

ORIGINAL ARTICLE

Scrutinizing the Expanding Scope of Geographical Indication Protection: A Critical Analysis of the Justifications for the Anti-Evocation Measures

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Abstract

The global trend towards heightened protection for geographical indications (GIs) has been bolstered by the incorporation of anti-evocation provisions in various bilateral and regional trade agreements, primarily led by the European Union (EU). While these anti-evocation measures have raised GI protection to an unprecedented level, they also place limitations on the freedom of expression and competition for other market players. This article conducts a critical analysis of the necessity of those restrictions by evaluating the justifications for implementing anti-evocation protection. Specifically, the analysis centres on the formal justifications put forth by law enforcement authorities and their direct contribution to enforcement errors and inconsistencies. Furthermore, inherent limitations within these justifications are also identified. Clarifying the rationale for anti-evocation protection and establishing a clearly defined scope of protection, substantiated by sound justifications, could effectively mitigate errors and inconsistencies in law enforcement and minimize any undue impact on the public interest. Countries that have adopted or are considering adopting anti-evocation protection, following the EU's lead, should exercise caution to avoid similar pitfalls.

Keywords: Geographical indication; anti-evocation protection; free trade agreement; rural development; justification

1. Introduction

In 1979, the Livradois Cheese Company commenced production and marketing of a cheese with a distinctive, central, horizontal ashy stripe on its slice, which became known as 'Morbier'. Subsequently, in 2002, the name 'Morbier' was granted protected status under the European Union's (EU) geographical indication (GI) scheme. This registration stipulates the use of the name to a specified geographic area and mandates adherence to specific production criteria.¹ As a result of noncompliance with the established requirements, Livradois is prevented from using the name 'Morbier'.

In a surprising turn of events, Livradois has been mandated to discontinue its three-decade-long practice of manufacturing cheese with a central and horizontal ashy stripe. The Court of Appeal of Paris reached this verdict on 18 November 2022, citing the stripe as an illicit 'evocation' according to the EU regulation on GIs.²

GIs are distinctive signs used to identify products originating from a particular region, possessing specific qualities and a reputation linked to their place of origin. The names 'Morbier', 'Scotch Whisky', and 'Champagne' serve as typical examples. The scope (level) of protection

¹Commission Regulation (EC) No. 1241/2002 of 10 July 2002 [2002] OJ L181/4.

²CA Paris, 18 November 2022, n° 21/16539.

accorded to GIs is a contentious issue worldwide: ‘New World’ countries, including the United States (US), advocate for protection that only prevents confusion, while ‘Old World’ countries, such as the EU, seek to forbid third-party use of GIs even when confusion is unlikely.³ As a result, a temporary compromise has been reached in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This compromise mandates that WTO members offer expanded protection for wines and spirits (Article 23), while limiting protection for other goods (Article 22).⁴ Consequently, the use of the term ‘Cognac style’ to describe a brandy produced in New Zealand is not allowed, whereas the use of ‘Roquefort style’ to describe a cheese made in Southern California may be permissible.⁵ As a result, a key area of focus in international trade negotiations in the post-TRIPS era has been the expansion of GI protection.⁶

In recent years, there has been a trend towards an expanding scope of GI protection, driven primarily by protection against evocation.⁷ This anti-evocation protection is characterized by the proscription of any act that *brings to mind* a GI or GI-denominated product. This protection is considerably broader than the likelihood of confusion standard under Article 22 of the TRIPS Agreement and can prohibit evocation even when no confusion arises.⁸ Moreover, anti-evocation protection can impede the use of dissimilar names, graphics, and even product shapes, extending the protection beyond the ambit required under Article 23. This was exemplified by the above-mentioned ‘Morbier’ case, where the ashy stripe was deemed an unlawful evocation.

The anti-evocation protection is driving the expansion of GI protection at three levels. The first level of expansion occurs at the global level, where an increasing number of non-EU countries are offering anti-evocation protection for GIs, influenced by the EU’s promotion of anti-evocation protection in international trade negotiations.⁹ The second level of expansion takes place at the European level, where broad interpretation of the concept of evocation by the Court of Justice of the European Union (CJEU) has resulted in an increasing number of acts falling within the scope of the EU anti-evocation law, such as the use of graphics or product shape.¹⁰ The third level of expansion takes place at the interaction level, where the expansion of anti-evocation protection within the EU serves as a reference for non-EU countries, leading to an expansion of anti-evocation protection in those countries. The legislative proposal by European Commission (EC) in 2022 for a definition of ‘evocation’, currently under intense debate in the prospective revision of the EU GI scheme,¹¹ could provide a valuable reference for the development of anti-evocation laws in non-EU countries.

³See, e.g., G.E. Evans and M. Blakeney (2006) ‘The Protection of Geographical Indications after Doha: Quo Vadis?’, *Journal of International Economic Law* 9, 575; T. Josling (2006) ‘The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict’, *Journal of Agricultural Economics* 57, 337.

⁴See, e.g., A. Taubman et al. (ed.) (2020) *A Handbook on the WTO TRIPS Agreement*, 2nd edition. Cambridge: Cambridge University Press, 95–100; J. Hughes (2006) ‘Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications’, *Hastings Law Journal* 58, 299, 302.

⁵M. Handler (2016) ‘Rethinking GI Extension’, in D. Gangjee (ed.), *Research Handbook on Intellectual Property and Geographical Indications*. Cheltenham: Edward Elgar, 146, 147.

⁶See e.g., T. Engelhardt (2015) ‘Geographical Indications under Recent EU Trade Agreements’, *IIC-International Review of Intellectual Property and Competition Law* 46, 781, 783–787; M. Huysmans (2020) ‘Exporting Protection: EU Trade Agreements, Geographical Indications, and Gastronationalism’, *Review of International Political Economy* 1, 7–10; C. Prescott et al. (2020) ‘Geographical Indications in the UK after Brexit: An Uncertain Future?’, *Food Policy* 90, 101808; D. Curzi and M. Huysmans (2022) ‘The Impact of Protecting EU Geographical Indications in Trade Agreements’, *American Journal of Agricultural Economics* 104, 364.

⁷I. Calboli (2021) ‘Geographical Indications: New Perspectives and Recent Developments’, *Journal of Intellectual Property Law & Practice* 16, 289.

⁸See Section 2.2.

⁹See Section 2.1.

¹⁰See Section 2.2.

¹¹Currently, both the European Parliament (EP) and the Council of the European Union (Council) have taken negotiation positions to delete the commission’s proposed definition of ‘evocation’. See EP, ‘Amendments adopted by the European Parliament’ (2023) P9 TA(2023)0210, amendment 142; Council, ‘Mandate for negotiations with the European Parliament’ (2023) 8598/2/23 REV 2, article 27. See also Section 4.5.

On the one hand, proponents view the trend of expanding the scope of protection for GIs as providing the maximum level of safeguarding.¹² On the other hand, this expansion of protection raises concerns about potential restrictions,¹³ such as those on free competition,¹⁴ freedom of expression,¹⁵ international trade,¹⁶ and rural development.¹⁷

The granting of exclusive rights to one party inherently imposes restrictions on others. However, a key consideration is whether these restrictions are reasonably necessary for achieving the intended objectives of anti-evocation protection.¹⁸ In other words, the question arises as to whether the scope of exclusive rights conferred by the anti-evocation protection is justifiable. This issue of justification not only poses a challenge for EU law enforcers,¹⁹ but will also be of significance to other nations that implement anti-evocation protection.

This article presents a critical analysis of the struggle of EU law enforcers to justify the prohibition of evocation and exposes the flaws in the justifications they have provided. The focus on law enforcement authorities' formal justifications is particularly crucial as they directly impact enforcement errors and inconsistencies.²⁰ The article begins with a brief overview of the expanding trend of GI protection, followed by a historical review of the reasons behind law enforcers' constant search for justification. It subsequently scrutinizes the rationales relied upon by the enforcers and highlights the enforcement errors that arise from the inconsistent criteria for determining illegal evocation resulting from the varied justifications. The limitations inherent in the rationales are also identified. Ultimately, the article highlights a new concern arising from the emerging trend of authorities disregarding the rational basis and reflexively applying the anti-evocation clause.

2. Where We Are Today: Anti-Evocation Protection as the Driving Force of GI Protection Expansion

This section elucidates how anti-evocation protection is propelling the contemporary and prospective expansion of GI protection worldwide and within the EU.

¹²See, e.g., C. Le Goffic (2020) 'Réflexions Autour de la Notion d'Evocation en Matière d'Indications Géographiques', *Légipresse* 61.

¹³See, e.g., D. Gangjee, 'Strengthening GIs (Responsibly)' (Keynote Address, European Commission Strengthening Geographical Indications Conference, 25 November 2020), https://agriculture.ec.europa.eu/events/strengthening-geographical-indications-2020-11-25_en (accessed 21 February 2023).

¹⁴See, e.g., V. Paganizza (2015) 'More Holes than Cheese: PDOs, Evocation and a Possible Solution', *European Food and Feed Law Review* 10, 222, 225.

¹⁵See, e.g., A. Zappalaglio (2022) 'Getting Art 22(1) TRIPS Right: A Commentary on the Definition of "Geographical Indication" from an EU Perspective with a Focus on Wines', *Journal of World Investment & Trade* 23, 180; X. Wang (2022) 'Expanding Geographical Indication Protection at Any Cost? A Critique of the EU Law of Evocation', *Queen Mary Journal of Intellectual Property* 12, 206, 224.

¹⁶World Intellectual Property Organization (WIPO) (2015) 'Report Adopted by the Working Group on the Development of the Lisbon System', LI/WG/DEV/10/7, 10.

¹⁷V. Zafrilla Díaz-Marta and A. Kyrylenko (2021) 'The Ever-Growing Scope of Geographical Indications' Evocation', *Journal of Intellectual Property Law & Practice* 16, 442, 447–448.

¹⁸The test of proportionality is also applied in various fields of intellectual property law to ensure the justification of exclusive rights. See, e.g., R.P. Merges (2011) *Justifying Intellectual Property*. Cambridge MA: Harvard University Press, 160.

¹⁹See Section 4.

²⁰Existing literature has explored the legitimacy of prohibiting evocation from legal, moral, and societal standpoints. Le Goffic argues that the prohibition of evocation is necessary to avoid consumer confusion, whereas Gibson emphasizes the importance of protecting against potential risks associated with evocative uses that could alter the consumer perception of the GI. This article aims to examine the justifications presented by implementing authorities and shed light on the inconsistencies and errors in the implementation of the anti-evocation clause, which can be attributed to a lack of robust justifications. See C. Le Goffic (2018) 'Appellations d'Origine et Indications Géographiques en Droit Français', *JurisClasseur Marques – Dessins et modèles*, Fasc. 8100, para. 135; J. Gibson (2019) 'Tilting at Windmills: The Law of Evocation in Geographical Indications and Designations of Origin', *Queen Mary Journal of Intellectual Property* 9, 239, 234.

2.1 Geographical Expansion of Anti-Evocation Protection

Under the impetus of the EU, a growing number of non-EU countries have implemented, or are contemplating, the adoption of anti-evocation protection for GIs in their domestic legislation. During the Uruguay Round of negotiations that established the WTO, the EU attempted, albeit unsuccessfully, to establish anti-evocation protection as the minimum standard that WTO members should meet.²¹ More recently, the EU made another unsuccessful attempt to include an anti-evocation clause in the Geneva Act of the Lisbon Agreement on Appellations of Origin (AOs) and GIs.²² Nevertheless, those failures did not prevent the EU from negotiating bilateral agreements that request its trading partners to adopt anti-evocation protection for GIs in their national laws. To date, the EU has encouraged the incorporation of anti-evocation provisions²³ in international trade agreements with various countries across Asia (e.g., China,²⁴ Mongolia,²⁵ Kazakhstan,²⁶ Kyrgyz Republic²⁷), Europe (e.g., Switzerland,²⁸ Republic of Moldova,²⁹ Iceland,³⁰ Georgia,³¹ Kosovo,³² Ukraine³³), North America (e.g., CARIFORUM states³⁴), South America (e.g., Chile³⁵), Africa (e.g., Morocco,³⁶ SADC EPA states³⁷), and Oceania (e.g., New Zealand,³⁸ Australia³⁹). Some countries, such as China,⁴⁰ Ukraine,⁴¹ Switzerland,⁴² and

²¹General Agreement on Tariffs and Trade (GATT) (1988) 'Guidelines and Objectives Proposed by the European Community', MTN.GNG/NG11/W/26, 9.

²²The Lisbon Agreement of 1958 mandates the protection against 'usurpation or imitation'. In the preparatory discussions for the Geneva Act, the EU has previously sought to broaden this scope by including 'evocation', thereby prohibiting any 'misuse, imitation, or evocation'. For the EU, 'imitation' and 'evocation' hold distinct meanings. The EU Intellectual Property Office (EUIPO) explains: 'The mark "imitates" (mimics, reproduces elements of, etc.), with the result that the product designated by the GI is "evoked" (called to mind). The term "evocation" requires less than "imitation" or "misuse".' See EUIPO (2022) 'Guidelines for Examination in the Office', Part B Examination, p. 588; World Intellectual Property Organization (WIPO) (2015) 'Working Group on the Development of the Lisbon System (Appellations of Origin)', LI/WG/DEV/10/7, 9.

²³The anti-evocation provisions proposed in international agreements by the EU closely resemble the language used in the EU GI regulations. These provisions, akin to the EU regulations, mandate the prohibition of 'any misuse, imitation, or *evocation* (emphasis added)'. However, an exception arises within the EU's agreement with China, wherein the primary text of the agreement refrains from explicitly employing the terminology 'evocation'. Instead, in footnote 4 of the agreement, the practice of suggesting mental association, which is a core element of the evocation concept, is acknowledged as a 'use' that should be prohibited. See European Commission (EC), 'Proposal for a Council Decision' (2020) COM/2020/213 final, footnote 4: 'the Parties agree that "any use" or "use of any means" may encompass ... use that would suggest or indicate a connection or an association' (emphasis added).

²⁴EC (2020) 'Proposal for a Council Decision' COM/2020/213 final.

²⁵EC (2021) 'Annex to the Recommendation for a Council Decision', COM(2020) 697 final/2, 1.

²⁶EC (2016) 'Annex to the Joint Proposal for a Council Decision', JOIN(2016) 26 final, annex 1, article 82.

²⁷EC (2022) 'Annex to the Proposal for a Council Decision', COM(2022) 277 final, annex, article 121.

²⁸EC (2010) 'Proposal for a Council Decision', COM(2010) 648 final, article 7.

²⁹EC (2012) 'Proposal for a Council Decision', COM(2012) 137 final, article 4.

³⁰EC (2016) 'Proposal for a Council Decision', COM(2016) 524 final, p. 2.

³¹EC (2011) 'Proposal for a Council Decision', COM(2011) 223 final, article 4.

³²EC (2015) 'Annex to the Proposal for a Council Decision', COM(2015) 181 final, annex 1, article 35.

³³EC (2013) 'Annex I to the Proposal for a Council Decision', COM(2013) 290 final, annex I, article 204.

³⁴Economic Partnership Agreement [2008] OJ L289/3, article 145.

³⁵EC (2017) 'Annex to the Joint Recommendation for a Council Decision', JOIN(2017) 19 final, annex 1, p. 12.

³⁶EC (2015) 'Annex to the Proposal for a Council Decision', COM(2015) 446 final, annex 1, article 7.

³⁷EC (2016) 'Annex to the Proposal for a Council Decision', COM(2016) 18 final, annex 7, protocol 3, article 5.

³⁸EC (2017) 'Annex to the Recommendation for a Council Decision', COM(2017) 469 final, annex 1, p. 7.

³⁹EC (2017) 'Annex to the Recommendation for a Council Decision', COM(2017) 472 final, annex 1, p. 7.

⁴⁰Agreement between the European Union and the Government of the People's Republic of China [2020] OJ L408I/3, article 4, footnote 4.

⁴¹Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3, article 204.

⁴²Agreement between the European Union and the Swiss Confederation [2011] OJ L297/3, article 7.

Georgia,⁴³ have embraced anti-evocation protection, while others, such as Australia,⁴⁴ remain sceptical. In light of the global expansion of trade and increasing consumer demand for high-quality and authentic agri-food products, the adoption of anti-evocation protection is expected to become more widespread, with the EU continuing to play an active role in promoting and advocating for enhanced GI protection worldwide.

2.2 Expansion of the Scope of Anti-Evocation Protection

The protection scope of anti-evocation has expanded in recent years, largely due to rulings by the CJEU, resulting in an increasing number of acts falling within its purview. In the ‘Cambozola’ case of 1999, the CJEU elaborated for the first time on anti-evocation protection, ruling that:

‘Evocation’ ... covers a situation where the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected.⁴⁵

The contested sign ‘Cambozola’ was found likely to evoke the GI ‘Gorgonzola’ based on three factors. The first factor concerns the similarity of names, with the contested term incorporating part of a protected designation resulting in obvious phonetic and visual similarities between the two terms.⁴⁶ The second factor relates to the proximity of products with the product covered by the contested sign (soft blue cheese) not being dissimilar in appearance to the GI product.⁴⁷ The third factor concerns intent or fault, with the similarity between the two names not being fortuitous but intentionally sought by the disputed name user.⁴⁸

Notably, the ‘Cambozola’ case rejected the requirement of a likelihood of confusion as a condition for evocation, acknowledging that ‘it is possible ... for a protected designation to be evoked where there is no likelihood of confusion between the products concerned’.⁴⁹ This approach is further reinforced in the ‘Viiniverla’ case, where the CJEU explicitly stated that the fact that ‘that name is not capable of misleading those consumers’ was ‘not relevant for the purposes of assessing the existence of an “evocation”’.⁵⁰ Instead, the CJEU underscored the significance of preventing ‘any association of ideas regarding the origin of the products’ and prohibiting traders from exploiting the reputation of the GI.⁵¹ It is important to highlight that the ‘Viiniverla’ case not only dismisses the necessity of a likelihood of confusion as a condition for evocation but also rejects any consideration of likelihood of confusion in determining the existence of evocation.

The ‘Parmesan’ case introduced the expansion of protection, with the CJEU adding ‘conceptual proximity’ as a consideration for determining the presence of evocation,⁵² no

⁴³Agreement between the European Union and Georgia [2012] OJ L93/3, article 4.

⁴⁴Australian Government (2020) ‘Australia–European Union Free Trade Agreement: Consultation on a Possible New Geographical Indications Right’ (September 2020) 5.

⁴⁵Case C-87/97 *Consorzio per la Tutela del Formaggio Gorgonzola v Käserei Champignon Hofmeister and Bracharz* [1999] ECR I-01301, para. 25.

⁴⁶*Ibid.*, para. 27.

⁴⁷*Ibid.*

⁴⁸*Ibid.*, 28.

⁴⁹*Ibid.*, 26. It is worth noting that ‘likelihood of confusion’ is not commonly used in GI laws but belongs to the terminology of trademark law. The EU GI Regulations and the TRIPS Agreement, instead, refer to ‘practice liable to mislead the consumer’ or ‘misleads the public’. However, the CJEU has employed ‘likelihood of confusion’ in several cases to explain the concept of evocation. For convenience, in this context, ‘likelihood of confusion’ refers to ‘practice liable to mislead the consumer’ unless otherwise specified in this article.

⁵⁰See e.g., Case C-75/15 *Viiniverla Oy v Sosiaali- ja terveystieteiden tutkimuskeskus* (ECJ 21 January 2016), para. 41.

⁵¹*Ibid.*, para. 46.

⁵²Case C-132/05 *Commission v Germany* [2008] ECR I-00957, para. 47.

longer limited to phonetic and visual similarity as proposed in *Cambozola*. In this case, the CJEU took into account the conceptual proximity between the terms ‘Parmesan’ and ‘Parmigiano Reggiano’ as a factor in assessing evocation, despite the possibility of not being exact translations.⁵³

On this basis, in *Glen*, the CJEU further highlighted the critical role of conceptual proximity, holding that even in the absence of phonetic and visual similarity, conceptual proximity alone can give rise to unlawful evocation.⁵⁴ Thus, the denomination ‘Glen Buchenbach’, although not visually or phonetically similar to the GI ‘Scotch Whisky’, may still fall within the prohibition of anti-evocation due to its conceptual proximity to the GI. A year later, in *Queso Manchego*, the CJEU went a step further, ruling that the use of figurative signs evoking the geographical area with which a designation of origin is associated (in that case, the illustrations of a character resembling Don Quixote de La Mancha, a bony horse, and landscapes with windmills and sheep) should be prohibited.⁵⁵ Another year later, in *Morbier*, while the CJEU did not provide an opinion on assessing evocation, the Advocate General (AG) suggested that similar product appearances could likewise give rise to unlawful evocation.⁵⁶ The Court of Appeal of Paris took that view and ruled that the defendant’s cheese must no longer bear the black stripe, which might bring the GI Morbier Cheese to mind.⁵⁷ Finally, the latest development is the ‘Champanillo’ case, in which the CJEU extended the prohibition scope to include the use of a contested element on dissimilar products or services.⁵⁸ In that case, the defendant used the name ‘Champanillo’ for catering services, a category distinctly separate from sparkling wines covered by the GI ‘Champagne’.

As depicted in Table 1, the CJEU’s evolving interpretations, spanning from the ‘Cambozola’ case in 1999 to the ‘Champanillo’ case in 2021, have led to changes in the factors considered for assessing evocation.

The factors that were previously considered, such as phonetic and visual resemblances, product proximity, and the use of figurative or verbal elements, have gradually been recognized as not being prerequisites for determining evocation. Furthermore, as evident from Table 1, likelihood of confusion is not only excluded as a prerequisite but also deemed irrelevant for assessing evocation. Instead, the CJEU consistently emphasizes the consumer’s establishment of a mental link between the element used and the protected GI as the primary determinant for evocation,⁵⁹ as reiterated in the Champanillo case:

The essential element, to establish the existence of an evocation, is that the consumer establishes a link between the term used to designate the product in question and the protected geographical indication.⁶⁰

As a consequence, the scope of anti-evocation protection has progressively expanded, emerging as a central element of GI protection.⁶¹ The expansion of the scope of anti-evocation protection has also raised certain concerns, particularly in relation to restrictions on the free use of descriptive terms, and the possibility of overbroad protection that could hinder fair

⁵³Ibid.

⁵⁴Case C-44/17 *Scotch Whisky Association v Michael Klotz* (ECJ 7 June 2018), para. 51.

⁵⁵Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL* (ECJ 2 May 2019), paras. 19–21.

⁵⁶Case C-490/19 *Syndicat interprofessionnel de défense du fromage Morbier v Société Fromagère du Livradois SAS* (ECJ 17 December 2020), para. 41 (AG Opinion).

⁵⁷Supra n. 2 and the accompanying text.

⁵⁸Case C-783/19 *Comité Interprofessionnel du Vin de Champagne v GB* (ECJ 9 September 2021), para. 52.

⁵⁹See Case C-75/15, supra n. 53, para. 22; Case C-44/17, supra n. 57, para. 45; Case C-783/19, supra n. 61, para. 59.

⁶⁰See Case C-783/19, supra n. 61, para. 59.

⁶¹Le Goffic, supra n. 15.

Table 1. Evolving Factors in Determining Evocation

Chronology	CJEU Cases	Changes in Considered Factors	Changes in Excluded Factors
1999	C-87/97 <i>Cambozola</i>	Mental link/association with the GI; Phonetic and visual resemblances; Proximity of products; Bad faith	Exclusion of likelihood of confusion as a prerequisite
2008	C-132/05 <i>Parmesan</i>	Recognizing the relevance of conceptual similarity	–
2016	C-75/15 <i>Viiniverla</i>	Focusing on any association of ideas regarding product origin and the potential for exploiting GI reputation	Exclusion of likelihood of confusion as a relevant factor
2018	C-44/17 <i>Glen</i>	Acknowledging that conceptual proximity alone can lead to unlawful evocation	Exclusion of phonetic and visual similarity as a prerequisite
2019	C-614/17 <i>Queso Manchego</i>	Recognizing that the use of figurative signs can potentially constitute evocation	Exclusion of use of verbal elements as a prerequisite
2020	C-490/19 <i>Morbier</i>	Recognizing that the similarity in product appearances can lead to evocation (AG Opinion)	Exclusion of use of figurative or verbal elements as a prerequisite (AG Opinion)
2021	C-783/19 <i>Champanillo</i>	Recognizing the extension of anti-evocation protection to services	Exclusion of product proximity as a prerequisite

competition.⁶² The subsequent sections of this article aim to provide an in-depth analysis of the challenges faced by law enforcement agencies in their efforts to address the justifiability of anti-evocation protection as a means of safeguarding GIs.

3. What Brought Us to Where We Are: Creation of Anti-Evocation Protection

Before delving into how law enforcement agencies respond to the question of whether anti-evocation protection is justified, this section briefly outlines the motivations behind agencies addressing this issue.

3.1 Expansion of Protection without Historical Roots

The question of why the justifiability of protecting GIs against evocation is a source of concern for law enforcement authorities can be partially answered by reviewing the history of introducing anti-evocation protection for GIs. Before the provision providing anti-evocation protection first appeared in the 1990s in Article 13 of the EU GI Regulation (Regulation 2081/92), no precedent for such protection existed at the EU level. Even if we trace back to the pre-1990s French system of *Appellation d'Origine Contrôlée* (AOC), which is recognized as having inspired the creation of the EU GI regime,⁶³ no tradition of prohibiting evocation existed in France either.⁶⁴

In the pre-1990 French law, the acts prohibited were more closely related to consumer harm, such as deceiving consumers or causing consumer confusion. The likelihood of confusion was the benchmark for delimiting the protection boundary and has been used continuously under

⁶²See notes 17–20.

⁶³D. Gangjee (2012) *Relocating the Law of Geographical Indications*. Cambridge: Cambridge University Press, 79; D. Marie-Vivien (2017) 'Are French Geographical Indications Losing Their Soul?', *World Development* 98, 25.

⁶⁴Wang, *supra* n. 18, 216.

trademark law,⁶⁵ the sui generis law on AOC,⁶⁶ the law against unfair competition,⁶⁷ and the agreements concluded between France and other countries on GI protection.⁶⁸

The use of an indication sufficiently evocative⁶⁹ of the AOC was prohibited not solely because of the evocative effect itself, but primarily due to the deceptive effect that such use could have.⁷⁰ For example, the trademarks ‘Fort-Médoc’,⁷¹ ‘Vieux-Cahors’,⁷² and ‘Ritzlinger’⁷³ were banned not because they contained the AOC name ‘Médoc’, ‘Cahors’, or a name recalling ‘Riesling’ but because they were likely to cause confusion. Consumer confusion was an essential element of infringement and could be manifested by a false perception of the geographical origin of the product,⁷⁴ by mistake as to the quality of the goods (even if the product came from the region indicated⁷⁵),⁷⁶ or by a misunderstanding of an unauthorized product by consumers as an authorized product.⁷⁷

Conversely, no infringement was found when the defendant used a sign not liable to be confused with ‘Plzen’, ‘Pilsen’, ‘Pilsner’, and ‘Pilsener’.⁷⁸ If evocation was likely, but no evidence of fraud or likelihood of confusion was produced, the validity of the contested mark would not be denied (e.g., ‘Pilsheim’⁷⁹), the act causing the evocation would not constitute an act of unfair competition (e.g., ‘Romanor’⁸⁰), the act would not be liable under the AOC law (e.g., ‘Cahors’⁸¹), and it would not constitute ‘imitation’ prohibited by the Lisbon Agreement (e.g., ‘Pilsheim’⁸²). In a nutshell, the conventional standard for deciding whether employing a name that imitated or closely resembled the AOC should lead to prohibition hinged on consumer confusion, not evocation.⁸³

Without historical roots, the dramatic shift in the criteria for delineation in the 1990s from consumer confusion to evocation has taken law enforcers out of their ‘comfort zone’, leaving them searching for justifications for their decisions against evocation.

⁶⁵TGI Strasbourg, 4 April 1978, PIBD 1979, n° 227; Cass. com., 6 December 1982, n° 81-12.287; Cass. com., 9 November 1981, n° 80-12.943; Cass. com., 3 May 1983, n° 81-16.606. The referenced French legal cases in this paper can be accessed via French legal databases such as Legifrance, Lexis360, and Dalloz.

⁶⁶Cass. crim., 25 November 1970, n° 69-90.594.

⁶⁷Cass. com., 18 May 1981, n° 79-13.806.

⁶⁸Cass. com., 12 June 1978, n° 76-13.980.

⁶⁹In early French cases, the terms ‘evocation’, ‘evocative’, or ‘evoke’ were seldom explicitly referenced, except in one notable instance where a party contended that trademarks should be prohibited ‘due to the sole fact that they evoked geographical appellations of origin’. However, the court dismissed this argument, asserting that no confusion was feasible in that specific case. See Cass. com., 12 June 1978, n° 76-13.980.

⁷⁰E. Agostini (1988) ‘Cass. com. 1er décembre 1987 – Commentaires’, *La Semaine Juridique Edition Générale* II 42, 21081.

⁷¹Cass. com., 9 November 1981, n° 80-12.943.

⁷²Cass. crim., 29 November 1972, n° 71-91589.

⁷³TGI Strasbourg, 4 April 1978, PIBD 1979, n° 227; Cass. com., 3 May 1983, n° 81-16.606.

⁷⁴Cass. com., 6 December 1982, n° 81-12.287.

⁷⁵Cass. com., 9 November 1981, n° 80-12.943.

⁷⁶TGI Strasbourg, 4 April 1978, PIBD 1979, n° 227; Cass. com., 3 May 1983, n° 81-16.606; Cass. com., 9 November 1981, n° 80-12.943.

⁷⁷Cass. com., 1 December 1987, n° 86-11.328.

⁷⁸Cass. com., 12 June 1978, n° 76-13.980.

⁷⁹Ibid.

⁸⁰Cass. com., 18 May 1981, n° 79-13.806.

⁸¹Cass. crim., 25 November 1970, n° 69-90.594; Cass. crim., 18 June 1997, n° 96-83.018.

⁸²Cass. com., 12 June 1978, n° 76-13.980.

⁸³It is noteworthy that if the contested name was identical to the AOC, rather than merely imitating it or being sufficiently similar to evoke it, it could be prohibited from use on products of the same category without the need to demonstrate a likelihood of confusion. Furthermore, it could also be prohibited from use on dissimilar products if it was found to exploit the reputation of the AOC unfairly and devalue its significance. See TGI Paris, 5 March 1984, *Ann. propr. ind.* 1985, p 161; G. Bonet (2004) ‘Des Cigarettes aux Parfum, L’irrésistible Ascension de l’Appellation d’Origine Champagne vers la Protection Absolue’, *Propriétés Intellectuelles* 13, 853, 856.

3.2 Lack of Legislative Clarification on the Reasons for Introducing Anti-Evocation Protection

The lack of a formal explanation for the introduction of anti-evocation protection is another reason prompting law enforcement agencies to discuss the rationale behind the protection. When the EC initially proposed the EU GI regulation, it specified that protected GIs should be shielded from ‘any practice which constitutes an act of unfair competition, including practices liable to mislead the public as to the true origin of the product’.⁸⁴ ‘Evocation’ was one such practice listed.⁸⁵ This provision suggests that the goal of introducing anti-evocation protection was to prevent unfair competition, including consumer confusion. However, this provision was excluded from the final version of the GI regulation.⁸⁶ Consequently, the legislative language fails to offer a rationale for the absolute prohibition of evocation, prompting judges to seek justifications for their rulings against evocation. As will be discussed in Section 4, this lack of guidance has given rise to divergent interpretations among law enforcement authorities, leading to inconsistencies and errors in the application of the anti-evocation clause.

4. Making Sense of Where We Are: The Shaky Rational Foundations of the Anti-Evocation Protection

Section 2 demonstrated that the essential factor in establishing evocation is the consumer’s establishment of a mental link between the disputed element and the protected GI.⁸⁷ However, as depicted in Table 2, numerous decisions from enforcement authorities, including national courts (using French courts as an illustration), the EU Intellectual Property Office (EUIPO), the General Court of the CJEU, and even the Court of Justice, consider or reference additional factors beyond the establishment of a mental link when assessing the existence of evocation.

Based on the examples provided in Table 2,⁸⁸ consumer confusion and free-riding are frequently taken into account as additional factors when assessing evocation by enforcement agencies. The timeline reveals that decisions emphasizing consumer confusion typically precede those focusing on free-riding. Notably, the Court of Justice’s continuous attention to the implications of evocation for free-riding since 2016 has contributed to an increased consideration of free-riding in decisions by the General Court and the EUIPO. However, it is important to acknowledge that the precise timeline and consistency of this shift may vary among enforcement agencies. Even within the same agency, it can be challenging to pinpoint the exact dates when the transition from considering confusion to considering free-riding occurred, as decisions during the same period may exhibit a mix of considerations, with some emphasizing confusion and others focusing on free-riding.

In addition, less frequently examined factors include the defendants’ intent and the broader objectives of GI protection policies. Moreover, a notable trend highlighted in Table 2 is the increasing occurrence of cases in recent years where the EUIPO and national courts no longer consider these additional factors. Instead, the existence of a mental link alone is deemed adequate to establish the presence of unlawful evocation.

The subsequent discussion in this section illustrates that enforcement authorities frequently incorporate additional considerations to support the prohibition of evocation. These considerations are recognized in certain decisions as potential harms to be prevented or benefits to be pursued through anti-evocation measures. This section critically evaluates the extent to which these additional considerations offer solid justifications. Additionally, it highlights the inconsistencies

⁸⁴EC (1990) ‘Proposal for a Council Regulation’, SEC(90) 2415 final, article 14.

⁸⁵Ibid.

⁸⁶Council Regulation (EEC) No 2081/92 of 14 July 1992 [1992] OJ L208/1, article 13.

⁸⁷See notes 62–63.

⁸⁸The examples provided are not exhaustive but serve as illustrations. These examples are referenced in the subsequent discussions in this section.

Table 2. Examples of Decisions Considering Additional Factors in Assessing Evocation

Additional Factors	Examples from Court of Justice Rulings	Examples from General Court Rulings	Examples from EUIPO Rulings	Examples from French Court Rulings
Consumer Confusion	–	Judgment of 18 Nov 2015 (Port Charlotte)	Decision of 14 May 2014 (Port Ruighe) Decision of 15 April 2015 (Chacomena) Decision of 5 Sept 2016 (Cave de Tain) Decision of 12 June 2017 (Sangre de Toro) Decision of 20 April 2018 (Pueroto) Decision of 14 Nov 2019 (PRO&ECO) Decision of 26 June 2020 (Las Villas) Decision of 1 Oct 2021 (Colombueno)	Judgment of 22 June 2004 (La Châsse du Pape) Judgment of 19 April 2005 (La Châsse du Pape) Judgment of 30 March 2009 (Coteaux du Layon-Chaume) Judgment of 22 Feb 2011 (Enclave des Papes)
Free-Riding	Judgment of 21 Jan 2016 (Viiniverla) Judgment of 2 May 2019 (Queso Manchego) Judgment of 17 Dec 2020 (Morbier)	Judgment of 2 Feb 2017 (Toscoro)	Decision of 29 Sept 2017 (Cá del Magro) Decision of 16 July 2018 (Piemguino) Decision of 19 March 2019 (Santa Croc) Decision of 21 Dec 2020 (Champaws) Decision of 18 Nov 2021 (Champ Champ) Decision of 21 March 2022 (Bolgaré)	Judgment of 3 Nov 2010 (Cham'allal) Judgment of 6 Jan 2012 (La Champenoise)
Bad Faith	Judgment of 4 March 1999 (Cambozola) Judgment of 21 Jan 2016 (Viiniverla)	–	Decision of 16 Jan 2014 (La Croix des Papes) Decision of 5 Oct 2021 (Pura Terra Piera)	Judgment of 5 April 2005 (Héritages des Caves des Papes) Judgment of 22 Nov 2006 (Darjeeling) Judgment of 29 Nov 2011 (Wel Scotch)
More General Objectives	Judgment of 21 Jan 2016 (Viiniverla)	–	–	–
Omitting Additional Factors	–	–	Decision of 29 July 2022 (Macroom buffaloumi)	Judgment of 17 Dec 2021 (Mormindia)

in determining the presence of unlawful evocation due to the varied range of additional considerations employed, resulting in errors in the application of the anti-evocation clause.

4.1 Consumer Confusion

In the early stages of implementing the EU's anti-evocation law, enforcement authorities relied on the idea that evocation could cause confusion to justify its prohibition. In other words, the prohibition of evocation was based on the need to prevent consumer confusion or consumer harm. As a result, the likelihood of confusion became the primary criterion for determining an unlawful evocation, even though this deviated from the evocation's literal meaning.

4.1.1 Likelihood of Confusion as the Rationale for Prohibiting Evocation

As illustrated in Section 2, an important aspect of anti-evocation protection is that it does not require demonstrating a risk of consumer confusion. The EU GI Regulation explicitly prohibits any evocation, which literally means 'to bring to mind',⁸⁹ without requiring a cognitive response in the consumer's mind that leads to confusion. However, numerous decisions from law enforcement authorities, including French courts, the EUIPO, and even the General Court of the CJEU,⁹⁰ go the extra mile in establishing a likelihood of confusion, particularly during the early application of the anti-evocation provision. This additional effort to identify confusion appears to be an endeavour to justify the prohibition of evocation by establishing its legitimacy through the potential deceptive consequences linked to evocative practices.

Specifically, the phenomenon of establishing legitimacy based on the likelihood of confusion is prominently observed in the early judgments of French courts. As mentioned earlier, French courts have traditionally used the likelihood of confusion test to determine whether an act falls within the scope of the prohibition.⁹¹ When faced with an unfamiliar test that relies solely on a mental connection, which appears less closely linked to consumer harm, French courts spontaneously explain why evocation should be prohibited. In their reasoning, they have always relied on the likelihood of confusion to justify their decisions against evocation. Some French courts have based their justification on the abstract hypothesis that confusion will result from mental association. This theoretical approach assumes that confusion is inherent in the concept of evocation and that once an evocation is created, it sows the seeds of confusion. In the case of 22 February 2011, concerning the assessment of whether the disputed designation infringed upon 'Châteauneuf du Pape', the French Supreme Court stated: 'The use of the denomination "Enclave des Papes" can only evoke this appellation, seeding confusion (*semant la confusion*) in the mind of the consumer, whether experienced or not, in this matter.'⁹² Alternatively, some courts have sought concrete evidence of confusion in individual cases to justify the prohibition of evocation, rather than relying on abstract theoretical assumptions. In an appellate case challenging the prohibition imposed by the Nîmes court on the use of 'La Chasse du Pape', which was determined to 'subtly or even subliminally evoke the prestigious appellation in the minds of more or less knowledgeable consumers',⁹³ the French Supreme Court found that a significant likelihood of confusion existed with the GI 'Châteauneuf-du-Pape'.⁹⁴ This factual finding of the risk of confusion served as the basis for the Court's definitive establishment of the offenses in question, stating that 'there is no uncertainty as to the offenses retained'.⁹⁵

⁸⁹Case C-614/17, supra n. 58, para. 19 (AG Opinion).

⁹⁰See Section 4.1.2.

⁹¹See Section 3.1.

⁹²Cass. crim., 22 February 2011, n° 10-80.723.

⁹³CA Nîmes, 22 June 2004, n° 04/0735.

⁹⁴Cass. crim., 19 April 2005, n° 04-84.854.

⁹⁵Ibid.

Similarly, the practice of legitimizing prohibitions on evocation based on the likelihood of confusion has been observed in certain rulings by the EUIPO. Some EUIPO decisions have explicitly stated that the establishment of unlawful evocation does not require proving a likelihood of confusion or deception among the public.⁹⁶ However, the EUIPO appears to grapple with the inclination to concurrently consider the potential for confusion when establishing the existence of unlawful evocation. For instance, the First Board of Appeal issued the following determination:

Article 118m(b) of Regulation (EC) No 1234/2007 applies and, *a fortiori*, when evocation is so obvious, that there is a likelihood of confusion or deception on the part of the public. It could therefore also be an evocation in relation to PDOs ... in so far as the consumer might possibly believe, erroneously, for example, that the sign 'Chacomena', used for identical (wines) or comparable goods (alcoholic beverages based on wines) is (or includes) 'chacolí'.⁹⁷

It appears that the EUIPO considers the presence of confusion strengthens the case for prohibiting evocation, adding further justification to the decision. A high likelihood of confusion is not necessary to justify the prohibition of evocation, but only a weak likelihood, even for a small portion of the relevant public. For instance, the EUIPO has ruled that 'PRO&ECO' evokes Italian GI 'Prosecco',⁹⁸ 'Sangre de Toro' evokes 'Toro',⁹⁹ 'Colombueno' evokes 'Café de Colombia',¹⁰⁰ 'Portobello' evokes 'Porto',¹⁰¹ and 'Port Ruighe' constitutes an unlawful evocation.¹⁰² The basis for these rulings is that the possibility cannot be excluded that at least a part of consumers may be misled or deceived.

The General Court of the CJEU also falls into the trap of relying on the likelihood of confusion as a basis for support. Certain judgments of the General Court have been criticized by AG Sánchez-Bordonam for over-reliance,¹⁰³ and they will be further analyzed in the subsequent discussion, along with the erroneous outcomes arising from the excessive reliance on the likelihood of confusion.

4.1.2 Limitation I: Pitfalls of Over-Reliance on the Likelihood of Confusion Test

When confusion prevention is regarded as the primary basis for prohibiting evocation, authorities may tend to apply the anti-evocation clause by focusing excessively on whether or not confusion arises. In certain instances, they may even assume that the absence of confusion automatically means the absence of unlawful evocation, which goes against the language of the anti-evocation provision. Additionally, the over-reliance on the likelihood of confusion test can lead to the ineffectiveness of the anti-evocation provision in prohibiting certain non-confusing but still harmful mental associations, which have long been the target of GI policies due to their potential to undermine or exploit the reputation of GIs.¹⁰⁴

One such case that illustrates this issue is the 'Port Charlotte' case,¹⁰⁵ where AG Sánchez-Bordona explicitly criticized the General Court's overreliance on the likelihood of confusion test. According to AG Sánchez-Bordona, while the General Court acknowledged

⁹⁶EUIPO, Decision of the First Board of Appeal of 15 April 2015 (Case R 2222/2013-1), para. 50.

⁹⁷*Ibid.*, para. 51.

⁹⁸EUIPO, Decision of the First Board of Appeal of 14 November 2019 (R 425/2019-1), paras. 100–102.

⁹⁹EUIPO, Decision of the Second Board of Appeal of 12 June 2017 (R 2390/2016-2), para. 32.

¹⁰⁰EUIPO, Decision of the Second Board of Appeal of 1 October 2021 (R 566/2015-2), para. 44.

¹⁰¹EUIPO, Decision of the Opposition Division of 17 April 2015 (B 2338120) 7.

¹⁰²EUIPO, Decision of the Opposition Division of 14 May 2014 (B 2135476) 8.

¹⁰³See Section 4.1.2.

¹⁰⁴For instance, the necessity to prohibit associations that dilute or take unfair advantage of GIs' reputation was widely acknowledged in French case law prior to the introduction of the evocation provision. *Supra* n. 86.

¹⁰⁵Case T-659/14 *Instituto dos Vinhos do Douro e do Porto v OHMI* (EGC 18 November 2015), para. 74.

that evocation protection does not necessitate the presence of a likelihood of confusion, it nevertheless erroneously concluded that there was no evocation because whisky is a different product and there was no potentially misleading or confusing statement in the contested mark.¹⁰⁶

This same flawed approach is also evident in the EUIPO's decisions concerning 'Port Ruighe',¹⁰⁷ 'Cave de Tain',¹⁰⁸ 'Yanghe',¹⁰⁹ 'Portage Dry Gin',¹¹⁰ 'La Manche',¹¹¹ and 'Las Villas',¹¹² where the EUIPO ruled out the possibility of evocation due to the absence of any risk of confusion. The EUIPO considered whether the relevant public would be misled when encountering the contested sign as the key to determining the existence of evocation.¹¹³ However, the absence of a likelihood of confusion cannot be equated with the absence of any harm. For instance, in a case similar to the 'Port Charlotte' case, the CJEU found that the word mark 'Portwo Gin' evoked the GI 'Porto' and thus was likely to exploit the reputation of that GI.¹¹⁴ Focusing excessively on the likelihood of confusion test enables those non-misleading but harmful mental associations to go undetected.

Moreover, AG Sánchez-Bordona missed the opportunity to highlight another flaw, namely the overly narrow interpretation of the evocation concept. Two different interpretations of the evocation concept are possible: first, the defendant's use triggers the reaction 'this is X' in the consumer's mind, and second, it generates the response 'this reminds me of X'. In discussing the US right of publicity law, which also provides anti-evocation protection, Haemmerli distinguishes between these two different psychological reactions.¹¹⁵ According to Haemmerli, the use of a robot dressed in a wig, gown, and jewellery, which resembles the co-host of the US television game 'Wheel of Fortune', Vanna White, may bring White to mind, but all agree that the robot is not White herself.¹¹⁶ The same distinction can be made in the context of GI protection. If the underlying rationale for the prohibition of evocation were merely to prevent confusion, then a narrow interpretation of the evocation concept as the 'this is X' reaction would be appropriate. However, if the anti-evocation protection is justified by the need to pursue other objectives other than consumer prevention, such as preventing dilution or free-riding, a broader interpretation of evocation is necessary. In such cases, it only requires a consumer response that evokes thoughts of the protected product ('this reminds me of X'), rather than the consumer believing that the defendant's product is the protected product ('this is X').

Early decisions by the EUIPO demonstrate that evocation was interpreted as 'this is X' when the justification for anti-evocation was based on preventing confusion. This narrow interpretation persisted even after the CJEU's decision in *Glen*, which emphasized the need to establish a 'sufficiently clear and direct' mental link between the contested sign and the GI product to constitute an unlawful evocation.¹¹⁷ In the 'Port Charlotte' case cited above, the disputing parties argued over whether consumers perceived the product in question as the genuine product covered by the GI (whether 'this is X'). The plaintiff claimed:

¹⁰⁶Case C-56/16 P *EUIPO v Instituto dos Vinhos do Douro e do Porto* (ECJ 14 September 2017), para. 97 (AG Opinion).

¹⁰⁷EUIPO, Decision of 14 May 2014, supra n. 105) 8.

¹⁰⁸EUIPO, Decision of the Fourth Board of Appeal of 5 September 2016 (R 980/2015-4) 10.

¹⁰⁹EUIPO, Decision of the Opposition Division of 2 March 2021 (B 3073858) 11.

¹¹⁰EUIPO, Decision of the Opposition Division of 21 December 2020 (B 3089786) 12.

¹¹¹EUIPO, Decision of the Opposition Division of 31 January 2019 (B 3035121) 7.

¹¹²EUIPO, Decision of the Cancellation Division of 26 June 2020 (C 32583) 7.

¹¹³EUIPO, Decision of 17 April 2015, supra n. 104) 7.

¹¹⁴Case T-417/20 *Esteves Lopes Granja v EUIPO* (EGC 6 October 2021), paras. 47–48.

¹¹⁵A. Haemmerli (1999) 'Whose Who – the Case for a Kantian Right of Publicity', *Duke Law Journal* 49, 383, 461.

¹¹⁶*Ibid.*, 462.

¹¹⁷Case C-44/17, supra n. 57, para. 53.

an average consumer seeing the expression “port charlotte” displayed on a bottle containing an alcoholic beverage would be led to believe that the beverage in question *is related to* port wine or, at least, to wonder *whether it is* (emphasis added).¹¹⁸

The court also interpreted evocation as ‘this is X’, arguing that due to differences in ingredients, alcohol content, and taste between port wine and whisky, consumers would not associate a whisky with port wine.¹¹⁹ Similarly, in the ‘Portwo Gin’ case, the Opposition Division of the EUIPO concluded that consumers would not associate a gin bearing ‘Portwo Gin’ with the GI product Porto, as there were non-insignificant differences between the respective features of the two.¹²⁰ In its decision of 2020, the Second Board of Appeal diverges from the flawed approach taken by the Opposition Division by interpreting ‘evocation’ as ‘this reminds me of X’, thereby overturning the Opposition Division’s determination of the absence of unlawful evocation. The Board provided a clarification:

The use of the contested trade mark would not only benefit from a transfer of the distinctive qualities of the PDO ‘Port’ that it has gained over the years, which in turn would enhance the younger mark’s ability to stand out among its competitors, but it would also benefit from the transfer of the earlier mark’s image of a prestigious and traditional well-established wine with a rather long history on the market in the EU.¹²¹

Additionally, the incorrect reading of evocation as ‘this is X’ has resulted in another flawed conclusion by the EUIPO, which assumes that evocation will not occur where the product in question is non-comparable (in particular, physically dissimilar¹²²) to the GI product. This is based on the rationale that if the products are different in terms of their recognizable features (e.g., food service and wine;¹²³ hotel service and wine;¹²⁴ retail service and wine;¹²⁵ bread and wine;¹²⁶ coffee and fruit wine;¹²⁷ whiskey and wine¹²⁸), using a similar term on the contested product would not lead to a misperception that the product is a GI product. No one would make the mistake of believing that bread labelled as ‘Champagne’ is Champagne wine due to the clear visual differences between the two products. In the cases concerning ‘Doura de Tears of God’¹²⁹ and ‘Champagnola’¹³⁰, the EUIPO Opposition Division ruled out the possibility of evocation because the contested goods (e.g., whiskey, gin, non-alcoholic beverages) are not comparable to or even completely different from the protected products (i.e., wines), and the public will not believe that the beverages under the contested names are a Champagne or Douro wine (no ‘this is X’ reaction). The mistake of these decisions, as pointed out by the EUIPO Board of Appeal, lies in taking comparability between the products as a necessary condition for triggering anti-evocation protection.¹³¹ Left unsaid is that this error stems from the idea of equating evocation with the misunderstanding

¹¹⁸Case T-659/14, supra n. 108, para. 54.

¹¹⁹Ibid., para. 76.

¹²⁰EUIPO, Decision of the Opposition Division of 16 April 2019 (B2881061) 5.

¹²¹EUIPO, Decision of the Second Board of Appeal of 21 April 2020 (R 993/2019-2), para. 54; See also Case T-417/20 *Esteves Lopes Granja v EUIPO* (EGC 6 October 2021) 47–48.

¹²²In evaluating the comparability of the products, careful consideration was given to scrutinizing their distinguishable physical attributes.

¹²³EUIPO, Decision of the Opposition Division of 27 September 2022 (B 2477183) 11.

¹²⁴EUIPO, Decision of the Opposition Division of 28 February 2020 (B 2629858) 11.

¹²⁵EUIPO, Decision of the Opposition Division of 11 November 2019 (B 2843269) 11.

¹²⁶EUIPO, Decision of the Opposition Division of 26 March 2019 (B 2953118) 12.

¹²⁷EUIPO, Decision of the Opposition Division of 18 October 2017 (B 2784596) 9.

¹²⁸EUIPO, Decision of the Opposition Division of 14 August 2019 (B 3017210) 10.

¹²⁹EUIPO, Decision of the Opposition Division of 2 October 2020 (B 3076510) 8.

¹³⁰EUIPO, Decision of 26 March 2019, supra n. 129, 12.

¹³¹EUIPO, Decision of the Fourth Board of Appeal of 17 April 2020 (R 1132/2019-4), para. 39.

'this is X'. This idea may, in turn, be erroneous since preventing reputational damage, such as dilution or free-riding, rather than preventing consumer misunderstanding, is increasingly regarded as the goal that justifies the anti-evocation protection. When preventing reputational damage serves as the justification, evocation needs to be interpreted broadly, requiring merely a consumer response that 'this reminds me of X'. This is because a use not making consumers believe that the defendant's goods are a GI product (no 'this is X' reaction) can nevertheless make consumers think of the GI product ('this reminds me of X'), which may, in turn, transfer the GI product's positive image to the defendant's goods, or at least enhance consumers' attention to the goods.¹³²

4.1.3 Limitation II: Moving Beyond a Confusion Prevention Rationale to Explain

The use of confusion prevention as the basis for justifying anti-evocation protection raises problematic issues. If the primary goal is to prevent confusion, why not adopt a likelihood of confusion test rather than the evocation test? In the 'Pueroto' case, the EUIPO put forward an explanation that terms evoking GIs may also be used in conjunction with potentially misleading or deceptive statements, such as the combination of accurate and false GIs, or the suggestion of a geographical location through terms such as 'type', 'flavour', or 'méthode'.¹³³ However, this explanation is flawed as labelling a prominent caveat to exclude any possibility of confusion does not justify an exemption from the anti-evocation provision. For example, labelling a highly visible warning that reads 'Our Champagne is produced in the US and has nothing to do with the genuine Champagne wine coming from France' would not absolve one from liability. The rationale of preventing confusion fails to explain why a mental association that is completely free of confusion cannot be allowed, and why measures to prevent confusion, such as mentioning the true origin of the contested goods and providing a disclaimer,¹³⁴ are irrelevant when determining the existence of a wrongful evocation. Given that the prevention of confusion theory is an insufficient justification, an argument that mental association leads to reputational damages such as dilution or free-riding is proposed instead.

4.2 Free-Riding

The assertion that the prohibition of evocation can be justified by the need to prevent free-riding gives rise to more concerns than it resolves, casting doubt on its validity as a justifiable basis for adopting such a stance.

4.2.1 The Emergence of Free-Riding as a Justification

When the argument that evocation leads to confusion is deemed insufficient as a justification for anti-evocation, the argument that evocation enables free-riding has gradually taken precedence. Early decisions prohibited evocation on the basis that it would result in the dual harm of confusion and free-riding. For example, the French Council of State rejected the registration of 'Chaume-Premier Cru des Coteaux du Layon' as an AOC not only due to the likelihood of creating a false consumer perception of a wine hierarchy with the use of the name 'Chaume' associated with 'Premier Cru', but also because of the potential to divert or weaken the reputation of the existing GI 'Quarts de Chaume'.¹³⁵ The grounds for prohibition were based on both consumer confusion and reputational harm.

The 'Viiniverla' case marked a turning point where one could raise concerns about the credibility of confusion prevention as valid rational basis for anti-evocation measures. In this case, the

¹³²Supra n. 124 and the accompanying text.

¹³³EUIPO, Decision of the Cancellation Division of 20 April 2018 (12448 C) 7.

¹³⁴EUIPO, Decision of the First Board of Appeal of 9 January 2014 (R 426/2013-1), para. 29.

¹³⁵CE, 27 July 2005, n° 261989; See also CE, 30 March 2009, n° 304990.

referring court inquired whether the fact that the name is not misleading to consumers should be considered in evaluating evocation. The CJEU responded negatively, emphasizing that ‘what matters is, in particular ... that a trader does not take undue advantage of the reputation of the protected geographical indication’.¹³⁶ In *Queso Manchego*, the prevention of free-riding was explicitly recognized as the overriding rationale for anti-evocation. AG Pitruzzella noted:

the main objective of protection against evocation is to protect the traditional quality and reputation of registered names against parasitic acts rather than to protect consumers against misleading conduct.¹³⁷

The prohibition of free-riding as a justification for banning evocation has been cited in an increasing number of cases, which aligns with AG Pitruzzella’s viewpoint.¹³⁸ Certain decisions justify their position on the hypothesis that the defendant may unfairly benefit from the reputation associated with a GI through mental association, without concrete evidence to substantiate the claim.¹³⁹ In contrast, some other decisions have relied on concrete evidence to establish the likelihood of free-riding, thereby bolstering their stance. For instance, the EUIPO concluded that the use of ‘Champ Champ’¹⁴⁰ and ‘Champaws’,¹⁴¹ supported by evidence of product resemblance and explicit references to Champagne in marketing materials, amounted to an unfair advantage taken from Champagne’s reputation. Based on objective evidence demonstrating the presence of an unfair advantage, ‘Champ Champ’ and ‘Champaws’ were deemed as unlawful evocation. Some have even suggested that free-riding is a necessary element for evocation to exist. In the case of ‘Santa Croce’, the EUIPO excluded the risk of evocation on the basis of the absence of evidence supporting the exploitation of the GI wine’s reputation.¹⁴² It is noteworthy that some authorities have broadened the scope of reputation protection beyond free-riding to encompass dilution, which involves depriving the GI of its distinctiveness and conferring on it a generic character.¹⁴³

4.2.2 Limitation I: False Presumption of Reputation

Substantiating the prohibition of evocation on the grounds of preventing free-riding poses a significant challenge due to the absence of concrete evidence of reputation in individual cases. Free-riding, which entails the unjust exploitation of reputation, presupposes the existence of a reputation. However, where a protected name lacks a reputation, can the risk of free-riding be ruled out, as asserted repeatedly by defendants in numerous cases?¹⁴⁴ This assumption is not without foundation since reputation is not a prerequisite for registering a name as an EU GI, but only an optional condition for registration.¹⁴⁵ Although obtaining an AOC in France requires a product to ‘have a duly established reputation (*possèdent une notoriété dûment établie*)’,¹⁴⁶ it cannot be inferred from this requirement that all names registered under the EU GI system possess a reputation. Thus, it is not impossible that a protected name lacks a de facto reputation. Despite the lack of reputation, the EUIPO continues to assert the applicability of the anti-

¹³⁶Case C-75/15, supra n. 53, para. 45.

¹³⁷Case C-614/17, supra n. 58, para. 17 (AG Opinion).

¹³⁸See, e.g., Case C-783/19, supra n. 61, paras. 36–37 (AG Opinion); Case T-510/15 *Mengozzi v EUIPO* (EGC 2 February 2017, para. 31; EUIPO, Decision of the Second Board of Appeal of 21 March 2022 (R 2564/2019-2), para. 53.

¹³⁹TGI Paris, 6 January 2012, n° 10/02979.

¹⁴⁰EUIPO, Decision of the Opposition Division of 18 November 2021 (B 3091533) 10.

¹⁴¹EUIPO, Decision of the Opposition Division of 21 December 2020 (B 3102239) 8.

¹⁴²EUIPO, Decision of the Opposition Division of 19 March 2019 (B 3022988) 7.

¹⁴³See, e.g., CA Paris, 25 April 2007, n° 06/03001; CAA Bordeaux, 16 July 2021, n° 20BX02993.

¹⁴⁴See, e.g., EUIPO, Decision of the First Board of Appeal of 16 July 2018 (R 2110/2017-1), para. 31 (arguments of the applicant).

¹⁴⁵See, e.g., Article 5 of the EU GI Regulation 1151/2012.

¹⁴⁶Article L. 641-5 of the French Rural Code.

evocation clause.¹⁴⁷ Hence, the question arises: how can the prohibition of evocation be justified based on the prevention of free-riding when the essential prerequisite for free-riding, that is, a reputation, is absent? Drawing an analogy to trademark law, only marks that possess a reputation or are at least ‘sufficiently well known’ are eligible for protection against free-riding.¹⁴⁸

Even assuming that all GIs enjoy a reputation, it cannot be assumed that they have the same level of reputation. Certain GIs inevitably have a higher reputation than others.¹⁴⁹ If the presumption is that the higher a GI’s reputation, the more likely it will come to consumers’ minds,¹⁵⁰ does it follow that the lower the reputation, the less likely an unlawful evocation will occur? The EUIPO has answered this question negatively on a controversial basis.

Firstly, the EUIPO presumes that all protected GIs have the same level of reputation in the examination of evocation. According to the EUIPO, the assessment of whether an unlawful evocation occurs ‘should be based on equal knowledge by the public of all protected GIs’.¹⁵¹ However, this presumption is not accurate, as in reality not all GIs possess the same level of reputation. Thus, the average consumer is more likely to associate with certain GIs than with others.¹⁵² Notably, even the draft 2023 edition of the EUIPO Guidelines on trademark practice has proposed to delete this presumption.¹⁵³

Secondly, the EUIPO regards GIs as enjoying ‘absolute protection’,¹⁵⁴ which is not subject to the burden of proving that there is a reputation. As a result, where the reputation of a GI appears weak or absent, the EUIPO holds that the de facto lack of reputation is irrelevant in the examination of evocation.¹⁵⁵ This rationale selectively ignores the real impact that a low reputation has on consumers’ reaction. Conversely, the EUIPO itself admits that a high reputation of the GI favours the conclusion that an unlawful evocation is established.¹⁵⁶ Then what is the reason to reject the opposite presumption that a low reputation of a GI disfavors the establishment of evocation? Essentially, these two presumptions are two sides of the same coin.

Thirdly, the EUIPO contends that the reputation of a GI cannot be equated with that of a trademark,¹⁵⁷ as the former is primarily dependent on the image of the GI, which in turn is heavily reliant on the specific characteristics and overall quality of the product.¹⁵⁸ According to this view, although the reputation of a GI product is not a prerequisite for its protection,¹⁵⁹ the law presumes that the product’s special qualities will gain the product a reputation once it is introduced into the market.¹⁶⁰ However, this view seems to contradict a previous conclusion of the CJEU, which has emphasized the need for objective evidence to establish the existence of a GI reputation, rather than presuming its existence. The CJEU held that ‘the image or reputation of the appellation of origin will depend significantly on factors which are extraneous to the

¹⁴⁷See EUIPO (2023) ‘Guidelines for Examination in the Office’, Part C Opposition, p. 1310.

¹⁴⁸D. Franklyn (2004) ‘Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law’, *Hastings Law Journal* 56, 117, 159.

¹⁴⁹M. Verbeeren and O. Vriens (2021) ‘The Protection of PDOs and PGIs against Evocation’, *Journal of Intellectual Property Law & Practice* 16, 316, 328.

¹⁵⁰EUIPO, Decision of the Opposition Division of 20 April 2018 (B 2780719) 7.

¹⁵¹EUIPO, ‘Guidelines’, supra n. 25, 591.

¹⁵²Verbeeren, supra n. 152, 326 (footnote 100).

¹⁵³EUIPO (2023) ‘Guidelines for Examination in the Office (Draft Version)’, Part B Examination, p. 656.

¹⁵⁴EUIPO, Decision of the Second Board of Appeal of 13 May 2020 (R 2230/2017-2), para. 31.

¹⁵⁵Ibid. See also EUIPO, Decision of the Fifth Board of Appeal of 29 September 2017 (R 1006/2017-5), para. 36; EUIPO, Decision of the Fifth Board of Appeal of 19 September 2019 (R 1223/2019-5) 26.

¹⁵⁶EUIPO, Decision of the Invalidity Division of 18 May 2020 (14481 C) 9.

¹⁵⁷Stefan Martin, Member of the EUIPO Board of Appeal, argues that reputation under GI regulations should be not confused with reputation with regard to trademarks. See EC (2022), ‘Impact Assessment Report Accompanying the Proposal for a Regulation’, SWD(2022) 135 final, Part 2/2, 231.

¹⁵⁸EUIPO, Decision of 21 April 2020, supra n. 124, para. 36.

¹⁵⁹Case T-510/15, supra n. 141, para. 48.

¹⁶⁰EUIPO, Decision of the Fourth Board of Appeal of 21 April 2022 (R 1299/2021-4), para. 53; EUIPO, Decision of 16 July 2018, see n. 147, para. 33.

product itself, including, among others, 'the amount of investment in promoting the appellation of origin, how intensive use of the appellation of origin has been, and the market share held by the product'.¹⁶¹ The court has excluded the presumption of reputation, reasoning that the GI reputation depends mostly on those extraneous factors and thus cannot be inferred from the GI registration status, but needs to be proved in individual cases.¹⁶²

4.2.3 Limitation II: Undefined Subject of Free-Riding

The lack of clarity surrounding the specific reputation being protected poses an additional challenge to justifying the use of anti-evocation protection as a tool to deter free-riding. This ambiguity is also a contributing factor to the inconsistent application of the anti-evocation clause.

The term 'reputation', which is the subject of free-riding or unfair exploitation, has various interpretations,¹⁶³ including 'positive image',¹⁶⁴ 'attractiveness',¹⁶⁵ 'pulling power',¹⁶⁶ and so forth. Reputation can be associated with specific products, particular locations, or their names. In our analysis, reputation is classified into four distinct types based on the subjects to which reputation is attributed. These types include product reputation, product's provenance reputation, general place reputation, and inherent reputation. 'Product reputation' refers to the reputation acquired by a product due to its specific characteristics and overall quality. 'Product's provenance reputation' specifically focuses on the reputation gained by a place as the origin or source of a particular product. When a product bearing the geographical name of its place of origin gains a reputation (product reputation), the place is likely to be known for being the product's provenance (product's provenance reputation). Product's provenance reputation must be distinguished from 'general place reputation', which pertains to the overall perception and recognition of a place, taking into account various factors such as geographical features and economic development. Finally, 'Inherent reputation' denotes the reputation associated with the name itself, which conveys a strong message irrespective of specific products or places, often embodying exclusivity, luxury, or other desirable lifestyle attributes.

The lack of clarity on the specific type of reputation being protected hinders the justification of anti-evocation as a means of preventing free-riding, contributing to inconsistencies in its application. According to some EUIPO decisions, the protection of a product's provenance reputation appears to be the focal point, as the finding of unlawful evocation is based on the premise that the GI product's place of provenance is evoked. Examples of unlawful evocation include the use of 'Emiliana' to refer to the Emilia region¹⁶⁷ and the use of 'Map of Imola' to indicate the same geographical origin as the GI 'Parcels of Imola',¹⁶⁸ even in the absence of any connection to the reputation of the GI product.¹⁶⁹ In the 'Ca Va' case, EUIPO clarified that the key question to determine the existence of unlawful evocation is 'whether the contested mark would evoke a geographical origin which a GI is associated with'.¹⁷⁰ The importance of evoking the place of provenance is rooted in the belief that the place is linked to a certain level of quality, reputation, or other distinguishing characteristics of the product, as explained in the 'Toro' case.¹⁷¹ This view is

¹⁶¹Joined Cases T-57/04 and T-71/04 *Budějovický Budvar v OHMI* [2007] ECR II-01829, para. 149.

¹⁶²*Ibid.*, para. 150.

¹⁶³Gangjee, *supra* n. 66, 167.

¹⁶⁴CA Paris, 3 November 2010, n° 09/07276; TGI Paris, 20 May 2016, n° 14/12759.

¹⁶⁵Judgement of 21 March 2022, Provincial Court of Barcelona, para. 10.4.

¹⁶⁶A.K. Sanders (2020) 'Dilution and Damage beyond Confusion in the European Union', in I. Calboli and J.C. Ginsburg (eds.), *The Cambridge Handbook of International and Comparative Trademark Law*. Cambridge: Cambridge University Press, 499, 508.

¹⁶⁷EUIPO, Decision of the Fourth Board of Appeal of 28 July 2015 (R 2718/2014-4), para. 20.

¹⁶⁸EUIPO, Decision of 19 September 2019, *supra* n. 158, para. 22.

¹⁶⁹See also EUIPO, Decision of 20 April 2018, *supra* n. 136, 7; EUIPO, Decision of the Opposition Division of 25 November 2020 (B 3066320) 8.

¹⁷⁰EUIPO, Decision of 5 September 2016, *supra* n. 110, para. 38.

¹⁷¹EUIPO, Decision of 12 June 2017, *supra* n. 102, para. 36.

consistent with the French *terroir* philosophy, which was endorsed by AG Cosmas in the ‘Windsurfing Chiemsee’ case. According to AG Cosmas, a product’s geographical origin may ‘confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products’.¹⁷²

In the CJEU ‘Queso Manchego’ case, it seems that the reputation associated with the geographical area in question, La Mancha, primarily relates to its ‘general place reputation’ rather than the specific product’s provenance reputation. The CJEU in *Queso Manchego* considered that ‘the use of signs evoking the geographical area with which a designation of origin is associated’ may constitute unlawful evocation of that designation.¹⁷³ However, the reputation of La Mancha extends beyond its role as the provenance of the ‘Queso Manchego’ cheese and includes its landscapes and association with the renowned novel ‘Don Quixote de la Mancha’ by Miguel de Cervantes.¹⁷⁴

In contrast, preventing the unfair exploitation of product reputation rather than product’s provenance reputation or general place reputation appears to be the focus in another part of the EUIPO decisions. The EUIPO has held that evoking the place of origin alone is not enough to constitute unlawful evocation. Instead, the image of the GI product needs to be evoked. For instance, names such as ‘Mui Gin Born in Porto’,¹⁷⁵ ‘Is Fence’,¹⁷⁶ ‘La Manche’,¹⁷⁷ and ‘Douro Atlantic Garden’¹⁷⁸ did not constitute evocation because they evoked the city of Porto, Valencia, the Spanish region of La Mancha, or the river Douro, respectively, and would not trigger in the consumer’s mind the image of the corresponding GI products. As the EUIPO commented in a recent case, the use of ‘La Menorquina’ would only project the image of the island of Menorca in the consumer’s mind, and not the cheese protected by the GI ‘Mah-in Menorca’.¹⁷⁹ The transition in judging criteria from evoking origin to evoking product implies a potential reorientation of the focus of protection, moving from product’s provenance reputation (the image of the product’s provenance) to product’s reputation (the image of the GI product).

The CJEU ‘Glen’ case has led to a growing body of EUIPO decisions that considers the mere fact that a name relates to a geographical origin of the goods as insufficient to constitute infringement. In the ‘Glen’ case, the CJEU provided a more restrictive interpretation compared to the ‘Queso Manchego’ case.¹⁸⁰ The CJEU clarified that in order for unlawful evocation to be established, it is not sufficient for ‘the disputed element of the sign at issue should evoke in the relevant public some kind of association with the protected geographical indication or the geographical area relating thereto’, ‘as it does not establish a sufficiently clear and direct link between that element and the indication concerned’.¹⁸¹

When the rationale behind anti-evocation is regarded as safeguarding ‘product reputation’, the key factor in determining the comparability of the products is the influence of GI products on consumers’ purchasing decisions. This approach differs from the one taken under the rationale of preventing confusion, as explained in Section 4.1. Under the latter rationale, product comparability is a prerequisite for infringement and is determined by assessing the comparison of objective physical characteristics. The premise is that consumers are less likely to mistake one product for another if the products’ physical features are distinguishable.¹⁸² In contrast, when the interest

¹⁷²Joined Cases C-108/97 & C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, para. 40 (AG Opinion).

¹⁷³Case C-614/17, supra n. 58, para. 43.

¹⁷⁴*Ibid.*, para. 13.

¹⁷⁵EUIPO, Decision of the Opposition Division of 5 October 2016 (B 2571738) 19.

¹⁷⁶EUIPO, Decision of the Opposition Division of 17 March 2020 (B 3056580) 6.

¹⁷⁷EUIPO, Decision of 31 January 2019, supra n. 114, 7.

¹⁷⁸EUIPO, Decision of the Opposition Division of 27 February 2015 (B 2304312) 18.

¹⁷⁹EUIPO, Decision of the Opposition Division of 5 August 2020 (B 3079568) 7.

¹⁸⁰Supra n. 176.

¹⁸¹Case C-44/17, supra n. 57, para. 53.

¹⁸²Supra n. 125–131.

is in safeguarding ‘product reputation’, comparable products are defined in terms of market impact rather than extrinsic features.¹⁸³ For instance, the products covered by the GIs ‘Cítricos Valencianos’¹⁸⁴ and ‘Recioto di Soave’¹⁸⁵ are considered comparable to the disputed products as they may serve as commercially important ingredients for the contested products and thus influence consumer preferences towards them. The market impact factor is considered in order to prevent the disputed products from capitalizing on the reputation of the GI products.¹⁸⁶

It is noteworthy that the judgment in the ‘Champanillo’ case rendered in 2021 rejects the approach of considering product comparability as a necessary condition for establishing evocation. The CJEU holds that ‘the notion of “evocation” ... does not require the product covered under the PDO and the product or service covered by the contested name to be identical or similar’.¹⁸⁷ Following the ‘Champanillo’ case, the EUIPO also acknowledges that the absence of comparability between products is not enough to exclude the possibility of evocation.¹⁸⁸ The diminishing importance of product comparability may indicate a belief in safeguarding the ‘reputation derived from the quality of these products’,¹⁸⁹ even when the reputation transcends the boundaries of specific product categories (beyond the principle of specialty).

In some EUIPO decisions, particular importance seems to be placed on the ‘inherent reputation’ of the protected names, as suggested by the reliance on the similarity of the names in determining the presence of evocation. When a disputed name bears resemblance to a GI, either due to common words¹⁹⁰ or because the disputed name contains all or part of the GI,¹⁹¹ unlawful evocation is established. In contrast, if the disputed name does not contain the GI¹⁹² or has no common points in words,¹⁹³ evocation is excluded. This test primarily assesses the similarity between the disputed name and the protected name,¹⁹⁴ which can yield different outcomes compared to a test that primarily focuses on the specific evocation of a particular GI product. In cases where the disputed name (e.g., ‘la Menorquina’) resembles both the protected name (‘Mah-Menorca’) and a place name (‘Menorca’), the association generated may primarily relate to the place rather than a specific product.¹⁹⁵ This type of association, which could be regarded as unlawful evocation in a test primarily focused on the similarity between names, may not be deemed as unlawful in a test primarily centred on the specific evocation of a particular GI product.

The outcome of a decision may differ depending on the type of reputation being targeted. In addition, it is highly doubtful how the unfair exploitation of reputation can be demonstrated, especially when it is unclear which type of reputation is at stake.

4.2.4 Limitation III: False Presumption of ‘Unfair Exploitation’

The lack of demonstration of the ‘unfair exploitation’ of reputation in the application of anti-evocation protection exposes another weakness in the anti-free-riding argument. If the objective of the anti-evocation protection is to safeguard GIs against exploitative uses, then the

¹⁸³EUIPO, Decision of 16 July 2018, supra n. 147, para. 29; EUIPO, Decision of the Opposition Division of 7 October 2019 (B 3059890) 5.

¹⁸⁴EUIPO, Refusal of Application for a European Union Trade Mark (12 March 2020) 5.

¹⁸⁵EUIPO, Decision of the Second Board of Appeal Of 24 June 2019 (R 400/2018-2, para. 32).

¹⁸⁶Ibid., para. 34.

¹⁸⁷Case C-783/19, supra n. 61, para. 61.

¹⁸⁸See, e.g., EUIPO, Decision of the First Board of Appeal of 28 October 2021 (R 1101/2019-1, para. 67).

¹⁸⁹Case C-783/19, supra n. 61, para. 49.

¹⁹⁰EUIPO, Decision of 9 January 2014, supra n. 137 para. 24; EUIPO, Refusal of Application for a Community Trade Mark (23 March 2015) 3.

¹⁹¹EUIPO, Decision of the Opposition Division of 25 October 2016 (B 2574823) 7.

¹⁹²EUIPO, Decision of the Cancellation Division of 20 May 2016 (9721 C) 17.

¹⁹³EUIPO, Decision of the Opposition Division of 10 December 2018 (B 2989104) 4.

¹⁹⁴EUIPO, Decision of the Second Board of Appeal of 26 October 2012 (R 1732/2012-2) para. 26.

¹⁹⁵EUIPO, Decision of 5 August 2020, supra n. 182), 7.

use of signs evocative of GIs should only be prohibited when it poses a genuine risk of free-riding.¹⁹⁶ However, under the evocation clause, there appears to be no need to demonstrate that a third party's use evoking the GI would result in a risk of unfair exploitation of the GI's reputation. Instead, evocation is presumed to confer an unfair advantage. As noted by AG Sánchez-Bordona in *Champagner Sorbet*, evocation suggests a 'presumed intention to exploit that reputation'.¹⁹⁷

However, the presumption that evocation constitutes unfair exploitation of reputation may not be universally substantiated by empirical evidence. While free-riding relies on evocation, as it is not possible to transfer a positive image without a prior mental association with the protected name or product,¹⁹⁸ mere mental association does not necessarily lead to an unfair exploitation of reputation.¹⁹⁹ For example, the use of the wine grape variety name 'Teran', which has been used for marketing Croatian wines prior to the Republic of Croatia's accession to the EU, may evoke the Slovenian GI wine with the same name. Nevertheless, the CJEU did not consider the labelling practices established historically in Croatia as taking undue advantage of the reputation of the Slovenian GI 'Teran'.²⁰⁰

Even if acknowledging that any mental association with a GI would necessarily enable third parties to take advantage of the GI's reputation, it could not be said that advantage must always be classified as 'unfair'. In some cases, the public interest should be taken into consideration to assess the fairness, in addition to the private benefit to third parties. For instance, evoking a GI in comparative advertising may confer an advantage to a third party by establishing a 'link' with the GI's reputation. However, that advantage may be regarded as 'inherent in the very nature of the phenomenon known as comparative advertising'.²⁰¹ In other words, it does not have to be classified as 'unfair' when the benefit of the comparative advertising to consumers is balanced against the advantage to the advertiser.²⁰²

Similarly, it does not seem unfair if a practice evoking a GI is the normal practice of the relevant trade or industry. In the foodstuff industry that incorporates GI products as ingredients, explicitly and subtly referring to the GI to communicate ingredient information to customers is not necessarily categorized as unfair.²⁰³ In the sparkling wine industry, the common product features (i.e., the bubbles) present in Prosecco wine or Cava wine would elicit a psychological association with Champagne wine. However, these customary practices have not been deemed as unlawful evocation or as exploiting the esteemed reputation of 'Champagne'.²⁰⁴ Likewise, the traditional practice of selling 'downgraded' (déclassé) products or 'second wine' (seconds vins) that began in the eighteenth century has not been regarded as free-riding on the GI products' reputation, despite using the appearance of those GI products that might be highly evocative.²⁰⁵

Moreover, the lack of clarity regarding the specific type of reputation that anti-evocation protection targets (i.e., product reputation? product's provenance reputation? general place reputation? or inherent reputation?²⁰⁶) poses further challenges to the general presumption of 'unfair

¹⁹⁶Verbeeren, supra n. 152) 328.

¹⁹⁷Case C-393/16 *Comité Interprofessionnel du Vin de Champagne* (ECJ 20 December 2017), para. 46 (AG Opinion).

¹⁹⁸A. Folliard-Monguiral (2017) 'Arrêt Port Charlotte', *Propriété Industrielle*, comm. 61.

¹⁹⁹P. Viviant (2019) 'L'évocation: une Protection de l'Appellation d'Origine en Construction', *Revue Lamy Droit de l'Immatériel* 161.

²⁰⁰Case T-626/17 *Slovenia v Commission* (EGC 9 September 2020), para. 192.

²⁰¹Case C-487/07 *L'Oréal v Bellure* [2009] ECR I-05185, para. 76 (AG Opinion).

²⁰²Case C-381/05 *De Landtsheer Emmanuel v Comité Interprofessionnel du Vin de Champagne* [2007] ECR I-03115, paras. 68–69.

²⁰³Case C-393/16 *Comité Interprofessionnel du Vin de Champagne v Aldi Süd Dienstleistungs* (ECJ 20 December 2017), para. 56.

²⁰⁴Gangjee, 'Strengthening GIs (Responsibly)', supra n. 16.

²⁰⁵C. Le Goff (2021) 'Affaire "Morbier AOP" : Cassation Attendue Après l'Arrêt de la CJUE', *Propriété Intellectuelle* 675.

²⁰⁶See Section 4.2.3.

exploitation'. The issue of whether the exploitation of any particular type of reputation is justifiable or permissible remains unaddressed. The anti-free-riding argument falls short in providing an explanation as to why 'product's provenance reputation' or even 'general place reputation' should be the exclusive domain of GI groups and why third parties' use of place reputation should be deemed unfair. Conversely, it could be argued that a GI cannot legitimately appropriate all reputations or all identifying elements of a region.²⁰⁷

This difficulty in justification is similarly encountered in the context of 'product reputation'. It is not a self-evident principle that product reputation should be solely attributed to GI groups, particularly in cases where the reputation has been established over a long period of time, rather than through the recent efforts of the GI group members. Assuming the vigorous assertion made by the defendant Livradois in the 'Morbier' case holds true²⁰⁸ – that the reputation of 'Morbier' cheese arises from its distinctive features and historical tradition, such as the ashy stripe, which Livradois implemented prior to 'Morbier' being registered as a GI, and is not based on investments made by the GI group or its members – the question arises as to whether Livradois' continued exploitation of this product reputation, which partly due to Livradois' own historical efforts, warrants an assessment of its fairness.

Moreover, one could even argue that newly emerging GI groups are free-riding on the established reputation that has resulted from the efforts of traditional producers who may not necessarily be affiliated with the groups.²⁰⁹ During the gradual development of the modern GI law in the early 1920s, there existed an argument emphasizing the significance of granting benefits and protection to those who contribute to the value and reputation of GIs. This perspective recognized that the GI reputation is established over time through the collaborative efforts of producers and communities linked to the specific geographic region. It was strongly believed that these stakeholders should have the opportunity to receive the advantages and safeguards provided by the recognition of GIs.²¹⁰ If this argument still holds merit, it is not the traditional producers who reap the benefits without effort, but rather the producers who have recently joined the institutionalized GI mechanism.

The practice of trademark law, which is similar to GI law in governing distinctive signs, demonstrates that creating a mental association does not necessarily result in a real change in consumer behaviour. Even if consumer behaviour changes, the change may not necessarily be unfair since competition in the market is primarily focused on attracting and retaining consumers.²¹¹ However, the anti-free-riding argument made in the context of GI protection against evocation seemingly presumes the contrary – that evocation will automatically lead to the unfair exploitation of reputation. Such a flawed presumption implies that the anti-evocation clause will ban evocative uses that are not likely to create the free-riding problem, which, in turn, suggests that the anti-evocation protection exceeds the necessary need for banning free-riding.

4.2.5 Limitation IV: Controversy of the Social Desirability of Prohibiting Free-Riding

The very basic issue of whether a ban on free-riding is socially desirable is itself a matter of dispute. For some, reputation, as a legitimate source of profit and an economic value in the contemporary world, belongs to the producer who invested in it. Letting third parties grab the fruit of the producer's labour would thus be unfair.²¹² For others, free-riding, without more, is

²⁰⁷S. Chatry (2019) 'Évocation d'une AOP par l'Emploi d'un Signe Figuratif', *L'Essentiel Droit de la Propriété Intellectuelle* 7, 5.

²⁰⁸Cass. com., 14 April 2021, n° 17-25.822.

²⁰⁹For an example of a traditional producer not joining the official GI scheme (Porcelaines Doralaine, claimed as the first French producer of the *Porcelaine de Limoges*), see CA Paris, 25 September 2018, n° 18/00624.

²¹⁰Chambre des Deputes (1919) 'Compte Rendu In-Extenso', JO 25 April 1919, 2170.

²¹¹Case C-487/07 *L'Oréal v Bellure* [2009] ECR I-05185, para. 76 (AG Opinion).

²¹²See, e.g., W.J. Derenberg (1955), 'The Influence of the French Code Civil on the Modern Law of Unfair Competition', *American Journal of Comparative Law* 4, 1, 3; G. Ghidini (2010) *Innovation, Competition and Consumer Welfare in Intellectual Property Law*. Cheltenham: Edward Elgar, 237–238.

ubiquitous²¹³ and, under certain conditions, may prove to be both necessary and desirable to achieve an efficient allocation of resources.²¹⁴ Examples are given: planting attractive flowers in front garden benefits neighbours, but this does not mean the neighbours should compensate for the increased value; the society may benefit without compensation from a person's decision to educate his children well, making them productive and law-abiding.²¹⁵ It is deduced that everyone is a beneficiary of free-riding. Consequently, free-riding is described as 'a ubiquitous boon for society'²¹⁶ and regarded as insufficient to justify government intervention to enable the investors to capture all or even most of the social benefit of their investment.²¹⁷ Then how the goal of preventing free-riding can provide a solid basis of justification for anti-evocation, if preventing free-riding is itself a controversial idea?

In conclusion to Section 4.2, the justification of anti-evocation based on the need to prevent free-riding raises more problems than it resolves. Firstly, preventing free-riding presupposes the existence of a reputation, but not all GIs have an equivalent association-provoking reputation. Secondly, it fails to clarify which types of reputations are protected from unfair exploitation, leading to inconsistencies in judgments and decreasing the predictability of the law. Thirdly, the ability to demonstrate the factual elements of free-riding in enforcement proceedings is still in doubt. Finally, even the fundamental issue of whether preventing free-riding is socially desirable remains a contentious topic.

4.3 Bad Faith

In supporting their rulings against evocation, certain enforcement authorities tend to emphasize the defendant's intention in their analysis. This entails examining the similarity between the names not as an accidental occurrence, but rather as a deliberate choice. In the case of 'Cambozola', the CJEU deemed it appropriate for national courts to consider any advertising material that suggests the phonetic similarity between the two names is not fortuitous. In *Queso Manchego* and *Morbier*, AG Pitruzzella suggested the assessment of unlawful evocation should consider whether the reference to the GI product was intentional.²¹⁸ The emphasis placed on intention may reflect a belief that deliberately deceiving others or benefiting from their work without proper compensation is unacceptable.

Accordingly, in determining the presence of unlawful evocation, law enforcement authorities have identified the defendant's intent to create confusion or benefit from the established GI reputation as a factor. In cases concerning 'La Chasse du Pape',²¹⁹ 'Héritages des Caves des Papes',²²⁰ and 'La Croix des Papes',²²¹ the authorities held that the presence of the term 'Pape' in the disputed trademark was not accidental, but rather an attempt to subtly evoke the prestigious name or, at the minimum, to exploit a certain linguistic ambiguity. In *Darjeeling*, the Paris Court of Appeal addressed in particular that by registering the name 'Darjeeling' for books, the applicant's intention was to leverage the reputation associated with the GI.²²²

²¹³See, e.g., D. Gangjee and R. Burrell (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review* 73, 282, 288.

²¹⁴See, e.g., G.S. Lunney, Jr (1999) 'Trademark Monopolies', *Emory Law Journal* 48, 367, 445.

²¹⁵See, e.g., B.M. Frischmann and M.A. Lemley (2007) 'Spillovers', *Columbia Law Review* 100, 101, 102.

²¹⁶B.M. Frischmann (2005) 'An Economic Theory of Infrastructure and Commons Management', *Minnesota Law Review* 89, 917, 967 (2005).

²¹⁷See, e.g., S.M. Greene (2006) 'Sorting Out Fair Use and Likelihood of Confusion in Trademark Law' *American Business Law Journal* 43, 43, 75.

²¹⁸Case C-490/19, supra n. 59, para. 45 (AG Opinion); Case C-614/17, supra n. 58, para. 29 (AG Opinion).

²¹⁹Cass. crim., 19 April 2005, n° 04-84.854.

²²⁰Cass. crim., 5 April 2005, n° 04-85.861.

²²¹EUIPO, Decision of the First Board of Appeal of 16 January 2014 (R 51/2013-1), para. 6.

²²²CA Paris, 22 November 2006, n° 05/20050.

Some EUIPO cases have even elevated the significance of intention to the level of a necessary condition. Such cases argue that the absence of evidence showing that the relationship between the two names was not fortuitous means that there is no conceptual connection, hence no evocation.²²³ Even more so, some authorities have declined to recognize the presence of evocation based on the assumption of a remote possibility of malicious intent. The French Supreme Court opined that ‘Wel Scotch’ would not lead consumers to associate it with ‘Scotch Whisky’, considering that the ‘Wel Scotch’ trademark was filed in 1958, 30 years prior to the marked increase in popularity and consumption of whisky in France.²²⁴ The court inferred from this temporal relationship that the registration of ‘Wel Scotch’ was not intended to create confusion with ‘Scotch whisky’.

However, targeting bad faith as a basis for justifying anti-evocation protection appears to be questionable in instances where the absence of bad faith can be established or when good faith can be demonstrated. The EUIPO recognizes that it is possible for a trademark applicant to unintentionally create a sign that closely resembles a GI.²²⁵ Nonetheless, the absence of intention does not absolve an applicant from liability for violating the anti-evocation clause. It is expected that when selecting a trademark, the applicant should conduct a thorough research process to ensure that the chosen sign does not ‘objectively’ evoke any existing GIs.²²⁶ As a result, the element of bad faith loses its significance in the evaluation of evocation, and its capacity to provide a rationale for anti-evocation measures is constrained.

4.4 Achievement of ‘More General Objectives’

An increasingly employed argument for justifying a ban on evocation is not to emphasize the harm or bad faith associated with evocation, but rather the benefits derived from its prohibition. The advantages of prohibiting evocation have been interpreted by the CJEU in multiple cases and have been progressively extended far beyond the initial interpretation of reducing consumer search costs.

In *Cognac*, the CJEU described the benefit of prohibiting acts such as evocation as maintaining the identification function of GIs, i.e., allowing consumers to identify products originating in a particular region with regional characteristics by their place names, thereby reducing consumer search costs.²²⁷ A similar rationale has traditionally been used to justify trademark protection, i.e., to reduce consumer search costs by allowing consumers to rely on trademarks to identify products that originate from a particular firm or have a desired characteristic. The benefit of reduced search costs has been used under trademark law to justify the prohibition of identical or confusingly similar names, as allowing other businesses to use a mark such as ‘Coca-Cola’ would render it less reliable for consumers seeking a particular item with specific characteristics and quality.²²⁸ However, the same reasoning used to justify the prohibition of evocation under the GI law is far-fetched. If the consumer is well aware that a name evoking a GI is not that GI, that name is not likely to distract the consumer from relying on the GI to find the product desired. Thus, the need arises to find additional benefits to justify the prohibition of evocation.

In the ‘Viiniverla’ case, the CJEU expanded the hierarchy of benefits of prohibiting conduct such as evocation, in addition to recognizing the benefit of maintaining the identification function mentioned in *Cognac*. The benefits were amplified to include the prevention of deceptive practices, the attainment of market transparency and fair competition, and the attainment of a

²²³EUIPO, Decision of the Opposition Division of 5 October 2021 (B 3122893) 9.

²²⁴Cass. com., 29 November 2011, n° 10-25.703, 1180.

²²⁵EUIPO, Decision of 21 March 2022, supra n. 141,) para. 57.

²²⁶EUIPO, Decision of the First Board of Appeal of 7 June 2021 (R 1249/2016-1) 46; Case C-87/97, supra n. 48, para. 33 (AG Opinion); Case C-783/19, supra n. 61, para. 68.

²²⁷Joined Cases C-4/10 and C-27/10 *Bureau national interprofessionnel du Cognac v Gust. Ranin Oy* [2011] ECR I-06131, para. 47.

²²⁸R.G. Bone (2004) ‘Enforcement Costs and Trademark Puzzles’, *Virginia Law Review* 90, 2099, 2015.

high level of consumer protection.²²⁹ These additionally articulated interests were summarized by AG Saugmandsgaard Øe as the ‘more general objectives’.²³⁰

AG Pitruzzella expounded on the ‘more general objectives’ in *Queso Manchego* and *Morbier*. In *Queso Manchego*, AG Pitruzzella observed that the tendency to interpret ‘evocation’ broadly is in line with the public interest aspect of the objective of protecting GIs, which not only constitutes part of the strategy of the EU economy, but also forms part of the objective of safeguarding European cultural heritage.²³¹ In *Morbier*, in addition to highlighting the benefit of maintaining the function of identification, AG Pitruzzella listed other advantages to consumers resulting from GI protection (including anti-evocation protection). These benefits include meeting consumers’ expectations regarding the quality of products covered by those names and safeguarding their right to receive truthful commercial information. Moreover, AG Pitruzzella also noted that the prohibition of evocation, among others, could provide an incentive model which relates directly to objectives relating to agricultural policy and the protection of common cultural heritage.²³²

Behind the ever-expansive reading of the benefits of anti-evocation protection, the underlying logic may be that more benefits can justify a greater scope of protection. Following this logic, the idea arises that banning evocation is justified because it leads to greater benefits. The major issue with this line of reasoning is that it overlooks the question of how much greater the benefit will be. There is no empirical evidence demonstrating the extent to which banning evocation would better achieve the ‘more general objectives’ of protecting GIs. For instance, while it may be true that the objective of ensuring that consumers have clear, concise, and reliable information regarding the origin of the product is better served by prohibiting the use of figurative signs that evoke the registered name, as speculated by the CJEU in *Queso Manchego*,²³³ it has not been shown to what extent banning images resembling Don Quixote de La Mancha will further enhance the guarantee of the word ‘Queso Manchego’ as a quality indicator.

Moreover, this line of reasoning neglects to assess the costs associated with achieving the purported benefits, nor does it evaluate whether the proportionality between benefits and costs is reasonable. There is a growing body of cases showing that the costs associated with banning evocation are substantial.²³⁴ It seems contrary to the principle of proportionality to achieve goals regardless of cost. The benefit-based justification ignores a key question: Do the benefits of anti-evocation protection as a policy of intervening in free competition really outweigh the costs?

4.5 Trespass

In recent years, a growing trend has been observed towards the mechanical application of the anti-evocation clause. Certain authorities directly label a use as infringing if it has the potential to evoke a protected name or product in the consumer’s perception. This approach often overlooks the resulting harm, the intentions of the user, and the potential broader goals that could be achieved by prohibiting the use.²³⁵ As a result, the rational basis for a finding of infringement is no longer adequately addressed.

The shift in attention from the search for justification to the ignoring of it may be attributed to the fact that enforcement authorities previously focused on justification as a response to the unclear protection boundary defined by an unfamiliar evocation test. As the boundary becomes clearer with repeated procedures on anti-evocation protection, authorities no longer need to search for justification in a state of uncertainty. As a consequence, anti-evocation cases have created a ‘property right’ on anything that reminds one of GIs, and any attempt at evocation is now considered a ‘trespass’.

²²⁹Case C-75/15, supra n. 53, paras. 23–24.

²³⁰Case C-44/17, supra n. 57, para. 37.

²³¹Case C-614/17, supra n. 58, para. 20.

²³²Case C-490/19, supra n. 59, para. 29.

²³³Case C-614/17, supra n. 58, paras. 29–30.

²³⁴See n. 16–20 and the accompanying text.

²³⁵See, e.g., CA Paris, 17 December 2021, n° 21/01247; EUIPO, Decision of the Fifth Board of Appeal of 29 July 2022 (R 1940/2021-5).

The concept that trespassing on a property is inherently wrong does not offer a compelling justification for anti-evocation protection. This reasoning fails to address the underlying question of why a property right should be established in this manner or why such a wide-ranging scope of exclusive rights should be granted in the first place.

Furthermore, as rights holders have become accustomed to what was once in the public domain becoming exclusive property, any attempt to narrow the scope of the anti-evocation protection may be met with challenge and resistance.²³⁶ This challenge is evident in the discussion of the 2022 reform of the EU GI regulation, where the EC provided a definition of evocation that aims to more clearly delineate the boundary of the anti-evocation prohibition. The suggested definition of evocation explicitly lists three types of harm:

the evocation of a geographical indication shall arise, in particular, where a term, sign, or other labelling or packaging device presents a direct and clear link with the product covered by the registered geographical indication in the mind of the reasonably circumspect consumer, thereby *exploiting, weakening, diluting or being detrimental to the reputation of the registered name*.²³⁷ (emphasis added)

If this proposal is adopted, the explicitly listed three types of reputational harm would become crucial in determining whether an unlawful evocation has occurred. This could potentially narrow down the boundary of anti-evocation to acts that cause reputational damage,²³⁸ thus making the protection against evocation more justifiable from the perspective of safeguarding reputation. However, opponents of this definition argue that it would weaken the existing scope of protection. During the first reading in Parliament, several members of the responsible committee proposed deleting the definition,²³⁹ stating that including a definition of evocation ‘may restrict protection of geographical indications’²⁴⁰ and limit the scope of anti-evocation ‘to only where the use exploits, weakens, dilutes, or is detrimental to the reputation of the GI name’.²⁴¹ During the EU Council’s first reading, several delegations similarly argued for the deletion of the definition. They expressed a preference for not legislating on this concept and relying solely on case law²⁴² to ‘avoid restricting the European Court of Justice in its work’.²⁴³ This reasoning indicates an acceptance of the current broad scope of protection established by CJEU case law and a reluctance to impose any restrictions on it. However, it is crucial to emphasize that the justification for the current scope of protection still remains unestablished.

5. Where We Go from Here: Conclusion and Recommendation

Generally, the grant of exclusive rights to one party, including those granted by the anti-evocation clause, can potentially limit the choices of other parties in terms of expression and competition. The crucial question is whether these exclusive rights are justified.

²³⁶See also J.S. Miller (2014) ‘Error Costs & IP Law’, *University of Illinois Law Review* 175, 183.

²³⁷EC (2022) ‘Proposal for a Regulation on European Union Geographical Indications for Wine, Spirit drinks and Agricultural Products’, COM(2022) 134 final, 44.

²³⁸However, the term ‘in particular’ in the proposed definition may imply that dilution, free-riding, and tarnishment are not an exhaustive list but illustrative for unlawful evocation. The inexhaustive enumeration might create a new source of inconsistency in applying the anti-evocation clause. Should the anti-evocation clause apply when dilution, free-riding, or tarnishment does not exist? If the answer is in the affirmative, this enumeration would again blur the justifications for anti-evocation.

²³⁹EP (2022) ‘Amendments Tabled in Committee’, PE737.394, amendments 513–518.

²⁴⁰Ibid., amendment 515.

²⁴¹Ibid., amendment 518.

²⁴²Council (2022) ‘Progress Report’, 9256/2/22 REV 2, p. 4.

²⁴³Council (2022) ‘Progress Report’, 15112/22, p. 6.

This article has examined the justifications for anti-evocation for GIs put forth by law enforcement authorities and identified two types of drawbacks the justifications exhibit. The first type is the varied justifications that exist due to different authorities having different understandings of why evocation should be prohibited. This diversity of justifications for anti-evocation protection leads to inconsistencies in determining illegal evocation, resulting in errors in its application. The second type is the lack of substantiation for the justifications for anti-evocation protection. The weak and insufficient justifications imply that the restrictions imposed on other market players may be unjustified, unnecessary, and disproportionate to the objectives of anti-evocation protection. As AG Jacobs cautioned two decades ago when commenting on the first CJEU case on the anti-evocation protection (the ‘Cambozola’ case):

It should be borne in mind that, as is the case with trade marks, an unduly high level of protection of geographical indications and designations of origin would impede the integration of national markets by imposing unjustified restrictions on the free flow of goods.²⁴⁴

It is important to consider the impact on non-GI market players, especially those operating within the geographic area associated with the GI but not officially part of the GI scheme. When the restrictions imposed on them cannot be sufficiently justified, it raises concerns that their development might be unreasonably limited. GI producers are not ‘the one and only representatives of the EU rural economy’.²⁴⁵ Non-GI producers also contribute significantly to rural development, and their growth and progress should be encouraged by policies rather than unjustifiably hindered by them.²⁴⁶

Moreover, law enforcers have gradually adapted to expanded protection, leading to the mechanical application of the anti-evocation clause without considering the justification basis. This blind application may further exacerbate the current problem of restricting the freedom of operation of other market players, particularly agricultural companies operating in the EU’s rural economy.

Therefore, it is essential for the EU to acknowledge the weaknesses in the justification for anti-evocation and avoid imposing unjustified restrictions or inconvenience on other market participants. Clarification of the rationale for anti-evocation protection is necessary to eliminate ambiguity, which can result in multiple interpretations and inconsistent standards of adjudication. This, in turn, would prevent enforcement errors and inconsistencies in decision-making. Additionally, re-examining the scope of anti-evocation protection is crucial. A well-defined scope of protection, supported by solid justifications, should be clearly delineated to prevent unnecessary impact on the public interest. The ongoing legislative reform of the EU GI regulations presents an opportunity to address these issues.²⁴⁷

For other countries that have followed the EU in prohibiting evocation or for those considering adopting anti-evocation protection, caution is necessary to prevent similar dangers. Notably, while the EU is taking steps to rectify its mistakes by clarifying the concept of evocation, other countries need not replicate these errors.

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²⁴⁴Case C-87/97, supra n. 48, para. 57 (AG Opinion).

²⁴⁵Díaz-Marta, supra n. 20, footnote 50.

²⁴⁶Paganizza, supra n. 17, 224.

²⁴⁷See n. 240–246 and the accompanying text.