settled case-law, the aim of Regulation No 2081/92 is to ensure uniform protection within the Community of the geographical designations which it covers; it introduced a requirement of Community registration in respect of those designations so that they could enjoy protection in every Member State (see, to that effect, *inter alia*, [Budějovický Budvar, paragraph 74](#) and the case-law cited).

108 That aim is apparent from the seventh recital in the preamble to Regulation No 2081/92 ([Joined Cases C-129/97 and C-130/97 Chiciak and Fol \[1998\] ECR I-3315, paragraphs 25 and 26](#)), which is essentially

identical to the sixth recital in the preamble to Regulation No 510/2006, which states:

'Provision should be made for a Community approach to designations of origin and geographical indications. A framework of Community rules on a system of protection permits the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework ensures fair competition between the producers of products bearing such indications and enhances the credibility of the products in the consumer's eyes.'

109 The Court has also held that Community legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through *inter alia* the use of designations of origin which enjoy special protection. In respect of agricultural products, that tendency manifested itself, in particular, in the adoption of Regulation No 2081/92, which, according to its preamble, is intended, *inter alia*, to meet consumers' expectations as regards products of quality and an identifiable geographical origin and to enable producers, in conditions of fair competition, to secure higher incomes in return for a genuine effort to improve quality (see, to that effect, *Ravil*, paragraph 48, and *Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita [2003] ECR I-5121, paragraph 63*).

110 Designations of origin fall within the scope of industrial and commercial property rights. The applicable rules protect those entitled to use them against improper use of those designations by third parties seeking to profit from the reputation which they have acquired. They are intended to guarantee that the product bearing them comes from a specified geographical area and displays certain particular characteristics. They may enjoy a high reputation amongst consumers and constitute for producers who fulfil the conditions for using them an essential means of attracting custom. The reputation of designations of origin depends on their image in the minds of consumers. That image in turn depends essentially on particular characteristics and more generally on the quality of the product. It is on the latter, ultimately, that the product's reputation is based. For consumers, the link between the reputation of the producers and the quality of the products also depends on their being assured that products sold under the designation of origin are authentic (*Ravil*, paragraph 49, and *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, paragraph 64).

111 It follows from this that Regulation No 510/2006, adopted on the basis of Article 37 EC, constitutes an instrument of the common agricultural policy essentially intended to assure consumers that agricultural products bearing a geographical indication registered under that regulation have, because of their provenance from a particular geographical area, certain specific characteristics and, accordingly, offer a guarantee of quality due to their geographical provenance, with the aim of enabling agricultural operators to secure higher incomes in return for a genuine effort to improve qual-

ity and of preventing improper use of those designations by third parties seeking to profit from the reputation which those products have acquired by their quality.

112 If the Member States were permitted to allow their producers to use, within their national territories, one of the indications or symbols which are reserved, under Article 8 of Regulation No 510/2006, for designations registered under that regulation, on the basis of a national right which could meet less strict requirements than those laid down in that regulation for the products in question, the risk is that that assurance of quality, which constitutes the essential function of rights conferred pursuant to Regulation No 510/2006, could not be guaranteed. That also carries the risk, in the internal market, of jeopardising the aim of fair competition between producers of products bearing those indications or symbols and, in particular, would be liable to harm rights which ought to be reserved for producers who have made a genuine effort to improve quality in order to be able to use a geographical indication registered under that regulation.

113 That risk of damage to the central aim of ensuring the quality of the agricultural products concerned is all the more important since, as the Advocate General observed in point 111 of his Opinion, unlike in the case of trade marks, no Community measure has been adopted in tandem, harmonising any national systems.

114 The conclusion must be drawn that the aim of Regulation No 510/2006 is not to establish, alongside national rules which may continue to exist, an additional system of protection for qualified geographical indications, like, for example, that introduced by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), but to provide a uniform and exhaustive system of protection for such indications.

115 A number of characteristics of the system of protection as laid down by Regulations No 2081/92 and No 510/2006 also support the view that that system is exhaustive in nature.

116 First, unlike other Community systems for the protection of industrial and commercial property rights, such as those of the Community trade mark under Regulation No 40/94 or plant variety rights under Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), the registration procedure under Regulations No 2081/92 and No 510/2006 is based on powers shared between the Member State concerned and the Commission, since the decision to register a designation may be taken by the Commission only if the Member State concerned has submitted to it an application for that purpose and such an application may be made only if the Member State has checked that it is justified (Case C-269/99 Carl Kühne and Others [2001] ECR I-9517, paragraph 53).

117 The national registration procedures are therefore incorporated in the Community decision-making procedure and constitute an essential part thereof. They

cannot exist outside the Community system of protection.

118 With regard to the Community registration procedure, it is also indicative that Article 5(6) of Regulation No 510/2006, a provision essentially identical to Article 5(5) of Regulation No 2081/92 as inserted in that regulation by Regulation No 535/97, provides that, on its sole responsibility, a Member State may grant transitional national protection until a decision on the application for registration is adopted.

119 In that regard, the Court has held, furthermore, that it follows from that provision that, under the system introduced by Regulation No 2081/92, where Member States have the power to adopt decisions, even of a provisional nature, which derogate from the provisions of the regulation, that power is derived from express rules ([Chiciak and Fol, paragraph 32](#)).

120 As the Advocate General observed in point 102 of his Opinion, a provision of that kind would be meaningless if the Member States were able in any event to retain their own systems of designations of origin and geographical indications within the meaning of Regulations No 2081/92 and No 510/2006 and have them coexist with those regulations.

121 Secondly, the fact that the system of protection laid down in Regulations No 2081/92 and No 510/2006 is exhaustive in nature is also evidenced by the transitional arrangements for existing national designations such as the Czech designation ‘Bud’ at issue in the main proceedings.

122 Thus, Article 17 of Regulation No 2081/92 introduced a so-called ‘simplified’ registration procedure for national designations legally protected in the Member State which sought their registration or, in Member States where there was no system of protection, validated through use ([Case C-66/00 Bigi \[2002\] ECR I-5917, paragraph 28](#)).

123 It was provided that, if their registration was sought within six months, their national protection could, on certain conditions, be maintained for a transitional period of five years in accordance with Article 13(2) of that regulation, which period was subsequently extended by an additional period of five years by Regulation No 535/97.

124 Since that specific system for the transitional protection of existing national designations had been repealed by Article 1(15) of Regulation No 692/2003, the Commission, by Regulation No 918/2004, laid down transitional provisions regarding the protection of designations of origin and geographical indications existing in the 10 States which became Member States of the European Union at the time of its 2004 enlargement, based on those laid down for the 15 old Member States.

125 Those provisions are especially relevant to the present case since, according to the national court, the designation ‘Bud’ existed at that time as a geographical designation in the Czech Republic.

126 Regulation No 918/2004 provided that the national protection of geographical indications and designations of origin within the meaning of Regula-

tion (EEC) No 2081/92 existing in the 10 new Member States on 30 April 2004 could be maintained for 6 months. However, as the simplified procedure no longer existed, that regulation provided that where an application for registration had been sent within that six-month period, that national protection could be maintained until the Commission had adopted a decision in accordance with Article 6 of Regulation No 2081/92.

127 Consequently, that regulation confirms, in respect of the 10 new Member States, what was already the case for the 15 old Member States, that is to say, that the national protection of existing qualified geographical indications is permitted only if the conditions in the rules of the transitional legislation specifically laid down in respect of such indications are met, including the condition that an application for registration be submitted within six months, which the Czech authorities neglected to do with regard to the designation 'Bud' at issue in the main proceedings.

128 Those particular systems and, especially, the express authorisation granted, on certain conditions, to the Member States to maintain, on a transitional basis, the national protection of existing qualified geographical indications would be difficult to understand if the Community system of protection of such indications were not exhaustive in nature, implying that the Member States retained in any event an unlimited capacity to maintain such national rights.

129 In the light of the foregoing, the answer to the second question is that the Community system of protection laid down by Regulation No 510/2006 is exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue, which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.

130 Having regard to that answer to the second question, there is no longer any need to answer the third question.

#### Costs

131 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 (Grand Chamber) hereby rules:

1. It follows from paragraph 101 of the judgment of 18 November 2003 in [Case C-216/01 Budějovický Budvar](#) that:

– in order to determine whether a designation can be considered to constitute a simple and indirect indication of geographical provenance, protection of which under the bilateral instruments at issue is capable of be-

ing justified on the basis of the criteria laid down in Article 30 EC, the national court must ascertain whether, according to factual circumstances and perceptions prevailing in the Czech Republic, that designation, even if it is not in itself a geographical name, is at least capable of informing the consumer that the product bearing that indication comes from a particular place or region of that Member State;

– the national court must, in addition, ascertain, once again in the light of factual circumstances and perceptions prevailing in the Czech Republic, whether, as stated in paragraph 99 of that judgment, the designation at issue in the main proceedings has not, either at the time of the entry into force of the bilateral instruments at issue in the main proceedings or subsequently, become generic in that Member State, the Court of Justice of the European Communities having already held, in paragraphs 99 and 100 of that judgment, that the aim of the system of protection introduced by those instruments falls within the sphere of the protection of industrial and commercial property within the meaning of Article 30 EC;

– in the absence of any Community provision in that regard, it is for the national court to decide, in accordance with its own national law, whether a consumer survey should be commissioned for the purpose of clarifying the factual circumstances and perceptions prevailing in the Czech Republic in order to ascertain whether the designation 'Bud' at issue in the main proceedings can be classified as a simple and indirect indication of geographical provenance and has not become generic in that Member State. It is also in the light of that national law that the national court, if it finds it necessary to commission a consumer survey, must determine, for the purposes of making the necessary assessments, the percentage of consumers that would be sufficiently significant; and

– Article 30 EC does not lay down specific requirements as to the quality and the duration of the use made of a designation in the Member State of origin for its protection to be justified in the light of that article. Whether such requirements apply in the context of the dispute in the main proceedings must be determined by the national court in the light of the applicable national law, in particular the system of protection laid down by the bilateral instruments at issue in the main proceedings.

2. The Community system of protection laid down by 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 is exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States, such as the bilateral instruments at issue in the main proceedings, which confers on a designation, which is recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed, despite the fact that no



application for registration of that designation of origin has been made in accordance with that regulation.

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OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 5 February 2009 1(1)

Case C-478/07

Budějovický Budvar National Corporation

v

Rudolf Ammersin GmbH

(Reference for a preliminary ruling from the Handelsgericht Wien)

(Geographical indications and designations of origin – Interpretation of the judgment of the Court of Justice of 18 November 2003 in Case C-216/01 Budějovický Budvar – Exclusive nature of Regulation No 510/2006)

**I – Introduction**

1. For the last hundred years, the United States Anheuser-Busch Inc. brewery and the Czech brewery Budějovický Budvar have been adversaries in interminable legal proceedings over the right to exclusive use of the names ‘Budweiser’ and ‘Bud’.

2. The main proceedings are now taking place in Austria before the Handelsgericht Wien (Commercial Court, Vienna), which in 2001 referred a question for a preliminary ruling to the Court of Justice in the same dispute, to which the Court replied by its judgment of 18 November 2003, ‘Bud I’. (2)

3. After its odyssey through higher courts, the case has returned – still unresolved – to the Viennese court, which has decided to refer fresh questions for a preliminary ruling before making its decision.

4. The first question, rather complex in its wording, seeks interpretation of various passages in the Bud I judgment, in particular on the requirements which a simple geographical indication must satisfy in order to be compatible with Article 28 EC.

5. The second and third questions broach the polemical issue of the exclusive nature of 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. (3) The Handelsgericht Wien, starting, surprisingly, from the hypothesis of a qualified geographical indication, enquires as to the validity of national protection for such a designation or of bilateral protection extended by treaty to a different Member State, in the light of two separate circumstances: on the one hand the fact that there has been no application for registration of the designation at Community level and, on the other, the fact that the qualified geographical indication in question is not included in a treaty concerning the accession of any Member State, unlike other names used for the beverage in question.

**II – Legal framework**

**A – International law**

6. Article 1(2) of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (4) provides that the countries which are contracting parties to the Agreement (5) undertake

to protect on their territories, in accordance with the terms of the Agreement, the appellations of origin of products of the other countries of the ‘Special Union’, recognised and protected as such in the country of origin and registered at the international office referred to in the Agreement establishing the World Intellectual Property Organisation (‘the WIPO’).

7. Article 2(1) of the Lisbon Agreement defines ‘appellation of origin’ as ‘the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’. The appellation of origin ‘Bud’ was registered for the beer at the WIPO on 10 March 1975 with No 598, under the Lisbon Agreement.

**B – The bilateral agreement**

8. On 11 June 1976, the Republic of Austria and the Czechoslovak Socialist Republic concluded an agreement on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products (‘the bilateral agreement’). (6)

9. According to Article 2 of the agreement, the terms ‘indications of source’, ‘designations of origin’ and other designations referring to source are used, for the purposes of the agreement, for all indications which relate directly or indirectly to the source of a product.

10. Under Article 3(1) ‘the Czechoslovak designations listed in the agreement provided for in Article 6 shall in the Republic of Austria be reserved exclusively for Czechoslovak products’. Point 2 of Article 5(1)B refers to beers as one of the categories of Czech products covered by the protection afforded by the bilateral agreement, and Annex B to the agreement, to which it refers in Article 6, includes ‘Bud’ as one of the Czechoslovak designations relating to agricultural and industrial products (under the heading ‘beer’).

11. By Constitutional Law No 4/1993 of 15 December 1992, the Czech Republic confirmed that it would assume the rights and obligations of the Czechoslovak Socialist Republic existing under international law on the date on which the latter ceased to exist.

**C – Community legislation**

**1. Regulation No 510/2006**

12. This new regulation on geographical indications and designations of origin recapitulates, in essence, the provisions of Regulation (EEC) No 2081/92, (7) which it repeals and replaces.

13. The sixth recital to Regulation No 510/2006 points out that provision ought to be made for ‘a Community approach to designations of origin and geographical indications’, in order to ensure fair competition between those who enjoy the protection of such indications and also the greater credibility of the products in the eyes of consumers.

14. Article 2 sets out what ‘designation of origin’ and ‘geographical indication’ mean for the purposes of the regulation. According to Article 2(1):

‘(a) “Designation of origin” signifies the name of a region, a specific place or, in exceptional cases, a coun-



try, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country,
  - the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and
  - the production, processing and preparation of which take place in the defined geographical area.
- (b) A “geographical indication” is confined to the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:
- originating in that region, specific place or country, and
  - which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and
  - the production and/or processing and/or preparation of which take place in the defined geographical area.’

15. An expression need not be a place name in order to be used as a designation of origin or as a geographical indication for, under Article 2(2) of the regulation, the category also includes ‘traditional geographical or non-geographical names’ which designate agricultural products or foodstuffs, provided that they fulfil the requirements referred to in Article 2(1).

16. Articles 5 to 7 of Regulation No 510/2006 regulate the ‘normal procedure’ for the registration of designations of origin and geographical indications, which consists of two phases, the first of which takes place before the national government and the second before the Commission.

17. Under Article 5, applications for registration are sent to the relevant Member State which, if they satisfy the requirements of Regulation No 510/2006, forwards the file to the Commission.

18. Article 5(6) of Regulation No 510/2006 affords Member States the possibility of granting transitional protection to the name at a national level, under the regulation. That temporary protection begins on the day the application is lodged with the Commission and ceases on the date on which a decision is made on inclusion in the register at Community level. If the name is not registered, the consequences of such transitional national protection ‘shall be the sole responsibility of the Member State concerned’.

## **2. Regulation (EC) No 918/2004**

19. In 2004 the inclusion of 10 new Member States in the European Union necessitated approval of a number of transitional measures relating to designations of origin and geographical indications.

20. That was the purpose of Regulation (EC) No 918/2004, (8) whose Article 1 authorised the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to maintain the national protection for the designations of origin and geographical indications existing on 30 April 2004, in accordance with Regulation No 2081/92,

- until 31 October 2004, as a general rule;
- or, where an application for registration had been forwarded to the Commission, until a decision was taken on the application.

21. The third paragraph of Article 1 likewise provided that the ‘consequences of such national protection in cases where the name is not registered at Community level are entirely the responsibility of the Member State concerned’.

### **3. The Act of Accession (9)**

22. Annex II to the Act of Accession itself extended the protection at Community level, by means of their registration as protected geographical indications, to the names of three beers from the Czech town of České Budějovice:

- Budějovické pivo;
- Českobudějovické pivo;
- Budějovický měšťanský var.

### **III – The main proceedings, their origins and the question referred for a preliminary ruling**

#### **A – A short history of a long dispute**

23. The struggle for exclusive use of the names ‘Budweiser’ and ‘Bud’ has for over a century generated serious conflicts between the Czech undertaking Budejovický Budvar (Budweiser Budvar, hereinafter ‘Budvar’) and the United States undertaking Anheuser-Busch.

24. The Budvar brewery (10) is to be found in the Czech town of České Budějovice, famous for a long tradition of brewing. (11) Since 1795 the undertakings which later converged in today’s Budvar have been making and selling beer with the names ‘Budweis’, (12) ‘Budweiser Bier’, (13) ‘Budvar’ or ‘Budbräu’. (14) The ‘Budweiser’ trade mark was registered in 1895.

25. In common with practically all brewers in Saint Louis (Missouri), the Anheuser-Busch family had German origins. (15) It is unsurprising, then, that, aware of the reputation of the Budweis beer, they decided in 1876 to launch on the American market a light beer with the name ‘Budweiser’, followed later by another with the abbreviated name ‘Bud’. Not only did they adopt the epithet of the Czech drink, but the recipe was also based on the brewing methods used in Bohemia (16) and they paraphrased the nickname ‘the beer of kings’, used in Budweis, with the labels on the American beer bearing the expression ‘the king of beers’. In February 1906 the United States Patent Office rejected Anheuser-Busch’s application for recognition of the ‘Budweiser’ trade mark, on the grounds that it was a geographical name. A year later, however, it was registered in the United States for 10 years.

26. Increased trade on both sides of the Atlantic gave birth to a conflict in which the first episode of litigation dates back to 1880. Since then, actions relating to the use of the names ‘Budweiser’ and ‘Bud’ have been brought in many countries, (17) with widely differing outcomes. (18)

27. Nor has the Community legal system remained apart from that global litigious approach. The represen-

tatives of both undertakings (or the distributors of their products) have frequently gone to the European tribunals, claiming infringement of Community law.

28. Repeatedly, Anheuser-Busch applied for registration of 'Budweiser' and 'Bud' as Community trade marks (as word and figurative marks and for various groups of classes). Budvar's opposition claiming earlier rights led to a series of decisions by the Second Board of Appeal of the Office for Harmonisation of the Internal Market ('OHIM' or 'the Office') and the corresponding appeals to the Court of First Instance of the European Communities.

29. For example, in its decision of 3 December 2003 the Office's Second Board of Appeal (19) upheld Budvar's opposition to registration of 'Budweiser' as a Community trade mark in class 32 (beers, etc.). An action was brought against that decision before the Court of First Instance, but the case did not proceed to judgment, Anheuser-Busch having withdrawn its application for registration. (20)

30. Conversely, the Office's Second Board of Appeal, in decisions of 14 and 28 June and 1 September 2006, (21) authorised registration of 'Bud' as a Community trade mark, despite the opposition of Budvar, which had invoked the bilateral agreements between Austria and Czechoslovakia and registration of the disputed name as an appellation of origin at the WIPO, under the Lisbon Agreements, with effect in France, Italy and Portugal. (22) The Board of Appeal took the view that it was difficult to conceive of 'Bud' as a designation of origin or as an indirect geographical indication and held that the evidence produced by Budvar on use of the name 'Bud', in particular in Austria, France and Portugal, was insufficient. It also held that mere use of the 'Bud' sign could not amount simultaneously to use of a trade mark and of an indication of origin since they perform different and incompatible roles. In its recent judgment of 16 December 2008 (23) the Court of First Instance annulled those Office decisions.

31. The Court of Justice itself has already delivered two judgments in the litigation carried on by the Czech company Budvar and the American company Anheuser-Busch. On the one hand, we have the Anheuser-Busch judgment of 16 November 2004 (24) and, on the other, the 2003 Bud I ruling, cited above.

32. In the first of those judgments, which concerned the Finnish strand of this long saga, the Court of Justice gave its decision on the rules applicable to use of a potentially conflicting registered trade mark and trade name, in particular in view of the Agreement on Trade-Related Aspects of Intellectual Property ('the TRIPS Agreement'). (25) That decision has no consequence whatsoever for the questions now under examination.

33. The Bud I ruling, in contrast, is much closer to the present case, signalling as it does the opening of the Austrian chapter, which turns more on geographical indications than on trade mark law.

## **B – The main proceedings**

### **1. The factual background to the first question referred for a preliminary ruling**

34. The facts which opened the present front of litigation in Austria go back to 1999, when Budvar applied to the Handelsgericht Wien for an order that Rudolf Ammersin GmbH (a company which markets beer in Austria under the American Bud brand) should refrain from using on Austrian territory the name 'Bud' or similar designations which might give rise to confusion, unless they were products of Budvar itself. It invoked, essentially, the bilateral agreement between the Republic of Austria and the Socialist Republic of Czechoslovakia, according to which the name 'Bud' (listed in Annex B to that agreement) could be used in Austria only for goods of Czech origin.

35. At the same time, Budvar had lodged an identical application with the Landesgericht Salzburg (Regional Court, Salzburg), here against Josef Sigl KG, the sole importer of American Bud beer into Austria. In that second action and, more specifically, in the appeal on a point of law brought in interlocutory proceedings for interim measures, on 1 February 2000 the Oberster Gerichtshof (Austrian Supreme Court), in addition to upholding the interim measures ordered by the lower court, held that protection of the name 'Bud' under the bilateral agreement was compatible with Article 28 EC, because it was covered by the definition of industrial and commercial property under Article 30 EC. It took the view that the designation 'Bud' was a 'simple' geographical indication (because there was no link between the characteristics of the product and its geographical origin) and also an 'indirect' geographical indication (because it was not, as such, a geographical name, but a description capable of informing consumers of the place of origin of the products), which enjoyed 'absolute protection', that is to say, irrespective of any risk of confusion or of consumers being misled.

### **2. The Bud I judgment**

36. Against that background, on 26 February 2001 the Handelsgericht Wien stayed the proceedings against Ammersin and referred four questions to the Court of Justice for a preliminary ruling, which the Court answered in the Bud I judgment of 18 November 2003.

37. The third and fourth questions related to the validity of the bilateral agreement in the Czech Republic (it must not be forgotten that it was the former Czechoslovakia which signed the agreement) and the effects of Article 307 EC.

38. Of greater relevance to the present case are the first two questions referred in 2001 to the Court of Justice, which found as follows:

'1. Article 28 EC and Council Regulation (EEC) No 2081/92 ... do not preclude the application of a provision of a bilateral agreement between a Member State and a non-member country under which a simple and indirect indication of geographical origin from that non-member country is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.'

2. Article 28 EC precludes the application of a provision of a bilateral agreement between a Member State and a non-member country under which a name which in that country does not directly or indirectly refer to the geographical source of the product that it designates is accorded protection in the importing Member State, whether or not there is any risk of consumers being misled, and the import of a product lawfully marketed in another Member State may be prevented.’

39. According to paragraphs 101 and 107 of the judgment, the referring court had to determine whether the name ‘Bud’ designated or referred to the origin of the product ‘according to factual circumstances and perceptions prevailing in the Czech Republic’.

### 3. Events since Bud I

40. Following the reply from the Court of Justice, on 8 December 2004 the Handelsgericht Wien dismissed the claimant’s application. It found that the Czech public did not associate the name ‘Bud’ with a specific region or a specific place, including the town of České Budějovice, or think that it identified products or services from a specific place, so that name could not be classified as a geographical indication. In line with the ruling of the Court of Justice, the Viennese court held that protection of the name in question should be found to be incompatible with Article 28 EC.

41. Although that first instance judgment was confirmed on appeal, the dispute was far from closed.

42. By order of 29 November 2005, the Oberster Gerichtshof annulled the earlier rulings and sent the case back to the Handelsgericht Wien for it to give judgment afresh after further proceedings. Applying the criteria set out in paragraphs 54 and 101 of Bud I, the Austrian Supreme Court concluded that, even though ‘Bud’ is not a geographical name, it is capable of informing consumers that the product it identifies comes from a particular place, region or country, whereas it remains uncertain whether in the minds of consumers ‘Bud’, in relation to beer, provides an indication of geographical source. It found, accordingly, that it still had not been determined whether the disputed name represented a simple or indirect geographical indication.

43. When the case was sent back to it, the court of first instance again rejected Budvar’s claims, in a judgment of 23 March 2006. On the basis of a demographic survey submitted by Ammersin, it held that the Czech public did not associate the name ‘Bud’ with a specific place, region or country and did not believe that Bud beer had a particular birthplace (specifically, České Budějovice).

44. The claimant appealed once more to the Oberlandesgericht Wien (Higher Regional Court, Vienna), which on that occasion set aside the contested decision, and sent the case back to the commercial court of first instance, recommending that, as Budvar proposed, a consumer survey should be conducted amongst relevant population groups to ascertain whether Czech consumers associated the designation ‘Bud’ with a beer product; whether, when they made that link (either spontaneously or at the suggestion of the expert), they

understood it as an indication that the product came from a specific place, region or country, and, if they did, with what place, region or country.

45. Addressing the case for the third consecutive time, the Handelsgericht Wien has found it necessary to make one last referral for a preliminary ruling by the Court of Justice, in order to clarify certain aspects of Bud I, interpretation of which has given rise to uncertainty in Austrian judicial circles, bearing in mind the significant factual and legal changes which have taken place since the 2003 judgment and, in particular, the Czech Republic’s accession to the European Union, the protection as geographical indications granted in the Accession Treaty to a series of names for beer from České Budějovice and the aforementioned decision of the Office’s Second Board of Appeal of 14 June 2006, which stated in its grounds that the name ‘Bud’, invoked by the claimant, cannot at one and the same time be a trade mark and a geographical indication.

### C – The questions referred

46. Pursuant to Article 234 EC, the Handelsgericht Wien refers the following questions to the Court of Justice for a preliminary ruling:

‘(1) In its judgment of 18 November 2003 in Case C-216/01 the Court of Justice defined the requirements for the compatibility with Article 28 EC of the protection of a designation as a geographical indication which in the country of origin is the name neither of a place nor of a region, namely that such a designation must,

- according to the factual circumstances and
- perceptions in the Czech Republic, designate a region or a place in that State,
- and that its protection must be justified there on the basis of the criteria laid down in Article 30 EC.

Do those requirements mean:

(1.1) that the designation as such fulfils a specific geographical indication function referring to a particular place or a particular region, or does it suffice that the designation is capable, in conjunction with the product bearing it, of informing consumers that the product bearing it comes from a particular place or a particular region in the country of origin;

(1.2) that the three conditions are conditions to be examined separately and to be satisfied cumulatively;

(1.3) that a consumer survey is to be carried out for ascertaining perceptions in the country of origin, and, if so, that a low, medium or high degree of recognition and association is required;

(1.4) that the designation has actually been used as a geographical indication by several undertakings, not just one undertaking, in the country of origin and that use as a trade mark by a single undertaking precludes protection?

(2) Does the circumstance that a designation has not been notified or its registration applied for either within the six-month period provided for in Regulation (EC) No 918/2004 or in Regulation (EC) No 510/2006 mean that existing national protection, or in any case protection that has been extended bilaterally to another Member State, becomes void if the designation is a

qualified geographical indication under the national law of the State of origin?

(3) Does the circumstance that, in the context of the Treaty of Accession between the Member States of the European Union and a new Member State, the protection of several qualified geographical indications for a foodstuff has been claimed by that Member State in accordance with Regulation (EC) No 510/2006 mean that national protection, or in any case protection that has been extended bilaterally to another Member State, for another designation for the same product may no longer be maintained, and Regulation (EC) No 510/2006 has preclusive effect to that extent?

#### **IV – The proceedings before the Court of Justice**

47. The request for a preliminary ruling was lodged at the Registry of the Court of Justice on 25 October 2007.

48. The claimant and the defendant in the main proceedings and the Greek and Czech Republic Governments have submitted written observations, as has the Commission.

49. At the hearing, held on 2 December 2008, the representatives of Budejovický Budvar Nacional Corporation, Rudolf Ammersin GmbH, the Czech Republic, the Hellenic Republic and of the Commission appeared in order to make their oral submissions.

#### **V – Analysis of the questions referred**

##### **A – Two introductory considerations**

50. The present reference for a preliminary ruling has two particular features which warrant examining at the outset.

##### **1. Interpretation of an earlier judgment**

51. The first peculiarity lies in the fact that the Handelsgericht Wien asks the Court of Justice to clarify the meaning of certain passages in Bud I.

52. The fact that the subject-matter of the referral is, in part, not a provision of Community law but a decision of this Court, does not, to my mind, raise issues of admissibility. The case-law has in the past entertained responses to requests of this kind made by national courts by way of references for preliminary rulings in, for example, the judgments of 16 March 1978, Robert Bosch, (26) and of 16 December 1992, ‘B & Q’. (27)

53. Here, the request for interpretation of an earlier ruling stems from the different views about it held by two Austrian courts, one higher than the other. In view of the emphasis which the Oberster Gerichtshof and the Oberlandesgericht Wien lay on the manner of taking and evaluating evidence of one aspect of the proceedings (the perception of the name ‘Bud’ in the Czech Republic), the Handelsgericht Wien has referred the case to the Court of Justice, perhaps in the hope that it will endorse its position or that it will, at least, put an end to the latent dissension between the national courts.

54. However, the Court of Justice should not take up the challenge. In Bud I it expressly made the evaluation in question the responsibility of the national court and there is no reason for it now to change its mind or to bring into play different criteria or clarifications additional to those it made in the past.

##### **2. The starting hypothesis changes**

55. The second unusual feature of the present case is that the referring court’s basic hypothesis differs between the three questions referred. In the first question, the Viennese court enquires about the criteria for ‘Bud’ to be considered a ‘simple and indirect’ geographical indication compatible with Article 28 EC, whilst the second and third questions are based on the assumption that the name is a ‘qualified’ geographical indication under the domestic law of the State of origin.

56. The distinction between simple and qualified geographical indications is widely accepted in legal academic circles (28) and in the case-law. (29)

57. Simple geographical indications do not require products to have any special characteristics or element of renown deriving from the place from which they come, but they must be capable of identifying that place. In contrast, geographical indications which designate a product having a quality, reputation or other characteristic related to its origin are qualified geographical indications. As well as the geographical link, they have another, qualitative, link, less strong than that of designations of origin, which are reserved to products whose particular characteristics are due to natural or human factors relating to their place of origin. Community law protects only designations of origin and qualified geographical indications.

58. Bud I held that ‘Bud’ is a simple geographical indication,(30) not within Regulation No 2081/92, and identified the circumstances in which its protection would be consistent with Community law at national level or those required for it to extend to a non-member State. By raising fresh doubts about the wording of that judgment, the referring court reiterates its original understanding of the name as a simple geographical indication. It is surprising, then, that it immediately afterwards poses two questions based on a potential classification of ‘Bud’ as a qualified geographical indication, falling within the scope of the Community regulation.

59. The claimant undertaking sees that inconsistency as grounds for refusing to admit the first question referred.

60. According to settled case-law, it is solely for the national court hearing the dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers under Article 234 EC. (31) However, the Court of Justice has conceded that, in exceptional cases, it is incumbent on it to examine the circumstances in which a national court refers a question, in order to confirm its own jurisdiction. (32) That occurs when the issue submitted to the Court of Justice is purely hypothetical, (33) since the spirit of cooperation which must prevail in the preliminary ruling procedure implies that the national court must have regard to the function entrusted to the Court of Justice, in the interests of assisting in the administration of justice in the Member States, and must not ask it to deliver advisory opinions on general or hypothetical questions. (34)

61. The Handelsgericht Wien itself recognises indirectly in its order for reference that the first question is



hypothetical by stating that, although in 2000 (when it referred for a preliminary ruling the questions which gave rise to Bud I) ‘it was assumed that the designation ‘Bud’ was a simple and indirect geographical indication’, everything has changed since then, since Bud I ‘referred, as regards the question of the compatibility with Article 28 EC of the protection of an indirect geographical indication, to the situation in the country of origin, namely the Czech Republic’, and “‘Bud’ is protected in law in the Czech Republic as an appellation of origin’.

62. Despite those clear statements, the meaning which people attribute to the name ‘Bud’ in the Czech Republic is still the subject of debate, around which in reality the entire main proceedings revolve. The response to the first question referred can in my view assist in determining whether it satisfies the requirement of a geographical link, a *sine qua non* for it to be treated as a geographical indication. If, in addition, there is a qualitative link, or any other grounds for regarding the name as a designation of origin in the Czech Republic, the response of the Court of Justice to the second and third questions would be extremely helpful.

63. Accordingly, although in other circumstances it would be essential for the facts of the case to have been proved and for issues of purely national law to have been resolved at the time of the referral to the Court of Justice, (35) on this occasion the three questions referred must be declared admissible.

#### **B – The first question**

64. By its first question, the Handelsgericht Wien submits to the Court of Justice a number of enquiries relating to the passages of Bud I which defined ‘the requirements for the compatibility with Article 28 EC of the protection of a designation as a geographical indication which in the country of origin is the name neither of a place nor of a region’.

65. Those passages are, in particular, paragraphs 101 and 107 of the judgment, in which the referring court is called upon to verify whether ‘according to factual circumstances and perceptions prevailing in the Czech Republic’, the name ‘Bud’ identifies a region or place in the territory of that State. If so, and if the national protection were ‘justified on the basis of the criteria laid down in Article 30 EC’, its extension to the territory of a Member State would be compatible with Community law. There would, otherwise, be an infringement of Article 28 EC.

##### **1. The method of verifying the association of ‘Bud’ with a particular place**

66. The Viennese court’s first enquiry is whether the name must, as such, perform a function as a specific geographical reference to a place or a region or whether it is sufficient that it suggests to consumers that the product has a certain origin.

67. Paragraph 101 of Bud I advocates verifying whether the name ‘Bud’ ‘designates’ a region or place, which would mean, on a first analysis, that it corresponds to a place name. Paragraph 107, however, undermines that approach by referring to direct or indi-

rect identification. Furthermore, the decision is based on the assumption that ‘Bud’ is a ‘simple and indirect’ geographical indication. (36)

68. Geographical indications and even designations of origin do not always consist of geographical names. They are called ‘direct’ when they do and ‘indirect’ when they do not, provided the indication or designation at least informs consumers that the foodstuff to which it relates comes from a specific place, region or country. Regulation No 510/2006 itself allows for the latter situation by referring, in Article 1(2), to ‘traditional names’, even though they may not be place names. (37)

69. In order to satisfy the requirements laid down in Bud I it is therefore sufficient for the term to identify the product’s place of origin. In the situation under analysis, it must be ascertained whether ‘Bud’ makes it clear to Czech citizens that beer with that name comes from the town of České Budějovice, which does not mean that the name performs that role of geographical indication when it is mentioned together with the product in question, and only then.

70. A number of the defendant’s objections are apposite. In paragraphs 25 and 26 of its written submissions, Ammersin asserts that its competitor Budvar in fact uses the word ‘Bud’ as a trade mark and not as a geographical indication, (38) a factor which in its view might obscure objective assessment of the role which the word ‘Bud’ actually performs, since ‘beer drinkers – like drivers – normally know the place, region or country where the beer or car they have bought is made’, and this does not have to cause confusion between such trade marks and indications of origin. It gives some very eloquent examples, such as those of Coca-Cola or Volkswagen. Most Americans know that Coca-Cola is made in Atlanta and many Germans associate Volkswagen with the town of Wolfsburg, but that does not make either of them geographical indications.

71. Regardless of whether the Czech public can guess where ‘Bud beer’ comes from, it must be ascertained whether the expression ‘Bud’ is sufficiently clear to evoke a product, beer, and its origin, the town of České Budějovice.

72. In the same way that the words ‘cava’ or ‘grappa’ call to mind the Spanish and Italian birthplaces of a sparkling wine and of a liqueur respectively and that ‘feta’ identifies a Greek cheese, (39) were it to be found that ‘Bud’ represents a geographical indication, Czech consumers would have to associate the expression with a precise place and with the brewing of beer.

##### **2. Whether the three requirements are independent**

73. In the second part of its first question, the Handelsgericht Wien asks whether Bud I, by asserting that everything depends on ‘the factual circumstances and perceptions prevailing in the Czech Republic’, and that protection of the name ‘Bud’ in that State is justified on the basis of the criteria laid down in Article 30 EC, ‘intends to differentiate so that three separate criteria must be assessed, or whether this is only meant to state that

Czech consumers associate a place, region or particular country with the designation “Bud” (connected or not connected with the product bearing it, depending on the answer to the first question).

74. The second interpretation is more correct. The wording of Bud I seems to be based on paragraph 12 of the judgment in *Exportur*, according to which the protection of indications of provenance is determined by the law of the country of import and ‘by factual circumstances and current conceptions in that country’. However, in Bud I regard must be had to the circumstances in the country of origin of the products (the Czech Republic), and not those of the importing country (Austria), since that decision examined the extension to Austria of the protection for the name ‘Bud’ in the Czech Republic, by virtue of a bilateral agreement.

75. Paragraph 101 means, therefore, that Czech consumers must associate ‘Bud’ with a particular place or region, on the terms set out in the reply to question 1.1), without particular ‘circumstances’ having to be present.

76. If that requirement is found to be satisfied, it must be ascertained that the name ‘Bud’ has not become generic in the State of origin, a prerequisite in the case-law for an indication of provenance to be classified as ‘industrial property’ under Article 30 EC. (40) If it has not, its protection would be justified on the basis of the criteria in that article.

### **3. The need to conduct a survey**

77. The third part of the first question enquires of the Court as to the appropriate mechanism ‘for ascertaining perceptions in the country of origin’ of the term and, in particular whether a survey is appropriate.

78. The case-law has accepted the possibility of using a consumer survey both to show that an advertising statement is misleading, (41) and to prove that a mark is distinctive. (42) In both situations the Court of Justice specified that the decision to use a particular tool lies with the national court, which must decide in accordance with the law of the Member State.

79. Following the principle of procedural autonomy, therefore, in the present case too it is for the national courts to determine, in accordance with their own law, whether an expert report or consumer survey should be commissioned to ascertain whether the name ‘Bud’ acts as an indication of provenance, and to fix the percentage of consumers which would be considered sufficiently significant for that purpose.

### **4. Use of ‘Bud’ by a single undertaking**

80. By the fourth and last part of its first question, the *Handelsgericht Wien* asks whether Bud I mean that a geographical indication must be used as such in the country of origin by several undertakings, with the effect that its use as a trade mark by a single undertaking would be contrary to protection.

81. The national court’s queries flow from the fact that the ‘designation “Bud” is a trade mark registered for the applicant in the Czech Republic’, and the applicant is, moreover, the only company which uses it in the Czech Republic, even though ‘it is in the nature of

an indication of origin that it is used by all producers in a particular region who are entitled to do so’.

82. Geographical indications and trade marks are distinct, although related, figures. Both protect an article’s commercial reputation against potential unlawful usurpation by third parties, focussing on its geographical or its business origin respectively. They differ in that a trade mark safeguards a private interest, that of its holder, whereas a geographical indication protects the interests of all producers established in the relevant area.

83. To my mind, the foregoing distinction does not mean that a geographical indication has to be used simultaneously by several companies in the region in order to preserve its validity, which depends on other factors. At least, I do not believe that such a requirement can be inferred, as the question put to the Court seems to suggest, from paragraph 101 of Bud I which mentions the need to investigate the ‘factual circumstances’, in relation to the disputed name, in the Czech Republic.

84. However, it is not a matter here either of a trade mark or of a geographical indication registered at Community level. How many people must in practice use the name in order for it to remain effective must therefore be determined by national law, in the light of the bilateral agreement.

85. We find something similar as regards the question whether use of ‘Bud’ as a trade mark by a single undertaking would compromise its protection as a geographical indication.

86. Community legislation lays down a number of rules to resolve potential conflicts between geographical indications and trade marks, precepts with a certain underlying preference for the former, perhaps because they protect the public interest in consumers knowing the provenance and characteristics of goods. (43) Accordingly, under Article 14 of Regulation No 510/2006, application for registration of trade marks will be refused if they correspond to protected designations of origin or geographical indications, whilst trade marks registered earlier or acquired by established use in good faith will coexist with indications subsequently registered in accordance with European law. Community trade mark legislation also prohibits the use of signs which may mislead as to the geographical origin of the product. (44)

87. In the present case, however, any such conflict between use of the ‘Bud’ trade mark and its recognition as a geographical indication must be resolved by the national court, in accordance with the bilateral agreement.

### **C – The second question**

88. By its second question, the Austrian court seeks to know whether, if a designation has not been notified to the Commission for registration at Community level, national protection in force or protection extended bilaterally to another Member State becomes void when there is found to be a qualified geographical indication in accordance with the internal law of the State of origin (in the present instance, the Czech Republic). (45)

89. The Court of Justice is asked, in short, to decide whether the Community provisions for the protection of geographical indications and designations of origin are exclusive, one of the most contentious issues in the present field, which the case-law has, to date, answered only in part.

90. Where names provide no geographical link, that is to say, they neither directly nor indirectly designate the geographical provenance of the product, Bud I found their protection to be contrary to Article 28 EC. There is, then, no national protection for such designations. (46) Nor do they have protection under Community law.

91. As regards simple geographical indications, it is apparent from Bud I and Warsteiner (47) that their protection at national level is consistent with Article 28 EC, for they fall within the exceptions under Article 30 EC under the heading 'industrial property'. Such indications do not fall within the scope of the Community regulation (which requires the term to have a topographical significance and, further, that the products should have some special attribute or renown as a result of the place from which they come).

92. There remain designations of origin and qualified geographical indications, which do satisfy the requirements of the European legislation and may, therefore, be registered and enjoy protection under Regulation No 510/2006. However, unless they are registered at Community level, it is uncertain that Member States can protect them with their own arrangements or that that regulation is exclusive and precludes any intervention at State level within the formal and material scope of its application.

93. The issue is complex. (48) What we have here ultimately is the debate about Community 'pre-emption' of a measure and the situations in which the concurrent competences of the Member States in a particular field may have been displaced by the activity of the Community legislature. (49)

94. The debate becomes further convoluted in the present case because the national regulations apparently operate under cover of Article 30 EC. As is well established in the case-law, that article is not designed 'to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article'. (50) Reliance on the exceptions under Article 30 EC may no longer be justified, however, if a Community provision comes to safeguard the same interests as the national provision, once harmonisation is complete. (51)

95. Regulation No 510/2006 does not completely resolve the issue, which has generated division amongst legal commentators (52) and has led the Member States to adopt divergent positions.

96. In my view, an exclusive Community system is more coherent with the wording of the Community provisions, with their purpose and with the case-law of the Court of Justice.

### **1. The wording of Regulation No 510/2006 and of Regulation No 918/2004**

97. In contrast to the trade mark context, where the European legislature has clearly opted for a dual – national and Community – system of protection, (53) in the field of geographical indications it was content to approve a regulation for their protection at Community level, without at the same time harmonising any national systems.

98. Underlying that different regulatory strategy is perhaps the perception that national provisions cannot remain in place which potentially operate in the sphere proper to the Community regulation. The text of Regulation No 510/2006 contains a number of pointers.

99. Article 5(6) is rather revealing, although it needs some clarification.

100. That article establishes that, from the date on which an application for registration is lodged with the Commission, the 'Member State may, on a transitional basis only, grant protection under this regulation at national level to the name' (first subparagraph). Later, it adds that 'such transitional national protection shall cease on the date on which a decision on registration under this Regulation is taken' (third subparagraph), and then specifies that the 'consequences of such transitional national protection, where a name is not registered under this Regulation, shall be the sole responsibility of the Member State concerned' (fourth subparagraph).

101. The Court of Justice confirmed, in Warsteiner, that Article 5(6) (54) 'has no bearing on the question whether Member States may, in their respective national territories, grant protection under their national law to geographical designations for which they do not apply for registration under Regulation No 2081/92 or which do not meet the conditions for receiving the protection provided for by that regulation' (paragraph 53).

102. Admittedly, Article 5(6) says nothing about the exclusive nature of the Community regulation, and merely covers contingencies which might arise whilst a Community decision on registration is pending, but that fact does not prevent us from invoking the provision as an aid to interpretation, since any provision of that kind would be meaningless if the Member States were able to retain their own systems in the sphere of application of the Community regulation, because the name would be covered by the national provision during the transitional period.

103. That assumption that national protection for qualified geographical indications continues only provisionally seems to lie behind the transitional provisions for the protection of the designations of origin and geographical indications of agricultural products and foodstuffs in the new Member States, contained in Regulation No 918/2004.

104. Article 1 of that regulation allows the Czech Republic and the other States acceding in 2004 to extend until 31 October of that year the 'national protection of geographical indications and designations of origin within the meaning of Regulation (EEC) No 2081/92 existing ... on 30 April 2004', and added, in parallel to

the authorisation under Article 5(6) of Regulation No 510/2006 that, where ‘an application for registration ... is forwarded to the Commission’, that protection can be upheld until a decision is made on it.

105. The foregoing provision, which is clearer than Article 5 of Regulation No 510/2006, not only refers to the period of effectiveness of a national system being extended where there is an application for registration, until the application is determined, but also expressly states that the systems existing in the Member States at the time of accession continue only until 31 October 2004, from which it is to be concluded that, after one or the other date, there is no national protection alongside the Community regulation and operating in the same sphere.

106. The foregoing inference is not, in my view, shaken by the assertion that the State in question bears entirely the ‘consequences of such national protection in cases where the name is not registered at Community level’ (or by the corresponding provision in the fourth subparagraph of Article 5(6) of Regulation No 510/2006). The subparagraph refers to the repercussions of the national provisions during the transitional period, if the indication applied for is not registered, and not to the repercussions of maintaining the State provisions beyond that provisional period.

## **2. The purpose of the Community provisions and their legislative history**

107. The objectives of Regulation No 510/2006 can be achieved only with a single European instrument for the protection of designations of origin and geographical indications.

108. Since its advent, the legislation in question has responded to the need to follow a ‘Community approach’ to the subject.

109. That emerges from the sixth and seventh recitals in the preamble to the 1992 regulation which state that ‘the desire to protect agricultural products or foodstuffs which have an identifiable geographical origin has led certain Member States to introduce “registered designations of origin”’. It acknowledged that there was currently ‘diversity’ in those national practices, and advocated a ‘Community approach’, since ‘a framework of Community rules on protection will permit the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers’ eyes’ (the wording of the sixth recital in the preamble to the new 2006 regulation is very similar).

110. The aim is, therefore, to guarantee identical quality for all consumers within the limits of the Treaty, a goal which is unlikely to be attained if there is different treatment, albeit in a limited geographical area, for names which have the same characteristics as those contained in the register at Community level. (55)

111. Probably for that reason the preambles to both regulations have placed such emphasis on the desirability of aligning the provisions governing qualified geographical indications, particularly since no directive

has been adopted in tandem, harmonising any national systems. Had the intention been for those to remain in force, notwithstanding that ‘uniformity’, there would have been a harmonisation, as there was with trade marks.

112. The legislative history of Regulation No 2081/92 also provides a few pointers to the intention of the Community legislature.

113. The Commission’s stance has always been plain. In its 1990 Proposal (56) it advocated that protection at Community level should replace national protection mechanisms, a view which it subsequently ratified in its various interventions before the Court of Justice. The Economic and Social Committee, conversely, expressed in its report its preference that the two levels should coexist. (57)

114. The differences of opinion continued in the negotiating process, but the Council finally opted not to include any express reference to the continuance of national systems. It did include, however, a hint that the regulation was exclusive, by requiring in the 12th recital that ‘to enjoy protection in every Member State geographical indications and designations of origin must be registered at Community level’.

## **3. Case-law**

115. Although, as I commented above, the Court of Justice has not yet ruled on this point, a number of decisions prefigure the view that the Community regulation is exhaustive.

116. The judgments in *Gorgonzola* (58) and *Chiciak and Fol* (59) highlight the limitations to which Member States are subject from the moment they apply to the Commission to register a name.

117. In *Gorgonzola*, the Court held that the argument that the protection granted by a Member State to a designation of origin continues after its registration, provided that it is wider in scope than the protection at Community level, is contradicted by the wording of the regulation, ‘which permits Member States to maintain national protection of a name only until such time as a decision has been taken on its registration as a name protected at Community level’.

118. In *Chiciak and Fol* the Court held that a Member State cannot alter a designation of origin for which it has applied for registration under the regulation, nor protect it at national level, specifically linking the regulation’s enthusiasm for uniformity to its exclusive nature, when it held that it ‘is intended to ensure uniform protection within the Community of geographical names’, adding that such ‘uniform protection results from registration carried out in accordance with the rules specifically laid down by the regulation’ (paragraph 25). In that vein, it stated that the Community provision introduced ‘the requirement for geographical names to be registered at Community level in order to enjoy protection in every Member State’, and defined the Community framework which was thenceforth to govern that protection (paragraph 26).

119. Paragraph 50 of *Warsteiner* contains a similar declaration. It is to be borne in mind that paragraph 49 of that decision states that ‘the purpose of Regulation No



2081/92 cannot be undermined by the application, alongside that regulation, of national rules for the protection of geographical indications of source which do not fall within its scope'. On a contrario interpretation, that assertion means that a national system governing qualified geographical indications, which are covered by the Community regulation, could indeed jeopardise attainment of the purpose of the European provision.

120. The case-law therefore seems to have accepted the suggestion in the 12th recital in the preamble to Regulation No 2081/92 that registration at Community level is compulsory.

121. If, then, registration is compulsory for names falling within the scope of the regulation, which, moreover, regulates the matter exclusively, an indication with those characteristics which has not been notified within the relevant period for registration at Community level will remain unprotected, since there is no parallel national protection, given that any such national system is no longer valid.

#### **4. Continuance of protection extended bilaterally to another Member State**

122. If the system created by the Community regulation is incompatible with maintenance of national protection in the same sphere, with all the more reason must its extension to other Member States be ruled out.

123. That view finds support in Article 5(6) of Regulation No 510/2006, the fifth subparagraph of which establishes that any protection measures which Member States transitionally afford to names where an application for their registration at Community level is pending 'shall produce effects at national level only, and they shall have no effect on intra-Community ... trade'.

124. The provision seeks to prevent the protection for names which fall within the scope of the regulation from being suspended following an application for registration at Community level. However, it curbs the temporal and geographical scope of the effectiveness of the transitional national protection, in keeping with the intention of generating 'uniformity' in the treatment of geographical indications within the scope of the European Union.

125. The 'Community approach' of Regulation No 510/2006 implies not only the disappearance of any national system of qualified geographical indications but also, and with all the more reason, that any bilateral agreement between two Member States to protect those indications outside the confines of the regulation will be inapplicable. The continued existence of a network of intra-European conventions superimposed on the Community rules would introduce a degree of opacity incompatible with the objectives of that mechanism.

126. The Czech Republic submits, however, that any line of argument supporting the exclusive nature of Regulation No 510/2006 implies denying the international obligations of the acceding States, in particular in the context of protection in the Member States of the Lisbon Union, and would therefore infringe Article 307 EC. (60)

127. However, Article 307 EC cannot validly be relied on in this case, in which no rights of any States outside the Union are now in issue. That emerges from the wording of the article, according to which the provisions of the EC Treaty will not affect 'rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other'. As the Court of Justice pointed out in its judgment in *Matteucci*, (61) that article (formerly Article 234 EC) is not concerned 'with agreements concluded solely between Member States'. Accordingly, there can be no grounds for setting it up in relation to an agreement the only parties to which are two Member States (irrespective of the fact that they were not Member States at the time it was signed), and which has no connection whatsoever with a non-member State.

#### **5. Inference to be drawn**

128. The Community legislature did not here go down the route of mutual recognition, but opted to centralise the instruments of protection at Community level. The mechanism makes sense only if the 'protected geographical indication' stamp has a specific meaning, associated with quality and identical for all consumers, an unattainable aim were the European rules to coexist with other systems of varying regional scope but applicable to names with the same characteristics.

129. In my view, Regulation No 510/2006 precludes any national or bilateral protection for qualified geographical indications which fall within its scope of application. Accordingly, a name which is within that scope and which has not been notified to the Commission cannot obtain protection from one or more Member States independently, and is unprotected. However, that circumstance does not derive solely, as the wording of the question referred for a preliminary ruling would seem to suggest, from non-registration of the indication, but from the fact that the Community system is exclusive.

#### **D – The third question**

130. The third question referred by the *Handelsgericht Wien* seeks to ascertain whether the fact that the treaty concerning the accession of the Czech Republic to the European Union includes protection for various qualified geographical indications for beer from the town of České Budějovice has any relevance to the validity of the systems of national and bilateral protection for a different name for the same product.

131. That last question requires no response if it is found that Regulation No 510/2006 is exclusive, since any national or treaty-based protection operating within its scope must cease, regardless of the fact that other indications for a particular foodstuff may have been registered at Community level.

132. Notwithstanding the foregoing, the reply to the question calls for analysis of the *Chiciak and Fol* judgment, which determined a case in some ways similar to that now at issue.

133. By Decree of 14 May 1991, the French Government established the 'Epoisses de Bourgogne'

designation of origin for a type of cheese from that region, and applied to the European Commission to register it under Regulation No 2081/92. In 1995 the Decree was amended to register the term 'Epoisses' as the registered designation of origin. The Chiciak and Fol judgment ruled that a Member State may not adopt provisions of national law to alter a designation of origin for which it has requested registration under the Community regulation, nor protect it at national level.

134. That decision limited the powers of a Member State in relation to a geographical indication notified to the Commission for registration. The Community regulation permits transitional protection for that name to continue in the State (limited in time and to a particular area, as I explained above). The Chiciak and Fol judgment added that the national authorities may not alter the indication notified.

135. In the 'Epoisses' case, then, the State conduct criticised by the Court of Justice was amendment of a name for which registration was pending, and to my mind the judgment is therefore not directly applicable, on a first analysis, where the protection is for a designation denoting the same place of provenance as other designations already registered, for the same product, at Community level.

136. The belief that it is necessary to confine Member States' sphere of operation in the field underpins Chiciak and Fol, but it is unnecessary to interpret it so widely, given that the regulation is, in my view, unquestionably exclusive.

137. It would, therefore, be appropriate to apply the Chiciak and Fol precedent to the present case only if the name 'Bud' were a part or an abbreviation of any of the geographical indications protected at Community level for beer from České Budějovice (Budějovické pivo, Českobudějovické pivo y Budějovický měšťanský var, according to the Accession Treaty). (62) That issue must, however, be determined by the national courts.

138. Accordingly, the fact that a name, unlike other names for the same foodstuff with the same provenance, is not on the list in the Accession Treaty so as to have protection at Community level, is not, in theory, an obstacle to its national or bilateral protection, unless it is a shortened version or a part of any of the notified geographical indications. That assertion has no practical consequences, however, given the exclusive nature of Regulation No 510/2006.

#### **VI – Conclusion**

139. In the light of the foregoing considerations, I suggest to the Court of Justice that it should respond as follows to the questions raised for a preliminary ruling by the Handelsgericht Wien:

(1) The requirements defined by the Court of Justice in its judgment of 18 November 2003 in Case C-216/01 Budějovický Budvar for the protection as a geographical indication of a designation which in the country of origin is the name neither of a place nor of a region to be compatible with Article 28 EC:

(1.1) mean that the name must be sufficiently clear to call to mind a product and its origin;

(1.2) are not three different requirements which must be satisfied separately;

(1.3) do not require a consumer survey or define the result which has to be obtained in order to justify protection;

(1.4) do not mean that, in practice, the name must be used in the country of origin as a geographical indication by more than one undertaking and says nothing about its use as a trade mark by a single undertaking.

(2) When a designation has not been notified to the Commission under 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, national protection in force or protection bilaterally extended to another Member State becomes invalid if the designation is a qualified geographical indication under the law of the State of origin, having regard to the fact that Regulation No 510/2006 is exclusive as regards the indications within its scope of application.

(3) The fact that the Treaty of Accession between the Member States of the European Union and a new Member State introduces protection for various qualified geographical indications for a foodstuff under Regulation No 510/2006 does not preclude maintenance of existing national protection or protection bilaterally extended to another Member State for a different name for the same product, unless that name is an abbreviation or a part of any of the geographical indications protected at Community level for the same product. Regulation No 510/2006 does not have exclusive effect to that extent, without prejudice to the response to the second question referred.

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1 – Original language: Spanish.

2 – Case C-216/01 Budějovický Budvar [2003] ECR I-13617.

3 – OJ 2006 L 93, p. 12.

4 – Adopted on 31 October 1958, revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (UN Treaty Series, Vol. 923, No 13172, p. 205).

5 – The 'Lisbon Union' (<http://www.wipo.int/treaties/en>) currently comprises 26 countries, which include the Czech Republic.

6 – It was published in the Bundesgesetzblatt für die Republik Österreich of 19 February 1981 (BGBl. No 1981/75) and came into force on 26 February 1981 for an indefinite period.

7 – 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).

8 – Commission Regulation of 29 April 2004 introducing transitional arrangements for the protection of geographical indications and designations of origin for agricultural products and foodstuffs in connection with the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2004 L 163, p. 88).

9 – Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

10 – Its full name is ‘Budějovický Budvar, národní podnik, Budweiser Budvar, Nacional Corporation, Budweiser Budvar, Entreprise Nationale’, meaning ‘Budweis Bud brewery, national corporation’.

11 – According to some it goes back to the XIII century, when King Premysl Otakar II of Bohemia founded the town and granted its inhabitants the privilege of brewing beer (O’Connor, B., ‘Case C-216/01 Budejovický Budvar, Judgment of the Court of Justice of 18 November 2003’, *European Business Organization Law Review* 5, 2004, p. 581).

12 – The name of České Budějovice in German.

13 – In Czech, ‘Budějovické pivo’, meaning ‘beer from Budweis’.

14 – Which means ‘Bud brewery’.

15 – Anheuser derived from an earlier entity, Bavarian Brewery, created in 1852. It was later renamed Anheuser-Busch, as a result of its incorporation into the firm belonging to Adolphus Busch, son-in-law of the owner of the company, and likewise a German immigrant. That and other historical facts can be seen at [www.anheuser-busch.com/History.html](http://www.anheuser-busch.com/History.html) and [www.budweiser.com](http://www.budweiser.com).

16 – As apparent from statements by Adolphus Busch himself in 1894, in the course of the lawsuit between Anheuser-Busch and Fred Miller Brewing Company: ‘The idea was simply to brew similar in quality, colour, flavour and taste to beer then made at Budweis, or in Bohemia ... The Budweiser beer is brewed according to the Budweiser Bohemian process’ (O’Connor, op. cit., p. 582).

17 – O’Connor (op. cit., p. 585) records up to 44 different sets of proceedings around the world.

18 – In some cases the courts found that Anheuser-Busch had an exclusive right to use the name ‘Bud’, whilst in others the Czech company won. In England in 2002, the Court of Appeal in London chose a compromise solution, enabling both companies to use the disputed trade marks. Similarly, the Japanese Supreme Court ruled in 2004 that both the Czech and the American brewers could call their beers ‘Budweiser’ (O’Connor, op. cit., p. 586). The peculiar features of the proceedings in Portugal are also worth highlighting. The Supreme Court’s ruling of 23 July 2001, refusing to allow Anheuser-Busch to register the ‘Budweiser’ trade mark in Portugal on the grounds that it was a designation of origin protected by a 1986 bilateral agreement between Portugal and Czechoslovakia, was challenged before the European Court of Human Rights, which held that the contested decision did not infringe Article of Protocol No 1 to the European Convention on Human Rights (ECHR, *Anheuser-Busch Inc. v Portugal*, 11 January 2007 (not yet published in

the Reports of Judgments and Decisions), paragraph 87.

19 – Cases R 1000/2001-2 and R 1024/2001-2.

20 – Joined Cases T-57/04 and T-71/04 *Budějovický Budvar v OHIM – Anheuser-Busch (Budweiser)* [2007] ECR II-1829, paragraph 228.

21 – Cases R 234-2005-2, R 241/2005-2, R 802/2004-2 and R 305/2005-2.

22 – The Portuguese, Italian, and French courts, however, have cancelled the registrations of Bud as an appellation of origin under the Lisbon Agreements.

23 – Joined Cases T-225/06, T-255/06, T-257/06 and T-309/06 *Budějovický Budvar v OHIM –Anheuser-Busch (BUD)* [2008] ECR I-0000.

24 – Case C-245/02 *Anheuser-Busch Inc. v Budějovický Budvar* [2004] ECR I-10989.

25 – That Agreement is referred to in Annex 1 C of the Agreement establishing the World Trade Organisation and was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

26 – Case 135/77 *Bosch* [1978] ECR 855

27 – Case C-169/91 [1992] ECR I-6635.

28 – Amongst others, Cortés Martín, J.M., *La protección de las indicaciones geográficas en el comercio internacional e intracomunitario*, Ministerio de Agricultura, Pesca y Alimentación, Madrid, 2003, p. 347.

29 – Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 11, Case C-312/98 *Warsteiner* [2000] ECR I-9187, paragraphs 43 and 44, and *Bud I*, paragraph 54.

30 – Because that is how it was specified by the referring court, in accordance with an earlier decision of the Austrian Supreme Court.

31 – Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 34; Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 34; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43; and Case C-248/07 *Trespa International* [2008] ECR I-0000, paragraph 32.

32 – Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21.

33 – Case C-379/98 *Preusen Elektra* [2001] ECR I-2099; paragraph 39, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22; and Case C-458/06 *Skatteverket* [2008] ECR I-0000, paragraph 25.

34 – *Foglia*, op. cit., paragraphs 18 and 20; Case 149/82 *Robards* [1983] ECR 171, paragraph 19; *Meilicke*, op. cit., paragraph 64; and Case C-62/06 *ZF Zefeser* [2007] ECR I-11995, paragraph 15.

35 – Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735, paragraph 6.

36 – *Bud I*, paragraph 54.

37 – Regulation No 2081/92 only allows traditional names (at least expressly) for designations of origin.

38 – Something that I analyse at greater length below.

39 – See here my Opinion in Case C-317/95 *Canadane Cheese Trading* [1997] ECR I-468, point 73, and that in



- Joined Cases C-465/02 and C-466/02 Germany and Denmark v Commission [2005] ECR I-9115, point 188.
- 40 – Bud I, paragraph 99; Exportur, *op. cit.*, paragraph 37; and Case C-87/97 Consorzio per la tutela del formaggio Gorgonzola [1999] ECR I-1301, paragraph 20. As regards whether a name is generic, see my Opinion in Germany and Denmark v Commission, *op. cit.*, points 46 to 49.
- 41 – Case C- 210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 35, and Case C-220/98 Estée Lauder Cosmetics [2000] ECR I-117, paragraph 31.
- 42 – Joined Cases C-108/97 and C-109/97 Windsurfing Chiemsee [1999] ECR I-2779, paragraph 53.
- 43 – Resinek, N., ‘Geographical indications and trade marks: Coexistence or “first in time, first in right” principle?’, *European Intellectual Property Review*, vol. 29 (2007), issue 11, pp. 446-455, von Mühlendhal, A., ‘Geographical indications and trade marks in the European Union: conflict or coexistence’, *Festschrift till Marianne Levin*, 2008, pp. 401-410, and Martínez Gutiérrez, A., ‘La tutela comunitaria de las denominaciones geográficas protegidas ante las marcas registradas’, *Noticias de la Unión Europea*, year XIX (2003), No 219, pp. 27-36.
- 44 – Articles 3(1)(c) and (g), and Article 12(2)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1). For further clarifications on interpretation of those provisions, see *Windsurfing Chiemsee*. In relation to conflicts between trade marks and indications of origin, see Case C-100/02 Gerolsteiner Brunnen [2004] ECR 691.
- 45 – The order for reference speaks of a designation which ‘has not been notified or its registration applied for ... within the six-month period provided for in Regulation (EC) No 918/2004’. That time-limit, which appeared in Article 17 of the former Regulation No 2081/92, began to run on the date on which it came into force and, naturally, has disappeared in the new Regulation No 510/2006. Regulation No 918/2004, in turn, refers only to ‘an application for registration under Regulation (EEC) No 2081/92 [being] forwarded to the Commission by 31 October 2004’. That provision does not, however, preclude the possibility of using the ordinary registration period, with no time-limit, under the new Regulation No 510/2006. That is why, in my findings on maintenance of the national provisions, I make no reference to that six-month time-limit.
- 46 – Also Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 Pistre [1997] ECR I-2343, paragraphs 35 and 36.
- 47 – Case C-312/98 [2000] ECR I-9187.
- 48 – Here I share the view of Advocate General Jacobs at point 41 of his Opinion in *Warsteiner*. The possibility of the Community regulation coexisting with national systems operating in the same field did not, however, arise in that case, which related only to the lawfulness of a national system of simple geographical indications, quite clearly not covered by the regulation.
- 49 – As Stephen Weatherill point outs, the Court of Justice plays an important role in defining the scope of any such ‘displacement’, although its function is not to choose between the merits of two competing regulatory systems, but rather to interpret the Community provision in order to determine whether it has occupied the entire field (Weatherill, S., ‘Beyond preemption? Shared competence and constitutional change in the European Community’, *Legal Issues of the Maastricht Treaty*, Ed. Wiley, 1999, p. 18).
- 50 – Case 5/77 Tedeschi [1977] ECR 1555, paragraph 34.
- 51 – The case-law provides several examples from the common agricultural policy: Tedeschi, paragraph 35, Case 148/78 Ratti [1979] ECR 1629, paragraph 36, Case 215/78 Denkavit [1979] ECR 3369, paragraph 14, Case 190/87 Moormann [1988] ECR 4689, paragraph 10, and Case C-323/93 Centre d’insemination Crespelle [1994] ECR I-5077, paragraph 31.
- 52 – The defendant in the main proceedings adduces more than 10 writers who have argued in favour of the principle that the Community system of qualified geographical indications applies preclusively. There are also numerous opposite views. Cortés Martín, J.M., *op. cit.*, p. 452, gives a broad summary of the different academic positions.
- 53 – A Community system was introduced with Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) and, in parallel, national bodies of legislation were harmonised by means of First Directive 89/104, referred to above.
- 54 – The judgment refers to the second subparagraph of Article 5(5) of Regulation No 2081/92, in force at the time, the import of which has been reproduced in Article 5(6) of Regulation No 510/2006.
- 55 – According to López Escudero, M., Regulation No 2081/92 created ‘an internal market in geographical designations ... protection for names which is effective throughout the Community and has proven much more favourable for producers than the protection conferred by the national provisions ... By means of Regulation No 2081/92 the EC has set up a system of special protection for geographical designations, seeking to reduce the problems caused to intra-Community trade by disparities between the existing national systems’, systems which must be understood to have been eliminated (López Escudero, M., ‘Parmigiano, feta, epoisse y otros manjares en Luxemburgo – Las denominaciones geográficas ante el TJCE’, *Une communauté de droit*, *Festschrift für Gil Carlos Rodríguez Iglesias*, BWV 2003, pp. 410 and 419).
- 56 – Commission Proposal, SEC (90) 2415 (OJ 1990 C 30).
- 57 – OJ C 269/63.
- 58 – Consorzio per la tutela del formaggio Gorgonzola, paragraph 18.
- 59 – Joined Cases C-129/97 and C-130/97 Chiciak and Fol [1998] ECR I-3315.
- 60 – Surprisingly, the Commission too cites that article in its written observations, stating that the regulation precludes the protection in question being extended to



the territory of another Member State ‘without prejudice to Article 307 EC’. Questioned on that point at the hearing, it replied that the phrase was introduced to provide an exception to cover any situations in which a Member State is bound to uphold treaties with non-member States which predate its accession. Which is what occurs with the non-member States who are parties to the Lisbon Agreement.

61 – Case 235/87 [1988] ECR 5589, paragraph 21.

62 – The defendant in the main proceedings denies any such possibility. In any event, the fact, also claimed by Ammersin, that the name ‘Bud’ already enjoyed protection before accession is irrelevant to that issue.

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