BORIE MANOUX

OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 March 2002 [1]

I — Introduction

1. These proceedings on a reference for a preliminary ruling essentially concern the interpretation of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts. [2] The national court seeks to ascertain whether Article 40 of that regulation, which provides that the description and presentation of certain products, and any form of advertising for such products, must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed, precludes the registration as a trade mark of a brand name containing a geographical reference the use of which is not provided for by Article 11 of Regulation No 2392/89.

2. More specifically, they concern the question whether a geographical reference in a brand name, the use of which is not provided for by a national law or Community legislation, gives rise to a likelihood of confusion for the consumer since it may give the impression that the geographical reference in question is protected.

II — Legal framework

A — *Community law*

3. Regulation No 2392/89 consolidates a number of amendments to Council Regulation (EEC) No 355/79 of 5 February 1979 laying down general rules for the description and presentation of wines and grape musts. [3] Regulation No 2392/89 was adopted on the basis of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine. [4]

4. Regulation No 2392/89 lays down rules for the description and presentation of

1 — Original language: Dutch.
2 — OJ 1989 L 232, p. 13.
3 — OJ 1979 L 54, p. 99.
4 — OJ 1987 L 84, p. 1.

wines and grape musts. According to the third recital in the preamble to the regulation, the purpose of those rules is 'to supply potential buyers and public bodies responsible for organising and supervising the marketing of the products concerned with information which is sufficiently clear and accurate to enable them to form an opinion of the products'. [5] The fifth recital in the preamble states that, in order to avoid too divergent interpretations, 'it was deemed appropriate to lay down fairly comprehensive rules on description;... to ensure that these rules are effective, it should also be laid down as a principle that only the details specified in the rules in question or in the relevant implementing rules are permitted for the description of wines and grape musts'.

5. The regulation makes a distinction between mandatory information necessary to identify the product and optional information designed mainly to indicate the special properties of the product or to characterise it.

6. The regulation also makes a distinction between table wine and quality wine produced in a specified region ('quality wine psr'). Quality wine psr is a term taken from Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions. [6]

7. Article 3 of Regulation No 823/87 reads as follows:

'1. "Specified region" shall mean a winegrowing area or combination of winegrowing areas which produces wine possessing special quality characteristics and whose name is used to designate those of its wines which are defined in Article 1. [7]

2. Each specified region shall be precisely demarcated, as far as possible on the basis of the individual vineyard or vineyard plot. Such demarcation shall be effected by each Member State concerned and shall take into account the factors which contribute towards the quality of the wines produced in those regions, such as the nature of the soil and subsoil, the climate and the situation of the individual vineyard or vineyard plot.'

8. Chapter I, Section B, of Regulation No 2392/89, concerning the description of quality wines psr, includes a Section B. I 'Labelling'. Article 11(1) specifies the mandatory information which the description on the labelling must include, such as the name of the specified region of origin (subparagraph (a)) and one of the

5 — The regulation was repealed on 1 August 2000. The rules in question have now been incorporated in Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ 1999 L 179, p. 1). The rules concerning the description and designation of wine are now to be found in Annex VII to that regulation.

6 — OJ 1987 L 84, p. 59. Regulation No 2392/89 implements that regulation.

7 — The wines referred to here are quality wines produced in a specified region (quality wines psr).

expressions referred to in the second indent of the first subparagraph of Article 15(7) of Regulation (EEC) No 823/87 (subparagraph (b)). [8]

9. Article 11(2) specifies how, in the case of quality wines psr, the mandatory descriptions referred to in paragraph 1 may be supplemented. I cite the following from the list in Article 11(2):

'...

(c) a brand name, in accordance with the conditions laid down in Article 40;

...

(i) additional details of a traditional kind, provided that they are used in the manner prescribed by the laws of the producer Member State and are entered in a list to be adopted;

(j) the Community expression "quality wine produced in a specified region", or "quality wine psr" if it does not appear pursuant to paragraph 1(b), or a specific traditional expression if it does not appear pursuant to paragraph 1(b)'.

10. Under Article 12(1), only the information specified in Article 11 is to be permitted for the description on the label of a quality wine psr. However, Member States may allow 'the statement of the specified region referred to in Article 11(1)(a) to be accompanied by a statement of the name of a larger geographical unit of which the specified region in question is a part, in order to indicate its whereabouts, provided, however, that the conditions governing use of the name of the said specified region and of the name of the said geographical unit are complied with'.

11. Under Title III, 'General provisions', Article 40(1) states that the description and presentation of the products referred to in the regulation, and any form of advertising for such products, must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed, particularly as regards the information governed in Article 11 and the characteristics of the products, including their nature, origin or provenance. The geographical

8 — That subparagraph reads: 'A quality wine psr shall be marketed under the name of the specified region granted it by the producer Member State.'

name designating a specified region must be sufficiently precise and familiarly linked to the area of production so that, taking account of the existing situations, confusion may be avoided. [9]

12. Article 40(2) relates to brand names and reads as follows:

'2. Where the description, presentation and advertising of the products referred to in this Regulation are supplemented by brand names, such brand names may not contain any words, parts of words, signs or illustrations which:

(a) are likely to cause confusion or mislead the persons to whom they are addressed within the meaning of paragraph 1;

or

(b) are:

— liable to be confused by the persons to whom they are addressed with all or part of the description of a table wine, of a quality wine psr, or of an imported wine whose description is regulated by Community provisions or with the description of any other product referred to in the first subparagraph of Article 1(1) and the first subparagraph of Article 36(1), or

— identical to the description of any such product unless the products used for making the final products referred to above are entitled to such description or presentation.

Moreover, the labelling used for the description of a table wine, a quality wine psr or an imported wine may not bear brand names containing words, parts of words, signs or illustrations which:

...

9 — That sentence was added by Council Regulation (EEC) No 3897/91 of 16 December 1991 amending for the third time Regulation (EEC) No 2392/89 laying down general rules for the description and presentation of wine and grape musts (OJ 1991 L 368, p. 5).

(b) ... contain false information, particularly with regard to geographical origin, vine variety, vintage year or a reference to superior quality.'

13. The Court has clarified the general provisions governing the description and presentation of wine in four judgments. They are:

— *Weigand*; [10]

— *Langguth*; [11]

— *Voisine*; [12]

— *Kessler*. [13]

10 — Case 56/80 [1981] ECR 583.
11 — Case C-456/93 [1995] ECR I-1737.
12 — Case C-46/94 [1995] ECR I-1859.
13 — Case C-303/97 [1999] ECR I-513.

B — *National legislation*

14. Under Article L 711-3 of the Code de la propriété intellectuelle (Code of Intellectual Property), no sign the use of which is prohibited by law or likely to mislead the public, in particular as to the nature, quality or geographical provenance of the product, may be adopted as a trade mark or element of a trade mark.

III — Facts and procedure

15. The company Borie Manoux sells wine from the Bergerac region. On 6 January 1997 it made application to the Institut national de la propriété industrielle (National Institute for Intellectual Property, 'INPI') for registration of the brand name Les Cadets d'Aquitaine as a trade mark to describe wines of designated origin from the Aquitaine region. On 8 July 1997 the director-general of the INPI rejected the application on the basis of Articles 11 and 40 of Regulation No 2392/89 and Article L 711-3 of the Code de la propriété intellectuelle.

16. Borie Manoux brought an appeal against that INPI decision before the Cour d'appel de Bordeaux (Court of Appeal,

Bordeaux). The Cour d'appel upheld the contested decision by judgment of 26 October 1998. It held that, in the case of quality wines psr, the statement of the production region may be supplemented only by the name of a smaller geographical unit which has undergone positive demarcation pursuant to a national provision. The Cour d'appel held that the inclusion of 'Aquitaine' in the brand name Les Cadets d'Aquitaine was unlawful inasmuch as it did not constitute a geographical reference the use of which is provided for by a national law or Community legislation.

17. Borie Manoux then brought an appeal on a point of law before the Cour de cassation (French Court of Cassation) against the judgment of the Cour d'appel. It maintains that the Cour d'appel infringed Articles 11 and 40 of Regulation No 2392/89 by holding that the reference 'Aquitaine' is unlawful without examining or explaining why that reference in the brand name Les Cadets d'Aquitaine is liable to give a misleading impression as to the origin, quality or nature of the product, or to cause confusion with a Community or national description.

18. In the main proceedings, Borie Manoux argued that it follows from Article 40 of Regulation No 2392/89 that there is no restriction on registering a geographical name as a trade mark for wines and grape musts, provided that it does fall under any of the prohibitions contained in the regulation. The prohibitions are intended to prevent, first, any misleading impression being created as to the origin, quality or nature of the product and, second, any risk of confusion with a description provided for under Community law. According to Borie Manoux, viewed in that light, the brand name Les Cadets d'Aquitaine cannot be regarded as misleading and does not involve any risk of confusion.

19. According to the referring court, in view of the Court's judgment in *Weigand*,[14] the interpretation of Article 40 is relevant for the purposes of a decision in the present case. The Cour de cassation therefore requested, by a judgment registered at the Court on 16 February 2001, a preliminary ruling on the following question:

'Must Article 40 of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts be interpreted as prohibiting the registration as a trade mark, for the products covered by the regulation, of a geographical reference the use of which is not provided for by Article 11, even where the registration of such a trade mark is not likely to mislead the consumer as to the provenance of the wine and does not give rise to any con-

14 — Cited in footnote 10. In that case the Court held, in connection with similar provisions of Articles 8, 18 and 43 of Regulation No 355/79, that the expressions 'misleading information', 'confusion' and 'false impression' must be interpreted as covering not only descriptions which are liable to be confused with the description of a particular small locality, but also all descriptions which are liable to induce the public to believe that the description in question is the name, or part of the name, of a wine-growing local administrative area which does not in fact exist or the name of a small locality which does not in fact exist.

fusion with a registered geographical designation, in so far as such registration might suggest that the geographical reference in question, which relates to the region where that wine is actually produced but which covers other designations of origin, is protected?'

20. Written observations have been submitted by the French Government and the Commission. No hearing took place.

IV — Assessment

21. This case concerns the interpretation of Regulation No 2392/89. According to the third recital in the preamble to that regulation, the purpose of the regulation is to provide sufficiently clear and accurate information on wines marketed within the Community in order to protect the consumer and the public bodies responsible for organising and supervising the marketing of wine from the likelihood of confusion or from misleading information as to the main qualities of the product concerned.

22. The relevant provisions in this case are Articles 11(1) and (2), Article 12(1) and Article 40(1) and (2) of Regulation No 2392/89. Article 11(1) lays down the mandatory information to be included in the description on the labelling in the case of quality wines psr. That information must include the name of the specified region of origin of the quality wine psr. Pursuant to Article 11(2), the description on the labelling may be supplemented by certain information, including a brand name, in accordance with the conditions laid down in Article 40. The latter article prohibits inter alia the use in brand names of words which are likely to cause confusion or to mislead the persons to whom they are addressed. Article 40(2)(b) concerns more specifically the elements of brand names which are liable to be confused with all or part of the description of wines. Article 12(1) provides that, subject to a number of exceptions, only the information specified in Article 11 is to be permitted for the description on the label of a quality wine psr. One of the exceptions provides that Member States may allow the statement of the specified region to be accompanied by a statement of the name of a larger geographical unit of which the specified region in question is a part, in order to indicate its whereabouts.

23. According to the referring court, the issue in the main proceedings is the interpretation of the prohibition in Article 40 of Regulation No 2392/89. The question is whether that article precludes the registration of the trade mark Les Cadets d'Aquitaine for Bergeracois wines, since the use of the geographical reference 'Aquitaine' is not provided for by

Article 11 of Regulation No 2392/89. [15] The referring court seeks in essence to ascertain whether a geographical reference in a brand name, the use of which is not regulated by a national law or a Community provision, creates a likelihood of confusion for the consumer since it may suggest that the geographical reference in question is protected and thus falls under the prohibition in Article 40.

24. Before it can be assessed whether the geographical reference 'Aquitaine' in the brand name Les Cadets d'Aquitaine could suggest that it is a protected trade mark, it must first be determined whether such a reference is permitted at all. To that end, reference must be made to Chapter I, Section B, of Regulation No 2392/89, which lays down the rules for the description and presentation of wine.

25. The first question which arises is whether that regulation precludes the use on a label of a geographical reference other than the region referred to in Article 11(1). As will become apparent below, the regulation contains, in Article 11(2)(l), a provision on the name of a smaller geographical unit and, in Article 12(1), a provision on the name of a larger geographical unit. It is clear from those provisions that the use of a geographical reference is permitted under certain conditions. The question then arises whether it makes any difference to the answer to the first question if a geographical reference forms part of a brand name. Regulation No 2392/89 provides, in Article 11(2)(c), that in the case of quality wines psr the description on the labelling may be supplemented by a brand name, in accordance with the conditions laid down in Article 40. The latter article does not actually prohibit the inclusion of a geographical reference in a brand name, provided that it does not cause confusion or mislead the persons to whom it is addressed. For the purposes of the present case, only if it is established that the detail 'Aquitaine' is a permissible geographical reference in a brand name does the question arise whether it is liable to cause confusion regarding the protection of the brand name concerned.

26. I shall start by setting out the relevant provisions of Regulation No 2392/89, namely, Articles 11, 12 and 40. I shall also discuss the Court's case-law on that regulation and other, related legislation. I do so by reference to the following topics:

— the exhaustive nature of Regulation No 2392/89;

— the rules concerning brand names;

15 — According to the observations submitted by the French Government, the designations of origin 'Bergerac', 'Bergerac sec' and 'Côtes de Bergerac' are regulated in French law by the Decree of 3 September 1993, JORF No 205 of 4 September 1993.

— the rules concerning geographical references;

— the meaning of the term 'consumer';

— the meaning of the terms 'confusion' and 'mislead'.

In points 52 et seq. I shall examine the observations of the French Government and the Commission. Those observations are chiefly concerned with Article 40 and with the terms 'confusion' and 'mislead'.

The exhaustive nature of Regulation No 2392/89

27. The intention that Regulation No 2392/89 was to be exhaustive in nature is apparent from the fifth recital in the preamble, which states that, with the aim of avoiding too divergent interpretations, 'it was deemed appropriate to lay down fairly comprehensive rules on description;... to ensure that these rules are effective, it should also be laid down as a principle that only the details specified in the rules in question or in the relevant implementing rules are permitted for the description of wines and grape musts'.

28. The exhaustive nature of Articles 11 and 12 of Regulation No 2392/89 is mentioned explicitly in *Voisine*. [16] In paragraph 22 of the judgment, the Court states that those articles reveal the Community legislature's intention to adopt, in that regulation, a detailed and complete code governing the description and presentation of wines. According to the Court, Articles 11 and 12 determine the sole particulars permitted for describing quality wine psr on the labelling.

29. What is the significance of the exhaustive nature of Regulation No 2392/89 for the present case? First, I note that the use of the geographical reference 'Aquitaine' is not provided for by Regulation No 2392/89 or any of the implementing regulations. The use of that reference on the labelling next to 'Bergeracois' is likewise not provided for by the French law, as is clear from the observations of the French Government. The designation of origin 'Bergerac' is certainly protected under the regulation. Since the geographical reference 'Aquitaine' is not provided for by a national law or Community legislation, I do not rule out the possibility that the geographical reference 'Aquitaine' may not be permitted. It follows from the foregoing

16 — Cited in footnote 12.

that any statement on the label of a quality wine psr needs to have an explicit basis in Regulation No 2392/89. It will therefore be necessary to find such a basis in the regulation for the geographical reference used in this case.

The rules concerning brand names

30. First, I cite Article 11(2)(c), by virtue of which the description on the labelling of quality wines psr may be supplemented by a brand name, in accordance with the conditions laid down in Article 40. Under the latter article, the description and presentation of wine must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed. Pursuant to Article 40(2)(a), brand names may not contain any (parts of) words, signs or illustrations which are likely to cause confusion or mislead the persons to whom they are addressed. Article 40(2)(b) relates more specifically to the elements of brand names which are liable to be confused with all or part of the description of wines.

31. In *Kessler*,[17] the Court held that by authorising the use of brand names to supplement the description or presentation of wine, the Community legislature necessarily intended to balance the interests involved as between, on the one hand, the protection of consumers, namely, the right not to be misled as to the intrinsic qualities of a product, and, on the other, the protection of intellectual property rights and, in particular, the legitimate interest of the owners of a brand name to use and exploit it for commercial purposes. The Court thus encapsulates the purpose of the legislation.

32. There is little case-law on the term 'brand name' within the meaning of Articles 11 and 40. The cases in which the Court has given judgment with regard to Article 40 generally concern the interpretation of the terms 'confusion' and 'mislead'. I shall come back to the meaning of those terms in detail below. Specifically as regards a brand name, the Court held in *Langguth*[18] that Article 40 does not impose any restriction concerning the lettering of the characters and the size of a brand name in relation to the indication on the label of the name of the specified region or of a geographical unit smaller than the specified region. It follows that the Court leaves the necessary scope for using a brand name to supplement the description and presentation of wine.

33. Article 11 likewise does not appear as such to prohibit the inclusion of a geo-

17 — Cited in footnote 13.

18 — Cited in footnote 11.

graphical reference in a brand name. Article 11 may therefore constitute the basis required by Regulation No 2392/89. The question which then arises is whether Article 12, which regulates the use of geographical references, prohibits it.

The rules concerning geographical references

34. First of all, Article 11(1)(a) of Regulation No 2392/89 provides that, in the case of quality wines psr, the description on the labelling must include the name of the specified region of origin. Pursuant to Article 11(2)(l), in the case of quality wines psr, the description on the labelling may be supplemented by the name of a geographical unit which is smaller than the specified region, in accordance with the conditions laid down in Article 13 of the regulation. [19] Under Article 12(1), Member States may allow the statement of the specified region of origin of the quality wine psr to be accompanied by a statement of the name of a larger geographical unit of which the specified region in question is a part, in order to indicate its whereabouts.

35. Article 12(1) seems at first sight to offer the option of stating the name of a larger geographical unit next to the designation of origin on the label if the national law provides for that. There is no dispute that the geographical reference 'Aquitaine' in the brand name Les Cadets d'Aquitaine constitutes a larger geographical unit. However, France has not permitted the use of that reference by virtue of a provision of the national law. In this case, therefore, Article 12 cannot in itself form a basis for the inclusion of the geographical reference 'Aquitaine'. On the other hand, however, it is not clear from the wording of Article 12 that it prohibits the inclusion of a geographical reference on a label if it forms part of a brand name. That is not obvious from the scheme of the regulation either. Article 12 does in fact provide that, subject to a number of exceptions, only the information specified in Article 11 is to be permitted for the description on the label of a quality wine psr. The use of a geographical reference in a brand name is therefore permitted, provided that it does not cause confusion or mislead the persons to whom it is addressed. The use of a brand name is thus restricted only by Article 40 and by trade mark law.

36. At this point, I propose to examine briefly the defence put forward by the appellant in the main proceedings with regard to the unlawfulness of the brand name Les Cadets d'Aquitaine. The Cour d'appel, it argued, wrongly held that the inclusion of the word 'Aquitaine' is unlawful, without examining or explaining why the inclusion of that word could be misleading as to the origin, quality or nature of

19 — Article 13 defines the term 'geographical unit which is smaller than the specified region'.

the product, or be liable to cause confusion with a Community or national description. According to the order for reference, the Cour d'appel held that, in the case of quality wines psr, the statement of the production region may be supplemented only by the name of a smaller geographical unit which has undergone positive demarcation pursuant to a national provision. In my view, in the light of the wording of Article 12, that is not correct.

37. It follows from the foregoing that Regulation No 2392/89 does not, in principle, prohibit the inclusion of a geographical reference in a brand name. However, the condition that the brand name concerned does not cause confusion or mislead the consumer must certainly be complied with.

38. I now move on to the central question: does the geographical reference 'Aquitaine' in the brand name Les Cadets d'Aquitaine cause confusion or mislead the consumer? To that end, I shall discuss in the following points the meaning of the term 'consumer', for whose protection the regulation is intended, and that of the terms 'confusion' and 'mislead'.

The meaning of the term 'consumer'

39. Article 40 is concerned with the problem of confusing or misleading the consumer. It is clear from the judgment in *Mars* that the term 'consumer' is taken to refer to average, 'reasonably circumspect consumers'. [20] It is settled case-law that, in order to determine whether a description or trade mark is liable to mislead a purchaser, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect. [21] According to the *Estée Lauder* judgment, that test is based on the principle of proportionality. [22]

40. In determining whether a description or trade mark is liable to mislead the consumer, account must also be taken of the possibility that a description or trade mark which is not misleading in one Member State may be misleading in another Member State because of linguistic, cultural and social differences between the Member States. In this connection, the Court held in *Graffione* [23] that the possibility of allowing a prohibition of marketing on account of the misleading nature of a trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States.

20 — Case C-470/93 [1995] ECR I-1923.

21 — See, in particular, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31, Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 27, and Case C-30/99 *Commission* v *Ireland* [2001] ECR I-4619.

22 — Cited in footnote 21.

23 — Case C-313/94 [1996] ECR I-6039.

41. The Court has also held, with regard to similar provisions which are intended to prevent consumers from being misled, that it is for the national court, taking into account all relevant information, to assess whether a description or trade mark may be misleading. [24] Where the national court has particular difficulty in making that assessment, it may, in the absence of any Community provision on this point, consider whether, under the conditions laid down by its own national law, it is appropriate to commission a consumer research poll or order an expert's report. On the basis of such a survey, the national court may determine the percentage of consumers misled by a promotional description or statement that, in its view, would be sufficiently significant in order to justify, where appropriate, banning its use.

42. In summary, in order to assess whether a description or trade mark is misleading, the national court must take into account the presumed expectations of the average consumer who is reasonably well informed, circumspect and observant. When that test is applied to a particular case, account must be taken of the linguistic, cultural and social differences between the Member States, which may mean that a trade mark which does not mislead the consumer in one Member State does so in another Member State. Where it appears particularly difficult to assess whether a description or trade mark is misleading, Community law does not preclude a national court from having recourse, under the conditions laid down by national law, to an opinion poll or expert's report to guide it in forming its judgment.

The meaning of the terms 'confusion' and 'mislead'

43. 'Confusion' and 'mislead' are the key terms in Article 40. Paragraph 2 specifies the meanings which 'confusion' or, as the case may be, 'mislead' may have in relation to a brand name. However, paragraph 2 does not apply to the use of a geographical reference in a brand name. For those reasons, guidance must be sought from the Court's case-law on the terms 'confusion' and 'mislead'. In a series of judgments, the Court has given an interpretation of those terms within the meaning of Article 40 and of other articles in which they occur. I have already cited those judgments in point 13 of this Opinion and I shall now examine in greater detail the considerations which are relevant to this case.

44. In order to determine the scope of Article 40, the meaning of the words 'be... likely to cause confusion or to mislead' for the purposes of Article 40 must first be established. The Court interpreted those terms in the context of Articles 8, 18 and 43 of Regulation No 355/79, the wordings of which are practically the same as that of Article 40, in *Weigand*. [25] In that case, the

24 — *Gut Springenheide and Tusky*, cited in footnote 21.

25 — Cited in footnote 10.

Court had to determine whether there was confusion within the meaning of that regulation where a wine merchant used on the label of two wines and in the advertising for those wines descriptions which gave the impression that they came from German wine regions and locations which in fact did not exist. The Court held that the term 'confusion' covered not only confusion in the narrow sense, but also the use of deceptive information. The same meaning was attributed to the words 'confusion' and 'false impression' because the provisions concerned serve the same purpose, namely 'the prevention in the marketing of wine of all practices which are of such a nature as to create false appearances'. This means that the same meaning must likewise be attributed to the terms 'confusion' and 'mislead' for the purposes of Article 40.

45. In *Kessler*,[26] the question at issue was whether the use of the terms 'cause confusion' and 'mislead' as alternatives in Article 13(1) and Article 13(2)(a), while Article 13(2)(b) is concerned only with the question whether the descriptions in question are 'liable to be confused', might indicate that, in the first two cases, the prohibition presupposes proof of the risk of persons actually being misled, whereas, in the situation covered by Article 13(2)(b), it is sufficient to find that the descriptions in question are in themselves 'liable' to be confused.

46. The Court held that it is not sufficient for the prohibition laid down by Article 13(2)(b) of Regulation No 2333/92[27] to be applied to find that a brand name which includes a word appearing in the description of one of the products mentioned in that provision is, as such, likely to be confused with that description. It is also necessary to establish that use of the brand name is in fact likely to mislead the consumers concerned and thus affect their economic behaviour.

47. As I observed in point 31, the Court held in *Kessler* that by authorising in principle the use of brand names to supplement the description, presentation and advertising of sparkling wines, the Community legislature intended to strike a balance between the interests involved, that is to say, between the right of consumers not to be misled as to the intrinsic qualities of a product, and the legitimate interest of the owners of a brand name to use and exploit it for commercial purposes. The Court took the view that that balance would be seriously undermined if a mere

26 — Cited in footnote 13.

27 — Council Regulation (EEC) No 2333/92 of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines (OJ 1992 L 231, p. 9).

risk of confusion, found to exist without even taking the opinions and habits of the consumers concerned into consideration, were enough to prevent the use of an appellation protected as a brand name. It must therefore be established that the use of a brand name is in fact likely to mislead consumers.

48. It is also clear from the judgment in *Langguth* [28] that Article 40 is aimed primarily at prohibiting the untruthful use of brand names. The Court held that, accordingly, the fact that a brand name is presented in a conspicuous manner does not mean that it is likely to cause confusion or mislead the persons to whom it is addressed, even if it contains a word that has been designated by the rules in question as information which may be used in the appellation of a quality wine psr.

49. I note that in *SABEL* [29] the Court interpreted the concept of 'likelihood of association', which serves to define the scope of the concept of 'likelihood of confusion'. According to that judgment, the likelihood of association implies that, because of the identity or similarity of both the trade marks and the goods or services covered, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with an earlier mark. It follows from paragraphs 22 and 23 of that judgment that '[t]he likelihood of confusion must... be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components.'

50. For the sake of completeness I cite *Voisine*, [30] which concerned the question whether decorations on bottles of wine, which have no connection with the wine itself, are covered by the definition of labelling given in Article 38 of Regulation No 2392/89. Under a French law on fraud and falsification of products it was laid down that it was misleading in certain towns to offer for sale bottles on which photographs were affixed of the towns where the bottles were being sold, together with a text giving the history of the town in question. Such labels were liable to mislead purchasers as to the provenance of the wine. The Court pointed out that the aim of the provisions relating to the labelling of wines is the prevention in the marketing of wine of all practices which are of such a nature as to create false appearances. It is irrelevant whether such practices give rise in the minds of consumers to confusion with existing products or the erroneous impression of an origin or of characteristics which in reality do not exist.

28 — Cited in footnote 11.

29 — Case C-251/95 [1997] ECR I-6191.

30 — Cited in footnote 12.

51. I summarise the foregoing case-law on the terms 'confusion' and 'mislead' as follows. The essential point is that use of the brand name should in fact be likely to mislead the consumers concerned and thus affect their economic behaviour. In that sense there must be an actual risk. The term 'confusion' in Article 40 is in itself certainly a wide concept. In addition to confusion in the narrow sense of the term, it also covers the use of deceptive descriptions which are liable to create the impression on the part of the public of an origin or of characteristics which in reality do not exist. In addition, it also covers the likelihood of association. Since the aim of Article 40 is to prevent in the marketing of wine all practices which are of such a nature as to create false appearances, intent is not a requirement.

The observations of the French Government and the Commission

52. In the present case, the French Government points out that in *Weigand*[31] the Court construed the prohibition of misleading information abstractly, that is to say, no proof of actual confusion is required, but a mere abstract risk of confusion is sufficient. The Court qualifies that view in later judgments and requires that there be a real likelihood of confusion or of being misled. In that respect, the Court held in *Langguth*[32] that the use of a brand name may only be regarded as giving rise to confusion or misleading the persons to whom it is addressed if it is established that, having regard to the views or habits of the consumers concerned, there is a real likelihood of their economic behaviour being affected.

53. The French Government argues, by reference inter alia to the judgments in *Weigand* and *Langguth*, that Article 40 prohibits the inclusion of a geographical reference in a brand name, the use of which is not provided for by Article 11, because of the likelihood of confusion of such a brand name with an existing brand name or the likelihood that it will mislead consumers as to the provenance of the wine.

54. The Commission is of the opinion that the inclusion of a geographical reference in a brand name, the use of which is not regulated by a national law or a Community provision, may give the impression that it is protected and result in the consumer being misled. Nevertheless, it does not consider that the mere inclusion of a geographical reference in a brand name is a sufficient basis for concluding that

31 — Cited in footnote 10.

32 — Cited in footnote 11.

Article 40 has been infringed. According to the Commission, it must also be established that the use of such a brand name is liable to cause confusion or to mislead consumers and thus affect their economic behaviour. It refers in this respect to *Kessler*. [33]

55. Both the French Government and the Commission take the view that it is for the national court to ascertain whether the inclusion of the geographical reference 'Aquitaine' in the brand name Les Cadets d'Aquitaine is liable to mislead the consumer. It is settled case-law that the national court must take into account in that context the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect. [34]

Assessment proper

56. The referring court's question must be answered in the light of the scheme of the regulation. The regulation lays down exhaustive rules as to which particulars are and which are not permitted, but uses for that purpose terms which are not always unambiguous. [35] For those reasons, the national court must always assess in each individual case whether a given particular is permitted under the regulation. The Court previously held that to be so with regard to provisions similar to Article 40 of Regulation No 2392/89 which are intended to prevent the consumer from being misled. I have already noted that in point 41.

57. As I have already stated in point 37, Regulation No 2392/89 does not in itself prohibit the use of the name of a large region as a geographical reference in a brand name. Such a prohibition cannot be inferred either from Articles 11 and 12 or from Article 40 of the regulation. I therefore share the Commission's view that the inclusion of a geographical reference in a brand name, the use of which is not regulated by a national law or by a Community provision, is not contrary to Article 40 solely for that reason. The use of such a reference is permitted, provided that it does not cause confusion or mislead the consumer. I also make that inference from the cases which I have discussed in points 44 et seq. It is clear from those cases that protection of the consumer is the main emphasis of Regulation No 2392/89 as far as information which is liable to cause confusion or mislead is concerned.

33 — Cited in footnote 13; see, in that regard, point 46 of this Opinion.

34 — See point 39 of this Opinion.

35 — In that respect the legislation does not comply with the provisions of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1), in particular guidelines 1 and 14.

58. In the present case, the national court is required to assess whether, having regard to the consumers to whom it is addressed, the name of a large region included as a geographical reference in a brand name is liable to be confused with registered names which occur in the same region.

59. The Court's case-law, as described in points 39 et seq. of this Opinion, gives a number of criteria for assessing whether information is liable to cause confusion or mislead. I refer in this connection in particular to points 42 and 51 of this Opinion. However, those criteria do not specify in what cases the name of a large region is permitted as a geographical reference in a brand name.

60. In order to provide the national court with a further point of reference for its assessment, I shall first examine in more detail the facts in the main proceedings. In the light of those facts, I shall then consider how the criteria formulated by the Court can be made more specific for the purpose of giving judgment in a case such as this.

61. The main proceedings concern the question whether the name 'Aquitaine' is permitted as a geographical reference in the brand name Les Cadets d'Aquitaine. In the terms of the regulation, does such a reference cause confusion or is it misleading as regards the protection of the name?

62. In this case, the appellant in the main proceedings markets wine from the Bergerac district, which is in Aquitaine. I note that, according to the order for reference, it is not disputed that 'Aquitaine' is a geographical name which serves to designate Bergeracois wines. The name 'Aquitaine' thus denotes the region in which the wine is actually produced.

63. It is clear that the name 'Aquitaine' is the central issue in the main proceedings. Aquitaine is a large region in south-west France, which has been known as such for centuries, where a number of renowned, traditional winegrowing areas are to be found. Moreover, Aquitaine is now also one of France's administrative regions. [36] Bordeaux is one of the best-known winegrowing areas in that region. There is no doubt that the name Aquitaine is generally familiar to the French public. By the same token, it does not seem likely that the French public regards Aquitaine as a specific winegrowing area. However, it is questionable to what extent the name of a large French region, in which a number of renowned winegrowing areas are located,

36 — Defined in *Le Petit Larousse* as a 'collectivité territoriale administrée par le conseil régional'.

may also be assumed to be familiar to foreign consumers.

64. I would add yet a further point. It is possible that the name of a large region included as a geographical reference in a brand name may indeed cause confusion with registered names from that region because of the associations which it holds for the reasonably well-informed consumer. The brand name Les Cadets d'Aquitaine indicates that the wine is from the Aquitaine region. That brand name, unlike registered names from the Aquitaine region, such as, for example, Bordeaux, Médoc and Bergerac, is not regulated by a national law or a Community provision. Since registered names also occur in the Aquitaine region, the brand name Les Cadets d'Aquitaine could give the impression that it too is a registered name.

65. What bearing does all this have on the assessment to be made by the national court?

66. As I have already stated in point 42 of this Opinion, in determining whether a description or trade mark is liable to mislead, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed, circumspect and observant. [37] In view of the circumstances of this case, it appears particularly important to take into account the expectations of consumers in other Member States as well.

67. The national court will then need to assess whether the use of the geographical reference in the brand name creates a likelihood of confusion for the consumers referred to above. In making that assessment, the national court may apply certain tests which have been developed in the Court's case-law. [38] The most important one is that the use of the brand name should actually be liable to mislead the consumers concerned and thus affect their economic behaviour. That economic behaviour may be affected by the use of deceptive references which may induce the public to believe that characteristics are present which in reality do not exist. In my view, the national court will need to ascertain whether the use of a geographical reference in a brand name is liable to be confused with names registered pursuant to the regulation and whether the consumer associates particular quality characteristics of wine with the use of the geographical reference in the brand name.

37 — See in particular the judgments in *Gut Springenheide and Tusky*, cited in footnote 21, paragraph 31, and *Estée Lauder*, cited in footnote 21, paragraph 27.

38 — See point 51 of this Opinion.

V — Conclusion

68. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Cour de cassation as follows:

Article 40 of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts does not in principle preclude the use of the name of a large region as a geographical reference in a brand name, the use of which is not provided for by Article 11 of that regulation. The national court will need to ascertain in each individual case whether the use of a geographical reference in a brand name causes confusion or misleads the consumer. In particular, it will need to ascertain whether the geographical reference is liable to be confused with names registered pursuant to the regulation or whether the consumer associates particular quality characteristics of wine with the use of the geographical reference in the brand name. In that respect, it will also need to take into account the expectations of consumers in other Member States.