

Court of Justice EU, 7 June 2018, Scotch Whisky Association



TRADEMARK LAW – PROTECTED GEOGRAPHICAL INDICATION

For the purpose of establishing that there is ‘indirect commercial use’ of a registered geographical indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it:

- It is not sufficient that that element is liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto.

For the purpose of establishing that there is an ‘evocation’ of a registered geographical indication, account is not to be taken either of the context surrounding the disputed element:

- In particular, no account is to be taken of the fact that that element is accompanied by an indication of the true origin of the product concerned.

“The order for reference indicates that Mr Klotz, the defendant in the main proceedings, maintains that the designation ‘Glen Buchenbach’ is a play on words consisting of the name of the place of origin of the drink at issue in the main proceedings (Berglen) and the name of a local river (‘Buchenbach’). However, the Court has already held that it is immaterial, so far as Article 16(b) of Regulation No 110/2008 is concerned, that the disputed designation corresponds to the name of the undertaking and/or the place where the product is manufactured (see, to that effect, judgment of 21 January 2016, Viiniverla, C-75/15, EU:C:2016:35, paragraphs 42 to 45).”

For the purpose of establishing that there is a ‘false or misleading indication’, as prohibited by that provision, account is not to be taken of the context in which the disputed element is used.

- If a false or misleading indication could nonetheless be permitted because it is accompanied by additional information relating, in particular, to the true origin of the product concerned, that provision would be deprived of practical effect.

Finally, as has already been stated in paragraph 38 of this judgment, the purpose of Regulation No 110/2008 and, in particular, of Article 16 thereof, is to protect registered geographical indications, both in the interests of consumers who should not be misled by inappropriate indications, and in the interests of economic operators which bear higher costs in order to guarantee the quality of products that lawfully bear protected geographical indications. Those operators must be protected against acts of unfair competition.

As the Advocate General has observed in point 101 of his Opinion, attainment of those objectives would be jeopardised if the protection of geographical indications could be restricted by the fact that additional information is included alongside an indication which is false or misleading, within the meaning of Article 16(c) of Regulation No 110/2008, since accepting that interpretation would be tantamount to allowing the use of such an indication provided that it is accompanied by correct information.

Source: curia.europa.eu

(J.L. da Cruz Vilaça, E. Levits, A. Borg Barthet, M. Berger (Rapporteur) and F. Biltgen)

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

7 June 2018 (*)

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

In Case C-44/17,

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

Scotch Whisky Association

v

Michael Klotz,

THE COURT (Fifth Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Scotch Whisky Association, by K.H. Reuer and W. Baars, Rechtsanwältinnen,

– Mr Klotz, by S.J. Mühlberger, Rechtsanwalt,

– the Greek Government, by G. Kanellopoulos, E. Leftheriotou, M. Tassopoulou and E. Chroni, acting as Agents,

– the French Government, by D. Colas, S. Horrenberger and E. de Moustier, acting as Agents,

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

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 16(a) to (c) of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 (OJ 2008 L 39, p. 16).

2. The request has been made in proceedings between the Scotch Whisky Association and Mr Michael Klotz, an online distributor of whisky, concerning an action seeking an order that Mr Klotz cease to market a whisky produced in Germany under the designation ‘Glen Buchenbach’.

Legal context

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

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

4. Recital 4 of that regulation states:

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

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

‘Given that Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [(OJ 2006 L 93, p. 12), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1),] does not apply to spirit drinks, the rules for protection of geographical indications on spirit drinks should be laid down in this Regulation. Geographical indications should be registered, identifying spirit drinks as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the spirit drink is essentially attributable to its geographical origin.’

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

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

(a) any direct or indirect commercial use in respect of products not covered by the registration in so far as

those products are comparable to the spirit drink registered under that geographical indication or in so far as such use exploits the reputation of the registered geographical indication;

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation, or labelling of the product liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product.’

7. Annex III to Regulation No 110/2008, entitled ‘Geographical indications’, states that ‘Scotch Whisky’ has been registered as a geographical indication relating to the second category of goods, namely ‘Whisky/Whiskey’, with the ‘United Kingdom (Scotland)’ listed as the country of origin.

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

8. The Scotch Whisky Association is an organisation constituted under Scottish law. Its objectives include protecting the trade in Scottish whisky both in Scotland and abroad.

9. Mr Klotz markets, via a website, a whisky under the designation ‘Glen Buchenbach’, which is produced by the Waldhorn distillery in Berglen, located in the Buchenbach valley in Swabia (Germany).

10. The label on the whisky bottles in question includes, in addition to a stylised depiction of a hunting horn (Waldhorn in German), the following information: ‘Waldhornbrennerei’ (Waldhorn distillery), ‘Glen Buchenbach’, ‘Swabian Single Malt Whisky’, ‘500 ml’, ‘40% vol’, ‘Deutsches Erzeugnis’ (German product), ‘Hergestellt in den Berglen’ (produced in the Berglen).

11. The Scotch Whisky Association brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking an order that Mr Klotz, inter alia, cease to market that whisky, which is not Scotch whisky, under the designation ‘Glen Buchenbach’, on the ground that use of that designation infringes, in particular, Article 16(a) to (c) of Regulation No 110/2008, which protects the geographical indications registered in Annex III to that regulation, which include ‘Scotch Whisky’.

12. According to the Scotch Whisky Association, those provisions ensure that a geographical indication registered for a spirit drink is protected not only against the use of such an indication but also against any reference that suggests the geographical origin of that indication. It argues that because the designation ‘Glen’ is very widely used in Scotland instead of the word ‘valley’ and, in particular, as an element of the trade mark in the names of Scottish whiskies, it evokes in the relevant public an association with Scotland and Scotch Whisky despite the fact that other information is included on the label, which specifies that the product

at issue is of German origin. Mr Klotz contends that the action should be dismissed.

13. The Landgericht Hamburg (Regional Court, Hamburg) states that whether the claim is to succeed depends on the interpretation to be given to Article 16(a) to (c) of Regulation No 110/2008. It has therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does “indirect commercial use” of a registered geographical indication of a spirit drink in accordance with Article 16(a) of [Regulation No 110/2008] require that the registered geographical indication be used in identical or phonetically and/or visually similar form, or is it sufficient that the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area?

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

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

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

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

The request that the oral part of the procedure be reopened

14. Following the presentation of the Advocate General’s Opinion, the Scotch Whisky Association, by a letter of 15 March 2018, requested the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court.

15. In support of that request, the Scotch Whisky Association argued, in essence, that the statements made by the Advocate General in points 66 to 68 and 107 and 108 of his Opinion are based on an incomplete and incorrect account of the factual background, as set out in the order for reference, with the result that those

statements are erroneous. The Scotch Whisky Association would hope to be able, at an oral hearing, to address those statements and, at the same time, to correct and complete that factual background.

16. In this regard, it must be borne in mind that, under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

17. That is not the case here. The Court considers, having heard the Advocate General, that it has sufficient information to give a ruling and that the present case does not need to be decided on the basis of arguments which have not been debated between the parties or the aforementioned interested persons.

18. Nor has it been argued that one of the parties to the main proceedings or one of those interested persons has, after the close of the oral part of the present proceedings, submitted a new fact of such a nature as to be a decisive factor for the decision of the Court.

19. The Scotch Whisky Association’s request for the reopening of the oral part of the procedure must therefore be rejected.

**Consideration of the questions referred
Preliminary observations**

20. In the present case, the two parties to the main proceedings have taken issue both with the wording and with the substance of the order for reference.

21. First, the Scotch Whisky Association complains that the referring court has not formulated the questions referred for a preliminary ruling correctly and suggests in its written observations that those questions should be reformulated.

22. On that point, it is sufficient to recall that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment of 4 April 2000, Darbo, C-465/98, EU:C:2000:184, paragraph 19). In particular, it is for the national court alone to determine and formulate such questions. The parties to the main proceedings may not change their tenor (judgments of 18 July 2013, Consiglio Nazionale dei Geologi, C-136/12, EU:C:2013:489, paragraphs 29 and 31 and the case-law cited, and of 6 October 2015, T-Mobile Czech Republic and Vodafone Czech Republic, C-508/14, EU:C:2015:657, paragraph 28 and the case-law cited). Consequently, the Court cannot grant a

request that the questions be reformulated in the terms which a party to the main proceedings indicates.

23. Second, Mr Klotz takes the view that the referring court gave a shortened and incomplete account of the facts in the main proceedings and he provides information intended to complete that account.

24. However, it must be reiterated that, in the procedure of cooperation established by Article 267 TFEU, it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (judgments of 3 September 2015, *Costea*, C-110/14, EU:C:2015:538, paragraph 13, and of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 119). Moreover, the Court of Justice must take account, under the division of jurisdiction between the EU Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set, (see, to that effect, judgments of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 10, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 27).

The first question

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

26. Should it be held that some kind of association of ideas with the registered geographical indication or the geographical area relating thereto is sufficient for there to be ‘indirect commercial use’ of that indication, within the meaning of Article 16(a) of Regulation No 110/2008, the referring court asks, in essence, whether that provision is to be interpreted as meaning that, in establishing that such use exists, account must be taken of the context surrounding the disputed element and, in particular, of the fact that that element is accompanied by an indication of the true origin of the product, with the result that the information provided by that context would ultimately make it possible to refute the claim that there is indirect commercial use.

27. The Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, *inter alia*, judgments of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraph 40, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 54).

28. In the first place, the wording of Article 16(a) of Regulation No 110/2008 makes clear that the provision

protects registered geographical indications from ‘any direct or indirect commercial use in respect of products not covered by the registration in so far as those products are comparable to the spirit drink registered under that geographical indication or in so far as such use exploits the reputation of the registered geographical indication’.

29. As the Advocate General has stated in point 28 of his Opinion, the word ‘use’ in that provision requires, by definition, that the sign at issue make use of the protected geographical indication itself, in the form in which that indication was registered or, at least, in a form with such close links to it, in visual and/or phonetic terms, that the sign at issue clearly cannot be dissociated from it.

30. In that regard, the Court has already held that the use of a trade mark containing a geographical indication, or a term corresponding to that indication and its translation, with respect to spirit drinks which do not meet the relevant specifications, constitutes, in principle, a direct commercial use of that geographical indication, for the purposes of Article 16(a) of Regulation No 110/2008 (judgments of 14 July 2011, *Bureau national interprofessionnel du Cognac*, C-4/10 and C-27/10, EU:C:2011:484, paragraph 55, and of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, C-393/16, EU:C:2017:991, paragraph 34).

31. Accordingly, for a situation to be covered by Article 16(a) of Regulation No 110/2008, the sign at issue must use the registered geographical indication in an identical form or at least in a form that is phonetically and/or visually highly similar.

32. Nevertheless, in accordance with that provision, a distinction must be drawn between situations in which the use is ‘direct’ and those in which it is ‘indirect’. In that connection, as the Advocate General has stated in point 30 of his Opinion, unlike ‘direct’ use, which implies that the protected geographical indication is affixed directly to the product concerned or its packaging, ‘indirect’ use requires the indication to feature in supplementary marketing or information sources, such as an advertisement for that product or documents relating to it.

33. So far as concerns, in the second place, the context of Article 16(a) of Regulation No 110/2008, the Court notes that the scope of that provision must necessarily be distinguished from that of the other rules for the protection of registered geographical indications, which are set out in points (b) to (d) of Article 16. Point (a) must, in particular, be distinguished from the situation covered by point (b) of Article 16, which refers to ‘any misuse, imitation or evocation’, that is to say, situations in which the sign at issue does not use the geographical indication as such but suggests it in such a way that it causes the consumer to establish a sufficiently close connection between that sign and the registered geographical indication.

34. Thus, as the Advocate General has observed in point 32 of his Opinion, Article 16(b) of Regulation No 110/2008 would be devoid of practical effect if Article 16(a) were given a broad interpretation, as is envisaged

by the referring court in its first question, in the sense that it would be applicable as soon as the sign at issue evokes in the relevant public some kind of association of ideas with a registered geographical indication or the geographical area relating thereto.

35. In the third place, an interpretation by virtue of which — in order to establish that there is indirect commercial use of a registered geographical indication — the disputed element must be used in a form that is either identical to that indication, or phonetically and/or visually similar to it, is better able to secure the objectives pursued by Regulation No 110/2008 and, in particular, by Article 16(a) thereof.

36. It must be recalled in that regard that the purpose of the system of registration of geographical indications of spirit drinks provided for by Regulation No 110/2008 is to contribute, as is noted in recital 2 of that regulation, to the attainment of a high level of consumer protection, to the prevention of deceptive practices and to market transparency and fair competition (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 24).

37. Furthermore, the Court has already made clear that the protection afforded by Article 16 of Regulation No 110/2008 to geographical indications must be interpreted in the light of the objective pursued by the registration of those indications, namely, as is apparent from recital 14 of that regulation, to allow the identification of spirit drinks as originating from a specific territory in situations where a given quality, reputation or other characteristic of those drinks is essentially attributable to that geographical origin (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 23 and the case-law cited).

38. Thus, as the Advocate General has noted in point 38 of his Opinion, the aim of the provisions of Regulation No 110/2008, in particular of Article 16, is to prevent the misuse of protected geographical indications, not only in the interests of consumers, but also in the interests of producers who have striven to guarantee the qualities expected of products lawfully bearing such indications (see, by analogy, judgments of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto*, C-56/16 P, EU:C:2017:693, paragraph 82, and of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, C-393/16, EU:C:2017:991, paragraph 38). In that context, Article 16(a) prohibits, more specifically, operators from making commercial use of a registered geographical indication in respect of products that are not covered by the registration, in particular with the aim of taking unfair advantage of that geographical indication.

39. In view of all the foregoing considerations, the answer to the first question is that Article 16(a) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is ‘indirect commercial use’ of a registered geographical indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it. Accordingly, it is not sufficient that that element is

liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto.

40. Having regard to the answer to the first part of the first question, there is no need to answer the second part.

The second question

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

42. Should it be held that some kind of association of ideas with the registered geographical indication or the geographical area relating thereto is sufficient for there to be an ‘evocation’ of that indication, within the meaning of Article 16(b) of Regulation No 110/2008, the referring court asks, in essence, whether that provision must be interpreted as meaning that, for the purpose of establishing such an evocation, account is to be taken of the context surrounding the disputed element and, in particular, of the fact that that element is accompanied by an indication of the true origin of the product, with the result that the information provided by that context would ultimately make it possible to refute the claim of ‘evocation’.

43. In order to provide the referring court with a useful answer, it should be borne in mind that Article 16(b) of Regulation No 110/2008 protects geographical indications from any ‘evocation’, ‘even if the true origin of the product is indicated or the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term’.

44. According to the Court’s case-law, the notion of ‘evocation’ covers a situation in which the term used to designate a product incorporates part of a protected geographical indication, so that when the consumer is confronted with the name of the product in question, the image triggered in his mind is that of the product whose indication is protected (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 21 and the case-law cited).

45. Thus, for the purpose of finding there to be an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008, the Court has held that the national court must determine not only whether the term used to designate the product at issue incorporates a part of a protected geographical indication but also whether, when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose indication is protected. Therefore, the national court must essentially rely on the presumed reaction of consumers in the light of the term used to designate the product at issue, it being essential that those consumers establish a link between

that term and the protected geographical indication (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 22).

46. It follows from the foregoing, as the Advocate General has stated in point 55 of his Opinion, that the partial incorporation of a protected geographical indication in the sign at issue is not an essential condition for Article 16(b) of Regulation No 110/2008 to apply. In assessing whether there is an ‘evocation’ within the meaning of that provision, it is therefore for the national court to determine whether, when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose geographical indication is protected.

47. In that regard, the national court must, in making that assessment, refer to the perception of an average European consumer who is reasonably well informed and reasonably observant and circumspect ([judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraphs 25 and 28](#)).

48. In addition, the Court has held that it is legitimate to consider there to be an evocation of a protected geographical indication where, concerning products which are similar in appearance, the sales names are phonetically and visually similar ([judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 33 and the case-law cited](#)).

49. However, as the Advocate General has stated in point 58 of his Opinion, identifying phonetic and visual similarity between the disputed designation and the protected geographical indication is likewise not an essential condition for establishing that there is an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008. It is only one of the factors to be taken into account by the national court when it assesses whether, when the consumer is confronted with the name of the product concerned, the image triggered in his mind is that of the product whose geographical indication is protected. Accordingly, it is possible that an ‘evocation’ may be found to exist even in the absence of such similarity.

50. In addition to the criteria relating to the incorporation of a part of a protected geographical indication in the disputed designation and to the phonetic and visual similarity between the designation and the indication, the Court has ruled that it is necessary, where appropriate, to take account of the criterion of ‘conceptual proximity’ between terms emanating from different languages, since such proximity, like the other criteria mentioned above, may also trigger an image in the consumer’s mind which is that of the product whose geographical indication is protected, when he is confronted with a similar product bearing the disputed name ([judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 35 and the case-law cited](#)).

51. It follows from the foregoing that, for determining whether there is an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008, the decisive criterion is whether, when the consumer is confronted with a disputed designation, the image triggered

directly in his mind is that of the product whose geographical indication is protected, a matter which it falls to the national court to assess, taking into account, as the case may be, the partial incorporation of a protected geographical indication in the disputed designation, any phonetic and/or visual similarity, or any conceptual proximity, between the designation and the indication.

52. In the case in the main proceedings, the referring court will therefore have to determine whether an average European consumer who is reasonably well informed and reasonably observant and circumspect thinks directly of the protected geographical indication, namely ‘Scotch Whisky’, when he is confronted with a comparable product bearing the disputed designation, in this case ‘Glen’, that court taking account, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, of conceptual proximity between the protected geographical indication and the disputed designation.

53. However, the criterion set out by the referring court in its second question for the purpose of establishing ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008 — namely that the disputed element of the sign at issue should evoke in the relevant public some kind of association with the protected geographical indication or the geographical area relating thereto — cannot be used, as it does not establish a sufficiently clear and direct link between that element and the indication concerned.

54. Furthermore, as the Advocate General has observed in points 61 to 63 of his Opinion, if it were sufficient, for the purpose of establishing such ‘evocation’, that the consumer make an association of any kind whatsoever with a protected geographical indication, that would result, first, in point (b) of Article 16 of Regulation No 110/2008 encroaching on the scope of the following provisions of that article, namely points (c) and (d), which cover situations in which the reference to a protected geographical indication is even more subtle than an ‘evocation’ of that indication.

55. Secondly, the use of such a criterion would extend the scope of Regulation No 110/2008 in an unforeseeable way and would give rise to significant risks, particularly for the legal certainty of the economic actors concerned. Indeed, as stated in recital 4 of that regulation, the EU legislature has sought to ‘ensure a more systematic approach in the legislation governing spirit drinks’, by setting out ‘clearly defined criteria’ for, inter alia, ‘the protection of geographical indications’. Allowing a criterion as vague and far-reaching as that put forward by the referring court in its second question would not be consistent with that objective.

56. In view of all the foregoing considerations, the answer to the first part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an ‘evocation’ of a registered

geographical indication, the referring court is required to determine whether, when the average European consumer who is reasonably well informed and reasonably observant and circumspect is confronted with the disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected. In making that determination, the referring court, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, must take account of the conceptual proximity, if any, between the designation and the indication.

57 As regards the second part of the second question, which relates to the role that the context in which the disputed designation is embedded plays in the national court's assessment of whether there is an 'evocation' within the meaning of Article 16(b) of Regulation No 110/2008, the Court notes that it is apparent from the wording of that provision that there may be an 'evocation' even if the true origin of the product is indicated (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 43 and the case-law cited).

58 The order for reference indicates that Mr Klotz, the defendant in the main proceedings, maintains that the designation 'Glen Buchenbach' is a play on words consisting of the name of the place of origin of the drink at issue in the main proceedings (Berglen) and the name of a local river ('Buchenbach'). However, the Court has already held that it is immaterial, so far as Article 16(b) of Regulation No 110/2008 is concerned, that the disputed designation corresponds to the name of the undertaking and/or the place where the product is manufactured ([see, to that effect, judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraphs 42 to 45](#)).

59 Moreover, as the Advocate General has observed in point 81 of his Opinion, the Court has also made clear that the fact that the disputed designation refers to a place of manufacture that is known to consumers in the Member State where the product is manufactured is not relevant for the purpose of assessing the concept of 'evocation' within the meaning of Article 16(b) of Regulation No 110/2008, since that provision protects registered geographical indications against any evocation throughout the territory of the European Union and, in view of the need to guarantee effective and uniform protection of those geographic indications in that territory, it covers all European consumers ([judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraph 27](#)).

60 In view of the foregoing considerations, the answer to the second part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an 'evocation' of a registered geographical indication, account is not to be taken either of the context surrounding the disputed element, or, in particular, of the fact that that element is accompanied

by an indication of the true origin of the product concerned.

The third question

61 By its third question, the referring court asks, in essence, whether Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is a 'false or misleading indication', as prohibited by that provision, account must be taken of the context in which the disputed element is used, in particular where that element is accompanied by an indication of the true origin of the product concerned.

62. It must be recalled that, under Article 16(c) of Regulation No 110/2008, a registered geographical indication is protected against 'any other false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation or labelling of the product, liable to convey a false impression as to its origin'.

63. First of all, the Court finds that, contrary to what has been argued by the European Commission, there is nothing in the wording of that provision to suggest that the intention of the EU legislature was that account should be taken of the context in which the disputed element is used in order to establish a 'false or misleading indication as to the provenance, origin, nature or essential qualities ... of the product'.

64. As the Advocate General has noted in point 92 of his Opinion, the expression 'false or misleading indication ... on the description, presentation or labelling of the product' amounts to a list of various mediums on which the indication suspected of being false or misleading may be found. That does not permit the inference that that indication must be examined in conjunction with any other information that may be included on the description, presentation or labelling of the product concerned.

65. Next, as has also been noted by the Advocate General in point 96 of his Opinion, Article 16 of Regulation No 110/2008 contains a graduated list of prohibited conduct in which point (c) of Article 16 must be distinguished from points (a) and (b) thereof. Point (a) of Article 16 is limited to use of the protected geographical indication and point (b) to misuse, imitation or evocation. Point (c), however, widens the scope of the protection to include 'any other ... indication' (in other words, information provided to consumers that is included on the description, presentation or labelling of the product concerned) which, while not actually evoking the protected geographical indication, is 'false or misleading' as regards the links between the product concerned and that indication.

66. In that regard, it must be stated, first, that the expression 'any other ... indication', used in Article 16(c) of Regulation No 110/2008, includes information that may be found in any form whatsoever on the description, presentation or labelling of the product concerned, inter alia in the form of words, an image or a container capable of providing information on the

provenance, origin, nature or essential qualities of that product.

67. Secondly, it is sufficient that a false or misleading indication be included on one of the three mediums mentioned in that provision, namely ‘on the description, presentation or labelling’ of the product concerned, for it to be found that it is ‘liable to convey a false impression as to [the product’s] origin’ within the meaning of that provision.

68. It follows from the foregoing that Article 16(c) of Regulation No 110/2008 affords extensive protection to registered geographical indications. If a false or misleading indication could nonetheless be permitted because it is accompanied by additional information relating, in particular, to the true origin of the product concerned, that provision would be deprived of practical effect.

69. Finally, as has already been stated in paragraph 38 of this judgment, the purpose of Regulation No 110/2008 and, in particular, of Article 16 thereof, is to protect registered geographical indications, both in the interests of consumers who should not be misled by inappropriate indications, and in the interests of economic operators which bear higher costs in order to guarantee the quality of products that lawfully bear protected geographical indications. Those operators must be protected against acts of unfair competition.

70. As the Advocate General has observed in point 101 of his Opinion, attainment of those objectives would be jeopardised if the protection of geographical indications could be restricted by the fact that additional information is included alongside an indication which is false or misleading, within the meaning of Article 16(c) of Regulation No 110/2008, since accepting that interpretation would be tantamount to allowing the use of such an indication provided that it is accompanied by correct information.

71. In view of all the foregoing considerations, the answer to the third question is that Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is a ‘false or misleading indication’, as prohibited by that provision, account is not to be taken of the context in which the disputed element is used.

Costs

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

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

1. Article 16(a) of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 must be interpreted as meaning that, for the purpose of establishing that there is ‘indirect commercial use’ of a registered geographical

indication, the disputed element must be used in a form that is either identical to that indication or phonetically and/or visually similar to it. Accordingly, it is not sufficient that that element is liable to evoke in the relevant public some kind of association with the indication concerned or the geographical area relating thereto.

2. Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purpose of establishing that there is an ‘evocation’ of a registered geographical indication, the referring court is required to determine whether, when the average European consumer who is reasonably well informed and reasonably observant and circumspect is confronted with the disputed designation, the image triggered directly in his mind is that of the product whose geographical indication is protected. In making that determination, the referring court, in the absence of (i) any phonetic and/or visual similarity between the disputed designation and the protected geographical indication and (ii) any partial incorporation of that indication in that designation, must take account of the conceptual proximity, if any, between the designation and the indication.

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

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

[Signatures]

* Language of the case: German.

OPINION OF ADVOCATE GENERAL SAUGMANDSGAARD ØE

delivered on 22 February 2018 (1)

Case C-44/17

The Scotch Whisky Association, The Registered Office
v

Michael Klotz

(Request for a preliminary ruling from the Landgericht Hamburg (Regional Court, Hamburg, Germany))

(Reference for a preliminary ruling — Approximation of laws — Protection of geographical indications of spirit drinks — Regulation (EC) No 110/2008 — Article 16(a), (b) and (c) — Annex III — Registered geographical indication ‘Scotch Whisky’ — Whisky produced in Germany and marketed under the designation ‘Glen Buchenbach’ — Concept of ‘indirect use’ of a registered geographical indication — Concept of ‘evocation’ of a registered geographical indication — Concept of ‘false or misleading indication’ —

Requirement for identity with the indication, phonetic and/or visual similarity, or some kind of association of ideas in the mind of the relevant consumer — Taking account of the context in which the designation at issue is embedded)

I. Introduction

1. This request for a preliminary ruling from the Landgericht Hamburg (Regional Court, Hamburg, Germany) concerns the interpretation of Article 16 of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89. (2) Article 16 protects all the geographical indications (3) registered in Annex III to Regulation No 110/2008 against practices liable to mislead the consumer as to the true origin of such products.

2. The request has been made in proceedings between a United Kingdom organisation that promotes the interests of the whisky industry in Scotland and a German seller concerning an action for an order that the latter cease to market a whisky produced in Germany under the designation ‘Glen Buchenbach’. The applicant in the main proceedings claims that use of the term ‘Glen’ infringes the registered geographical indication ‘Scotch Whisky’, in so far as it constitutes both indirect commercial use and an evocation of the registered geographical indication, as well as being a false or misleading indication, prohibited under Article 16(a), (b) and (c) of Regulation No 110/2008 respectively.

3. The referring court asks the Court, first of all, to state whether ‘indirect commercial use’, within the meaning of Article 16(a) of that regulation, requires that the protected geographical indication be used in an identical or phonetically and/or visually similar form, or if it is sufficient that the disputed element evokes in the relevant public some kind of association with that indication. It also asks whether, if the mere association of ideas is sufficient, account should be taken, to apply that provision, of the context in which the term used to designate the product at issue is embedded and, in particular, of the fact that it is also accompanied by an indication, on the label, of the true origin of the product.

4. Next, the referring court asks the Court whether the ‘evocation’ referred to in Article 16(b) of that regulation implies that there is a phonetic and/or visual similarity between the protected geographical indication and the disputed term, or if it is sufficient that the disputed term evokes in the relevant public some kind of association of ideas with that indication. It also asks whether, if such an association is sufficient, the context in which that term is used should be taken into account for the purposes of applying that provision.

5. Lastly, it asks whether, when determining whether there is any ‘other false or misleading indication’ within the meaning of Article 16(c) of that regulation,

account should also be taken of the context in which the disputed term is embedded.

6. The present case differs from those in which the Court has already interpreted Article 16 of Regulation No 110/2008, (4) in so far as it concerns, in particular, the unprecedented situation where — as emphasised by the questions referred — there is no similarity, whether phonetic or visual, between the disputed designation and the protected geographical indication, but where the disputed designation is allegedly liable to cause consumers to make an inappropriate connection to the protected geographical indication. Moreover, the Court is indirectly asked to clarify the way in which the rules set out in Article 16(a) to (c) relate to each other in the light of the different situations referred to therein.

II. Legal context

7. Regulation No 110/2008 provides in Article 16, entitled ‘Protection of geographical indications’, that ‘... the geographical indications registered in Annex III shall be protected against:

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

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation or labelling of the product, liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product.’

8. Annex III to Regulation No 110/2008, entitled ‘Geographical indications’, states that ‘Scotch Whisky’ has been registered as a geographical indication relating to the second category of goods, namely ‘Whisky/Whiskey’, with the ‘United Kingdom (Scotland)’ listed as the country of origin.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

9. The Scotch Whisky Association, The Registered Office (‘TSWA’) is an organisation constituted under Scottish law. Its objectives include protecting the trade in Scottish whisky both in Scotland and abroad.

10. Mr Michael Klotz markets, via a website, a whisky under the designation ‘Glen Buchenbach’ which is produced by the Waldhorn distillery in Berglen, situated in the Buchenbach valley in Swabia (Baden-Württemberg, Germany).

11. The label on the whisky bottles in question includes, in addition to the full address of the German producer and the stylised drawing of a hunting horn (called a ‘Waldhorn’ in German), the following information: ‘Waldhornbrennerei [Waldhorn distillery], Glen Buchenbach, Swabian Single Malt Whisky, 500

ml, 40% vol, Deutsches Erzeugnis [German product], Hergestellt in den Berglen [produced in the Berglen]’.

12. TSWA brought an action before the Landgericht Hamburg (Regional Court, Hamburg) to stop Mr Klotz’s use of the designation ‘Glen Buchenbach’ for the whisky at issue, on the ground that such use infringes, in particular, Article 16(a) to (c) of Regulation No 110/2008, (5) which protects the geographical indications registered in Annex III to that regulation, including the indication ‘Scotch Whisky’. TSWA claims, inter alia, that, on the one hand, those provisions apply not only to the use of such an indication itself, but also to any reference that suggests the protected geographical indication of origin and that, on the other, the designation ‘Glen’ evokes in the relevant public an association with Scotland and Scotch Whisky, notwithstanding the addition of other references to the German origin of the product. Mr Klotz contends that the action should be dismissed.

13. In that context, by decision of 19 January 2017, received at the Court on 27 January 2017, the Landgericht Hamburg (Regional Court, Hamburg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does “indirect commercial use” of a registered geographical indication of a spirit drink in accordance with Article 16(a) of Regulation No 110/2008 require that the registered geographical indication be used in identical or phonetically and/or visually similar form, [(6)] or is it sufficient that the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area?

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

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

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

(3) When determining whether there is any “other false or misleading indication” in accordance with Article 16(c) of Regulation No 110/2008, does the context in which the disputed element is embedded play a role, or

can that context not counteract any misleading indication, even if the disputed element is accompanied by an indication of the true origin of the product?’

14. Written observations have been lodged before the Court by TSWA, Mr Klotz, the Greek, French, Italian and Netherlands Governments, and by the European Commission. No hearing has taken place.

IV. Analysis

A. Preliminary observations

15. First of all, I would like to note that both parties in the main proceedings raise objections to the wording of the order for reference.

16. First, Mr Klotz submits that the referring court gave a shortened and incomplete presentation of the facts in the main proceedings and he provides information completing that presentation. (7)

17. In that regard, I would like to point out that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to assess the factual circumstances of the case in the main proceedings and it is solely for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. (8) However, the Court may, in a spirit of cooperation, provide the national court with all the information it deems necessary to give a reply which is of assistance to the national court. (9)

18. Second, TSWA claims that the questions referred by the referring court are poorly formulated. (10) In its observations to the Court, it presents the questions as reformulated by it and provides answers to them. (11)

19. However, it is solely for the national courts before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, the Court cannot grant a request that the question be reformulated in the terms which a party to the main proceedings indicates. (12) However, the Court must provide the referring court with an answer which will be of use to it and enable it to determine the case before it and the Court may therefore have to reformulate the questions referred to it. (13)

20. Next, so far as concerns the relationship between the various paragraphs of Article 16 of Regulation No 110/2008, it must be stressed at the outset that it would appear, in line with the view taken by the French Government, that those provisions protect the geographical indications registered in Annex III to that regulation by setting out a series of situations which refer more and more indirectly to those indications.

21. Indeed, I take the view that paragraph (a) applies to situations where reference is made to the registered geographical indication itself; paragraph (b) prohibits any misuse, imitation or evocation of that indication, even if the disputed designation does not expressly refer to it; paragraph (c) prohibits any other misleading reference to the origin of the product; and paragraph (d)

applies to any other commercial practice liable to mislead the consumer as to the origin of the product. I will come back to the specific differences between paragraphs (a) to (c), referred to in the present order for reference, and to my interpretation thereof, throughout the following discussion. (14)

B. The concept of ‘indirect ... use’ of a registered geographical indication within the meaning of Article 16(a) of Regulation No 110/2008 (first question)

1. The required form of the ‘indirect ... use’ of a registered geographical indication under Article 16(a) of Regulation No 110/2008 (first part of the first question)

22. By its first question, the referring court asks the Court to rule on what is meant by ‘indirect commercial use [of a] registered geographical indication’ for a spirit drink, within the meaning of Article 16(a) of Regulation No 110/2008.

23. The first part of that question concerns, in essence, the question whether, in order to establish the existence of such use, prohibited by Article 16(a), it is necessary that the disputed indication be used in identical or phonetically and/or visually similar form to the protected geographical indication, or whether it is sufficient that the disputed indication evokes in the relevant public some kind of association with the indication or the geographical area relating thereto.

24. The referring court states that two interpretations of Article 16(a) of Regulation No 110/2008 are possible. According to the first approach, taken from German legal writing, (15) ‘indirect ... use’, within the meaning of that provision, requires use of the registered geographical indication in identical or at least phonetically and/or visually similar form, by being mentioned not on the goods or their packaging, as is the case with ‘direct ... use’, but in any other context such as in advertising or on accompanying documents. The referring court observes that, on the basis of that interpretation, it would not consider Article 16(a) to be applicable in the present case, since the designations ‘Glen’ and ‘Scotch Whisky’ are neither identical, nor similar. On the contrary, according to the second approach, it is sufficient if the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area in question. (16)

25. TSWA and the Greek and Italian Governments agree with that second interpretation. However, Mr Klotz, the French and Netherlands Governments, and the European Commission consider, in essence, that there cannot be ‘indirect ... use’ within the meaning of Article 16(a) where the designation used is in a wholly different form to the registered geographical indication in question. (17) For the following reasons I agree.

26. I note, first of all, that the Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part. (18)

27. First, so far as concerns the wording of Article 16(a) of Regulation No 110/2008, TSWA claims, wrongly in my view, that that provision should be given a broad interpretation, in the sense that ‘indirect’ commercial use of a registered geographical indication does not require use to be made of that indication itself, in whole or in part, but rather an implicit reference to it, provided that such use concerns ‘products [that are] comparable’ or ‘exploits the reputation of the registered geographical indication’ in question. (19)

28. In that regard, I am of the opinion that the use, in Article 16(a), of the expression ‘direct or indirect commercial use [of a] registered geographical indication’ (20) requires that use be made of the disputed indication in the form in which it was registered or at least in a form with such close links to it that the sign at issue is manifestly inseparable from it. (21) I believe it is apparent that the word ‘use’ requires, by definition, that the protected geographical indication itself be used, which must therefore be in an identical or phonetically and/or visually similar form, (22) in the sign at issue. (23)

29. I note that the Court has already given pointers for the definition of the concept of ‘direct’ use within the meaning of Article 16(a), in acknowledging that it may include the use of a mark containing a geographical indication, or a term corresponding to that indication and its translation, with respect to spirit drinks which do not meet the relevant specifications, as was the case with the figurative trade marks at issue in the main proceedings. By contrast, the Court has not yet ruled on what is meant by ‘indirect’ use within the meaning of that provision.

30. In my opinion, this indirect character does not relate to situations where the designation at issue does not make an express reference to the geographical indications registered in Annex III to Regulation No 110/2008, as claimed by TSWA, but rather to situations where a more indirect reference is made in order to make use of such an indication. Like Mr Klotz, the Netherlands Government and the Commission, I take the view that unlike ‘direct’ use, which implies that the protected geographical indication is affixed directly to the products in question or their packaging, ‘indirect’ use requires the indication to feature in supplementary marketing or information sources, such as an advertisement for that product (24) or documents relating to it. (25)

31. Second, so far as concerns the context surrounding the provision at issue, I would point out that the scope of Article 16(a) is necessarily separate from that of subsequent rules set out in that article. Article 16(a) must, in particular, be differentiated from Article 16(b), which applies to ‘misuse, imitation or evocation’, that is to say, in cases where use is not made of the geographical indication itself but it is suggested, by a more subtle reference than that described in paragraph (a), to the relevant public.

32. Article 16(b) would be devoid of practical effect if Article 16(a) were given a broad interpretation, as is envisaged in the first question submitted for a

preliminary ruling, in the sense that it would be applicable as soon as the sign at issue evokes some kind of association of ideas with a registered geographical indication or the geographical area relating thereto. It is therefore clear from the general scheme of that article, as noted by the French Government and the Commission, that ‘direct or indirect commercial use [of a] registered geographical indication’, within the meaning of Article 16(a), cannot cover such cases.

33. In my opinion, that conclusion is supported by the Court’s case-law, (26) according to which a sufficiently close link of proximity to the protected geographical indication is required even in respect of the straightforward concept of ‘evocation’ within the meaning of Article 16(b), (27) a requirement which I believe applies a fortiori to the concept of ‘use’ within the meaning of Article 16(a).

34. Third, so far as concerns the objectives of Regulation No 110/2008, I note, first of all, that recital 4 thereof states that the EU legislature sought to ‘ensure a more systematic approach in the legislation governing spirit drinks’, by setting out ‘clearly defined criteria’ for, inter alia, ‘the protection of geographical indications’. (28)

35. I doubt that it would be consistent with that express objective of legal certainty to allow the relevance of a criterion such as that envisaged by the referring court, namely to ‘[evoke] in the relevant public some kind of association with the registered geographical indication or the geographical area’, (29) given that it is not a criterion introduced by the legislature and its scope seems to me to be too uncertain. Admittedly, the Court has already alluded, with regard to Article 16 of that regulation, to the risk of ‘sett[ing] in train in the mind of the public an association of ideas regarding [the origin of product]’, (30) but it seems to me that it did not, however, intend to establish that general consideration as a crucial determining factor for the purposes of applying one or other of those provisions.

36. Next, on a more substantive level, I observe that recital 2 of Regulation No 110/2008 states that the measures provided for in that regulation ‘should contribute to the attainment of a high level of consumer protection, the prevention of deceptive practices and the attainment of market transparency and fair competition’. Recital 9 adds that those measures ‘should also prevent the misuse of ... the names of spirit drinks for products which do not meet the definitions set out in this Regulation’. Recital 14 refers to the specific protection afforded to the geographical indications registered in Annex III to that regulation ‘where a given quality, reputation or other characteristic of the spirit drink is essentially attributable to [a given] geographical origin’.

37. With regard to the objectives pursued, in particular, by Article 16 of Regulation No 110/2008, it is clear from, inter alia, its title that the objective of that article is to ensure the ‘[p]rotection of geographical indications’ through a registration of those indications which aims, on the one hand, to allow the identification

of spirit drinks as originating in a specific territory in the situations set out in recital 14 and, on the other, to contribute to the achievement of the more general objectives set out in recital 2. (31)

38. Accordingly, it appears to me that the aim of the provisions of Regulation No 110/2008, and in particular Article 16, is to prevent the misuse of protected geographical indications, not only in the interests of consumers, but also producers who have made a genuine effort to guarantee the expected quality of products bearing such indications, as the Court has already pointed out with regard to a provision of EU law (32) with similar wording (33) to that of Article 16 of that regulation. (34) From this point of view, Article 16(a) expressly prohibits, more specifically, other operators from making commercial use of a registered geographical indication in respect of products that do not comply with all the required specifications, (35) in particular with the aim of taking unfair advantage of the reputation of the geographical indication concerned. (36)

39. In my opinion, it follows from the above that the high level of consumer protection is indeed one of the objectives of the provisions to be interpreted, but it cannot, however, be inferred from this, as the Greek and Italian Governments claim, that it is sufficient, for the prohibition provided for in Article 16(a) to apply, that the disputed designation be liable to mislead the public, in any way, as to the origin of the product and thus have the same effect as if the geographical indication had been used in the form in which it was registered or in a similar form. Indeed, it should be borne in mind that the purpose of those provisions is to maintain the recognised qualities of products bearing such an indication and, therefore, to protect the economic interests of operators who have invested in guaranteeing those qualities as well as, more generally, to promote market transparency and fair competition.

40. I therefore propose that the answer to the first part of the first question should be that Article 16(a) of Regulation No 110/2008 must be interpreted as meaning that ‘indirect ... use’ of a registered geographical indication, prohibited by that provision, requires the disputed designation to be identical or phonetically and/or visually similar to the indication in question. Accordingly, it is not sufficient that the disputed designation is liable to evoke in the relevant public some kind of association with the registered geographical indication or the geographical area relating thereto.

2. The impact of additional information surrounding the disputed sign in the light of Article 16(a) of Regulation No 110/2008 (second part of the first question)

41. The second part of the first question is put to the Court only in the event that the mere association of ideas with the registered geographical indication or the geographical area in question is found to be sufficient to establish the existence of ‘indirect commercial use’ of that indication, within the meaning of Article 16(a) of Regulation No 110/2008.

42. In so far as I advocate an interpretation to the contrary in response to the first part of that question, I consider that there will be no need for the Court to rule on the second part. I will, nevertheless, make a few observations on it.

43. The referring court asks whether, to establish the existence of such use, it is necessary to take account of the context surrounding the disputed designation and, in particular, the fact that it is accompanied by an indication of the true origin of the product, with the result that the information provided by that context would refute the claim that the requirements set out in Article 16(a) have not been met. More specifically, it asks whether the element ‘Glen’ must be examined in isolation or whether it is also necessary to take account of the information included on the label indicating that the product at issue comes from Germany. (37) It takes the view that it could order the pure prohibition sought by TSWA in the main proceedings only if the Court were to interpret Article 16(a) in the sense that it prohibits use made of a term which evokes in the relevant public some kind of association of ideas with the registered geographical indication, irrespective of the context of that use.

44. SWA and the Greek Government claim that additional indications provided by the labelling and packaging (38) of the product are not relevant in order to preclude the application of Article 16(a). The Italian Government takes the view that, even if the context in which the disputed element is embedded may play a role, the existence of indirect commercial use, within the meaning of that provision, cannot be ruled out, including when that element is accompanied by information concerning the origin. The Netherlands Government considers that there can be no such use where no reference is made to the protected geographical indication and, moreover, the label clearly states the place where the drink was produced. (39)

45. I should merely like to point out, in the alternative, (40) that Article 16(a) of Regulation No 110/2008 contains no express mention of the kind that appears in paragraph (b), which states that ‘misuse, imitation or evocation’ of a registered geographical indication may be established ‘even if the true origin of the product is indicated’.

46. That difference in wording is explained, in my opinion, by the fact that when it is a question of ‘direct or indirect commercial use’ of a protected geographical indication, within the meaning of Article 16(a), that situation implies use of the indication itself or in a similar form and not some other type of indication. (41) There is therefore no possible ambiguity regarding the fact that the analysis of the situation must focus on whether use has been made of one of the geographical indications registered in Annex III to Regulation No 110/2008.

47. By contrast, in the situation referred to in paragraph (b), concerning ‘misuse, imitation or evocation’, it is clear that the assessment of the situation should go beyond such an objective finding and must be placed in context, with regard to which the EU legislature has

expressly stated that certain determining factors, including that ‘the true origin of the product’ (42) is indicated, cannot rule out the application of one of those three classifications. (43) In my opinion, the same should also be true, a fortiori, of the simpler situation referred to in paragraph (a), provided that the Court considers it necessary, for the application of that provision, to examine the context in which the disputed sign is embedded.

C. The concept of ‘evocation’ of a registered geographical indication within the meaning of Article 16(b) of Regulation No 110/2008 (second question)

1. The required form of the ‘evocation’ of a registered geographical indication under Article 16(b) of Regulation No 110/2008 (first part of the second question)

48. By its second question, the referring court asks the Court to rule on the concept of ‘evocation’ of a registered geographical indication relating to a spirit drink, within the meaning of Article 16(b) of Regulation No 110/2008.

49. By the first part of that question, the referring court asks whether, in order to establish the existence of such evocation, prohibited by Article 16(b), the disputed designation must be in an identical or phonetically and/or visually similar form to the protected geographical indication, or whether it is sufficient that the designation evokes in the relevant public some kind of association with that indication or the geographical area relating to it.

50. In support of its question, the referring court observes that the Court has consistently interpreted the concept of ‘evocation’, referred to in Article 16(b) of Regulation No 110/2008 and in similar EU regulations preceding it, as meaning that it ‘covers a situation in which the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product the image triggered in his mind is that of the product whose designation is protected’ (44). It adds that, to its knowledge, the Court has not yet ruled on whether a phonetic and/or visual similarity between the signs at issue (45) is a necessary requirement for the existence of evocation to be established. It considers that an answer to that question is crucial in the present case, in so far as there is no such similarity. (46)

51. The answer proposed by TSWA and the Greek, French and Italian Governments is that ‘evocation’ of a registered geographical indication within the meaning of Article 16(b) does not require the disputed term to be phonetically and/or visually similar to the indication concerned and that it is sufficient if that term evokes in the relevant public some kind of association with the indication or the geographical area. Mr Klotz and the Netherlands Government support the argument to the contrary.

52. The Commission adopts a position somewhere in between according to which the concept of ‘evocation’ does not necessarily require phonetic and/or visual similarity or the mere association of ideas but rather, in

the circumstances of present case, ‘the existence, between the registered geographical indication and the designation at issue, of conceptual proximity in the context of which a reasonably well informed consumer would establish a clear and direct link between the disputed designation and [that] indication’ (47). I lean towards an interpretation in line with the latter view, for the following reasons.

53. First of all, I would like to point out that the wording of Article 16(b) does not contain elements which allow for the precise identification of what is meant by the ‘evocation’ of a protected geographical indication. At most, a comparison of the two other situations already referred to in that provision, namely ‘misuse’ and ‘imitation’, permits the inference that the concept of ‘evocation’ implies a certain degree of similarity with the geographical indication concerned, even if it appears to require the lowest degree of similarity amongst those three concepts.

54. In addition, I consider that a number of lessons must be drawn from the case-law of the Court on Article 16(b) of Regulation No 110/2008 or from other provisions of EU law with similar wording.

55. As noted by the referring court, the Court has held that there is ‘evocation’, within the meaning, *inter alia*, of Article 16(b), where the disputed element ‘incorporates part of a protected designation’. (48) It appears to me that such partial incorporation,(49) which existed in the proceedings which gave rise to the judgments of the Court in question, (50) is not, however, a condition *sine qua non* for the application of that provision.

56. Indeed, as the French Government states, it is apparent from the expression ‘so that’, which follows the aforementioned phrase, that the central, decisive criterion in order to establish the existence of an ‘evocation’, is to determine whether, ‘when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected’. (51) In addition, the Court has already held that ‘the national court must essentially rely on the presumed reaction of consumers in the light of the term used to designate the product at issue, it being essential that those consumers establish a link between that term and the protected name’. (52) It has, moreover, stated that the national court is required ‘to refer to the perception of the average European consumer who is reasonably well informed and reasonably observant and circumspect’. (53) In fact, even though the protected designation in question forms an integral part of the contested mark, the average consumer, in reaction to a product bearing that mark, may still not necessarily associate it with a product covered by that designation. (54)

57. The Court has also repeatedly held ‘that it was legitimate to consider that there is evocation of a protected name where, concerning products which are similar in appearance, the sales names are phonetically and visually similar’ and that such a relationship ‘is not fortuitous’, stating that ‘such similarity was clear where the term used to designate the product at issue ends in

the same two syllables as the protected name and contains the same number of syllables as that name’. (55)

58. However, I take the view, like the majority of the parties who have submitted observations in the present case, (56) that identifying phonetic and visual similarity is not an essential condition in order to establish the existence of an ‘evocation’, but is instead one of the tests laid down by the Court for such a verification. It is apparent that the Court’s reference to a phonetic and visual ‘relationship’ or ‘similarity’ relates to the specific circumstances of the proceedings which gave rise to the cases in which the reference was made (57) and it cannot therefore be ruled out that the existence of an ‘evocation’ may be established even without such a relationship.

59. In addition to the aforementioned criterion relating to the partial incorporation of a protected designation, (58) another relevant factor to be taken into account is the “‘conceptual proximity” between terms emanating from different languages’. I would point out that the Court has distinguished that criterion from the criterion relating to the ‘phonetic and visual relationship’ and that, as with the other criteria, it concerns the perception of the consumer, which thus appears to be the determining criterion for the purposes of establishing the existence of an ‘evocation’. (59)

60. I therefore consider that, for the purposes of identifying an ‘evocation’, within the meaning of Article 16(b) of Regulation No 110/2008, the only determining criterion is whether, ‘when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected’, (60) which the national court must verify by taking into account, as appropriate, the partial incorporation of a protected name in the disputed designation, a phonetic and visual relationship, or a conceptual proximity.

61. By contrast, it is not, in my view, consistent with the aforementioned objectives of the provisions interpreted in this Opinion (61) to allow a criterion as vague and far-reaching as the criterion set out in the second question submitted for a preliminary ruling, namely that ‘the disputed element evokes in the relevant public some kind of association with the registered geographical indication or the geographical area’. (62)

62. Moreover, in the light of the general scheme of Article 16, care should be taken, as I stated with regard to paragraph (a) thereof, (63) to ensure that paragraph (b) is not interpreted in such a way that it encroaches on the scope of paragraphs (c) and (d), which cover situations where the reference to the protected geographical indication is even more subtle than an ‘evocation’ of that indication.

63. Lastly, so far as concerns the broader context of Regulation No 110/2008 and, in particular, Article 16 thereof, Mr Klotz rightly points out that if the Court were to find it sufficient, for the purposes of identifying an ‘evocation’, that any kind of association is triggered, this would extend the scope of that regulation in an

unforeseeable way and there would be significant risks to the free movement of goods, given that the protection of industrial and commercial property, such as provided by that regulation, (64) constitutes one of the possible justifications for restrictions on that freedom. (65)

64. More specifically, if the protection of the geographical indication — in the present case ‘Scotch Whisky’ — under Article 16(b) were to be extended to include the use of a term in no way similar to it, products or trade marks which make no reference to the wording of that indication would also come under the prohibition in that provision. It follows, as the Netherlands Government points out, that the opportunity for whisky producers from countries other than the ‘United Kingdom (Scotland)’ (66) to stand out by means of their own products or trade marks would thus be significantly reduced. (67)

65. Consequently, I propose that the answer to the first part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that the ‘evocation’ of a registered geographical indication, prohibited by that provision, does not require that there necessarily be a phonetic and visual similarity between the disputed designation and the indication in question. It is not, however, sufficient that the disputed designation is liable to evoke in the relevant public some kind of association of ideas with the protected indication or the geographical area relating thereto. In the absence of such similarity, it is necessary to take account of the conceptual proximity existing, if it be the case, between the indication in question and the disputed designation, in so far as that proximity is of such a nature as to lead the consumer to have in mind, as reference image, the product whose indication is protected.

66. So far as concerns implementing that conclusion in the main proceedings, I would point out that it is solely for the referring court, and not the Court of Justice, to assess whether there is, in the present case, an ‘evocation’ within the meaning of Article 16(b), (68) although the Court may, however, provide clarification designed to give the national court guidance in its decision. (69)

67. In that regard, I note that, after considering the arguments of the parties in the main proceedings, (70) the referring court states that the word ‘glen’ is a Gaelic word meaning ‘a narrow valley’ and that 31 out of 116 distilleries producing ‘Scotch Whisky’ — thus whisky of Scottish origin — are named after the glen in which they are located. The referring court observes, however, that there are also whiskies produced outside of Scotland which have ‘glen’ as part of their name, such as the whiskies ‘Glen Breton’ from Canada, (71) ‘Glendalough’ from Ireland and ‘Glen Els’ from Germany. (72). In addition, it refers to a survey, submitted by TSWA and contested by Mr Klotz, according to which, inter alia, 4.5% of the German whisky consumers surveyed associated ‘glen’ with Scottish whisky or something Scottish.

68. In view of those elements, I agree with the Commission that it is not certain that, in circumstances such as those in the main proceedings, there is sufficient conceptual proximity between the protected geographical indication and the disputed designation for the latter to constitute an ‘evocation’ of the protected geographical indication in question within the meaning of Article 16(b) of Regulation No 110/2008. (73) In that regard, it is solely for the referring court to determine whether, when the average European consumer (74) is confronted with a comparable product bearing the designation ‘Glen’, the image triggered directly in his mind is that of ‘Scotch Whisky’, notwithstanding the fact that his choice of whisky is undoubtedly not entirely fortuitous. (75) Even if the referring court were to find that consumers systematically associate the word ‘Glen’ with whisky, the required close connection to Scottish whisky, and thus the necessary proximity to the indication ‘Scotch Whisky’, may be lacking.

2. The impact of additional information surrounding the disputed sign in the light of Article 16(b) of Regulation No 110/2008 (second part of the second question)

69. The second part of the second question is to be answered by the Court only in the event that phonetic and visual similarity is not found to be mandatory and the mere association of ideas with the registered geographical indication or the geographical area in question is found to be sufficient to establish the existence of an ‘evocation’ of that indication, within the meaning of Article 16(b) of Regulation No 110/2008.

70. In view of my answer to the first part of the second question, (76) it is necessary to comment on the second part.

71. The referring court asks the Court whether, for the purposes of establishing, in concrete terms, the existence of an ‘evocation’ prohibited by Article 16(b), it is necessary to analyse the disputed element of the sign in isolation or whether the context in which that element is used should also be considered, in particular where that element is accompanied by ‘de-localising’ references stating the true origin of the product concerned. (77)

72. The referring court observes that Article 16(b) of Regulation No 110/2007 expressly states that ‘any ... evocation’ is prohibited ‘even if the true origin of the product is indicated’, a clarification that could preclude the context in which the disputed element is embedded from being taken into account. It takes the view, however, that this does not necessarily exclude consideration of that context ‘at the prior stage of assessing whether any “evocation” has occurred at all’.

73. The Netherlands Government considers that it is not necessary to address the second part of the second question, given its proposed answer to the first part. Mr Klotz claims that the context in which the disputed element is embedded should play a role in the application of Article 16(b). (78) According to the Italian Government, that may be the case, but an

unlawful ‘evocation’ under that provision cannot be ruled out, even if the exact origin of the product at issue is expressly indicated. TSWA, the Greek and French Governments, and the Commission consider, in essence, that, when establishing whether there is an ‘evocation’, additional indications provided by the label and packaging (79) of the product in question should not play any role, even if the disputed element is accompanied by an indication of the true origin of the product. For the following reasons I agree with the latter view.

74. First, it is clear from the — in my view unequivocal — wording of Article 16(b) of Regulation No 110/2008 that the fact that the ‘true origin of the product’ is brought to the attention of the relevant public is not such as to counteract the misleading nature of the disputed designation and thus to rule out its being categorised as an ‘evocation’ within the meaning of that provision.

75. I consider that the other clarifications set out in Article 16(b), which relate to the situation in which the protected geographical indication is used in translation or is accompanied by a mitigating expression, (80) support the interpretation that, so far as concerns that categorisation, it is irrelevant that additional information as to the origin is provided by means of the description, the presentation or the labelling and packaging (81) of the product concerned.

76. Second, like TSWA, the French Government and the Commission, I believe that the lessons drawn from the Court’s case-law support that interpretation.

77. The Court has clearly stated that the possible use of the expressions expressly cited in Article 16(b), with regard, *inter alia*, to the true origin of the product, ‘would not alter [the] categorisation’ as an ‘evocation’ within the meaning of Article 16(b) of Regulation No 110/2008. (82)

78. In addition, the Court has held that there may be ‘evocation’ even in the absence of any likelihood of confusion on the part of the relevant public between the products at issue. (83)

79. Consequently, the use of a name classified as an ‘evocation’, within the meaning of that provision, of a geographical indication referred to in Annex III to that regulation cannot therefore be authorised in the light of the specific circumstances surrounding the product bearing that unlawful designation or where there is no likelihood of confusion with a product lawfully bearing that geographical indication. (84) The referring court does not therefore have any discretion as to the context in that regard. (85)

80. More specifically, it is apparent from that case-law that it is irrelevant, under Article 16(b), that the disputed designation corresponds to the name of the undertaking and/or the place where the product is manufactured, (86) as submitted by Mr Klotz, who claims that the designation ‘Glen Buchenbach’ is a play on words consisting of the name of the place of origin of the drink at issue in the main proceedings (Berglen) and the name of a local river (Buchenbach). (87)

81. The Court has also stated that the fact that the disputed designation refers to a place of manufacture that is known to consumers in the Member State where the product is manufactured is not relevant for the purposes of assessing the concept of ‘evocation’, within the meaning of Article 16(b), since that provision protects registered geographical indications against any evocation throughout the territory of the European Union and, in the light of the need to guarantee effective and uniform protection of those geographic indications in that territory, it covers all European consumers. (88)

82. That lack of relevance is, in my view, also true of the situation where the reference to the place of manufacture of the product concerned is included, as is the case in the main proceedings, not only in the disputed designation itself, but also in indications supplementing it. (89)

83. I therefore propose that the answer to the second part of the second question is that Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that, for the purposes of establishing the existence of an ‘evocation’ prohibited by that provision, it is not necessary to take account of additional information found alongside the sign at issue in the description, presentation or labelling of the product concerned, in particular with regard to its true origin.

D. The impact of additional information surrounding the disputed sign in the light of Article 16(c) of Regulation No 110/2008 (third question)

84. By its third question, the referring court asks the Court to rule on whether, for the purposes of determining whether there is ‘any false or misleading indication ... liable to convey a false impression as to its origin’, within the meaning of Article 16(c) of Regulation No 110/2008, it is necessary to take account of the context in which the disputed element is used, in particular where the disputed element is accompanied by an indication of the true origin of the product.

85. The referring court explains that its question concerns whether, for the purposes of establishing the existence of any misleading indication as to the origin, in the context of the main proceedings, only the disputed element of the sign — ‘Glen’ — should be considered or whether the context in which that element is embedded should also be considered. The context in the present case would include, in particular, the word ‘Buchenbach’ which follows the word ‘Glen’ in the disputed designation and the ‘de-localising’ references on the label. (90)

86. In that regard, Mr Klotz and the Commission, as well as, in essence, the Netherlands Government, (91) consider that, for the purposes of determining whether there exists any ‘false or misleading indication’ within the meaning of Article 16(c), it is necessary to take account of the context in which the disputed sign is embedded and, in particular, to carry out an overall assessment of the label. According to the Italian Government, consideration of that context must take account of the fact that there may be a misleading

indication, even if there is also an indication of the true origin of the product. TSWA and the Greek and French Governments claim that that context is irrelevant for the purposes of applying that provision, even if the disputed element is accompanied by an indication of the true origin of the product. For the following reasons I agree with the latter view.

87. First, so far as concerns the wording of Article 16(c) of Regulation No 110/2008, I would point out, first of all, that that provision makes no reference to any elements likely to surround and supplement, or even correct, the disputed designation.

88. Next, the Commission claims, wrongly in my opinion, that ‘the adjectives “any other” and the collective reference to “the description, presentation or labelling of the product” clearly indicate that it is necessary to consider all the indications as to the origin in their entirety and, collectively, the description, presentation and labelling’, with the result that, in the main proceedings, the examination should take account of all the information featured on the label.

89. In that regard, I would point out that in the German-language version (92) of paragraphs (a) and (b) of Article 16, which begin with the word ‘jede [each]’ followed by the singular, are clearly formulated differently to paragraphs (c) and (d), which begin with the word ‘alle [all]’ followed by the plural, which could therefore convey the comprehensive nature of paragraphs (c) and (d).

90. Nonetheless, that variation in the formulation of the various situations set out in Article 16 does not exist in other language versions, where the term which essentially means ‘every’ and which is used at the beginning of Article 16(c), as well as paragraphs (a), (b) and (d), does not, in my view, indicate the need for an assessment of all the information featured, in the present case, on the label in order to assess whether a situation such as that in the main proceedings is caught by the prohibition laid down in paragraph (c). (93)

91. However, it is settled case-law that the provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions established in all the EU languages and that, where there is a divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (94) Accordingly, I tend to favour an interpretation contrary to that proposed by the Commission. (95)

92. So far as concerns the expression ‘false or misleading indication ... on the description, presentation or labelling of the product’, I cannot see how, on the basis of that wording, which includes the coordinating conjunction ‘or’ (96) — usually indicating an alternative — the Commission takes the view that it is necessary to carry out a ‘collective’ assessment taking account of all the information relating to the product concerned which accompanies the disputed sign in order to determine whether it constitutes a ‘false or misleading indication’ within the meaning of Article 16(c) of Regulation No 110/2008. (97)

93. In addition, Mr Klotz invokes the expression ‘liable to convey a false impression as to its origin’ used at the end of Article 16(c). He submits that, if the Court were to find that, in order to assess whether there is an ‘evocation’ within the meaning of Article 16(b), it is necessary to refer to the overall perception of the average consumer who is reasonably well informed and reasonably observant and circumspect, (98) the same is true, a fortiori, when assessing whether there is a ‘false or misleading indication’ within the meaning of Article 16(c). However, I consider that argument to be ineffective in the light of my proposed answer to the second part of the second question. (99)

94. I am of the opinion that if the EU legislature had really intended that an indication which is in itself false or misleading, within the meaning of Article 16(c) of that regulation, may nonetheless be authorised on the basis of additional information surrounding that indication, such a restriction to the scope of that provision would have been expressly provided for, especially in view of the objectives of protection that are pursued. (100)

95. Second, so far as concerns the context in which Article 16(c) is embedded, I agree with the Commission’s view that the situation provided for in that provision must be distinguished from the situations set out in Article 16(a) and (b). (101) However, I am also of the opinion that it is not apparent from the general scheme of Article 16(c) that an overall examination of the label is necessary in the situation referred to therein.

96. In line with what was pointed out by Advocate General Campos Sánchez-Bordona with regard to a provision of EU law similar to Article 16 of Regulation No 110/2008, (102) I take the view that that article sets out a graduated list of prohibited acts, in which paragraph (c) is very different to the two previous paragraphs. Whereas Article 16(a) is limited to use of the protected geographical indication and paragraph (b) to misuse, imitation or evocation, paragraph (c) widens the scope of the protection to include ‘indications’ (information provided to consumers) on the description, presentation or labelling of the product concerned which, while not actually evoking the protected geographical indication, are ‘false or misleading’ as regards the links between the product concerned and that indication. (103)

97. However, I am of the opinion that the difference in wording and scope between Article 16(a), (b) and (c) provides no ground for inferring that paragraph (c) has to be interpreted as meaning that all the information included, in particular, on the labelling of the product concerned should be taken into account when assessing whether the disputed designation constitutes a ‘false or misleading indication’ within the meaning of that provision. It seems to me that, on the contrary, that assessment should be based on the disputed designation itself, taken in isolation, without any of the accompanying information calling into question that categorisation; otherwise paragraph (c) — which in my

view has a broad scope of application — would be stripped of its usefulness, as I will now explain.

98. Third, the taking into account of the objectives pursued by Regulation No 110/2008 in general and by the specific provisions analysed in particular supports, in my view, the interpretation that I advocate.

99. As I have already stated, (104) it seems to me that the objective of Regulation No 110/2008 and, in particular, Article 16, is to ensure the protection of geographical indications registered in Annex III to that regulation, both in the interests of consumers who should not be misled by inappropriate indications, and economic operators which bear higher costs in order to guarantee the quality of products that deservedly bear such indications and which must be protected against acts of unfair competition.

100. So far as concerns, in particular, Article 16(c), I am of the opinion that the EU legislature intended to give it a broad scope in order to ensure that the aforementioned objectives can be achieved. Like the French Government, I take the view that the expression ‘any other ... indication used in that provision covers any type of indication or sign, including a text, image or receptacle that may provide information as to the characteristics of the product. In addition, the flexible wording of the references included in paragraph (c) (105) permit, in my view, the inference that any one of the three mediums referred to therein, in the present case a reference on the label of the drink in question, could be sufficient to ‘create an erroneous impression as to the origin’ within the meaning of that provision. The other information on the label of the product in question cannot, in my opinion, counteract the potentially false or misleading nature of the disputed indication, even if it is accompanied by an indication of the true origin of the product.

101. In other words, as noted by the French Government, the attainment of those objective would be jeopardised if the protection of the geographical indications could be restricted by the fact that there is additional information accompanying an indication which is in itself false or misleading, within the meaning of Article 16(c) of Regulation No 110/2008, since to accept that interpretation would be to allow the use of such an indication, provided that it is accompanied by precise information which serves, in some way, to counteract the misleading nature of the indication.

102. Lastly, so far as concerns the application of the case-law relating to Directive 2000/13/EC, (106) repealed by Regulation (EU) No 1169/2011, (107) which seems to be proposed by the Commission, (108) I doubt that it is actually relevant for the purposes of answering the third question.

103. Regulation No 110/2008, of which interpretation is sought here, has a different purpose to that of Directive 2000/13, in so far as Directive 2000/13 enacts rules of a general and horizontal nature (109) concerning ‘the labelling of foodstuffs ... and certain aspects relating to the presentation and advertising thereof’, (110) whereas Regulation No 110/2008,

adopted subsequently, lays down specific measures, applicable vertically, relating to ‘the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks’. (111) As a result, there are differences in the objectives and scope of protection conferred by those two legal instruments, differences which, in my view, should be taken into account, notwithstanding the fact that the indication of geographical designations on the labelling of such drinks can fall simultaneously within the ambit of both those legal instruments. (112)

104. In particular, in the light of the wording of Article 2(1)(a)(i) of Directive 2000/13, which is the subject matter of the case-law referred to in the comments by the Commission, I take the view that the wording of that provision, which concerns ‘fair information practices’, (113) is not actually equivalent, at least not in substance, to that of Article 16(c) of Regulation No 110/2008, which concerns the ‘protection of geographical indications’, (114) to which the third question relates.

105. Moreover, I would point out that, in that case-law, the Court ruled in favour of carrying out an overall examination of the situation including all the information featured on the label of the product concerned, (115) including some external factors, (116) to determine whether a designation is liable to mislead the consumer, (117) but only with regard to references which are not registered as a designation of origin or a geographical indication protected at EU level, (118) which is not the case in the main proceedings, where such a protection is at issue. Against that background, I therefore see no reason to apply reasoning by analogy with that case-law.

106. Consequently, I propose that the answer to the third question is that Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purposes of establishing the existence of a ‘false or misleading indication’ prohibited by that provision, it is not necessary to take account of additional information found alongside the sign at issue in the description, presentation or labelling of the product concerned, in particular with regard to its true origin.

107. In the present case, having regard to the principles already referred to relating to the distribution of jurisdiction between national courts and the Court of Justice, (119) I shall merely point out that if the Court were to adopt the interpretation suggested above, that prohibition would be unlikely to apply in circumstances such as those in the main proceedings, in so far as the disputed term, ‘Glen’, does not have a sufficiently clear and direct link with the protected geographical indication in question, ‘Scotch Whisky’, or with the country with which it is associated — the ‘United Kingdom (Scotland)’ — in order for that term to constitute a ‘false or misleading indication ... liable to convey a false impression as to its origin’. (120)

108. In the alternative, in the event that Article 16(c) is interpreted by the Court as meaning that it is necessary to carry out an examination of all the information surrounding the disputed sign, I take the view that that

examination should necessarily lead, a fortiori, to the same actual result. If it were found to be necessary, in the present case, to take account of all the elements featured on the label which expressly refer to the exact origin of the product in question, as submitted by the Commission, it is difficult to imagine that use made of the term 'Glen' would come under the prohibition laid down in that provision. (121)

V. Conclusion

109. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Landgericht Hamburg (Regional Court, Hamburg, Germany) as follows:

(1) Article 16(a) of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 must be interpreted as meaning that 'indirect ... use' of a registered geographical indication, prohibited by that provision, requires the disputed designation to be identical or phonetically and/or visually similar to the indication in question. Accordingly, it is not sufficient that the disputed designation is liable to evoke in the relevant public some kind of association with the registered geographical indication or the geographical area relating thereto.

(2) Article 16(b) of Regulation No 110/2008 must be interpreted as meaning that the 'evocation' of a registered geographical indication prohibited by that provision does not necessarily require there to be phonetic and visual similarity between the disputed designation and the indication in question. It is not, however, sufficient that the disputed designation is liable to evoke in the relevant public some kind of association of ideas with the protected indication or the geographical area relating thereto. In the absence of such similarity, it is necessary to take account of the conceptual proximity existing, if it be the case, between the indication in question and the disputed designation, in so far as that proximity is of such a nature as to lead the consumer to have in mind, as reference image, the product whose indication is protected.

For the purposes of establishing the existence of an 'evocation' prohibited by Article 16(b), it is not necessary to take account of additional information found alongside the sign at issue in the description, presentation or labelling of the product concerned, in particular with regard to its true origin.

(3) Article 16(c) of Regulation No 110/2008 must be interpreted as meaning that, for the purposes of establishing the existence of a 'false or misleading indication' prohibited by that provision, it is not necessary to take account of additional information found alongside the sign at issue in the description, presentation or labelling of the product concerned, in particular with regard to its true origin.

1 Original language: French.

2 OJ 2008 L 39, p. 16. That regulation has been the subject of various amendments, but the provisions relevant to the present case have not been affected.

3 Under Article 15(1) of Regulation No 110/2008, a 'geographical indication' is 'an indication which identifies a spirit drink as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of that spirit drink is essentially attributable to its geographical origin'.

4 See judgments of 14 July 2011, Bureau national interprofessionnel du Cognac (C-4/10 and C-27/10, EU:C:2011:484, paragraphs 2 and 16), and of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35, paragraphs 10 and 11).

5 According to TSWA, the three concepts set out in Article 16(a), (b) and (c) referred to in the questions submitted for a preliminary ruling apply cumulatively to the use made of the disputed designation. In that regard, I shall merely observe that the referring court has not established the order of priority between the situations set out respectively in those provisions and has not asked the Court whether they may be applied cumulatively.

6 I would like to point out that the order for reference uses the German adjective 'optisch', literally translated by 'optique' in French, but, in my opinion, it is more accurate, from a lexical point of view, to use the French word 'visuel' [visual in English]. I shall therefore use 'visual' in this Opinion, as the Court has done in its most recent case-law in this area.

7 See, in particular, footnote 72 of this Opinion.

8 See, in particular, judgments of 13 February 2014, Maks Pen (C-18/13, EU:C:2014:69, paragraph 30); of 3 September 2015, Costea (C-110/14, EU:C:2015:538, paragraph 13); and of 10 March 2016, Safe Interenvíos (C-235/14, EU:C:2016:154, paragraph 119).

9 See, in particular, judgments of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35, paragraph 31), and of 5 December 2017, M.A.S. and M.B. (C-42/17, EU:C:2017:936, paragraph 23).

10 TSWA points out that it brought an action to rectify those deficiencies. The action was found to be inadmissible by the referring court.

11 See, in particular, footnote 38 of this Opinion.

12 See, inter alia, judgment of 4 April 2000, Darbo (C-465/98, EU:C:2000:184, paragraph 19).

13 See, inter alia, judgment of 1 February 2017, Município de Palmela (C-144/16, EU:C:2017:76, paragraph 20).

14 See, inter alia, points 31, 62 and 95 et seq. of this Opinion.

15 The referring court cites, in that regard, 'Tilmann GRUR 1992, 829, 832 f.; Ströbele/Hacker, Markengesetz, 11. Aufl., § 135 Rn. 16', noting that the opinion of those authors concerns a provision similar to Article 16, namely Article 13 of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p.

1), and ‘Ingerl/Rohnke, Markengesetz, 3. Aufl., § 135 Rn. 4’.

16 The referring court observes that, thus far, the Court has only stated generally that ‘points (a) to (d) of Article 16 of Regulation No 110/2008 refer to various situations in which the marketing of a product is accompanied by an explicit or implicit reference to a geographic indication in circumstances liable to mislead the public as to the origin of the product or, at the very least, to set in train in the mind of the public an association of ideas regarding that origin, or to enable the trader to take unfair advantage of the reputation of the geographical indication concerned’ (judgment of 14 July 2011, Bureau national interprofessionnel du Cognac, C-4/10 and C-27/10, EU:C:2011:484, paragraph 46).

17 More specifically, Mr Klotz is of the opinion that the disputed indication should necessarily be ‘identical’ to the protected geographical indication; according to the French Government, it should be ‘identical or [at least] phonetically and/or visually similar’; the Netherlands Government takes the view that it should ‘make reference’ to the geographical indication, even if an association may be made in the mind of the relevant public; according to the Commission, there is no ‘use’ of the geographical indication where a ‘different designation’ is used.

18 See, *inter alia*, judgment of 15 November 2017, Geissel and Butin (C-374/16 and C-375/16, EU:C:2017:867, paragraph 32 and the case-law cited).

19 In that regard, TSWA claims that the designation ‘Glen’ should be prohibited, in the present case, in so far as it concerns a product ‘comparable’ to ‘Scotch Whisky’ but is not of Scottish origin. It considers, nevertheless, that the question referred also concerns the second situation referred to in Article 16(a), on the ground that the fact that the products are comparable does not preclude the reputation of the protected geographical indication from being exploited. I note that the referring court has not taken a position on this subject but that the Court has already held that ‘[where] the products not covered by a geographical indication are spirit drinks, it seems reasonable to hold that that situation may concern products comparable to the spirit drink registered under that geographical indication’ (judgment of 14 July 2011, Bureau national interprofessionnel du Cognac, C-4/10 and C-27/10, EU:C:2011:484, paragraph 54).

20 The emphasis is mine.

21 See, by analogy, judgment of 14 September 2017, EUIPO v Instituto dos Vinhos do Douro e do Porto (C-56/16 P, EU:C:2017:693, paragraphs 114 et seq.), concerning the criteria of association between the sign at issue and the protected designation which relate to the perception by the relevant public of ‘a logical and conceptual unit’ or a ‘geographical reference to the port wine covered by the designation of origin in question’.

22 Likewise, in his Opinion in Comité Interprofessionnel du Vin de Champagne (C-393/16, EU:C:2017:581, points 42 et seq.), Advocate General

Campos Sánchez-Bordona also considered, with regard to provision equivalent to Article 16(a), that the concept of ‘direct or indirect commercial use’ is applicable to use of the protected designation of origin (in the present case, the protected geographical indication) in an identical or similar form.

23 The Commission notes that the requirement for use to be made of the geographical indication itself does not, however, preclude a translation thereof, adding that this is clearly not the situation in the present case.

24 The Netherlands Government gives the — fictitious — example of indirect commercial use of the protected geographical indication ‘Scotch Whisky’ in the context of an advertising campaign which is worded as follows: ‘Glen Buchenbach has the taste of Scotch Whisky’.

25 See also the doctrine cited in the order for reference which is referred to in footnote 15 of this Opinion.

26 See judgments of 14 July 2011, Bureau national interprofessionnel du Cognac (C-4/10 and C-27/10, EU:C:2011:484, paragraphs 56 and 57), and of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35, paragraphs 33 to 35).

27 As regards the interpretation of Article 16(b), see the answer to the second question submitted for a preliminary ruling set out in point 48 et seq. of this Opinion.

28 See, also, recital 1 of Regulation No 110/2008, and the Explanatory Memorandum of the Commission’s proposal of 15 December 2005 which led to the adoption of that regulation (Proposal for a Regulation of the European Parliament and of the Council on the definition, description, presentation and labelling of spirit drinks, COM(2005) 125 final, p. 2), in which the need to enhance the clearness of existing EU legislation on spirit drinks was noted.

29 The emphasis is mine.

30 See the paragraph cited in footnote 16 of this Opinion, in respect of which TSWA claims that the German-language version (which mentions only an ‘association’) is more restrictive than the Spanish-, English-, French- and Italian-language versions (which refer to an ‘association of ideas’) and that the latter — broader — formulation should be preferred so that ‘association’ refers to the range of thoughts generated by the geographical indication, and not to an association with the geographical indication itself.

31 The objectives thus pursued by Article 16 are discussed in the judgments of 14 July 2011, Bureau national interprofessionnel du Cognac (C-4/10 and C-27/10, EU:C:2011:484, paragraph 47), and of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35, paragraphs 23 and 24).

32 Namely Article 118m(2) of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1), as amended by Council Regulation (EC) No 491/2009 of 25 May 2009 (OJ 2009 L 154, p. 1).

33 So far as concerns the similarities between Article 16 of Regulation No 110/2008 and Article 118m(2) of

Regulation No 1234/2007, see judgment of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne* (C-393/16, EU:C:2017:991, paragraphs 18, 34, 39 and 40) and the Opinion of Advocate General Campos Sánchez-Bordona in *Comité Interprofessionnel du Vin de Champagne* (C-393/16, EU:C:2017:581, point 60 and footnote 16).

34 In the words of the judgment of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne* (C-393/16, EU:C:2017:991, paragraph 38), ‘in connection with the protection of [protected designations of origin] and [protected geographical indications], Regulation No 1234/2007 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 quality, 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’ (the emphasis is mine).

35 I note that Article 15(4) of Regulation No 110/2008 requires that ‘[s]pirit drinks bearing a geographical indication registered in Annex III shall comply with all the specifications of the technical file provided for under Article 17(1)’.

36 See, to that effect, judgments of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 46), and of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne* (C-393/16, EU:C:2017:991, paragraphs 39 and 40).

37 Namely ‘Swabian ... Whisky’, ‘Deutsches Erzeugnis’ (German product), ‘Hergestellt in den Berglen’ (Made in the Berglen).

38 TSWA proposes to reword the second part of the first question submitted for a preliminary ruling in those terms on the ground that the concept of ‘context’ (‘Umfeld’ in German, the language of the case) used by the referring court does not appear in either Regulation No 110/2008 or the case-law of the Court. In the light of the grounds for the order for reference, it is, TSWA claims, therefore preferable to refer to the concepts of ‘presentation’, ‘labelling’ and ‘packaging’ defined in paragraphs 15 to 17 of Annex I to that regulation, which appear to be covered, in essence, by that question.

39 In view of their proposed response to the first part of the first question submitted for a preliminary ruling, Mr Klotz, the French Government and the Commission have taken no position in that regard.

40 For the reasons set out in point 42 of this Opinion.

41 See also point 40 of this Opinion.

42 Article 16(b) also states that it is of no significance that ‘the geographical indication is used in translation or accompanied by an expression such as “like”, “type”, “style”, “made”, “flavour” or any other similar term’. Indeed, despite the use of such supposedly corrective expressions, the consumer is still likely to be misled by the message conveyed by the main designation, which makes an inappropriate link to that indication.

43 With regard to the possible relevance of the context in which the element at issue is embedded as regards Article 16(b) of Regulation No 110/2008, see the answer to the second part of the second question referred set out in points 69 et seq. of this Opinion.

44 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 21 and the case-law cited).

45 As there was, according to the example put forward by the referring court, between the designation ‘Verlados’ and the registered geographical indication ‘Calvados’ in the proceedings which gave rise to the judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35).

46 The disputed element ‘Glen’ is clearly different, phonetically and visually, to the registered geographical indication ‘Scotch Whisky’.

47 I note that the French and Italian Governments also emphasise the importance of ‘conceptual proximity’, although the answer they propose instead focuses on the criterion of ‘association’ raised by the referring court.

48 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 21 and the case-law cited).

49 On the contrary, it amounts not to mere ‘evocation’, but rather ‘use’, within the meaning of a provision similar to Article 16(a) of Regulation No 110/2008, where the protected designation is incorporated in its entirety in that of the foodstuff concerned to indicate the taste of the foodstuff (see judgment of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, C-393/16, EU:C:2017:991, paragraphs 57 and 58).

50 In so far as concerns the disputed designations ‘Cambozola’, ‘parmesan’, ‘KONJAKKI’, ‘Verlados’ and ‘Port Charlotte’, see, respectively, judgments of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 25); of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117, paragraph 44); of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 56); of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 21), and of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:693, paragraph 122).

51 See, inter alia, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 21, 32, 35 and 48 and the case-law cited). According to the Commission, that criterion laid down in the case-law implies that an association is evoked, immediately and

precisely, between the product concerned and the protected geographical indication.

52 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 22). The emphasis is mine.

53 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 25, 28 and 48).

54 See, to that effect, judgment of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:693, paragraphs 122 to 125).

55 See, *inter alia*, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 33, 34, 38 to 40 and 48 and the case-law cited).

56 Namely all the parties, with the exception of Mr Klotz and the Netherlands Government.

57 See, in particular, judgments of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 27); of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117, paragraph 46); of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraphs 57 and 58); and of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 38 to 40).

58 See point 55 of this Opinion.

59 See judgments of 26 February 2008, *Commission v Germany* (C-132/05, EU:C:2008:117, paragraphs 47 and 48), and of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 35).

60 It is irrelevant that the average European consumer would not be liable to confuse the product at issue with a product lawfully bearing the protected designation in question (see the case-law cited in point 79 of this Opinion).

61 Objectives analysed in points 34 et seq. of this Opinion.

62 The emphasis is mine.

63 See points 31 et seq. of this Opinion.

64 See, by analogy, judgment of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:693, paragraphs 80 and 81).

65 In that regard, Mr Klotz cites, *inter alia*, the judgment of 20 May 2003, *Consorzio del Prosciutto di Parma et Salumificio S. Rita* (C-108/01, EU:C:2003:296, paragraph 66 and the case-law cited).

66 Country of origin, as set out in Annex III of Regulation No 110/2008, for the protected geographical indication ‘Scotch Whisky’.

67 The Netherlands Government rightly highlights the links between the protection afforded by Regulation No 110/2008 to geographical indications and the freedom of undertakings to choose a product name, irrespective of whether it is protected under trade mark law, in so far as the purpose of that regulation is to prevent the misuse of the designation ‘Scotch Whisky’ for whisky which has not been produced in Scotland, while the individual protection of the trade mark is intended to give the undertaking the opportunity to stand out and to prevent third parties from using the protected trade mark (on the links established with trade mark law by

Article 23 of that regulation, see Blakeney, M., *The protection of geographical indications*, Law and practice, Edward Elgar Publishing, Cheltenham, 2014, p. 286).

68 It is settled case-law that in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts in the case is a matter for the national court or tribunal (see, *inter alia*, judgments of 8 May 2008, *Danske Svineproducenter*, C-491/06, EU:C:2008:263, paragraph 23, and of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 27), especially as the Court does not necessarily have available to it all the information that is essential for that purpose (see, *inter alia*, judgments of 21 June 2007, *Omni Metal Service*, C-259/05, EU:C:2007:363, paragraph 15, and of 9 February 2017, *Madaus*, C-441/15, EU:C:2017:103, paragraph 35).

69 See the case-law cited at footnote 9 to this Opinion.

70 According to TSWA, the sign in question — ‘Glen’ — comes from Scottish Gaelic and is used, particularly in Scotland, as a common place name and is widely used as an element forming part of the name of Scottish whiskies with which European and German consumers will, in the first place, associate that word. By contrast, Mr Klotz is of the opinion that that word does not indicate Scottish origin, in so far as it is a common word in English which comes from Irish Gaelic and features in the names of many towns, rivers and valleys located outside of Scotland, as well as in the names of whiskies produced around the world.

71 The Commission states that TSWA sought, without success, to prevent registration of the trade mark ‘Glen Breton’ by the Glenora distillery established in Nova Scotia (Canada) (see judgment of the Federal Court of Appeal, Canada, of 22 January 2009, *Glenora Distillers International Ltd v. The Scotch Whisky Association*, 2009 FCA 16, (2010) 1 F.C.R. 195). It adds that, by contrast, TSWA did not object to the registration in Germany, in 2013, of the trade mark ‘Glen Buchenbach’ at issue in the main proceedings. I would point out that TSWA also failed to prohibit, in France, use made of the trade mark ‘Wel Scotch’ for a beer, on the basis of Articles 10 and 16 of Regulation No 110/2008 (see judgment of the Court de cassation, *Chambre commerciale* (Court of Cassation, Commercial Chamber), 29 November 2011, 10-25.703, published in the Bulletin).

72 Mr Klotz states that that list is not exhaustive and refers to ‘Old Glen Malt Whisky’ produced in Kentucky (United States) and the whisky produced in Australia by the Castle Glen Distillery. It should be borne in mind, however, that for such information to be considered decisive, it would have to be established that the average European consumer is aware of it.

73 The Commission submits that the word ‘Glen’ does not create a sufficient connection with the protected geographical indication ‘Scotch Whisky’, in so far as Scottish whiskies are not all marketed under the designation ‘Glen’, that word is not a designation

commonly used by consumers of Scottish whisky, the origins of that word are not only Scottish, but also Gaelic, and it is also used in Ireland, and the survey referred to is limited to the German market and does not indicate an automatic association of ideas.

74 As defined in the case-law of the Court cited in point 56 of this Opinion.

75 The Commission states that it cannot be excluded that the purpose of using the word ‘Glen’, which has no autonomous meaning in German, is to confer prestige on the product in question, since it is also used for certain high-end whiskies. It is apparent, however, that here it is merely a clever marketing strategy, given the lack of a sufficient connection with the registered indication ‘Scotch Whisky’.

76 See point 65 of this Opinion.

77 On the indications provided by the label of the product at issue in the main proceedings with regard to its German origin, see footnote 37 of this Opinion.

78 According to Mr Klotz, account should be taken of the fact that the disputed element ‘Glen’ is incorporated into the overall sign ‘Glen Buchenbach’ and that it is accompanied, on the label, by several indications of the true origin of the product which would be noticed by the consumer at the same time as the sign ‘Glen Buchenbach’ as a whole.

79 Regarding the specific wording of the proposed answer, see the observations submitted by TSWA referred to in footnote 38 of this Opinion.

80 See the reminder of those other clarifications set out in footnote 42 of this Opinion.

81 Possible sources of information are referred to in paragraphs 14 to 17 of Annex I to Regulation No 110/2008 (where those four concepts are defined) and expressly in Article 16(c) thereof, which refers to indications included in ‘the description, presentation or labelling’ of the product (three words which also appear in the title of that regulation). On the requested interpretation of that provision, see points 84 et seq. of this Opinion.

82 See judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 43 and the case-law cited) and, by analogy, judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraphs 29 and 43).

83 See judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 45, 51 and 52 and the case-law cited). See also, so far as concerns the protected designation of origin ‘Porto/Port’ of the trade mark ‘Port Charlotte’, Opinion of Advocate General Campos Sánchez-Bordona in *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:394, points 95 et seq.), and judgment of 14 September 2017, *EUIPO v Instituto dos Vinhos do Douro e do Porto* (C-56/16 P, EU:C:2017:693, paragraph 123).

84 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 11, 12, 29, 49 et seq.), concerning a drink named ‘Verlados’, in respect of which it was submitted that that name refers to the

name of the undertaking (*Viiniverla*) and to the village (*Verla*, Finland) where that drink was manufactured, but not to the French geographical indication ‘Calvados’.

85 In the judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraphs 27 and 28), it is true that the Court took the view that it was appropriate for the national court to take into account advertising material which appeared to suggest that the phonetic similarity between the two names ‘Cambozola’ and ‘Gorgonzola’ is not fortuitous, but only for the purposes of categorising that similarity and thus to justify the categorisation as an ‘evocation’.

86 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 42 et seq.).

87 It is also irrelevant that the product is, as the case may be, sold only locally and in small quantities (judgment of 21 January 2016, *Viiniverla*, C-75/15, EU:C:2016:35, paragraphs 46 and 47).

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

89 In the present case, the indications ‘Swabian’, ‘Deutsches Erzeugnis [German product]’, and ‘Hergestellt in den Berglen [Made in the Berglen]’, are included on the product’s labelling.

90 The referring court is of the view that only if the context does not play a role will it have to decide whether ‘Glen’ is misleading to the relevant public. By contrast, if the context is to be taken into consideration, TSWA cannot support its application on the basis of Article 16(c) of Regulation No 110/2008, because the application is for a total prohibition of the use made of that word, regardless of any ‘de-localising’ references.

91 More specifically, the Netherlands Government takes the view that ‘it is not a question of a false or misleading indication, within the meaning of Article 16(c) of Regulation No 110/2008, if there is no reference to a geographical indication, or a term corresponding to that indication and its translation and, moreover, the label of the product clearly indicates the provenance of the spirit drink’ (the emphasis is mine). So far as concerns the first part of the proposed answer, that government cites paragraph 60 of the judgment of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484), which refers to ‘the use of a mark containing a geographical indication, or a term corresponding to that indication and its translation’, a reference which, however, appears to me to be specific to the factual circumstances of the case (see, *inter alia*, paragraphs 16 and 38 of the judgment).

92 Language of the case.

93 There is also variation in the Spanish-language version (‘todo’ followed by the singular in paragraphs (a) and (b); ‘caulquier’ in paragraphs (c) and (d) but without the use of the plural present in the German version). By contrast, an identical word, the meaning of which refers to a single element of a number of things, is used, and followed by the singular in paragraph (c)

as well as in paragraphs (a), (b) and (d), in, in particular, the Danish- ('enhver'), English- ('any'), French- ('toute'), Italian- ('qualsiasi'), Portuguese- ('qualquer') and Swedish- ('varje') language versions.

94 See, inter alia, judgments of 26 July 2017, Mengesteab (C-670/16, EU:C:2017:587, paragraph 82), and of 12 October 2017, Lombard Ingtatlan Lízing (C-404/16, EU:C:2017:759, paragraph 21).

95 With regard to the normative system in which Article 16(c) of Regulation No 110/2008 is incorporated and the objectives of that regulation, see point 95 et seq. of this Opinion.

96 Including in the German-language version of Article 16(c).

97 It seems to me that that expression merely states that the alleged false or misleading indication may be on one or other of the three mediums referred to, without determining whether that indication must be examined in isolation or in combination with any other information included on the description, presentation or labelling.

98 The French Government also takes the view that, for the purposes of assessing whether the indication at issue is 'liable to convey a false impression as to its origin' within the meaning of Article 16(c), the relevant perception is that of 'the average consumer who is reasonably well informed and reasonably observant and circumspect', as the Court held with regard to Article 16(b) (see judgment of 21 January 2016, Viiniverla, C-75/15, EU:C:2016:35, paragraph 28). I would like to point out, however, that that question has not been asked of the Court in the present case.

99 The answer that it is not necessary to take account of all the contextual elements surrounding the disputed sign for the purposes of assessing whether there is an 'evocation' within the meaning of Article 16(b) (see point 69 et seq. of this Opinion).

100 On the objectives pursued by the rules in question, see point 98 et seq. of this Opinion.

101 According to the Commission, '[t]he third situation requiring protection, provided for in paragraph (c), is different to the first two, in so far as the disputed word does not automatically evoke in the consumer an association with the registered geographical indication'.

102 Namely Article 118m(2) of Regulation No 1234/2007 (see also footnotes 32 and 33 of this Opinion).

103 See, to that effect, Opinion of Advocate General Campos Sánchez-Bordona in Comité Interprofessionnel du Vin de Champagne (C-393/16, EU:C:2017:581, points 46 and 104).

104 See points 36 et seq. of this Opinion.

105 Namely 'any other false or misleading indication ... on the description, presentation or labelling of the product'.

106 Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29).

107 Regulation (EU) No 1169/2011 of the European Parliament of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 2011 304, p. 18).

108 The Commission submits that its view, advocating an overall examination of the label, 'is consistent with the case-law on the interpretation of Article 7(1)(a) of Regulation No 1169/2011, in which the overall impression should also be taken into account', citing the judgments of 10 September 2009, Severi (C-446/07, EU:C:2009:530, paragraphs 58 et seq.), and of 4 June 2015, Teekanne (C-195/14, EU:C:2015:361, paragraphs 36 to 42). The passages cited concern the interpretation of Article 2(1)(a)(i) of Directive 2000/13, which provides that the labelling and methods used must not be such as could mislead the purchaser to a material degree, particularly as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production, which is equivalent, in essence, to Article 7 of Regulation No 1169/2011.

109 Under recitals 4 and 5 of Directive 2000/13, the purpose of that directive is 'to enact rules of a general nature applicable horizontally to all foodstuffs put on the market', whilst 'rules of a specific nature which apply vertically only to particular foodstuffs should be laid down in provisions dealing with those products'.

110 In accordance with Article 1(1) of Directive 2000/13.

111 Recital 9 of Regulation No 110/2008 points out that difference to Directive 2003/13, even though certain provisions of that regulation (in particular Articles 8, 9(9) and 11(4)) refer to it.

112 See, also, with regard to the differences between Directive 2000/13 and 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), judgment of 10 September 2009, Severi (C-446/07, EU:C:2009:530, paragraph 58), and Opinion of Advocate General Sharpston in Severi (C-446/07, EU:C:2009:289, points 47 to 49).

113 As is apparent from the title of Article 7 of Regulation No 1169/2011, which corresponds to Article 2 of Directive 2000/13 (see footnote 108 of this Opinion).

114 As is apparent from the wording of Article 16.

115 In the judgment of 4 June 2015, Teekanne (C-195/14, EU:C:2015:361, paragraphs 37 to 44), the Court held that it is for the referring court to carry out an overall examination of the various items comprising

the labelling, in particular the list of ingredients on the packaging.

116 In the judgment of 10 September 2009, *Severi* (C-446/07, EU:C:2009:530, paragraphs 62 and 63), the Court held that national courts may have regard to the length of time during which the designation has been used, but that any good faith on the part of the manufacturer or retailer is irrelevant.

117 Bearing in mind that Article 16(c) of Regulation No 110/2008 covers ‘any ... indication ... liable to convey a false impression as to its origin’.

118 See judgments of 10 September 2009, *Severi* (C-446/07, EU:C:2009:530, paragraphs 59 and 63), and of 4 June 2015, *Teekanne* (C-195/14, EU:C:2015:361, paragraphs 27 to 29).

119 See, *inter alia*, point 66 of this Opinion.

120 See also footnote 75 of this Opinion.

121 The Commission rightly states that the label, far from reinforcing the vague character of the designation ‘Glen’, includes, on the contrary, information, in clearly visible characters, which makes it impossible for consumers to believe that the product is Scottish. Indeed, not only is the word ‘Glen’ used in combination with the place name ‘Buchenbach’, which is obviously German sounding, but it is also stated that it is a ‘Swabian’ whisky, a ‘German product’, produced by the Waldhorn distillery in Berglen. The information is also topped by a stylised drawing of a hunting horn (‘Waldhorn’ in German) which, unlike the bagpipes, is not typically Scottish.