

Court of Justice EU, 17 December 2020, Morbier



PROTECTED DESIGNATION OF ORIGIN

Article 13(1) of Regulation No 1151/2012 (PDO scope of protection) covers, in a broad sense, all acts which may mislead the consumer as to the true origin of the product concerned:

- does not merely prohibit the use by a third party of the registered name.
- prohibits the reproduction of the shape or appearance characterising a product covered by a registered name where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name. It is necessary to assess whether such reproduction may mislead the European consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account all the relevant factors in the case.

Source: [ECLI:EU:C:2020:1043](#)

Court of Justice EU, 17 December 2020

(E. Regan, K. Lenaerts, M. Ilešič, C. Lycourgos and I. Jarukaitis)

JUDGMENT OF THE COURT (Fifth Chamber)

17 December 2020 (*)

(Reference for a preliminary ruling – Agriculture – Protection of geographical indications and designations

of origin for agricultural products and foodstuffs – Regulation (EC) No 510/2006 – Regulation (EU) No 1151/2012 – Article 13(1)(d) – Practice liable to mislead the consumer as to the true origin of the product – Reproduction of the shape or appearance of a product which has a protected name – Protected designation of origin (PDO) ‘Morbier’)

In Case C-490/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 19 June 2019, received at the Court on 26 June 2019, in the proceedings Syndicat interprofessionnel de défense du fromage Morbier

v

Société Fromagère du Livradois SAS,
THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, M. Ilešič, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2020,

after considering the observations submitted on behalf of:

– the Syndicat interprofessionnel de défense du fromage Morbier, by J.-J. Gatineau, avocat,

– the Société Fromagère du Livradois SAS, by E. Piwnica, avocat,

– the French Government, by C. Mosser and A.-L. Desjonquères, acting as Agents,

– the Greek Government, by G. Kanellopoulos, E. Leftheriotou and I.-E. Krompa, acting as Agents,

– the European Commission, by D. Bianchi and I. Naglis, acting as Agents,

after hearing [the Opinion of the Advocate General](#) at the sitting on 17 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13(1) of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12) and the same article 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).

2 The request was submitted in proceedings between the Syndicat interprofessionnel de défense du fromage Morbier (*‘the Syndicat’*) and the Société Fromagère du Livradois SAS concerning an infringement of the protected designation of origin (PDO) ‘Morbier’ and acts of unfair and *‘parasitic’* competition (free-riding) alleged against the Société Fromagère du Livradois SAS.

Legal context

EU law

3 Recitals 4 and 6 of Regulation No 510/2006, which was repealed by Regulation No 1151/2012, stated:

'(4) In view of the wide variety of products marketed and the abundance of product information provided, the consumer should, in order to be able to make the best choices, be given clear and succinct information regarding the product origin.

...

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

4 Article 13(1) of the regulation is worded as follows:

'Registered names shall be protected against:

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

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

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container 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.

...

5 Recitals 18 and 29 of Regulation No 1151/2012 state:

'(18) The specific objectives of protecting designations of origin and geographical indications are securing a fair return for farmers and producers for the qualities and characteristics of a given product, or of its mode of production, and providing clear information on products with specific characteristics linked to geographical origin, thereby enabling consumers to make more informed purchasing choices.

...

(29) Protection should be granted to names included in the register with the aim of ensuring that they are used fairly and in order to prevent practices liable to mislead consumers ...'

6 Article 4 of that regulation, entitled 'Objective', provides:

'A scheme for protected designations of origin and protected geographical indications is established in order to help producers of products linked to a geographical area by:

(a) securing fair returns for the qualities of their products;

(b) ensuring uniform protection of the names as an intellectual property right in the territory of the Union;

(c) providing clear information on the value-adding attributes of the product to consumers.'

7 Article 5(1)(a) and (b) of that regulation, which essentially reproduces the wording of Article 2(1)(a) and (b) of Regulation No 510/2006, provides as follows:

'For the purpose of this Regulation, "designation of origin" is a name which identifies a product:

(a) originating in a specific place, region or, in exceptional cases, a country;

(b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors ...'

8 The wording of Article 13(1) of the regulation reproduces, in essence, that of Article 13(1) of Regulation No 510/2006. Except that at the end of points (a) and (b) the words 'including when those products are used as an ingredient' have been added.

9 Pursuant to Commission Regulation (EC) No 2400/96 of 17 December 1996 on the entry of certain names in the 'Register of protected designation of origin and protected geographical indications' provided for in Council Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1996 L 327, p. 11), as amended by Commission Regulation (EC) No 1241/2002 of 10 July 2002 (OJ 2002 L 181, p. 4), the name 'Morbier' was entered in the Register of protected designation of origin and protected geographical indications, annexed to that regulation, as a PDO.

10 The description of the product contained in the specification in Commission Implementing Regulation (EU) No 1128/2013 of 7 November 2013 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications (Morbier (PDO)) (OJ 2013 L 302, p. 7) is as follows: "Morbier" is a cheese made from raw cow's milk, with an uncooked pressed paste, in the shape of a flat cylinder 30 to 40 centimetres in diameter, 5 to 8 centimetres high, weighing 5 to 8 kg, with flat sides and a slightly convex heel.

Throughout each slice the cheese has a continuous, joined, horizontal, central black mark. Its rind is natural, rubbed, of regular appearance, smeared, and bears the imprint of the frame of the mould. Its colour is beige to orange with shades of orangey brown, orangey red and orangey pink. Its paste is homogeneous and ivory to pale yellow in colour, with frequently a number of scattered openings the size of a redcurrant or small flattened bubbles. It is soft to the touch, smooth and melting and not very sticky in the mouth and its texture is smooth and fine. The taste is clear with hints of milk, caramel, vanilla and fruit. With ageing, the aromatic range becomes enriched by roasted, spicy and vegetable nuances. The flavours are balanced. The cheese has a minimum fat content of 45 grams per

100 grams after complete desiccation. The moisture content of the fat-free cheese must be between 58% and 67%. The maturing of the cheese is carried out over a minimum period of 45 days from the day of production, without interrupting the cycle.'

French law

11 Article L. 722-1 of the Intellectual Property Code, in the version applicable to the main proceedings, provides: *'In the event of any infringement of a geographical indication, the person responsible shall incur civil liability.*

For the purposes of this Chapter, "geographical indications" are:

...

(b) protected designations of origin and protected geographical indications under Community legislation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs;

...

12 Morbier cheese has enjoyed appellation d'origine contrôlée (AOC) (registered designation of origin) status since the adoption of the decree of 22 December 2000 relating to the registered designation of origin *'Morbier'* (JORF No 302 of 30 December 2000, p. 20944), since repealed, which defined a geographical reference area, and the conditions necessary to claim that designation of origin, and laid down, in Article 8 thereof, a transitional period for undertakings situated outside that geographical area which had produced and marketed cheeses under the name *"Morbier"* on a continuous basis, in order to enable them to continue to use that name without the *'AOC'* reference, until the expiry of a period of five years following the publication of the registration of the designation of origin *'Morbier'* as a PDO.

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

13 In accordance with the decree of 22 December 2000, Société Fromagère du Livradois, which had produced Morbier cheese since 1979, was authorised to use the name *'Morbier'*, without the AOC indication, until 11 July 2007. After that date, it substituted for that name the name *'Montboissié du Haut Livradois'*. Moreover, on 5 October 2001, Société Fromagère du Livradois filed an application in the United States for the US trade mark *'Morbier du Haut Livradois'*, which it renewed in 2008 for 10 years, and, on 5 November 2004, it filed an application for the French trade mark *'Montboissier'*.

14 On 22 August 2013, accusing Société Fromagère du Livradois of infringing the protected designation and committing acts of unfair and parasitic competition by producing and marketing a cheese that has the visual appearance of the product covered by the PDO *'Morbier'*, in order to create confusion with that product and to benefit from the renown of the image associated with it, without having to comply with the specification of the designation of origin, the Syndicat brought proceedings before the Tribunal de grande instance de Paris (Regional Court, Paris, France) requesting that Société Fromagère du Livradois be ordered to cease any

direct or indirect commercial use of the name of the PDO *'Morbier'* for products not covered by that name, any misuse, imitation or evocation of the PDO *'Morbier'*, any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product by any means liable to convey a false impression as to the origin of the product, any other practice liable to mislead the consumer as to the true origin of the product and, in particular, any use of a black line separating two parts of the cheese, and to compensate it for the damage suffered.

15 Those applications were dismissed by judgment of 14 April 2016, which was upheld by the cour d'appel de Paris (Court of Appeal, Paris, France) by judgment of 16 June 2017. The cour d'appel de Paris (Court of Appeal, Paris) held that the marketing of a cheese which has one or more features contained in the specification for Morbier cheese, and which therefore resembles that cheese, did not constitute misconduct.

16 In that judgment, after stating that PDO legislation aims to protect not the appearance or features of a product as described in its specification, but its name, and therefore does not prohibit a product being made using the same techniques as those set out in the standards applicable to the geographical indication, and after taking the view that, in the absence of an exclusive right, reproducing the appearance of a product falls within the scope of the freedom of trade and industry, the cour d'appel de Paris (Court of Appeal, Paris) held that the features relied on by the Syndicat, in particular the blue horizontal line, relate to a historical tradition, an ancestral technique present in other cheeses, which were implemented by Société Fromagère du Livradois even before the PDO *'Morbier'* was obtained, and which are not built on the investments made by the Syndicat or its members. That court held that, although the right to use vegetable carbon is conferred only on cheese with the PDO *'Morbier'*, in order to comply with United States legislation, Société Fromagère du Livradois had to replace it with grape polyphenol, and therefore the two cheeses cannot be likened as a result of that feature. Noting that Société Fromagère du Livradois had claimed other differences between the Montboissié and the Morbier cheeses relating, inter alia, to the use of pasteurised milk in the former and raw milk in the latter, the court concluded that the two cheeses were distinct and that the Syndicat was seeking to extend the protection of the PDO *'Morbier'* for commercial interests, which was unlawful and contrary to the principle of free competition.

17 The Syndicat appealed on a point of law against the judgment of the cour d'appel de Paris (Court of Appeal, Paris) before the referring court, the Cour de cassation (Court of Cassation, France). In support of its appeal, it submits, first, that a designation of origin is protected against any practice liable to mislead the consumer as to the true origin of the product and that in holding, however, that only the use of the name of the PDO is prohibited, the cour d'appel de Paris (Court of Appeal, Paris) infringed Article 13 of Regulation No 510/2006 and the same article of Regulation No 1151/2012. The

Syndicat submits, next, that by merely stating, first, that the features that it relied on related to a historical tradition and were not dependent on the investments made by the Syndicat and its members and, secondly, that the ‘*Montboissié*’ cheese marketed since 2007 by Société Fromagère du Livradois was different from ‘*Morbier*’ cheese, without investigating, as requested, whether Société Fromagère du Livradois’ practices, in particular copying the ‘*cinder line*’ feature of Morbier cheese, were liable to mislead the consumer as to the true origin of the product, the court of appeal’s decision had no legal basis in the light of that legislation.

18 For its part, the Société Fromagère du Livradois maintains that the PDO protects products from a defined region, which alone can claim the protected designation, but does not prohibit other producers from producing and marketing similar products, provided they do not give the impression that they are covered by the designation in question. It is to be inferred from national law that any use of the sign constituting the PDO to designate similar products which are not entitled to that designation, either because they do not come from the defined area or because they come from it without having the required properties, is prohibited, but that it is not prohibited to market similar products, provided that such marketing is not accompanied by any practice liable to cause confusion, in particular by the misuse or the evocation of that PDO. It also argues that a ‘*practice liable to mislead the consumer as to the true origin of the product*’, within the meaning of Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012, must necessarily focus on the ‘*origin*’ of the product. It must therefore be a practice which causes the consumer to think that the product he or she is encountering is the PDO product in question. It considers that that ‘*practice*’ cannot result merely from the appearance of the product in itself, without any indication on its packaging referring to the protected origin.

19 The referring court states that the appeal before it raises the novel question of whether Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 must be interpreted as prohibiting only the use by a third party of the registered name or whether it must be interpreted as also prohibiting any presentation of the product which is liable to mislead the consumer as to its true origin, even if the registered name has not been used by the third party. Noting in particular that the Court has never ruled on that question, it considers that there is doubt as to the interpretation of the expression ‘*other practice*’ in those articles, which constitutes a particular form of infringement of a protected designation if it is liable to mislead the consumer as to the true origin of the product.

20 The question therefore arises, according to the referring court, as to whether the reproduction of physical characteristics of a product protected by a PDO may constitute a practice that is liable to mislead the consumer as to the true origin of the product, as prohibited by Article 13(1) of the regulations cited above. That question amounts to determining whether

the presentation of a product that is protected by a designation of origin, in particular the reproduction of the shape or the appearance which are characteristic of it, is capable of constituting an infringement of that designation, despite the fact that the name has not been reproduced.

21 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay proceedings and to refer the following question to the Court:

‘Must Article 13(1) of Regulation No 510/2006 ... and Article 13(1) of Regulation No 1151/2012 ... be interpreted as prohibiting solely the use by a third party of the registered name, or must they be interpreted as prohibiting the presentation of a product protected by a designation of origin, in particular the reproduction of the shape or the appearance which are characteristic of it, which is liable to mislead the consumer as to the true origin of the product, even if the registered name is not used?’

Consideration of the question referred

First part of the question

22 By the first part of its question, the referring court asks whether Article 13(1) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 must be interpreted as prohibiting solely the use by a third party of the registered name.

23 It is clear from the wording of those provisions that registered names are protected against various acts, namely, first, direct or indirect commercial use of a registered name, secondly, misuse, imitation or evocation, thirdly, false or misleading indications as to provenance, origin, nature or essential qualities of the product on the inner or outer packaging, advertising material or documents relating to the product concerned and the packing of the product in a container liable to convey a false impression as to its origin and, fourthly, any other practice liable to mislead the consumer as to the true origin of the product.

24 Those provisions therefore contain a graduated list of prohibited conduct (see, to that effect, [judgment of 2 May 2019, Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego, C-614/17, EU:C:2019:344](#), paragraph 27). Whilst Article 13(1)(a) of Regulation No 510/2006 and the same article of Regulation No 1151/2010 prohibit direct or indirect use of a registered name for products not covered by the registration, in an identical form or a form that is phonetically and/or visually highly similar (see, by analogy, [judgment of 7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraphs 29, 31 and 39), Articles 13(1)(b) to (d) of those regulations prohibit other types of conduct against which registered names are protected and which do not use the names themselves either directly or indirectly.

25 Thus, the scope of Article 13(1)(a) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 must necessarily be distinguished from that relating to the other rules on the protection of registered names contained in Article 13(1)(b) to (d) of those regulations. In particular, Article 13(1)(b) of Regulation No 510/2006 and the same article of Regulation No

1151/2010 prohibit actions which, unlike those referred to in point (a), do not use either directly or indirectly the protected name itself, but suggest it in such a way that it causes the consumer to establish a sufficiently close connection with that name (see by analogy, concerning 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 (OJ 2008 L 39, p.16), [judgment of 7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraph 33).

26 As regards, more specifically, the concept of 'evocation', the decisive criterion is whether, when the consumer is confronted with a disputed designation, the image triggered directly in his or her mind is that of the product covered by the PDO, a matter which it falls to the national court to assess, taking into account, as the case may be, the partial incorporation of a PDO in the disputed designation, any phonetic and/or visual similarity, or any conceptual proximity, between the designation and the PDO (see, by analogy, [judgment of 7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraph 51).

27 Furthermore, in its [judgment of 2 May 2019, Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego \(C-614/17, EU:C:2019:344\)](#), the Court held that Article 13(1)(b) of Regulation No 510/2006 must be interpreted as meaning that a registered name may be evoked through the use of figurative signs. In reaching that view, the Court held, inter alia, in paragraph 18 of that judgment, that the wording of that provision can be understood as referring not only to words capable of evoking a registered name, but also to any figurative sign capable of evoking in the mind of the consumer products whose designation is protected. In paragraph 22 of the judgment, it noted that it cannot be excluded, in principle, that figurative signs may trigger directly in the consumer's mind the image of products whose name is registered on account of their 'conceptual proximity' to such a name.

28 With regard to the conduct referred to in Article 13(1)(c) of Regulation No 510/2006 and the same article of Regulation No 1151/2012, it should be noted that those provisions widen, in relation to points (a) and (b) of those articles, the scope of the protection by including, inter alia, 'any other indication', that is to say, information provided to consumers, on the inner or outer packaging of the product concerned, on advertising material or documents relating to that product, which, while not actually evoking the protected geographical indication, is false or misleading as regards the links between the product concerned and that indication. The expression 'any other indication' includes information which may appear in any form on the inner or outer packaging of the product concerned, on advertising or on documents relating to that product, in particular in the form of text, pictures or a container likely to provide information on the provenance, origin, nature or essential qualities of that product (see, by analogy,

[judgment of 7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraphs 65 and 66).

29 As regards the conduct referred to in Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012, as the Advocate General notes in point 49 of his Opinion, it is clear from the words 'any other practice' used in those provisions that they are intended to cover any conduct not already covered by the other provisions of those articles and thus to tighten the system of protection for registered names. 30 Thus, it follows from the foregoing considerations that Article 13(1) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 are not limited to prohibiting the use of the registered name itself, but have a wider scope.

31 Consequently, the answer to the first part of the question referred for a preliminary ruling must therefore be that Article 13(1) of Regulation No 510/2006 and Article 13(1) of Regulation No 1151/2012 do not prohibit solely the use by a third party of a registered name.

Second part of the question

32 By the second part of its question, the referring court asks, in essence, whether Article 13(1)(d) of Regulation No 510/2006 and Article 13(1)(d) of Regulation No 1151/2012 must be interpreted as prohibiting the reproduction of the shape or appearance characteristic of a product covered by a registered name where that reproduction is liable to mislead the consumer as to the true origin of the product.

33 By providing that registered names are protected against 'any other practice liable to mislead the consumer as to the true origin of the product', Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 do not specify the conduct prohibited by those provisions, but broadly cover all conduct, other than that prohibited by Article 13(1)(a) to (c) of those regulations, which may result in the consumer being misled as to the true origin of the product in question.

34 Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012 meet the objectives set out in recitals 4 and 6 of Regulation No 510/2006 and in recitals 18 and 29 and Article 4 of Regulation No 1151/2012, from which it is apparent that the system of protection of PDOs and protected geographical indications (PGIs) is intended, in particular, to provide consumers with clear information on the origin and properties of the product, so as to enable them to make more informed purchasing choices, and to prevent practices which may mislead them.

35 More generally, it is clear from the Court's case-law that the system of protection of PDOs and PGIs is essentially intended to assure consumers that agricultural products with a registered name 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 (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, paragraph 82; of [20 December 2017, Comité Interprofessionnel du Vin de Champagne, C-393/16, EU:C:2017:991](#), paragraph 38, and of [7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraphs 38 and 69).

36 As regards the question of whether the reproduction of the shape or appearance of a product covered by a registered name may constitute a practice prohibited by Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012, it should be observed that, indeed, as the Société Fromagère du Livradois and the European Commission argued, the protection provided for by those provisions concerns, according to the wording itself of those provisions, the registered name and not the product covered by that name. It follows that the purpose of that protection is not to prohibit, inter alia, the use of manufacturing techniques or the reproduction of one or more characteristics indicated in the specification of a product covered by a registered name, on the ground that they appear in that specification, in the making of another product not covered by the registration.

37 Nevertheless, as the Advocate General noted, in point 27 of his Opinion, a PDO is, in the words of Article 5(1)(a) and (b) of Regulation No 1151/2012, which, essentially, reproduces the wording of Article 2(1)(a) and (b) of Regulation No 510/2006, a name which identifies a product originating in a specific place, region or, in exceptional cases, a country, whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors. PDOs are therefore protected as they designate a product that has certain qualities or characteristics. Thus, the PDO and the product covered by it are closely linked.

38 Therefore, having regard to the open-ended nature of the expression ‘*any other practice*’ in Article 13(1)(d) of Regulation No 510/2006 and the same article of Regulation No 1151/2012, the possibility remains that the reproduction of the shape or appearance of a product covered by a registered name may fall within the scope of those provisions without that name appearing either on the product in question or on its packaging. This will be the case where that reproduction is liable to mislead the consumer as to the true origin of the product in question.

39 In order to determine whether that is so, it is necessary, as the Advocate General stated, in essence, in points 55 and 57 to 59 of his Opinion, first, to refer to the perception of the average European consumer, who is reasonably well informed and reasonably observant and circumspect (see, by analogy, judgments of [21 January 2016, Viiniverla, C-75/15, EU:C:2016:35](#), paragraphs 25 and 28, and of [7 June 2018, Scotch Whisky Association, C-44/17, EU:C:2018:415](#), paragraph 47), and, secondly, to take into account all the

relevant factors in the present case, including the way in which the products in question are presented to the public and marketed and the factual context (see, to that effect, [judgment of 4 December 2019, Consorzio Tutela Aceto Balsamico di Modena, C-432/18, EU:C:2019:1045](#), paragraph 25).

40 In particular, as regards, as in the case in the main proceedings, an element of the appearance of the product covered by the registered name, it is necessary, in particular, to assess whether that element constitutes a baseline characteristic which is particularly distinctive of that product so that its reproduction may, in conjunction with all the relevant factors in the case in point, lead the consumer to believe that the product containing that reproduction is a product covered by that registered name.

41 In the light of all the foregoing considerations, the answer to the second part of the question referred is that Article 13(1)(d) of Regulation No 510/2006 and Article 13(1)(d) of Regulation No 1151/2012, must be interpreted as prohibiting the reproduction of the shape or appearance characterising a product covered by a registered name where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name. It is necessary to assess whether such reproduction may mislead the European consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account all the relevant factors in the case.

Costs

42 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:

Article 13(1) of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Article 13(1) 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 must be interpreted as meaning that they do not prohibit solely the use by a third party of a registered name. Article 13(1)(d) of Regulation No 510/2006 and Article 13(1)(d) of Regulation No 1151/2012 must be interpreted as prohibiting the reproduction of the shape or appearance characterising a product covered by a registered name where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name. It is necessary to assess whether such reproduction may mislead the European consumer, who is normally informed and reasonably observant and circumspect, taking into account all relevant factors in the case.

[Signatures]

* Language of the case: French.

OPINION OF ADVOCATE GENERAL

PITRUZZELLA

delivered on 17 September 2020 (1)

Case C-490/19

Syndicat interprofessionnel de défense du fromage Morbier

v

Société Fromagère du Livradois SAS

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))
(Reference for a preliminary ruling – Agriculture – Agricultural products and foodstuffs – Geographical indications and designations of origin – Protection afforded by the registration of a name – Prohibition on use by a third party or prohibition on presentation capable of misleading the consumer in situations where the name is not used)

I. Introduction

1. In the request for a preliminary ruling which is the subject of this Opinion, the Cour de cassation (Court of Cassation, France) asks the Court a question concerning the interpretation of Article 13(1) of Regulations (EC) No 510/2006 (2) and (EU) No 1151/2012. (3)
2. That question was raised in the context of a dispute between the Syndicat interprofessionnel de défense du fromage Morbier (*'the Syndicat'*) and Société Fromagère du Livradois SAS (*'SFL'*) regarding alleged acts of unfair and *'parasitic'* competition (free-riding) on the part of the latter, in disregard of the protected designation of origin (PDO) *'Morbier'*.

II. Legal framework

A. EU law

3. The European Union introduced protection for PDOs and protected geographical indications (PGIs) for agricultural products and foodstuffs in Council Regulation (EEC) No 2081/92 of 14 July 1992, (4) repealed and replaced by Regulation No 510/2006. Article 13(1) of the latter regulation provides:

'Registered names shall be protected against:

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

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

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container 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.
...

4. Regulation No 510/2006 was repealed and replaced, with effect from 4 January 2013, by Regulation No 1151/2012. Article 13(1) of that regulation is essentially

identical to the corresponding provision of Regulation No 510/2006, except in so far as it also applies to products covered by the protected name when they are used as an ingredient and to *'services'*. Provisions identical to Article 13(1) of Regulations No 510/2006 and No 1151/2012 are laid down in the various quality schemes established by the European Union. (5)
5. In accordance with Commission Regulation (EC) No 1241/2002 of 10 July 2002, (6) adopted in accordance with Regulation No 2081/92, the name *'Morbier'* was entered into the register of PDOs. The specification for the PDO *'Morbier'*, as amended by Commission Implementing Regulation (EU) No 1128/2013 of 7 November 2013, (7) applicable to the facts in the main proceedings, describes the visual appearance of Morbier as follows: *"'Morbier' is a cheese made from raw cow's milk, with an uncooked pressed paste, in the shape of a flat cylinder 30 to 40 centimetres in diameter, 5 to 8 centimetres high, weighing 5 to 8 kg, with flat sides and a slightly convex heel. Throughout each slice the cheese has a continuous, joined, horizontal, central black mark. Its rind is natural, rubbed, of regular appearance, smeared, and bears the imprint of the frame of the mould. Its colour is beige to orange with shades of orangey brown, orangey red and orangey pink. Its paste is homogeneous and ivory to pale yellow in colour, with frequently a number of scattered openings the size of a redcurrant or small flattened bubbles. ...'*
6. Under Regulation (EU) No 1129/2011, (8) which entered into force on 1 June 2013, vegetable carbon E 153 may be used only in cheese with the PDO *'Morbier'*. (9)

B. French law

7. Article L. 722-1 of the French Intellectual Property Code, inserted by Law No 2007-1544 of 29 October 2007 on the fight against counterfeiting, (10) applicable to the facts in the main proceedings, provides that:

'In the event of any infringement of a geographical indication, the person responsible shall incur civil liability.

For the purposes of this Chapter, "geographical indications" are:

...

(b) protected designations of origin and protected geographical indications under Community legislation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs;
...

III. The main proceedings and the question referred for a preliminary ruling

8. The Syndicat was recognised on 18 July 2007 by the Institut national de l'origine et de la qualité (National Institute for Origin and Quality (INAO)) as the organisation responsible for the protection of Morbier. SFL, established in Puy-de-Dôme (France), is a company which produces and markets cheese.
9. Morbier cheese has enjoyed appellation d'origine contrôlée (AOC) (registered designation of origin) status since a decree was adopted on 22 December 2000. Article 8 of that decree laid down a transitional period

for undertakings situated outside the geographical reference area defined in that decree which produced and marketed cheeses under the name 'Morbier', in order to enable them to continue to use that name without the indication 'AOC' for a five-year period from the publication of the registration of the designation of origin 'Morbier' as a PDO by the European Commission, in accordance with Article 6 of Council Regulation No 2081/92. (11) That decree was repealed by Decree No 2011-441 of 20 April 2011. 10. Since it was not in the geographical area for which the name 'Morbier' was reserved, SFL, which had been producing cheese under the name 'Morbier' since 1979, was authorised, in accordance with Article 8 of the Decree of 22 December 2000, to use that name without the 'AOC' indication until 11 July 2007. After that date, it replaced 'Morbier' with 'Montboissié du Haut Livradois'. Moreover, on 5 October 2001, SFL filed an application in the United States for the United States trade mark 'Morbier du Haut Livradois', which it renewed in 2008 for 10 years, and on 5 November 2004, it filed an application for the French trade mark Montboissier.

11. Accusing SFL of infringing the protected designation and committing acts of unfair and 'parasitic' competition (free-riding) by producing and marketing a cheese that has the visual appearance of the product covered by the PDO 'Morbier', in order to create confusion with that product and to benefit from the renown of the image associated with it, without having to comply with the specification of the designation of origin, on 22 August 2013, the Syndicat brought proceedings before the Tribunal de grande instance de Paris (Regional Court, Paris, France) requesting that SFL be ordered to cease any direct or indirect commercial use of the name of the PDO 'Morbier', any misuse, imitation or evocation of that PDO, any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product by any means liable to convey a false impression as to the origin of the product, any other practice liable to mislead the consumer as to the true origin of the product and, in particular, any use of a black line separating two parts of the cheese, and to compensate it for the damage suffered.

12. By judgment of 14 April 2016, the Tribunal de grande instance de Paris (Regional Court, Paris) dismissed all of the Syndicat's claims. That judgment was upheld by the Cour d'appel de Paris (Court of Appeal, Paris, France) by judgment of 16 June 2017. In that judgment, the Cour d'appel de Paris (Court of Appeal, Paris) held, inter alia, that the marketing of a cheese which has one or more features contained in the specification for Morbier, and therefore resembles Morbier, did not constitute misconduct. After stating that PDO legislation aims not to protect the appearance or features of a product as described in its specification, but to protect its name, and therefore does not prohibit a product being made using the same techniques as those set out in the standards applicable to the geographical indication, and after noting that, in the absence of an

exclusive right, reproducing the appearance of a product falls within the scope of the freedom of trade and industry, the Cour d'appel de Paris (Court of Appeal, Paris) held that the features relied on by the Syndicat, in particular the blue horizontal line, relate to a historical tradition, an ancestral technique present in other cheeses, which were implemented by SFL even before the PDO was obtained, and which are not built on the investments made by the Syndicat or its members. That court held that, although the right to use vegetable carbon is conferred only on cheese with the PDO 'Morbier', in order to comply with United States legislation, SFL had to replace it with grape polyphenol, and therefore the two cheeses cannot be likened as a result of that feature. Noting that SFL claimed that there are other differences between Montboissier cheese and Morbier cheese relating, inter alia, to the use of pasteurised milk in the former and raw milk in the latter, the court concluded that the two cheeses are distinct and that the Syndicat was seeking to extend the protection of the designation 'Morbier' for commercial interests, which is unlawful and contrary to the principle of free competition. 13. The Syndicat brought an appeal against the judgment of the Cour d'appel de Paris (Court of Appeal, Paris) before the referring court. It submits that, by stating that only the use of the name 'Morbier' could constitute an infringement of the PDO 'Morbier', the Cour d'appel de Paris (Court of Appeal, Paris) adopted a position contrary to the wording of Article 13 of Regulations No 510/2006 and No 1151/2012, and did not address the question as to whether the presentation of Montboissier cheese was capable of misleading the consumer. For its part, SFL contends that the PDO protects products from a defined region and only those products may use the protected name. It does not prohibit other producers from producing and marketing similar products, as long as that marketing is not accompanied by any practice capable of giving rise to confusion, in particular by the misuse or the evocation of the protected designation. SFL also argues that a 'practice liable to mislead the consumer as to the true origin of the product', within the meaning of Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012, must necessarily focus on the 'origin' of the product. It must therefore be a practice which causes the consumer to think that the product he or she is encountering is the PDO product in question. SFL considers that that 'practice' cannot result merely from the appearance of the product in itself, without any indication on its packaging referring to the protected origin.

14. It is in that context that the Cour de cassation (Court of Cassation) has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 13(1) of ... Regulation No 510/2006 ... and Article 13(1) of Regulation No 1151/2012 ... be interpreted as prohibiting solely the use by a third party of the registered name, or must they be interpreted as prohibiting the presentation of a product protected by a designation of origin, in particular the reproduction of the shape or the appearance which are characteristic of

it, which is liable to mislead the consumer as to the true origin of the product, even if the registered name is not used?'

15. Written observations were submitted by the Syndicat, SFL, the French and Greek Governments and the Commission. Oral submissions were made by those interested parties, with the exception of the Greek Government, at the hearing before the Court which took place on 18 June 2020.

IV. Analysis

A. Preliminary observations

16. The question referred for a preliminary ruling by the Cour de cassation (Court of Cassation) may be divided into two parts. By the first part of that question, the referring court asks the Court whether Article 13(1) of Regulations No 510/2006 and No 1151/2012 must be interpreted as prohibiting only the use by an unauthorised third party of a protected name.

17. The second part of the question referred, which presupposes that the first part is answered in the negative, asks, on the other hand, whether that provision also prohibits the reproduction of the shape or appearance of the product covered by the registered name, even if the protected name is not used, where it is liable to mislead the consumer as to the true origin of the product reproducing that shape or appearance.

18. Although the question referred relates to Article 13(1) of those regulations as a whole, as may be inferred from the wording of that question and as is apparent from the grounds of the order for reference, the question is more specifically concerned with the provision in subparagraph (d) of paragraph 1 of that article, which covers any '*other practice liable to mislead the consumer as to the true origin of the product*'. However, as will be seen below, almost all the interested parties which submitted written observations to the Court have also analysed the question referred for a preliminary ruling in the light of Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012, which prohibits, inter alia, any '*evocation*' of a protected designation of origin. Moreover, one of the written questions for oral answer which the Court addressed to the interested parties at the hearing related to the difference between the provisions in subparagraphs (b) and (d) of Article 13(1). Therefore, for the sake of completeness, I shall consider the question referred for a preliminary ruling in the light of both subparagraph (b) and subparagraph (d).

B. Overview of the parties' observations

19. The Syndicat submits that the first part of the question referred for a preliminary ruling by the national court has already been answered in the case-law of the Court, in particular, in the judgments of 7 June 2018, Scotch Whisky Association (12) ('*the judgment in Scotch Whisky*'), and of 2 May 2019, Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego (13) ('*the judgment in Queso Manchego*'), which stated that even a practice not involving the use of the protected name may be caught by the prohibition laid down in Article 13(1) of Regulations No 510/2006 and No 1151/2012. As regards the second part of the question referred, the Syndicat

argues that reproducing the characteristic appearance of a product covered by a registered designation of origin can be prohibited under both Article 13(1)(b) and Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012. Accordingly, the Syndicat maintains that reproducing the characteristic appearance of a product is prohibited on the basis of Article 13(1)(b) of Regulation No 510/2006 only where the appearance at issue is capable of triggering directly in the consumer's mind the product whose name is protected. On the other hand, such reproduction is prohibited on the basis of Article 13(1)(d) where it is capable of misleading the consumer as to the origin of the product. The Syndicat states that the black line on Morbier cheese is a mark of recognition, the '*signature*', of that cheese, which gives it its identity, at least where the other conditions relating to its colour and texture are met.

20. SFL argues that, by its very nature, a PDO protects the '*name*' of the product in question, which establishes the product's link with a particular region and production technique. However, a PDO does not restrict the use of such a technique to products bearing that name, and does not give rise to any prohibition on marketing a product with the same appearance as products bearing that name. Such extensive protection would create a permanent monopoly on one or more of the characteristics described in the specification of the designation and on the appearance of a product, which, in itself, cannot be protected by an intellectual property right. SFL states that the judgments in Scotch Whisky and Queso Manchego concerned visual elements of the packaging or the name of the product, the replacement of which is easy and does not prevent the marketing of the product itself, unlike in the case of elements relating to the appearance of the product, such as the line through the middle of the cheese produced by SFL, which, moreover, is created by using an ancestral production technique. (14) SFL also refers to the case-law of the Court on measures having equivalent effect, according to which the use of a particular type of packaging cannot, in the absence of any exclusive right or provisions in that regard, be monopolised by some of the producers, in so far as the use of such packaging by other producers is fair and traditional. In addition, SFL argues, first, that it is not prohibited to produce '*feta*', '*mozzarella*' or '*parmesan*' cheese having the same presentation and packaging as those covered by the respective protected names (15) and, secondly, that several different PDOs may protect a product with an identical shape. It also refers to '*downgraded*' products, that is to say, products which, because their presentation is not compliant with the PDO specification, are not eligible for a PDO, but are still marketed with the authorisation of professional bodies such as the Syndicat. Lastly, SFL observes that the black stripe is a characteristic of many products made both in France and abroad (for example, '*Cendré des Prés*', '*Le Douanier*', '*Le Ratoureux*', and so on). SFL concludes that the answer to the question referred for a preliminary ruling should be that the protection afforded by a PDO applies only to the product name and that it does not prohibit a product which does not enjoy

such protection from having a characteristic of a similar shape.

21. As a preliminary point, the Commission states that a designation of origin, as set out in the specification or on the products marketed under the protected geographical indication in question, does not protect the products that it covers or any of the physical or other characteristics of those products. Only the registered name is protected. That being so, the Commission considers, generally, that it cannot be ruled out *prima facie* that reproducing the shape or appearance of a product which has a protected name may constitute an infringement of that name, although this would be the case only in exceptional circumstances. Referring to the judgments in *Scotch Whisky* and *Queso Manchego*, the Commission considers that Article 13(1) of Regulations No 510/2006 and No 1151/2012 should be interpreted as meaning that it prohibits not only the use of a registered name by a third party, but also any other practice, in particular the reproduction of the shape or appearance of the product protected by that name, where such a practice concerns characteristics which are clearly visible and are exclusive to that product, and where there is a sufficiently clear and direct conceptual proximity between that practice and the protected designation which is liable to mislead the consumer as to the true origin of the product, even if the registered name is not used. However, in order to conclude that such a practice exists in a particular case, the shape or appearance reproduced must be characteristic of the product whose name is protected and must be perceived by consumers as being unique and *'distinctive'* of that product.

22. As regards the first part of the question referred, the French Government argues that it follows from the wording, spirit and objectives of Article 13(1) of Regulations No 510/2006 and No 1151/2012, and from the Court's case-law, that that provision grants registered names a broad scope of protection covering a very large variety of infringements, and that it is therefore not only the use of that name by a third party which is prohibited. As regards the second part of the question referred, the French Government considers that reproducing a characteristic shape or particularly distinctive sign of a product covered by a PDO could, first, give rise to *'evocation'*, which is contrary to Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012 and, secondly, constitute a practice which is prohibited under Article 13(1)(d) if it is capable of triggering directly in the consumer's mind the image of the product covered by the PDO.

23. The Greek Government also considers that it is clear from the wording and objectives of Article 13(1) of Regulations No 510/2006 and No 1151/2012 that the provisions thereof cover the widest possible range of infringements against protected names. As regards Article 13(1)(d) in particular, the Greek Government considers that that provision is broader than those which precede it in terms of the nature and type of practice covered, but not in terms of the outcome of that practice, namely that it must result in the consumer being misled. According to that government, the shape or appearance

of a product is liable to mislead the consumer and to trigger directly in his or her mind the product whose name is protected, even if there is no direct reference to that name. Therefore, reproducing the appearance of a product whose name is protected may fall under the prohibitions laid down in Article 13(1) of Regulations No 510/2006 and No 1151/2012, provided that that appearance has been reproduced not by chance, but with the intention of taking advantage of the reputation of the protected name.

C. Assessment

24. First of all, I would like to refer to the assertion made by the Commission, in both its written observations and oral argument, that Article 13(1) of Regulations No 510/2006 and No 1151/2012 provides for a mechanism for the protection of the registered name itself, and not the product covered by that name.

25. That assertion is undoubtedly correct. Accordingly, in the present case, it is the name *'Morbier'* which is protected, and not, or at least not directly, the product that is made according to the rules imposed by the specifications for that name (16) and has the physical and organoleptic characteristics described therein, nor the presentation, appearance or any other characteristics of the product. However, in my view, such an assertion needs to be contextualised.

26. Indeed, I would observe, in the first place, that, while there is no doubt that it is the registered name which is protected under Article 13(1) of Regulations No 510/2006 and No 1151/2012, it should also be borne in mind that, in establishing a system for the protection of geographical indications and designations of origin, the intention of the EU legislature was, first, to support the rural economy – particularly in less-favoured or remote areas – through the *'promotion of products having certain characteristics'*, (17) and, secondly, to preserve *'the quality and diversity of the Union's agricultural ... production'*, which is considered to be *'one of its important strengths, giving a competitive advantage to the Union's producers and making a major contribution to its living cultural and gastronomic heritage'*. (18) The ultimate objective of the legislation on PDOs and PGIs is therefore to protect traditional products *'with specific characteristics linked to geographical origin'*. The protection granted to those terms merely serves to fulfil that objective, and the scope of such protection must therefore be interpreted in the light of that objective. (19)

27. In the second place, and further to what I have stated above, I would note that, in the actual words of Article 5(1)(a) and (b) of Regulation No 1151/2012, *'designation of origin'* is *'a name which identifies a product originating in a specific place, region or, in exceptional cases, a country'*, *'whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors'*. (20) PDOs are therefore protected if they designate a product which has certain *'qualities'* or *'characteristics'*, namely physical attributes such as its own flavour, aroma and appearance, that are linked to its geographical origin. More generally, it is the link with the region, as an element capable of

qualitatively distinguishing a product from all the other products available on the market, which forms the basis for the protection of PDOs. The registration procedure for PDOs, currently provided for in Articles 49 to 52 of Regulation No 1151/2012, is specifically intended to verify compliance with the requirements applicable to designations of origin, as laid down in Article 5 of that regulation. To that end, in accordance with Article 8 of that regulation, an application for registration must include a product specification which contains, inter alia, *'a description of the product, including the raw materials, if appropriate, as well as the principal physical, chemical, microbiological or organoleptic characteristics of the product'*, the definition of the geographical reference area and the elements establishing the link between the quality or characteristics of the product and that area. (21) That application must also be accompanied by a single document setting out, in particular, *'the main points of the product specification: the name, a description of the product, including, where appropriate, specific rules concerning packaging and labelling'* and *'a description of the link between the product and the geographical environment or geographical origin ... including, where appropriate, the specific elements of the product description or production method justifying the link'*. (22) There is also provision for an opposition procedure enabling third parties to lodge an opposition to, inter alia, the registration, if they show that the requirements applicable to PDOs, as defined in Article 5 of Regulation No 1151/2012, or the conditions referred to in Article 7(1) of that regulation, as regards the specification, are not complied with. (23)

28. Lastly, it is important to point out that, should the Court hold that reproducing the distinctive characteristic of a product covered by a registered name is liable to infringe Article 13(1) of Regulations No 510/2006 and No 1151/2012, it is not the characteristic in itself, or the product to which the name refers, which is to be protected. Indeed, such reproduction is prohibited only if it constitutes, where applicable, evocation of a protected name, or a practice which makes it impossible for producers or farmers whose products are covered by such a name *'to communicate to buyers and consumers the characteristics of their product under conditions of fair competition'* and *'to correctly identify their products on the marketplace'*. (24) In other words, such reproduction is prohibited only if it interferes with the achievement of the specific protection objectives of PDOs and PGIs. Those objectives are identified in recital 18 of Regulation No 1151/2012 and set out in Article 4 thereof and are intended, in particular, to ensure that producers and farmers receive fair returns for the qualities of products made by them which are linked to a particular geographical region and to provide consumers with clear information on the attributes of those products.

29. As a further preliminary point, it should be noted that, although geographical names are industrial property rights, they are covered by sui generis rules, of which the public-law aspects prevail over the private-

law aspects. In that respect, a geographical name also differs from a trade mark, which is the industrial property right that is most similar to a geographical name. Accordingly, first, the legal existence of PDOs (and, indeed, that of PGIs) is based on a legislative measure (a Commission regulation). That measure sets out in detail *'the principal physical, chemical, microbiological or organoleptic characteristics of the product'*, the method of obtaining the product and, where appropriate, the packaging of that product. Secondly, it establishes a scrutiny system to verify compliance with the legal requirements relating to PDOs. That system is based on official controls carried out by a responsible authority designated by each Member State, the aim of which is to ensure, in particular by means of *'verification that a product complies with the corresponding product specification'*, (25) that the quality standards of products marketed under a registered name are maintained. (26) Thirdly, the rules on registered names very much embody the objective of protecting consumer interests, which are taken into account both from the perspective of the consumers' expectations as to the quality of products covered by those names and from the perspective of their right to receive truthful commercial information and not to be misled in their choice of purchase. (27) Fourthly, although registered geographical names confer an exclusive right on the proprietor, that right is not individual, since any producer within the geographical area concerned is permitted to use the relevant name, the only condition being that his or her product must comply with the corresponding product specification. (28) Here too, it is the public interest in ensuring that names of origin can be freely appropriated by any producer meeting the required conditions which prevail. Lastly, the exclusive right conferred by registered geographical names is not intended to reward innovation, inventiveness or, more simply, individual entrepreneurial abilities. Nor is it intended to remunerate investments made by the producers authorised to use those names, contrary to what was held by the Cour d'appel de Paris (Court of Appeal, Paris) in the judgment under appeal in the main proceedings. The activity of those producers is in fact limited, by definition, to continuing a local and sometimes very long-standing production tradition linked to the natural and human environment of the region in which they operate, which are, in other words, factors that do not depend on their entrepreneurial initiative or choices. As explained in this Opinion, the rules on the protection of protected geographical names pursue objectives relating to agricultural policy, consumer protection and the protection of common cultural heritage. Those rules therefore promote an incentive model which relates directly to those objectives and which differs from that oriented towards competitive innovation. 30. That having been clarified, I shall now examine the first part of the question referred for a preliminary ruling, by which the referring court asks the Court whether Article 13(1) of Regulations No 510/2006 and No

1151/2012 prohibits only the use by a third party of a registered name.

31. As has been acknowledged by all the interested parties which have submitted their observations in the present proceedings, the answer to that question can already be found in the Court's case-law.

32. Accordingly, in the judgment in Scotch Whisky, which was delivered after the judgment of the Cour d'appel de Paris (Court of Appeal, Paris) which is under appeal before the referring court, the Court drew a clear distinction between situations where there is direct or indirect use of a registered geographical indication, as referred to in Article 16(a) of Regulation No 110/2008 (29) (of which the wording is essentially identical to that of Article 13(1) of Regulations No 510/2006 and No 1151/2012), and situations covered, inter alia, by Article 16(b) of that regulation. While the aim of the first provision, according to the Court, is to prohibit *'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'*, (30) and covers situations in which the sign at issue makes use of the registered geographical indication *'in an identical form or at least in a form that is phonetically and/or visually highly similar'*, (31) paragraph (b) of that provision covers *'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'*. (32)

33. The Court also stated in the judgment in Scotch Whisky that neither *'the partial incorporation of a protected geographical indication in the sign at issue'* nor the *'[identification of] phonetic and visual similarity between the disputed designation and the protected geographical indication'* (33) is an essential condition for the application of Article 16(b) of Regulation No 110/2008 and that, in assessing whether there is an *'evocation'* within the meaning of that provision, *'it is ... 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'*. Referring to paragraph 35 of the judgment of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35), the Court pointed out that it was necessary, where appropriate, to take account of the criterion of *'conceptual proximity'* between terms emanating from different languages, since such proximity may also trigger an image in the consumer's mind which is that of the product whose geographical indication is protected when he or she is confronted with a similar product bearing the disputed name, (34) and concluded that it falls to the national court to assess whether there is an evocation *'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'*. (35) Those principles were confirmed in

the judgment in Queso Manchego, in which the Court stated that the broad wording of Article 13(1)(b) of Regulation No 510/2006 *'can be understood as referring not only to words capable of evoking a registered name, but also to any figurative sign capable of evoking in the mind of the consumer products whose designation is protected'*, and that the use of the word *'any'* in that provision reflects the Union legislature's intention to *'protect registered names as it took the view that evocation is possible through the use of a word element or a figurative sign'*. (36) Indeed, according to the Court, *'it cannot be excluded, in principle, that figurative signs may trigger directly in the consumer's mind the image of products whose name is registered on account of their "conceptual proximity" to such a name'*. (37)

34. The Court stated that Article 16(c) of Regulation No 110/2008 *'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'*, and that the expression *'any other ... indication'* used in Article 16(c) *'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'*. (38)

35. More generally, the Court has ruled that Article 16(a) to (d) of Regulation No 110/2008 (39) refers to various situations in which the marketing of a product is accompanied by an explicit or implicit reference to a geographical 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 operator to take unfair advantage of the reputation of the geographical indication concerned.

36. The same principles apply to Article 13(1)(a) to (d) of Regulations No 510/2006 and No 1151/2012. That article therefore provides broad protection covering, first, the use, misuse and evocation of the protected name and, more generally, any attempt to free-ride on the reputation of that name by being associated with it and, secondly, any conduct liable to create a likelihood of confusion between the goods bearing such a name and ordinary goods. (40) Its aim is to prevent the misuse of protected geographical indications not only in the interests of those buying the products, but also in the interests of the producers who have endeavoured to guarantee the qualities expected of the products legally bearing such indications. (41)

37. The answer to the first part of the question referred for a preliminary ruling must therefore be that Article 13(1) of Regulations No 510/2006 and No 1151/2012 does not prohibit only the use by a third party of a registered name.

38. By the second part of the question referred for a preliminary ruling, the national court wishes to know whether Article 13(1) of Regulations No 510/2006 and No 1151/2012 also prohibits the reproduction of the shape or appearance of a product covered by a registered name. As stated in point 18 of this Opinion, I shall address the question in the light of both subparagraph (b) of Article 13(1) and subparagraph (d) thereof, even though the question referred relates only to subparagraph (d).

39. I share the Commission's view that Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012 does not, in principle, lend itself to an interpretation to the effect that an 'evocation' of a registered name within the meaning of that provision may be brought about merely by the reproduction of the shape or appearance of the product covered by such a name.

40. It is true that, in the light of the case-law referred to in points 32 and 33 of this Opinion, which accepted the possibility of a purely conceptual evocation of registered names, it cannot be ruled out that, in exceptional cases, a registered name may be evoked when the consumer encounters the shape or appearance of an ordinary product which partially or wholly reproduces the shape or appearance of a similar product covered by a protected name.

41. That could be the case, for example, where a protected name contains an express reference to the typical shape of the product which it designates. (42) Indeed, in such a case, the shape or appearance of the product could create in the mind of the public a 'clear and direct' (43) association with that name, as the Court held in the judgment in Queso Manchego as regards the figurative elements on the label of an ordinary product, referring to the geographical area associated with a PDO of which the essential component is a reference to that geographical area. (44)

42. However, in my view, in order for such an association to constitute 'evocation' within the meaning of Article 13(1) of Regulations No 510/2006 and No 1151/2012, three conditions must be met.

43. First, the element which has been reproduced must appear in the specification of the registered name as a distinctive characteristic of the product covered by that name. Such a requirement, first, makes it possible to ensure that that element is actually part of the local production tradition covered by the registered name and, secondly, meets an objective of legal certainty.

44. Secondly, as the Commission has, in my view, correctly stated, the element which has been reproduced must not be intrinsically linked to a production process which, as such, must remain freely available for use by any producer.

45. Lastly, and in accordance with the approach which I proposed in point 29 of my Opinion in the case which gave rise to the judgment of Queso Manchego (C-614/17, EU:C:2019:11), the existence of evocation must be established on the basis of a case-by-case assessment, which takes into account, in addition to the element at issue – in this case, the shape or appearance of the product with a protected name which has been

reproduced – all other elements deemed to be relevant, either because of their potentially evocative nature or, conversely, because they exclude or reduce the possibility that the consumer could make a clear and direct association between an ordinary product and the product bearing the protected name. (45) In my view, it should also be established whether there is an intention to take unfair advantage of the protected name. (46) 46. I would state, at this stage, that the interpretation of Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012 proposed in the points above does not imply, more generally speaking, that the shape, appearance or packaging of the ordinary product may not be taken into consideration, as contextual factors, for the purposes of the overall assessment of the existence of an evocation, within the meaning of Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012, and, in particular, in order to establish whether there is an intention to take unfair advantage of a protected name, as was accepted by the Court in its judgments of 4 March 1999, *Conorzio per la tutela del formaggio Gorgonzola*, (47) and of 26 February 2008, *Commission v Germany*, (48) and as I stated in point 29 of my Opinion in *Queso Manchego* (C-614/17, EU:C:2019:11).

47. Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012 is applicable only in exceptional cases to conduct such as that at issue in the main proceedings. However, that conduct may, in appropriate cases, fall within the scope of Article 13(1)(d).

48. As the Court confirmed in relation to Article 16 of Regulation No 110/2008, (49) Article 13(1) of Regulations No 510/2006 and No 1151/2012 (50) contains a graduated list of prohibited conduct in which each subparagraph of that provision is to be distinguished from those that precede it. (51) As I have observed in points 32 to 34 of this Opinion, the Court has already had the opportunity to address the relationship between subparagraphs (a), (b) and (c) of Article 16 of Regulation No 110/2008. However, it has never interpreted subparagraph (d) of that article or subparagraph (d) of Article 13(1) of Regulations No 510/2006 and No 1151/2012, or similar provisions in the regulations establishing quality schemes.

49. As was observed by all the interested parties who have participated in these proceedings, Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012 (52) contains a 'catch-all' provision to tighten the protection of registered names. That is clear in particular from the wording of that article, which refers to 'any other practice', in other words, any conduct not already covered by the other provisions of that article.

50. The objective pursued by that provision is clearly stated in its wording: to avoid the consumer being misled as to the true origin of the product.

51. Unlike Article 13(1)(b) of Regulations No 510/2006 and No 1151/2012, which disregards the existence of a likelihood of confusion (53) and seeks to prohibit, *inter alia*, free-riding, (54) subparagraph (d) of that article covers practices liable to mislead the consumer, with a view to preventing the consumer from making a mistake when he or she is making a purchase, and protecting the

farmers and producers who use the registered name from a potential loss of business.

52. In that regard, it is important to note, first, that, as is apparent from the expression '*practice liable*' used in Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012, that provision requires only proof of the existence of a '*risk*' that the consumer could be misled by the disputed practice and, secondly, that the risk of the consumer being misled must relate to the '*origin*' of the product, which is to be understood in the sense of both '*geographical origin*' and '*production origin*', since the consumer must be misled into thinking, mistakenly, that the product comes from the geographical area referred to by the registered name or that it was made using a production method covered by the registered name.

53. The objective of preventing the consumer from being misled as to the true origin of the product constitutes the only requirement for the application of Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012. Accordingly, that provision does not define what the prohibited conduct is, but merely describes each type of conduct in terms of its outcome.

54. It follows that any practice may be caught by the prohibition, including, in principle, reproducing the typical shape or appearance of a product covered by a registered name, or a particular and distinctive characteristic of that product, provided that it is liable to mislead the consumer.

55. The assessment of the existence of a risk that consumers could be misled must also be carried out on a case-by-case basis and in the light of all the relevant elements. Accordingly, as regards a practice such as that at issue in the main proceedings, which consists of reproducing an element of the appearance of the product covered by a registered name, it is necessary, in particular, to take account of the importance, in the eyes of the consumer, of the element in question for the purposes of identifying the product. The assessment of the likelihood of confusion may, indeed, vary depending on whether the characteristic that has been reproduced is an exclusive or particularly distinctive characteristic of the product bearing the registered name, or a characteristic which is commonly used in the agri-food sector in question.

56. In that context, it is also necessary to assess the appearance of the product as a whole. Indeed, as was correctly observed at the hearing, even the reproduction of a characteristic typical of and exclusive to the shape or appearance of a product covered by a registered name cannot mislead the consumer if the appearance of the ordinary product is, on the whole, different from that of the product designated by that name.

57. Account must also be taken of the way in which the product in question is presented to the public in order to assess, first, whether the consumer does in fact encounter the characteristic at issue when making his or her purchasing decision (55) and, secondly, whether other elements connected with the presentation of the product are liable to increase the risk of error on the part of the consumer. (56)

58. More generally, it is important to state that, unlike Article 13(1)(c) of Regulations No 510/2006 and No 1151/2012, according to which no account is to be taken of the context in which the '*false or misleading indication*' is used, (57) Article 13(1)(d) requires an assessment of that context in order to establish whether there is, in actual fact, a risk that the consumer could be misled.

59. It is for the national court alone to make that assessment, referring to the perception of the average European consumer, who is reasonably well informed and reasonably observant and circumspect. (58)

60. On the basis of all the foregoing considerations, the answer to the second part of the question referred for a preliminary ruling should be that reproducing the shape or appearance of a product covered by a registered name may constitute a prohibited practice covered by Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012 if it is liable to mislead the consumer as to the origin of the product.

V. Conclusion

61. In the light of the above considerations, I propose that the Court should answer the question referred by the Cour de cassation (Court of Cassation, France) as follows:

Article 13(1) of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Article 13(1) 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 must be interpreted as meaning that they do not prohibit only the use by a third party of a registered name. Reproducing the shape or appearance of a product covered by a registered name may constitute a prohibited practice under Article 13(1)(d) of Regulations No 510/2006 and No 1151/2012 if it is liable to mislead the consumer as to the true origin of the product. It is for the national court to assess, in each individual case, whether such a practice is illegal in the light of all the relevant elements and referring to the perception of the average European consumer who is reasonably well informed and reasonably observant and circumspect.

1 Original language: French.

2 Council Regulation of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12).

3 Regulation 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).

4 Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

5 For the wine sector, see Article 103 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC)

No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671), for aromatised beverages, Article 20 of Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91 (OJ 2014 L 84, p. 14), and, for spirit drinks, 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 (OJ 2008 L 39, p. 16).

6 Regulation supplementing the Annex to Regulation (EC) No 2400/96 on the entry of certain names in the 'Register of protected designations of origin and protected geographical indications' provided for in Council Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (Gailtaler Speck, Morbier, Queso Palmero or Queso de la Palma, Thrapsano extra virgin olive oil, Turrón de Agramunt or Torró d'Agramunt) (OJ 2002 L 181, p. 4).

7 OJ 2013, L 302, p. 7.

8 Commission Regulation of 11 November 2011 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council by establishing a Union list of food additives (OJ 2011 L 295, p. 1).

9 See annex to Regulation No 1129/2011, part E, section 01.7.2.

10 JORF of 30 October 2007, text No 2.

11 In its written observations, SFL states that an action against the Decree of 22 December 2000 was dismissed by judgment of the Conseil d'État (Council of State) of 5 November 2003. In the course of the proceedings leading to the judgment, the INAO and the French Finance Minister contended that *'the Decree [of 22 December 2000] in no way prevents traders based outside the protected designation area from continuing to manufacture and market their products. It merely precludes that they continue to do so using the name "Morbier", since they do not duly fulfil the geographical and technical criteria required in order to be entitled to use that name'*. In its judgment, the Conseil d'État (Council of State) stated *'that the objective of both the national and Community rules governing the protection of designations of origin is to promote the quality of products with a registered name, in particular by requiring that the production, processing and preparation of those products be carried out in the defined area'* and *'that those rules do not preclude the free movement of other products which do not enjoy that protection'*.

12 C-44/17, EU:C:2018:415.

13 C-614/17, EU:C:2019:344.

14 In its written observations, SFL states that morbier, which was also produced outside the current PDO area, was traditionally made using milk from cows milked on

the same day: the morning milk was covered with a thin layer of charcoal to protect it before the evening milk was added. After maturation, the wheel of cheese would have a black line through the middle of it due to the interposed layer of charcoal. It is apparent from the documents before the Court that the line through the middle of the cheese produced by SFL has a reddish tinge and is made of grape must, and not vegetable carbon.

15 SFL refers, in particular, to judgments of 25 October 2005, Germany and Denmark v Commission (C-465/02 and C-466/02, EU:C:2005:636), and of 26 February 2008, Commission v Germany (C-132/05, EU:C:2008:117).

16 See, however, as regards wines, Article 103(2) of Regulation No 1308/2013 and, as regards aromatised beverages, Article 20(2) of Regulation No 251/2014, which provide that the wines and aromatised beverages using a protected name in conformity with the product specifications are themselves to be protected against any practice which is prohibited under those provisions.

17 See recital 2 of Regulation No 510/2006; see, to the same effect, recital 4 of Regulation No 1151/2012.

18 See recital 1 of Regulation No 1151/2012.

19 See judgment of 21 January 2016, Viiniverla (C-75/15, EU:C:2016:35, paragraph 23 and the case-law cited), and the judgment in Scotch Whisky, paragraph 37.

20 Article 2(1)(a) of Regulation No 510/2006 contains a virtually identical definition.

21 See Article 7(1)(b), (c) and (f) of Regulation No 1151/2012.

22 See Article 8(1)(c)(ii) of Regulation No 1151/2012.

23 See Article 10(1) of Regulation No 1151/2012 in relation to grounds of opposition, and Article 51 of that regulation in relation to the opposition procedure.

24 See recitals 3 and 5 of Regulation No 1151/2012; see, also, 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, paragraph 24), and the judgments in Scotch Whisky (paragraph 36) and Queso Manchego (paragraph 29).

25 See Article 36(3)(a) of Regulation No 1151/2012.

26 Although one of the functions of a trade mark is as an indicator of quality, that quality depends exclusively on the choices made by the trade mark proprietor who, at least theoretically, is not under any obligation to maintain the quality of his or her goods or services.

27 Consumers' interest in not being confused as to the commercial origin of the products and services they purchase is also an underlying consideration of trade mark law. Trade mark law, however, is focused on the private interests of the proprietors.

28 Trade marks, on the other hand, confer an exclusive, and usually individual, right, which enables proprietors to exclude any third party use of the same distinctive sign or a similar sign. Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1, in particular

Articles 29 and 36) also provides for collective trade marks. However, the rules applicable to them, like the rules applicable to individual trade marks, are private-law rules and do not have public-law aspects, unlike the rules on protected geographical names.

29 The content of Article 16(a) to (d) of Regulation No 110/2008 is virtually identical to that of Article 13(1)(a) to (d) of Regulation No 510/2006.

30 See the judgment in *Scotch Whisky*, paragraph 38.

31 See the judgment in *Scotch Whisky*, paragraph 31.

32 See the judgment in *Scotch Whisky*, paragraph 33, emphasis added.

33 See the judgment in *Scotch Whisky*, paragraphs 46 and 49.

34 See the judgment in *Scotch Whisky*, paragraph 50.

35 See the judgment in *Scotch Whisky*, paragraph 51. In the main proceedings giving rise to that judgment, the name at issue was the word ‘*Glen*’. The Court therefore held that it was for the referring court to ascertain whether an average European consumer who is reasonably well informed and reasonably observant and circumspect thought directly of the protected geographical indication, namely ‘*Scotch Whisky*’, when he or she was confronted with a comparable product bearing that name, taking account, in the absence of, first, any phonetic and/or visual similarity between that name and the protected geographical indication and, secondly, any partial incorporation of that indication in that name, of conceptual proximity between the protected geographical indication and the disputed name (judgment in *Scotch Whisky*, paragraph 52).

36 See the judgment in *Queso Manchego*, paragraph 18, emphasis added.

37 See the judgment in *Queso Manchego*, paragraph 22.

38 See the judgment in *Scotch Whisky*, paragraphs 65 and 66.

39 See judgment of 14 July 2011, *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 46).

40 I will use this expression to denote products which are not covered by a designation of origin or protected geographical indication.

41 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).

42 The Commission referred, by way of example, to the PDO ‘*Queso tetilla*’. By judgment of 31 October 2013 (No 419/13), the Commercial Court of Appeal of Alicante found that that PDO protected a traditional name that consumers associated with the conical shape of the product in question, and held that the unauthorised marketing of an identically shaped cheese constituted an infringement of Article 13(1)(b) of Regulation No 1151/2012.

43 As I stated in my Opinion in *Queso Manchego* (C-614/17, EU:C:2019:11), the existence of such an association must be assessed both in terms of immediacy (the associative cognitive process must not require a complex reprocessing of information) and impact (the

association must have sufficient impact) as regards the consumer’s response to the encountering the ordinary product.

44 See the judgment in *Queso Manchego*, paragraph 40.

45 See also, to that effect, the judgment in *Queso Manchego*, paragraph 42.

46 See point 29 of my Opinion in the case which gave rise to the judgment of *Queso Manchego* (C-614/17, EU:C:2019:11). See also, to that effect, judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 28).

47 C-87/97, EU:C:1999:115, paragraph 27.

48 C-132/05, EU:C:2008:117, paragraph 48.

49 See the judgment in *Scotch Whisky*, paragraph 65.

50 See, as regards Regulation No 510/2006, the judgment in *Queso Manchego*, paragraph 25.

51 It is important to point out that that graduated list relates to the nature of the prohibited conduct and not to the elements to be taken into consideration in order to determine the existence of such conduct (see, to that effect, the judgment in *Queso Manchego*, paragraph 27). It cannot therefore be ruled out that the same elements may be taken into account for the purposes of applying both subparagraph (b) and subparagraph (d) of Article 13.

52 See, as regards Regulation No 510/2006, the judgment in *Queso Manchego*, paragraph 25.

53 See judgment of 4 March 1999, *Consorzio per la tutela del formaggio Gorgonzola* (C-87/97, EU:C:1999:115, paragraph 26).

54 See, to that effect, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 45).

55 In that regard, the Syndicat stated that retailers sell Morbier cheese by the slice and that the black line which characterises Morbier cheese is perfectly visible to consumers.

56 In particular, when ordinary products are placed in close proximity to products covered by a protected name.

57 See the judgment in *Scotch Whisky*, paragraphs 70 and 71.

58 See, in particular, to that effect, judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 25 and 28), and the judgment in *Scotch Whisky*, paragraph 47.