Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 20 July 2017 [1]

Case C-393/16

Comité Interprofessionnel du Vin de Champagne
v
Aldi Süd Dienstleistungs-GmbH & Co.OHG, represented by **Aldi Süd Dienstleistungs-GmbH,**
formerly **Aldi Einkauf GmbH & Co. OHG Süd,**
Intervener: **Galana NV**

(Request for a preliminary ruling
from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Common organisation of the markets in agricultural products — Protection of protected designations of origin — Concepts of exploitation of the reputation of a designation of origin, misuse, imitation, evocation and false or misleading indications — Foodstuff whose name corresponds to the name usually used by the relevant public — Possibility of misleading the relevant public about the geographical origin of a product)

1. A German supermarket chain sells a sorbet containing champagne, which is distributed under the name 'Champagner Sorbet'. Is that conduct lawful or are the manufacturer and the distributor of the sorbet in fact taking advantage of the reputation of the French sparkling wine which benefits from a Protected Designation of Origin (PDO)?

2. That is, in essence, the question submitted by the Bundesgerichtshof (Federal Court of Justice, Germany) in its request for a preliminary ruling, on the basis of which it will have to determine whether the Comité Interprofessionnel du Vin de Champagne ('CIVC'), which defends the interests of that PDO, is right in claiming that the sale of the sorbet should cease.

3. In a recent Opinion, [2] I observed that the Court has a substantial body of case-law on PDOs and protected geographical indications (PGIs). The present case provides the Court with the opportunity to extend that case-law to situations in which a sparkling wine (champagne) covered by a PDO is used as an ingredient in — and is included in the presentation of — a foodstuff.

4. When replying to the referring court, the Court of Justice will need to take account of the fact that, according to the former, 'Champagner Sorbet' is the name ordinarily used in Germany to describe a type of frozen dessert containing champagne. The Court will also need to examine the interpretation of disparate provisions (relating to PDOs, on the one hand, and the labelling of food products, on the other) in order to strike a balance between the rights of proprietors of PDOs and those of the manufacturers of a foodstuff who wish to reflect its ingredients on the packaging.

1 Original language: Spanish.

2 Delivered on 18 May 2017 in *EUIPO* v *Instituto dos Vinhos do Douro e do Porto IP* (C-56/16 P, EU:C:2017:394).

I. Legal framework

5. The Bundesgerichtshof (Federal Court of Justice) refers to both Regulation (EC) No 1234/2007 [3] and the regulation which repealed it, Regulation (EU) No 1308/2013,[4] even though the latter is not applicable *ratione temporis* to the present dispute. The referring court states that the interpretation of Regulation No 1308/2013 is necessary because the action for an injunction brought might create effects as regards the future when the factual situation will have to be decided on in accordance with that regulation.

6. Although I do not dispute that view, I shall refer only to the provisions of Regulation No 1234/2007, since that was the regulation applicable at the material time and because the two articles relevant to the case (Article 118m of Regulation No 1234/2007 and Article 103 of Regulation No 1308/2013) are similar. I see no reason why the interpretation of the former should not be applied, *mutatis mutandis*, to the latter.

A. Regulation No 1234/2007

7. Pursuant to Article 118m ('Protection'):

'1. Protected designations of origins and protected geographical indications may be used by any operator marketing a wine which has been produced in conformity with the corresponding product specification.

2. Protected designations of origins and protected geographical indications and the wines using those protected names in conformity with the product specification shall be protected against:

(a) any direct or indirect commercial use of a protected name:

(i) by comparable products not complying with the product specification of the protected name; or

(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;

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

3. Protected designations of origin or protected geographical indications shall not become generic in the Community within the meaning of Article 118k(1).

3 Council Regulation of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1).

4 Regulation 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).

…’

8. Recital 97 of Regulation No 1308/2013, which corresponds to recital 32 of Regulation No 479/2008,[5] adopting the provisions on the protection of designations of origin inserted into Regulation No 1234/2007 by Regulation No 491/2009,[6] is worded as follows:

‘Registered designations of origin and geographical indications should be protected against uses which take advantage of the reputation enjoyed by complying products. So as to promote fair competition and not to mislead consumers, that protection should also extend to products and services not covered by this Regulation, including those not found in Annex I to the Treaties.’

B. Directive 2000/13/EC[7]

9. In the area of foodstuff labelling, the provision in force at the material time was Directive 2000/13.[8] In so far as is relevant for the present purposes, Article 3(1) of that directive provides:

‘1. In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

(1) the name under which the product is sold;

(2) the list of ingredients;

(3) the quantity of certain ingredients or categories of ingredients as provided for in Article 7;

…’

10. Article 5(1) stipulates:

‘1. The name under which a foodstuff is sold shall be the name provided for in the Community provisions applicable to it.

(a) In the absence of Community provisions, the name under which a product is sold shall be the name provided for in the laws, regulations and administrative provisions applicable in the Member State in which the product is sold to the final consumer or to mass caterers.

Failing this, the name under which a product is sold shall be the name customary in the Member State in which it is sold to the final consumer or to mass caterers, or a description of the foodstuff, and if necessary of its use, which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused.

…’

5 Council Regulation of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (OJ 2008 L 148, p. 1).

6 Council Regulation of 25 May 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (OJ 2009 L 154, p. 1).

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

8 It was not repealed until 13 December 2014, that is, more than two years after the facts at issue in the main proceedings, in accordance with the repealing provision of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18).

11. Article 6(5) reads:

'The list of ingredients shall include all the ingredients of the foodstuff, in descending order of weight, as recorded at the time of their use in the manufacture of the foodstuff. It shall appear preceded by a suitable heading which includes the word "ingredients".

…'

12. Article 7(1) and (5) provides:

'1. The quantity of an ingredient or category of ingredients used in the manufacture or preparation of a foodstuff shall be stated in accordance with this Article.

…

5. The indication referred to in paragraph 1 shall appear either in or immediately next to the name under which the foodstuff is sold or in the list of ingredients in connection with the ingredient or category of ingredients in question.'

C. Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) and protected geographical indications (PGIs) as ingredients [9]

13. Point 2.1 (' Recommendations on the use of registered names') provides:

'1. According to the Commission, a name registered as a PDO or PGI may legitimately be included in the list of ingredients of a foodstuff.

2. The Commission also considers that a name registered as a PDO or PGI may be mentioned in or close to the trade name of a foodstuff incorporating products benefiting from a registered name, as well as in the labelling, presentation and advertising relating to that foodstuff, provided that the following conditions are met.

   — The foodstuff in question should not contain any other "comparable ingredient", i.e. any other ingredient which may partially or totally replace the ingredient benefiting from a PDO or PGI. As a non-restrictive example of the concept of "comparable ingredient", the Commission considers that a blue-veined cheese (commonly known as "blue cheese") could be considered comparable to "Roquefort" cheese.

   — This ingredient should also be used in sufficient quantities to confer an essential characteristic on the foodstuff concerned. However, given the wide range of possible scenarios, the Commission is not able to suggest a minimum percentage to be uniformly applied. As an example, the incorporation of a minimum amount of a spice benefiting from a PDO/PGI in a foodstuff could, if appropriate, be sufficient to confer an essential characteristic on that foodstuff. By contrast, the incorporation of a minimum amount of meat benefiting from a PDO/PGI in a foodstuff would not a priori be sufficient to confer an essential characteristic on a foodstuff.

   — Finally, the percentage of incorporation of an ingredient with a PDO or PGI should ideally be indicated in or in close proximity to the trade name of the relevant foodstuff or, failing that, in the list of ingredients, in direct relation to the ingredient in question.'

9 Commission Communication (OJ 2010 C 341, p. 3; 'the Guidelines').

II. Facts of the dispute and the questions referred for a preliminary ruling

14. At the end of 2012, Aldi Süd, a company which distributes food and other consumer goods in supermarkets, began to sell a product manufactured by Galana NV[10] called 'Champagner Sorbet', the ingredients of which include 12% champagne. The packaging looked like this:



15. The CIVC brought an action before the Landgericht München (Regional Court, Munich, Germany), seeking an injunction prohibiting Aldi Süd from using the PDO Champagne on its frozen product, on the ground that this was an infringement of that PDO.

16. The application, which was based on Article 118m of Regulation No 1234/2007, was granted at first instance but dismissed on appeal by the Oberlandesgericht München (Higher Regional Court, Munich, Germany).

17. The CIVC appealed against the appellate judgment to the referring court. That court is inclined to take the view that use of the PDO Champagne in a frozen product falls within the scope of Article 118m(2)(a)(ii) of Regulation No 1234/2007 because the word 'champagne' is used for commercial purposes to designate a dessert which does not comply with the specifications for wines protected by the PDO Champagne.

18. The referring court also points out that the reputation of the PDO Champagne is liable to have a beneficial effect on the name 'Champagner Sorbet'. However, the referring court questions whether there is exploitation of the reputation of the PDO, within the meaning of Article 118m(2)(a)(ii) of Regulation No 1234/2007, given that 'Champagner Sorbet' corresponds to the name by which the relevant public usually refers to the dessert, which contains champagne in a quantity sufficient to confer an essential characteristic on it. There will thus be no exploitation of the reputation of the PDO if, as the appellate court found, its use is justified by a legitimate interest.

19. In view of the fact that the action brought by the CIVC could be based on Article 118m(2)(b) of Regulation No 1234/2007, the referring court also asks whether usage of the PDO may amount to unlawful misuse, imitation or evocation. The referring court argues that the use must be unlawful and, therefore, if it is justified by a legitimate interest, there will be no infringement of the PDO.

20. Lastly, as regards the argument put forward by the CICV to the effect that Aldi Süd used the indication 'Champagner Sorbet' in a misleading way, within the meaning of Article 118m(2)(c) of Regulation No 1234/2007, the referring court seeks to ascertain whether that provision covers only situations in which the misleading indication conveys to the public a false impression regarding the geographical origin of the product or whether it encompasses misleading indications regarding the essential qualities of that product.

10 Galana NV has intervened in support of Aldi Süd in the main proceedings.

21. Against that background, the Bundesgerichtshof (Federal Court of Justice) has referred the following questions to the Court for a preliminary ruling:

'(1) Are Article 118m(2)(a)(ii) of Regulation No 1234/2007 and Article 103(2)(a)(ii) of Regulation No 1308/2013 to be interpreted as meaning that the scope of those provision also covers a case in which a protected designation of origin is used as part of the name of a foodstuff which does not correspond to the product specifications but to which an ingredient has been added which does correspond to the product specifications?

(2) If Question 1 is answered in the affirmative:

Are Article 118m(2)(a)(ii) of Regulation No 1234/2007 and Article 103(2)(a)(ii) of Regulation No 1308/2013 to be interpreted as meaning that the use of a protected designation of origin as part of the name of a foodstuff which does not correspond to the product specifications but to which an ingredient has been added which does correspond to the product specifications constitutes exploitation of the reputation of the designation of origin where the name of the foodstuff corresponds to the name usually used by the relevant public to refer to that foodstuff and the ingredient has been added in a quantity which is sufficient to give the product one of its essential characteristics?

(3) Are Article 118m(2)(b) of Regulation No 1234/2007 and Article 103(2)(b) of Regulation No 1308/2013 to be interpreted as meaning that the use of a protected designation of origin in the circumstances set out in Question 2 constitutes misuse, imitation or evocation?

(4) Are Article 118m(2)(c) of Regulation No 1234/2007 and Article 103(2)(c) of Regulation No 1308/2013 to be interpreted as meaning that they are applicable only to false or misleading indications which, for the relevant public, are liable to convey a false impression as to a product's geographical origin?'

III. Proceedings before the Court of Justice

22. The order for reference was received at the Registry of the Court of Justice on 14 July 2016.

23. Written observations were lodged by the CIVC, Galana NV, the French and Portuguese Governments and the European Commission.

24. On 18 May 2017, a hearing was held at which oral argument was presented by the representatives of the CIVC, Galana NV, the French Government and the European Commission.

IV. Summary of the parties' observations

A. The first question

25. All the parties submit that the first question should be answered in the affirmative. In the CIVC's submission, the EU provisions protect PDOs against any direct or indirect commercial use which seeks to exploit their reputation. That protection encompasses use of the PDO where it is included in the name of a product and where it designates a foodstuff which does not comply with the specification.

Relying on the judgment in *Bureau National Interprofessionnel du Cognac*,[11] the CVIC argues that there is direct commercial use of the PDO Champagne where that PDO appears, in its entirety or translated, as part of 'Champagner Sorbet'.

26. The French Government submits that, although the applicable regulations do not expressly refer to the use of PDOs as ingredients, the protection of PDOs and the consistency between the rules in the wine sector and those in the agricultural products and foodstuffs sector incline it to take the view that those regulations are also applicable to such use.

27. The Portuguese Government adds that 'Champagner' is, in this case, the most significant word element of the product, whereas the term 'sorbet' is generic in nature, that is, it has no effect on the assessment regarding use of the PDO.

B. The second question

28. The CIVC also proposes an affirmative reply to the second question. The CIVC points out, as does the Portuguese Government, that the term 'to exploit' means to make use of or to use something, and it is sufficient if an advantage is obtained from the reputation of the PDO. That is the case of the sorbet which, through the inclusion of the word 'champagne', takes advantage of the image of quality or prestige of that sparkling wine, which is covered by the PDO. The CIVC rejects the application by analogy of Article 10(1) of Regulation (EC) No 110/2008,[12] which is confined to spirit drinks and which the legislature did not wish to extend to wines, but the CIVC identifies relevant criteria in the Commission Guidelines.

29. Like Galana NV and the French Government, the CIVC submits that it is immaterial if the name of a foodstuff which includes a PDO is the same as the usual term by which it is known by the public. To accept otherwise would entail the risk that the PDO might become generic, contrary to the objective sought by its protection.

30. The CIVC contends that it is necessary to ascertain whether the quantity of champagne contained in the sorbet is sufficient to confer an essential characteristic on the sorbet. That is not so in this case, for the essential features of champagne (its fine, long-lasting bubbles and its refreshing, fruity and slightly acidic taste) are not found in the sorbet. Nor does the proportion of champagne used (12%) in the preparation of the foodstuff justify usage of the PDO.

31. Galana NV submits that it is not appropriate to rely on Article 118m(2)(a)(ii) of Regulation No 1234/2007 because the name of the sorbet reflects the reality, is clear and does not mislead the public. The quantity of champagne included as an ingredient is sufficient to confer an essential characteristic on the sorbet. Furthermore, the foodstuff complies with the Guidelines which, Galana NV submits, confirm its approach.

32. In the French Government's submission, use of a PDO as part of the name of a foodstuff is not, in principle, prohibited because it does not amount, on its own, to exploitation of the reputation of the PDO. Like the Commission, the French Government refers to the fact that, in accordance with the case-law of the Court, 'exploitation' means use which leads to a trader taking unfair advantage of the reputation of a geographical indication of origin.[13]

11 Judgment of 14 July 2011 (C-4/10 and C-27/10, EU:C:2011:484, paragraph 55).

12 Regulation 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).

13 Judgments of 14 July 2011, *Bureau National Interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 46), and of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 45).

33. It is for the national court to determine whether the conditions laid down in the Guidelines are satisfied and, perhaps, to consider other assessment criteria such as, for example, whether the use by the trader of the PDO concerned, through images and references, is proportionate, and also the typeface used on the packaging or advertising material for the product.

34. The Portuguese Government contends that 'Champagner Sorbet' takes unfair advantage of the reputation of the PDO Champagne. PDOs must be protected against all forms of use, by prohibiting the exploitation of their reputation; in particular, any degradation or dilution of the distinctive character of a PDO must be prevented.

35. The Commission suggests that the second question should be answered in the negative. The Commission argues in favour of a consistent interpretation of Regulation (EU) No 1151/2012 [14] (which refers to the Guidelines) and Regulations No 1169/2011 and No 110/2008, in particular Article 10(1) thereof as regards the indication of a spirit drink in the name of a foodstuff. The Commission points out that use of the PDO Champagne satisfies those conditions in this case and complies with Article 9(1)(a) and (b) and Articles 17(1), 18 and 22 of Regulation No 1169/2011.

C. The third question

36. The CIVC also proposes an affirmative reply to the third question. In its submission, which is essentially the same as that of the Portuguese Government, 'Champagner Sorbet' evokes the PDO Champagne, within the meaning of Article 118m(2)(b) of Regulation No 1234/2007, even though that term corresponds to the name usually used by the public to refer to the foodstuff and the ingredient is added in a sufficient quantity to imbue the sorbet with an essential characteristic. The definition of 'evocation' covers a situation in which the name of a food product includes a PDO, leading the consumer to establish a link between that product and the ingredient protected by the PDO.

37. Galana NV and the French Government deny that, in this case, use of the PDO Champagne amounts to misuse, imitation or evocation. Those terms entail a copy of the product or of terms inspired by the PDO, or a reference to the PDO without satisfying the conditions of the product specification, whereas this case involves direct use of the PDO.

38. In the Commission's submission, 'Champagner Sorbet' intentionally and directly describes the contents, which means that there is no evocation, imitation or any other form of appropriation of the PDO. Nor is the consumer misled as to the origin of the sorbet, because it clearly states that the sorbet contains a substantial measure of champagne from the French region of the same name.

D. The fourth question

39. The CIVC submits that this question must be answered in the negative. Its contention, and that of the French Government, is that Article 118m(2)(c) of Regulation No 1234/2007 applies to false indications as to the nature of the product and as to its essential characteristics.

40. Galana NV, like the Commission, argues that Article 118m(2)(c) of Regulation No 1234/2007 is not applicable because it covers only wine products. In the alternative, Galana NV submits that the provision is applicable to false or misleading indications liable to convey to the relevant public a false impression as to the geographical origin of the product.

14 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).

41. The Portuguese Government contends that false or misleading indications may give the public the wrong impression regarding the geographical origin of a product and submits that the names through which such indications are given should not be permitted.

V. Legal analysis

A. The first question

42. The referring court asks, first, for clarification of the scope of Article 118m(2)(a)(ii) of Regulation No 1234/2007. In particular, the referring court asks for a determination of whether that provision covers situations like that in the present case, in which the PDO Champagne is *part* of the name of a sorbet containing a certain quantity of that sparkling wine.

43. All the participants in these preliminary-ruling proceedings agree with the referring court that its first question should be answered in the affirmative. The uncertainties expressed in the order for reference have arisen on the basis of the view put forward in a section of German legal literature, to the effect that that provision is applicable only to use of the PDO on *identical* terms. In contrast, the use of *similar* terms is said to come under Article 118m(2)(b) of Regulation No 1234/2007.

44. I do not believe that that view [15] should be accepted, for a number of reasons. First, as the French Government observes, the scope defined by that article is very broad, consistent with the protection intended to be conferred on PDOs. It does not cover an interpretation which, for example, excludes the use of a translation of a PDO, which would be contrary to the prohibition of any direct or indirect use.

45. Second, as the Commission points out, the Court held in *Bureau National Interprofessionnel du Cognac* [16] that use, in a trade mark, of a geographical indication or of a term corresponding to that indication and its translation, to identify products (on that occasion, spirit drinks) which do not meet the relevant specifications entails a *direct* commercial use of that geographical indication.

46. Finally, Article 118m(2)(a) of Regulation No 1234/2007 stipulates the types of (direct and indirect) use of (comparable and different) products [17] against which the protection afforded by the PDO may be relied on. In the case of comparable products, the PDO may be relied on where those products do not meet the product specification, while, in the case of non-comparable products, it is necessary to prove that there is exploitation of the reputation of the PDO. In contrast, point (b) — and in all likelihood the following two points too — refers to certain types of unfair conduct against which the proprietors of PDOs may defend themselves, in accordance with the obligations derived from international agreements to which the European Union and the Member States are parties. [18] There is, in relation to those types of use, a presumed intention to exploit that reputation.

15 If I understand it correctly, this view proposes an interpretation of Article 118m(2) of Regulation No 1234/2007 whereby point (a) applies to use of a PDO in an identical form to that of its registration, whereas point (b) concerns the use of similar designations which differ to a greater or lesser degree from the PDO as registered. See paragraph 29 of the order for reference.

16 Judgment of 14 July 2011 (C-4/10 and C-27/10, EU:C:2011:484, paragraph 55). Although that judgment concerned Regulation No 110/2008, there is no doubt that it may be applied by analogy to the instant case, in view of the similarity between the wording and purpose of Article 16 of that regulation and the wording and purpose of Article 118m of Regulation No 1234/2007.

17 Le Goffic, C., *La protection des indications géographiques*, ed. LITEC, Paris, 2010, p. 137.

18 Compare Article 118m(2)(b), (c) and (d) of Regulation No 1234/2007 with Article 3 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as amended on 28 September 1979) and with Article 22(2)(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (OJ 1994 L 336, p. 214), forming Annex 1C to the Agreement establishing the World Trade Organization (WTO) (OJ 1994 L 336, p. 3), which refers to Article 10a of the Paris Convention for the Protection of Industrial Property, as amended in Stockholm in 1967.

47. To my mind, therefore, Article 118m(2)(a)(ii) of Regulation No 1234/2007 is applicable, from which it follows that the first question should be answered in the affirmative.

B. The second question

48. The referring court asks whether the use of a PDO as part of the name of a foodstuff which does not meet the product specification and to which an ingredient (champagne, in this case) has been added which does meet that specification is caught by the prohibition in Article 118m(2)(a)(ii) of Regulation No 1234/2007, where:

– the name of the foodstuff corresponds to the name usually used by the relevant public; and

– the quantity of the ingredient used is sufficient to confer an essential characteristic on the product.

49. The appellate court found that the distributor had a *legitimate interest* in the use of the PDO Champagne, for the following two reasons: (a) 'Champagner Sorbet' is the term usually used in German and in German cookery books to describe a frozen dessert which is made from champagne; and (b) Galana NV's product contains 12% champagne, a quantity which is sufficient to confer on the sorbet an essential characteristic of that sparkling wine (specifically, its taste).

50. The Bundesgerichtshof (Federal Court of Justice) does not appear to agree with the view of the appellate court, which, it argues, accepted the facts described in points (a) and (b) above without carrying out the necessary assessments of the facts. Nevertheless, the referring court states that it is possible for such a *legitimate interest* to be inferred from the EU legislation on labelling,[19] read in conjunction with the legislation on the quality of agricultural products and foodstuffs.[20]

51. Accordingly, the reply to the second question requires an analysis of the provisions relating to the protection of PDOs and those relating to the labelling of foodstuffs.

1. Exploitation of the reputation of the PDO

52. If it is accepted that there is direct commercial use (in reply to the first question), the referring court acknowledges that, in the present case, the use of the PDO Champagne will satisfy the requirement in Article 118m(2)(a)(ii) of Regulation No 1234/2007 (that is, it will exploit the reputation of the PDO) if the defendant does not have a legitimate interest in such use.

53. The Court first specified the function of PDOs in '*Sekt-Weinbrand*':[21] informing and ensuring that the product designated does in fact possess qualities and characteristics that are due to its geographical area of origin. In the 1970s, a dual connection, both spatial and qualitative, was required and was subsequently laid down in the legislation on agricultural products and foodstuffs[22] and in the legislation relating to the wine sector.[23]

19 In particular, the referring court refers to Articles 5 and 7 of Directive 2000/13, which was in force at the material time (see point 9 et seq. of this Opinion), without prejudice to the interpretative value of Article 9(1)(a) and Article 17 of Regulation No 1169/2011. That regulation repealed Directive 2000/13 with effect from 13 December 2014 and is therefore not applicable *ratione temporis* to the present case.

20 Specifically, Article 13(1)(a) and (b) of Regulation No 1151/2012, recital 32 of which refers to the Guidelines.

21 Judgment of 20 February 1975, *Commission* v *Germany* (12/74, EU:C:1975:23).

22 See the explanation about the origins of PDOs in the Opinion of Advocate General Ruiz-Jarabo Colomer in *Germany and Denmark* v *Commission* (C-465/02 and C-466/02, EU:C:2005:636, point 5 et seq.).

23 For example, recitals 27 and 32 of Regulation (EC) No 479/2008, cited in footnote 5. Although that regulation has been repealed, the wording of those two recitals can be found, with slight variations, in the preamble to Regulation No 1308/2013.

54. The aim of Regulation No 1234/2007, as far as PDOs for wines are concerned, is to assure consumers and, from another perspective, the proprietors of the respective designations as well, that the goods covered by those PDOs are of a high level of quality based on their geographical origin. [24]

55. Where it is carried out for the purposes of marketing a food product, the inclusion of the *full* name of a PDO in the name of that product tends, by its very nature, to exploit the prestige and the reputation of the protected quality. That is why such conduct should, in principle, be regarded as unlawful.

56. However, it may be agreed that, in the case of trade in manufactured goods, a person who establishes a legitimate interest will be able to use a PDO as part of the name of his product. The referring court frames its question, which has arisen in relation to direct commercial use, specifically on the basis of the 'use which exploits the reputation of the PDO/legitimate interest' dichotomy, meaning that, in the absence of the latter, there will be exploitation of the reputation of the PDO.

57. The legitimate interest may be derived either from the ownership of an earlier right (for example, another type of intellectual property) or from compliance with a statutory requirement. In addition to those hypothetical cases, and outside the *direct* commercial sphere, I agree with the French Government that there must be areas where it will be legitimate for third parties to use a PDO; [25] in other words, situations in which use of a PDO may be classified as a kind of *ius usus inocui*.

58. Indeed, in relation to other types of intellectual property, the Court has recognised areas in which the use, by third parties, of signs or protected works does not infringe the rights of proprietors. Thus, in trade mark law, the Court has allowed descriptive uses in order to reveal the characteristics of the product offered for sale to the potential customer, who is familiar with the characteristics of the products covered by the trade mark concerned. [26] The Court has also allowed uses where the consumer does not perceive the sign as an indication that the products on which it is affixed come from the trade mark proprietor. [27]

59. In the field of copyright and related rights, the Court has accepted, in the light of Article 5(1) and (5) of Directive 2001/29/EC, [28] the lawfulness of cached copies and on-screen copies of copyright-protected works; [29] of ephemeral acts of reproduction enabling the satellite decoder and the television screen to function correctly, thereby enabling the broadcasts containing protected works to be received; [30] and of the drafting of a summary of newspaper articles even though it was not authorised by the holders of the copyright over those articles. [31]

24 In that connection, I refer to point 63 of my Opinion in *EUIPO* v *Instituto dos Vinhos do Douro e do Porto IP* (C-56/16 P, EU:C:2017:394).

25 I am thinking of a restaurant menu which includes a champagne sorbet as a dessert or the publication of a recipe for making such a sorbet. At the hearing, Galana's representative gave the example of an advertisement for champagne glasses (flutes) which use that word.

26 Judgment of 14 May 2002, *Hölterhoff* (C-2/00, EU:C:2002:287, paragraph 16). The case concerned a commercial negotiation in which Mr Hölterhoff offered for sale to a customer some semi-precious and ornamental stones, whose cuts he called 'Spirit Sun' and 'Context Cut', which were marks registered in a competitor's name.

27 Judgment of 25 January 2007, *Adam Opel* (C-48/05, EU:C:2007:55, paragraph 24), and the Opinion of Advocate General Ruiz-Jarabo Colomer in that case (EU:C:2006:154, point 35 et seq.). The case concerned the use of the Opel trade mark logo on the radiator grille of the scale models of cars sold by Autec, an undertaking not linked to Opel.

28 Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

29 Judgment of 5 June 2014, *Public Relations Consultants Association* (C-360/13, EU:C:2014:1195, paragraphs 26 and 27).

30 Judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 170 to 172).

31 Order of 17 January 2012 in *Infopaq International* (C-302/10, EU:C:2012:16, paragraphs 44 and 45).

60. That approach is, moreover, consistent with the settled case-law of the Court to the effect that the advantage taken of the reputation of a geographical indication must be 'undue' (or 'unfair').[32] Although those judgments were given in relation to Article 16 of Regulation No 110/2008 (on geographical indications for spirit drinks), the similarity between that provision and Article 118m(2)(a) of Regulation No 1234/2007 supports the application of that interpretation to the wine sector.[33] Therefore, if there is a legitimate interest, the use of the PDO should not be classified as *undue (or unfair)*.

61. Returning to the present case, and in view of the fact that Galana NV has not adduced any kind of earlier right, it is necessary to examine whether the use of the PDO Champagne in the name of the sorbet Galana NV produces complies with any statutory requirement or can be classified as harmless.

2. Legitimate interest in the use of the PDO

62. As I have already stated, the referring court asks about the relevance of two specific factors, which may both give rise to a legitimate interest: (a) the name of the product corresponds to the name usually used by the relevant public; and (b) the sorbet includes a sufficient quantity of champagne, which confers on the sorbet an essential characteristic.

63. Both factors need to be examined separately, despite the fact that, in my view, they might not be the only relevant factors for determining whether there has been exploitation of the reputation of the PDO.

(a) The name of the product which contains the PDO and the customary name used by the public

64. All the parties except the Commission agree that the customs of German consumers do not legitimise the use of the PDO Champagne in the commercial presentation of the sorbet. To admit otherwise would be tantamount to converting that PDO into a generic term whose use is available to any economic operator.

65. I am of the same opinion, for one of the primary aims of the protection of PDOs for wines is to prevent those PDOs from becoming generic.[34] The indiscriminate use of a PDO for products not covered by it may lead the public to believe that the characteristic names of PDOs may be applied to products produced outside the territory to which the PDO applies. That would promote the use of a PDO as a mere generic indication, even where that practice is confined to a particular country. It must be borne in mind that the protection of PDOs must be the same in all Member States, without any fragmentation resulting from the customs of the consumers of one Member State.[35]

32 Judgments of 14 July 2011, *Bureau National Interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 46), and of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 45).

33 In that connection, the beginning of recital 32 of Regulation No 479/2008, Article 45 of which inserted the current wording of Article 118m, at issue in this case, states: '… designations of origin … should enjoy protection against uses which *unduly* take advantage of the reputation that complying products command' (italics added).

34 I refer to points 87 to 89 of my Opinion in *EUIPO* v *Instituto dos Vinhos do Douro e do Porto IP* (C-56/16 P, EU:C:2017:394).

35 Reference was made at the hearing to the fact that established customs in certain Member States had to be altered; prior to that, those Member States used as generic names those which, after the adoption of the EU provisions, became PDOs for wines (champagne is a case in point). That was also the situation with regard to the protection of European PDOs outside the EU through bilateral and multilateral treaties.

66. From a legislative perspective, once registered, PDOs for wines benefit from permanent protection pursuant to Article 118m(3) of Regulation No 1234/2007, although they may be cancelled. The protection of PDOs would be at risk, including in third countries,[36] if, through becoming generic, the names of PDOs effectively passed into the public domain; names which have become generic cannot be registered.[37] The prevention of uses designed to popularise names therefore becomes an overriding need rather than a mere aspiration on the part of producers of wines protected by a PDO.

67. Accordingly, the fact that 'Champagner Sorbet' may be the name usually used to refer to a sorbet in one or more Member States is not sufficient to confer on the distributor a *legitimate interest* which allows it to include in the commercial presentation of that product the name of the PDO Champagne.

(b) Conferral of the essential characteristic of the ingredient covered by a PDO through the use of a sufficient quantity of that ingredient

68. I agree with the Commission that, in this case, it is necessary to interpret the general EU provisions on the labelling of food products (primarily laid down in Directive 2000/13 and in the legislation repealing it, Regulation No 1169/2011), since sorbet — which is, obviously, such a product — is not covered by a PDO.[38]

69. In accordance with Directive 2000/13, the labelling of foodstuffs must contain 'the name under which the product is sold … the list of ingredients [and] the quantity of certain ingredients …'[39] The 'name under which the product is sold'[40] means that laid down in the applicable EU provisions or, in the absence of such provisions, in national provisions. Failing this, the name under which a product is sold is to be 'the name customary in the Member State in which it is sold to the final consumer'.

70. At first sight, 'Champagner Sorbet' appears to comply with the rules on labelling, which would provide Galana NV with a legitimate interest in giving its food product that name. However, in accordance with Article 13(1)(a) and (b) of Regulation No 1151/2012, registered PDOs are also protected when they are used as ingredients. It is therefore necessary to examine the extent of that protection.

71. In accordance with Article 6(5) of Directive 2000/13,[41] the producer is required to include on the label a list of all the ingredients contained in the foodstuff. Where an ingredient appears in the 'name under which the [foodstuff] is sold' (as in this case), it must be expressed as a percentage, pursuant to Article 7(4) of that directive.[42]

72. Neither Directive 2000/13 nor Regulation No 1169/2011 refers directly to ingredients covered by a PDO. In 2010, to remedy and to help clarify that situation, the Commission published the Guidelines (referred to in recital 32 of Regulation No 1151/2012). Although they lack binding legislative force,[43] the Guidelines must be taken into account because they reflect that institution's view.

36 Although Article 12 of the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (adopted on 20 May 2015) also provides for permanent protection, that treaty has not yet entered into force.

37 As stipulated by Article 118k(1) of Regulation No 1234/2007, later included in Article 101(1) of Regulation No 1308/2013.

38 By contrast, the labelling of wine products is subject to Regulation No 1308/2013, Articles 117 to 123, while the labelling of geographical indications for spirit drinks is subject to Regulation No 110/2008. Both act as a *lex specialis* in relation to the general law governing foodstuffs.

39 Article 3(1)(1), (2) and (3). The equivalent provision of Regulation No 1169/2011, in force since 13 December 2014, is Article 9(1)(a), (b) and (d).

40 Article 5(1)(a) of Directive 2000/13, equivalent to Article 17 of Regulation No 1169/2011.

41 Its more recent equivalent is Article 18(1) of Regulation No 1169/2011. Directive 2000/13 is applicable to the wine sector in this regard, as Article 118 of Regulation No 1308/2013 states.

42 The legislature entrusted food producers with the choice of where to include the quantity, expressed as a percentage, of the ingredient: (a) in the name under which the foodstuff is sold; (b) immediately next to that name; or (c) in the list of ingredients. In the present case, that list is on the bottom of the packaging.

43 The Guidelines state that their uptake is voluntary and that they 'should not be deemed to constitute a legally binding interpretation of EU legislation on PDOs and PGIs or the Labelling Directive.'

73. According to the Guidelines, the characteristic name of a PDO may be mentioned in the list of ingredients and also 'in or close to the trade name of a foodstuff incorporating products benefiting from a registered name, as well as in the labelling, presentation and advertising relating to that foodstuff', provided that the conditions I transcribed in point 13 of this Opinion are met.

74. It is for the national courts, which are best placed to assess the facts of the dispute and establish their characterisation in law, to rule on whether those three conditions are met in the present case. I shall therefore confine myself to setting out a number of considerations which may assist those courts with that task.

75. The first condition (there must not be any other 'comparable ingredient' to that covered by the PDO) is straightforward to assess and sufficiently objective. Nothing appears to indicate that 'Champagner Sorbet' contains other ingredients similar to the sparkling wine protected by the PDO, which could be substituted for that wine.

76. The second condition (the ingredient should be used in sufficient quantities to confer an essential characteristic on the foodstuff concerned) is more complex. Contrary to the view of the CIVC, it is not a question of seeking to identify the essential characteristics of the protected ingredient in the foodstuff, but rather that that foodstuff must have an essential characteristic linked to the PDO. [44]

77. However, that rule is not sufficiently certain either. The quantitative factor will not always be the most significant when it comes to conferring an essential characteristic on a foodstuff. [45] Normally, in the case of foodstuffs, the essential characteristic will come from the aroma and the taste which the ingredient protected by the PDO gives to the foodstuff, but there may be other relevant factors. [46] Again, it will be for the national court, based on the evidence adduced [47] and on its own assessment of the facts, to determine whether the addition of champagne confers on the sorbet an essential characteristic, in the way I have explained above.

78. The third condition poses more problems for the interpreter. First, it is debatable whether the condition complies with Article 7(5) of Directive 2000/13. [48] At all events, its wording, in using the adverb 'ideally', deprives it of force, even for guidance purposes. Specification of the percentage of the ingredient in the foodstuff consequently becomes a factor whose importance must be assessed in the light of Directive 2000/13.

79. On that basis, it is, I repeat, the national courts which must determine whether an ingredient covered by a PDO which is added to a foodstuff provides that foodstuff with an essential characteristic such that it must be included on the label.

44 The Commission rightly refrained from suggesting a uniform usage percentage in the Guidelines. The Commission did, however, suggest a rule whereby the greater the quantity of an ingredient covered by a PDO, the greater the likelihood that that essential characteristic will be conferred.

45 There are, for example, products protected by a PDO, such as certain varieties of truffle, which, when added to a foodstuff in small quantities, are immediately recognisable by their smell and leave an indelible taste in the mouth.

46 The indication of the ingredient on the label of the foodstuff, in or next to the 'name under which [that foodstuff] is sold', is therefore, possible if the product has the aroma and/or taste of the ingredient protected by a PDO. However, it is important to have regard to other factors such as the texture and the colour, which I do not believe to be as decisive in relation to foodstuffs as the two factors referred to above.

47 In this type of dispute, expert evidence may be useful, given by gastronomy experts who can explain the qualities of a champagne sorbet, or reports based on consumer surveys to confirm that the sorbet actually tastes of champagne. The procedural practice of the Member States is very valuable in that connection: see, specifically in relation to champagne, the judgment of 15 March 2013 of the Cour d'appel de Paris (Court of Appeal, Paris, France), in *SAS Euralis Gastronomie* v *CIVC*, upheld by the Cour de cassation (Supreme Court, France) on 25 November 2013.

48 That article offers a producer who uses an ingredient covered by a PDO three possibilities for indicating, as a percentage, the quantity of that ingredient in his foodstuff (see point 12 of this Opinion). However, the Guidelines appear to restrict the possibility of indicating that percentage to cases in which the ingredient is not mentioned in or in close proximity to the name under which the foodstuff is sold (that is how I construe the expression 'failing that'). The producer is bound by Directive 2000/13, not by the Guidelines, which is why the options provided for in that directive are left intact.

(c) The presence of other factors which assist in the exploitation of the reputation of the PDO

80. The answer given to the referring court will be incomplete if it is confined merely to the existence of a legitimate interest on the part of the distributor, derived from its compliance with the Guidelines, which permit it to include ingredients protected by a PDO on labels for its foodstuffs.

81. The three conditions stipulated in those Guidelines cannot be separated from certain basic concepts (the duty of good faith and the duty not to mislead the consumer) which are referred to in point 1.1, which sets out the background to the Guidelines.

82. Admittedly, in determining whether undue advantage has been taken of the PDO (whether its reputation has been unlawfully exploited), the starting point will be whether there is a sufficient quantity of an ingredient covered by that PDO, which confers an essential characteristic on the foodstuff. However, that circumstance will not authorise the use of the PDO in the sorbet at issue in the proceedings if there are other factors (in particular, in relation to the presentation of the labelling) which reveal an intention to exploit the prestige of the PDO by appropriating its reputation.

83. In this case, the label visible to consumers to whom the cartons of 'Champagner Sorbet' are offered includes, in the foreground, a cork with the wire which attaches it to the bottle, a half-full champagne glass and a drink which is presumably champagne. In the background, but clearly recognisable, is a bottle of champagne.

84. I do not believe that the importance of those factors can be overlooked when assessing whether the producer or distributor of the foodstuff has taken advantage of the reputation of the ingredient protected by the PDO Champagne.[49] The national court may, and must, take those factors into account when it determines whether there has been undue exploitation of the PDO.

85. The aim of Regulation No 1308/2013 and Directive 2000/13[50] is to prevent consumers from being misled, and the Court has held that the list of ingredients on the packaging is not sufficient in itself to exclude the possibility that the labelling and methods used for it may be such as to mislead the purchaser.[51]

86. The Court has held that, in order to assess the capacity of labelling to mislead the consumer, the national court must in essence take account of the expectations which the consumer can be presumed to have, in the light of that labelling, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine.[52]

87. The court with jurisdiction will have to consider whether the use of the graphic elements concerned on the label of 'Champagner Sorbet' can be explained only as an indication of the desire to establish an exaggerated connection with the sparkling wine protected by the PDO. In other words, the court must consider whether the underlying aim of the commercial presentation of the foodstuff is in reality to establish a link with the reputation of sparkling wine from Champagne, with the intention of extending that wine's quality to the sorbet.

49 At the hearing, the parties acknowledged that the main proceedings are not restricted to the use of the PDO in the name of the sorbet.

50 Article 2(1)(a)(i).

51 Judgment of 4 June 2015, *Teekanne* (C-195/14, EU:C:2015:361, paragraph 38).

52 Ibid., paragraph 36 and the case-law cited.

C. The third question

88. The answers to the third and fourth questions may be superfluous if, based on the answer to the second question, the Bundesgerichtshof (Federal Court of Justice) finds that there has been exploitation of the PDO Champagne. In any event, I shall analyse both questions.

89. The third question asks, in essence, whether the use of the characteristic name of a PDO in the circumstances of the present case misuses, imitates or evokes the PDO.

90. Article 118m(2)(b) of Regulation No 1234/2007 lists, in decreasing order of intensity of usage of the PDO, a number of types of conduct, from misuse, through imitation, to evocation, which are distinguished by the fact that they constitute unfair trading.

91. *Misuse* is directed at the use of the full name of the PDO for similar products. I do not believe that has occurred in the present case because the sorbet is sold frozen, which is unthinkable for wine.[53] Nor do I believe that there is *imitation* in the strict sense of the term because the name 'Champagner Sorbet' contains the full name of the PDO.

92. It is more difficult to determine whether or not there is *evocation*, an issue which must be resolved by turning to the case-law of the Court, which has established a number of the legal features of that third type of unfair practice.[54]

93. According to that case-law, the concept of 'evocation' covers a situation in which the term used to designate a product incorporates *part* of a PDO, so that when the consumer is confronted with the name of the product the image triggered in his mind is that of the product whose designation is protected.[55]

94. Inclusion of the reference to *partial* use of the PDO was prompted by the facts of three cases in which the evocation of a PDO was due to the partial overlapping of the names or trade marks for the goods at issue ('Gorgonzola/Cambozola',[56] 'Parmigiano Reggiano/Parmesan'[57] and 'Verlados/Calvados'[58]).

95. When examining, in the context of Regulation No 110/2008, the case of a trade mark which contained the complete form of the element 'Cognac', the Court chose to treat that mark as an 'evocation' rather than 'misuse', even though the mark was for spirit drinks which did not meet the specifications of the PDO.[59]

96. The principles inferred in relation to PDOs for spirit drinks may be transferred by analogy to 'evocation' as referred to in Article 118m(2)(b) of Regulation No 1234/2007.[60] Recitals 92 and 97 of Regulation No 1308/2013 explain that the protection of PDOs seeks not only to prevent misleading practices and to promote transparency on the market and fair competition, but also to achieve a high level of consumer protection.

53 The conclusion might be different if the product had a different name which suggested to the consumer that it was frozen champagne, suitable for eating as sorbet.

54 In my Opinion in *EUIPO* v *Instituto dos Vinhos do Douro e do Porto IP* (C-56/16 P, EU:C:2017:394, point 94 et seq.), I also dealt with the concept of evocation, applied on that occasion to the use of the PDO Porto/Port by the EU trade mark 'Port Charlotte'.

55 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraph 21 and the case-law cited), in relation to Article 16(b) of Regulation No 110/2008.

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

57 Judgment of 26 February 2008, *Commission* v *Germany* (C-132/05, EU:C:2008:117, paragraph 44).

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

59 Judgment of 14 July 2011, *Bureau National Interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 58).

60 Ibid., paragraphs 22 to 27.

97. In that same vein, account should also be taken of the criteria established by the case-law which, for the purpose of determining whether there is evocation, refer to the perception of the average European consumer, who is reasonably well informed and reasonably observant and circumspect, as an expression of the principle of proportionality. [61]

98. Again, it is the referring court (or, as appropriate, the lower courts) which, on the basis of that case-law, must decide whether, in this instance, there is an evocation of the PDO Champagne. [62] As grounds for its judgment, that court may take into consideration not only the name of the sorbet but also the other elements through which that foodstuff is offered for sale, to which I referred above.

99. Without wishing to encroach on the jurisdiction of the referring court, and subject to the fact that only that court is equipped to carry out a full examination of the facts at issue, I nevertheless believe that the inclusion of the graphic elements concerned on the packaging of the product helps to foster the evocation of the PDO Champagne. In using those elements, in addition to the name 'Champagner Sorbet', the manufacturer and the distributor seek to ensure that the consumer has in mind the quality and prestige associated with that PDO, which are intended to be transferred to the sorbet.

D. The fourth question

100. The Bundesgerichtshof (Federal Court of Justice) asks whether Article 118m(2)(c) of Regulation No 1234/2007 applies only to false or misleading indications which are liable to create a false impression on the part of the relevant public as to the geographical origin of a product.

101. For a better understanding of the question, it is necessary to refer to paragraph 62 et seq. of the order for reference. It appears from those paragraphs that the uncertainty arose in the light of the argument put forward by the CIVC, to the effect that the prohibition of those indications is *general* and does not encompass only indications which convey to the public a false impression as to the place of origin of a product.

102. The referring court appears to incline to the more reductionist interpretation of the provision, restricting it to cases in which the public is misled or confused as to the origin of the product as a result of the use of the PDO.

103. My view is, however, that the protection which the Community legislature wished to confer on PDOs is broad and, in addition to confusion regarding the origin of products, it seeks also to prevent the risk of generalisation through the dilution of PDOs by their indiscriminate use.

104. Article 118m(2) of Regulation No 1234/2007 ranks the different types of unfair conduct, as I stated above. While point (a) refers to acts exploiting the reputation of PDOs and point (b) refers to misuse, imitation and evocation, point (c) widens the extent of the protection to include 'indications' (information provided to consumers) on the inner or outer packaging or advertising material for the product, which, while not actually evoking the PDO, are false or misleading as regards the links between the product concerned and that PDO.

61 Judgment of 21 January 2016, *Viiniverla* (C-75/15, EU:C:2016:35, paragraphs 26 to 28).

62 At paragraph 31 of the judgment in *Viiniverla*, the Court observed that it was for the referring court 'to assess whether the name "Verlados" for cider spirits constitutes an "evocation" within the meaning of Article 16(b) of Regulation No 110/2008 of the protected geographical indication "Calvados."'

105. I believe that the *ratio* of point (c) is not distorted if commercial information about the foodstuff *associated* with the PDO, which is made directly available to the consumer, is liable to induce the consumer to believe that that foodstuff benefits from the same protection, and the same quality, as the PDO, when that is not really the case. A false or misleading indication may, of course, concern the origin of the product but may also concern its essential characteristics (such as its taste).

106. In short, the protection granted by the provision referred to in the fourth question is not limited to cases where the consumer is misled as to the geographical origin of a product.

VI. Conclusion

107. In the light of the foregoing considerations, I suggest that the Court should reply as follows to the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany):

(1) Article 118m(2)(a)(ii) of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products is applicable when the PDO Champagne is used, in circumstances like those in the main proceedings, to designate a foodstuff marketed under the name 'Champagner Sorbet'.

(2) Article 118m(2)(a)(ii) of Regulation No 1234/2007 must be interpreted as meaning that, in order to determine whether the foodstuff 'Champagner Sorbet', which contains 12% champagne, exploits the reputation of the PDO Champagne, the referring court must assess whether there is a legitimate interest justifying the use of that PDO in the commercial presentation of the foodstuff.

Relevant factors for evaluating whether such exploitation exists are whether the ingredient protected by the PDO Champagne and added to the foodstuff confers an essential characteristic on the foodstuff, and also elements of the packaging and labelling which may lead the consumer to link that foodstuff to the PDO Champagne.

(3) Article 118m(2)(b) of Regulation No 1234/2007 must be interpreted as meaning that, in order to determine whether the product 'Champagner Sorbet' evokes, within the meaning of that provision, the PDO Champagne, the referring court must establish whether, in the light of the product's name and its commercial presentation, the average European consumer, who is reasonably well informed and reasonably observant and circumspect, is led to believe that that product benefits from the quality and prestige inherent in the protected name.

(4) Article 118m(2)(c) of Regulation No 1234/2007 does not apply only to false or misleading indications which are liable to convey to the relevant public a false impression regarding the geographical origin of a product.