

Enforceable copies  
delivered to the parties on:

FRENCH REPUBLIC  
IN THE NAME OF THE FRENCH PEOPLE

## **COURT OF APPEAL OF PARIS**

**Division 5 – Chamber 2**

**JUDGEMENT OF NOVEMBER  
18, 2022**

(no. 158, 15 pages)

Registration number in the general directory: **no. RG 21-16539 – no. Portalis 35L7-V-B7F-CELM**

**ON REFERRAL AFTER CASSATION**, by judgement of the Commercial, Financial and Economic Chamber of the Court of Cassation on April 12, 2021 (Appeal No. U-17-25.822), of a judgement of Division 5, Chamber 2 of PARIS Court of Appeal delivered on June 16, 2017 (RG No. 16-11371) on appeal from a judgement of 3<sup>rd</sup> Chamber of the 4<sup>th</sup> section of the PARIS District Court dated April 14, 2016 (RG No. 13-13650)

### **APPLICANT TO THE REFERRAL**

**SYNDICAT INTERPROFESSIONNEL DE DÉFENSE DU FROMAGE MORBIER**  
**acting for its president domiciled in this capacity at the head office located**  
1, rue de la Maison du Comté  
39800 POLIGNY

Represented by Mr. Frédéric INGOLD of SELARL INGOLD & THOMAS, solicitor at the PARIS bar, toque B 1055  
Assisted by Ms. Delphine BRUNET-STOCLET, pleading for SELARL SCHMIDT - BRUNET – LITZLER, solicitor at the PARIS bar, mark L 183

### **RESPONDENT TO THE REFERRAL**

**S.A.S. FROMAGÈRE DU LIVRADOIS**, acting through its legal representatives  
**domiciled in this capacity at the head office located**  
LES PERINES

Represented by Mr. Matthieu BOCCON-GIBOD of SELARL LEXA VOUE PARIS-VERSAILLES, solicitor at the PARIS bar, mark C 2477

Assisted by Mr. Jean-Daniel BOUHENIC, pleading for SCP DEPRez – GUIGNOT & ASSOCIES, solicitor at the PARIS bar, mark P 221, Ms. Catherine JANKOWSKI, pleading for SCP DEPRez – GUIGNOT & ASSOCIES, solicitor at the PARIS bar, mark P 221

### **COMPOSITION OF THE COURT**

In accordance with the provisions of Sections 805 and 907 of the Code of Civil Procedure, the matter was heard on September 7, 2022, in public hearing, the solicitors not having opposed to it, before Ms. Agnès MARCADE, Council member, in charge of examining the case, which was previously heard in her report

Ms. Agnès MARCADE gave an account of the pleadings in the Court's ruling, composed of:

Ms. Agnès MARCADE, Council member, acting as President, appointed to replace Ms. Véronique RENARD, President, unable to attend

Ms. Françoise BARUTEL, Council member, appointed to replace Ms. Laurence LEHMANN, Councilor, unable to attend

Ms. Déborah BOHEE, Council member, appointed to complete the Court

**Clerk** at the hearing: Ms. Pauline ROBERT, Director of the Court Office

### **ARRET:**

Contradictory

By issuing the decision to the court clerk, the parties having been previously notified in accordance with the conditions provided in the second paragraph of Section 450 of the Code of Civil Procedure

Signed by Ms. Agnès MARCADE, Council member, acting as President, in replacement of Ms. Véronique RENARD, President, unable to attend, and by Ms. Carole TREJAUT, Clerk, present at the time of issuance.

Upon considering the contradictory judgement rendered on April 14, 2016, by the Tribunal de Grande Instance de Paris,

Upon considering the judgement of the Paris Court of Appeal, dated June 16, 2017,

Upon considering the judgement of the Court of Cassation dated June 19, 2019, submitting a preliminary question to the Court of Justice of the European Union,

Upon considering the judgement of the Court of Justice of the European Union, dated December 17, 2020,

Upon considering the partial quashing judgement of the Court of Cassation, dated April 14, 2021,

Upon considering the declaration of referral of Syndicat Interprofessionnel de Défense du Fromage Morbier, dated September 14, 2021,

Upon considering the final submissions filed with the Court and served on September 1, 2022, by Syndicat Interprofessionnel de Défense du Fromage Morbier, applicant,

Upon considering the final submissions filed with the Court and served on August 12, 2022, by Fromagère du Livradois, respondent,

Upon considering the closing order on September 1, 2022.

### **THEREUPON, THE COURT,**

For a complete statement of the facts of the case and of the procedure, reference is expressly made to the judgement under appeal, to the subsequent decisions and to the above-mentioned pleadings of the parties.

Fromagère du Livradois, incorporated in 1971 in Fournols in Puy-de-Dôme, produces and markets cow's and goat's milk cheeses, some of which have a protected designation of origin (PDO), others are specialties from Auvergne. Since 1979, it has been making Morbier cheese, which has all the characteristics of this cheese, including a dark central horizontal stripe.

By decree of December 22, 2000, Morbier was granted an "appellation d'origine contrôlée" (AOC) MORBIER and the geographical area of reference was defined (section 2) as well as the conditions necessary to claim the designation of origin.

The decree specified that companies located outside the geographical area of reference, listed by the Institut National des Appellations d'Origine (INAO), which had continuously produced and marketed cheeses under the name Morbier could continue to use this name under the current conditions without the mention "AOC" until the expiration of a period of five years following the publication of the registration of the designation of origin MORBIER as a protected Designation of Origin (PDO) by the Commission of the European Communities, in accordance with regulation no. 2081-92.

The PDO was registered on July 10, 2002.

By orders dated September 13, 2002, and January 23, 2004, Fromagère du Livradois was authorized to use the term "Montagne" to market Morbier cheese and by letter dated October 17, 2005, from the INAO to use the name "Morbier" without the mention "AOC" until July 11, 2007.

As of this date, Fromagère du Livradois substituted the name “Morbier” for “Montboissié du Haut Livradois”.

By decision, dated July 18, 2007, the INAO acknowledged Syndicat Interprofessionnel de Défense du Fromage Morbier (Interprofessional Union) as a defense organization for the protection of Morbier cheese, empowered in particular to take action in the event of violation.

On February 7, 2013, Interprofessional Union obtained authorization from the Clairemont-Ferrand District Court to have two bailiffs note the production, possession, sale in France or export of cheeses and packaged in any manner whatsoever, on which the word Morbier appears, whether associated or not with Morbier du Haut Livradois Morbier of High Livradois, as well as the words Montboissié or Montboissier, as well as the use of deceptive marks. Under the terms of this order, the operations could be carried out in the premises of Fromagère du Livradois, located in Fournols, as well as one located in Tauves.

On February 15, 2013, Interprofessional Union obtained a similar order from the High Court of Aurillac for the premises of Fromagère du Livradois located in Allanche.

These orders resulted in affidavits, prepared on March 5, 2013, from three bailiffs who simultaneously visited the three aforementioned facilities.

By writ dated August 22, 2013, Interprofessional Union summoned Fromagère du Livradois before the Tribunal de Grande Instance, now the Judicial Tribunal, in Paris, seeking, among other things, that it be prohibited from any direct or indirect commercial use of the name Morbier as well as the black stripe separating two parts of the cheese.

By contradictory judgement, dated April 14, 2016, the Paris District Court:

- Sat aside the three reports carried out on March 5, 2013, In Fournols, Tauves and Allanche by bailiffs in accordance with the orders on requests obtained pursuant to section 145 of the Code of Civil Procedure,
- Dismissed Interprofessional Union’s claims in their entirety,
- Dismissed Fromagère du Livradois’ counterclaim for abuse of process,
- Ordered Interprofessional Union to pay Fromagère du Livradois the sum of 4,000 euros pursuant to section 700 of the Code of Civil Procedure and to pay all costs.

By judgement, dated June 16, 2017, the Paris Court of Appeal upheld the judgement except insofar as it dismissed Fromagère du Livradois’ claim for abuse of process and ordered Interprofessional Union to pay Fromagère du Livradois the sum of 10,000 euros for abuse of process.

By judgment of June 19, 2019, the Court of Cassation referred a preliminary question to the Court of Justice of the European Union (the CJEU) on the interpretation of Section 13(l) of the Council Regulation (EC) No 510/2006 of March 20, 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Regulation (EU) No 1151/2012 of the European Parliament and of the Council of November 21, 2012, on quality schemes for agricultural products and foodstuffs.

The CJEU answered the preliminary question in a judgment dated December 17, 2020 (C490/19).

By the judgement, dated April 14, 2021, the Court of Cassation (Commercial Chamber) reversed and sat aside the judgement of the Paris Court of Appeal of June 16, 2017, except insofar as, confirming the judgement, it sat aside the three official reports carried out on March 5, 2013, in Fournols, Tauves and Allanches by bailiffs in accordance with the orders obtained on the basis of section 145 of the Code of Civil Procedure and restored, except on these points, the proceedings and the parties as they were prior to the judgement and referred them to the Court of Appeal of Paris, with a differently consisted bench.

The Court of Cassation quashed and sat aside the judgement of the Paris Court of Appeal on the grounds of Section 13(1) of of Council Regulation (EC) No 510/2006 of March 20, 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Regulation (EU) No. 1152/2012 of the European Parliament and of the Council of 21 November 2012, on quality systems for agricultural products and foodstuffs, on the grounds that:

14. According to these texts, "Registered names are protected against any:

- a) direct or indirect commercial use of a registered name for products not covered by the registration, insofar as these products are comparable to those registered under that name or insofar as using the name exploits the reputation of the protected name;
- b) misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", or similar;
- c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or on documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- d) any other practice liable to mislead the consumer as to the true origin of the product".

15. Answering the above-mentioned question for a preliminary ruling, the CJEU (judgment of December 17, 2020), after emphasizing that PDOs are protected insofar as they designate a product which has certain qualities or characteristics and that the PDO and the product covered by it are closely linked (point 37), ruled:

"The respective sections 13(1) of Council Regulation (EC) No. 510-2006 of March 20, 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Regulation (EU) No. 1151-2012 of the European Parliament and of the Council of November 21, 2012, on quality systems for agricultural products and foodstuffs must be interpreted as not strictly prohibiting the use by a third party of the registered name.

The respective Sections 13(1)(d) of Regulation No. 510-2006 and 1151-2012 must be interpreted as prohibiting the reproduction of the nature or appearance characterizing a product covered by a registered name where that reproduction is likely to lead the consumer to believe that the product in question is covered by that registered name. It is necessary to assess whether the reproduction is likely to mislead the European consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account all the relevant factors in the case".

16. In rejecting Interprofessional Union's claims, the ruling stated that the PDO regulations are not intended to protect the appearance of a product, or its characteristics as described

in the specifications, but rather its name, so that they do not prohibit the production of a product using the same methods as the ones described in the specifications of a designation of origin, and that, in the absence of an exclusive right, the use of a product's appearance is not wrongful but falls within the scope of freedom of trade and free market. It noted that the characteristics invoked by Interprofessional Union were part of historical tradition and had been implemented by Fromagère du Livradois in 1979, even before the "Morbier" PDO was obtained and that they were not based on characteristics that Interprofessional Union or its members had created. He also noted that the horizontal blue line is an ancestral technique that can be found in other cheeses. He noted that the two cheeses could not be equated by the characteristics of vegetable carbon since that for several years, Fromagère du Livradois had replaced it with grape polyphenol and that there were other differences, in particular in that Montboissié used pasteurized milk and Morbier used raw milk, an essential characteristic since the public for which Montboissié intended is that of canteens and hospitals. He deduced that Interprofessional Union was trying to extend the protection enjoyed by the name "Morbier" in an illegitimate commercial interest and contrary to the principle of free market.

17. In so determining, while a PDO is not strictly protected against the use by a third party of the registered name, but also against the reproduction of the nature or appearance characterizing the product covered by the registered name when such reproduction is likely to lead the consumer to believe that the product in question is covered by the PDO, the Court of Appeal, which did not investigate whether the horizontal blue line was not a reference characteristic and particularly distinctive of "Morbier" cheese and, if so, whether its reproduction combined with all the relevant factors of the case, was not likely to mislead the consumer as to the true origin of the product marketed under the name "Montboissié", deprived its decision of legal basis.

Interprofessional Union seized the court of referral and in its final submissions asks the court to:

- Overturn the judgement rendered by the Paris District Court on April 14, 2016, insofar as it:

- Dismissed all of its claims,
- Ordered it to pay Fromagère du Livradois the sum of 4,000 euros on the basis of Section 700 of the Code of Civil Procedure,
- Ordered it to pay all costs,

- To confirm the judgement rendered by the Tribunal de Grande Instance of Paris on April 14, 2016, insofar as it dismissed the counterclaim of Fromagère du Livradois for abuse of process,

And, ruling again,

- To hold that producing and offering for sale a cheese marketed under the name "Montboissié" reproducing the characteristics of the PDO "Morbier" cheese, in particular the central and horizontal dark stripe, a reference characteristic and particularly distinctive of Morbier cheese, Fromagère du Livradois has infringed the PDO "Morbier", its cheese in this form and appearance being likely to mislead the consumer as to its true origin,

- Prohibit Fromagère du Livradois from infringing the protective provisions of Regulation (EU) 1151-2012 and in particular from making any direct or indirect commercial use of the PDO Morbier name for products that it does not cover, from misusing, imitating or evoking the PDO Morbier, or from making any other false or misleading indication of the origin, nature or essential qualities of the product by any means whatsoever which would

be likely to create an false impression as to the origin of the product, any other practice likely to mislead the consumer as the true origin of the product, and especially any use of a horizontal dark line separating two parts of the cheese,

- Order Fromagère du Livradois to pay the sum of 90,000 euros in damages as compensation for its moral prejudice,
- Order Fromagère du Livradois to pay it the lump sum of 137,000 euros in damages for its economic loss,
- Order the publication of the decision to intervene by extracts in a maximum of 3 press supports, of its choice,
- Order Fromagère du Livradois to pay the cost of publication in the periodicals it chooses, up to a limit of 30,000 euros (excluding taxes) per publication,
- Order Fromagère du Livradois to pay Interprofessional Union the sum of 131,904 euros under Sections 639 and 700 of the Code of Civil Procedure,
- To dismiss all the claims from Fromagère du Livradois,
- Order Fromagère du Livradois to pay all costs in accordance with the provisions of Section 699 of the Code of Civil Procedure, as well as the reimbursement of the bailiff's fees incurred in serving the upcoming decision.

By its final submissions, Fromagère du Livradois asks the court to:

Primarily:

- Confirm the judgement insofar as it dismissed all the claims, conclusions and allegations from Interprofessional Union and order it to pay the costs of the first instance as well as the sum of 4,000 euros to Fromagère du Livradois pursuant to Section 700 of the Code of Civil Procedure;
- To hold that it is not established that their production and marketing of the cheese made from pasteurized milk that it has been producing in Auvergne since 1979 and that it has been marketing since 2007 under the name Montboissié du Haut Livradois, would be liable to mislead the average European consumer, who is reasonably well informed and reasonably observant and circumspect, as to its origin, or to prejudice the protected name Morbier and that Interprofessional Union fails to demonstrate wrongful conduct attributable to Fromagère du Livradois;
- To overturn the judgement, but only insofar as it dismissed its counterclaims;
- and ruling again, order Interprofessional Union to compensate it by paying a sum of 50,000 euros for the abuse of process and for the moral prejudice it suffered;

In the alternative:

- To dismiss all Interprofessional Union's general and imprecise prohibition requests, vexatious requests for judicial publication and claims for compensation or to reduce them to more adequate proportions;

In any case:

- Order Interprofessional Union to pay it the sum of 100,000 euros to indemnify it pursuant to Section 700 of the Code of Civil Procedure, as well as Sections 639 and 699 of the Code of Civil Procedure, to pay all the costs of the proceedings, including the costs of the bailiffs who will be hired to serve the upcoming judgement.

The first question for which the Court is seized is whether the horizontal blue line constitutes a reference characteristic and particularly distinctive of the cheese of designation of origin "Morbier".

Interprofessional Union argues that it only objects to the fact that the disputed cheese "Montboissié", which already reproduces all the visual characteristics of the PDO

Morbier cheese, also reproduces its central and horizontal dark stripe, a distinctive characteristic of purely ornamental, not fulfilling any technical function and is in no way required by the method of production of this cheese of designation of origin.

It specifies that the reproduction of visual elements of a product covered by a PDO is prohibited if it concerns an element "characterizing a PDO" and if "this reproduction is likely to lead the consumer to believe that the product in question is covered by this registered name". It adds that by producing and offering for sale a cheese reproducing the appearance of the cheese covered by the PDO Morbier, in particular the central dark horizontal and horizontal stripe, which is the reference characteristic and particularly distinctive of the PDO "Morbier" cheese, Fromagère du Livradois has infringed this PDO, which is protected under section 13 of Regulation (EC) No 510/2006 of March 20, 2006 and (EU) n°1151/2012 of November 21, 2012 and of section L.721-8 of the intellectual property code, against any practice likely to mislead the consumer as to the true origin of the product.

Fromagère du Livradois contends that the marketing of Morbier cheeses produced outside the reference area of the designation for several decades, the use by numerous products of all or part of the characteristics claimed by Interprofessional Union marketed in France, in Europe and outside Europe and the practice of downgrading operated with the assent of Interprofessional Union, demonstrate that the characteristics of Morbier cheese, and in particular the central and horizontal dark stripe, are not particularly distinctive characteristics of the PDO "Morbier" cheese or of its origin and that thus their use cannot be considered as a practice liable to mislead the consumer within the meaning of section 13.1 of the Regulation. It maintains that by incriminating the marketing of Montboissié du Haut Livradois in the form it has been marketed since 1979, on the basis of "studies", Interprofessional Union is illegitimately trying to extend the protection to which the designation is entitled and pursues an illegitimate commercial interest.

First of all, it will be noted that the protection of traditional products "with specific characteristics linked to their geographical origin" is the ultimate objective of the PDO and protected geographical indication (PGI) of the PDO and PGI regulations, that the protection granted to these terms is only an instrument at the service of this objective and that its scope must, therefore, be interpreted in the light of that objective (paragraph 26 of the submissions from general counsel in Case C-490/19).

Likewise, as general counsel recalled in his submissions (paragraph 36), Section 13(1)(a) to (d) of Regulations No 510/2006 and 1151/2012 provides for a wide range of protection, which covers, on one hand, the use, misuse and evocation of the protected designation and, more generally, any parasitic practice looking to profit from the reputation of this name by association with it, and, on the other hand, any conduct susceptible to create a risk of confusion between the products benefiting from such a name and conventional products. It aims to prevent the misuse of protected geographical indications, not only in the interest of buyers, but also in the interest of producers who have made efforts to ensure that their products contained the qualities expected of products legally bearing such indications.

It is not disputed that the PDO is not intended to cover the characteristics of the product as specified in the specifications of a product covered by a registered name, as the CJEU recalls in paragraph 36 of the judgment of December 17, 2020. Nevertheless, PDOs are



protected insofar as they designate a product that has certain qualities or characteristics, and the PDO and the product covered by it are closely linked (point 37 of the above-mentioned judgment).

The fact that the protection of Section 13 of the abovementioned European regulations relates primarily to the name and does not expressly protect the characteristics of the specification, does not rule out the possibility that their inclusion may, in certain cases, constitute a practice likely to mislead the consumer.

In its judgment of December 17, 2020, the CJEU stated that "with regard to the question whether the reproduction of the nature or appearance of a product covered by a registered name may constitute a practice prohibited by the respective Sections 13, (1)(d) of Regulations No 510/2006 and No 1151/2012, it should be noted that, as argued by Fromagère du Livradois and the EC, the protection provided for by these regulations the protection provided for by these provisions is, according to their very terms, for the registered name and not for the product covered by it. It follows that this protection is not intended to prohibit, *inter alia*, the use of producing techniques or the reproduction of one or more of the characteristics indicated in the specifications of a product covered by a protected designation, on the grounds that they appear in that specification, to make another product not covered by the registration.

Nevertheless, as general counsel pointed out in paragraph 27 of his submission, a PDO is, under Sections 5(1)(a) and (b) of Regulation No 1151/2012 which essentially reproduces the wording of Section 2(1)(a) and (b) of Regulation No 510/2006 510/2006, a designation which identifies a product as originating in a specific place, region or, in exceptional cases, a country and which qualities or characteristics are essentially or exclusively due to the geographical environment, including natural and human factors. PDOs are therefore protected insofar as they designate a product that has certain qualities or characteristics. Thus, the PDO and the product covered by it are intimately linked.

Therefore, regarding the non-exhaustive nature of the expression "any other practice" comprised in respective Sections 13(1)(d) of Regulations 510/2006 and 1151/2012, it cannot be excluded that the reproduction of the nature or appearance of a product covered by a registered designation, without that designation appearing either on the product in question or on its packaging, may fall within the scope of these provisions. This will be the case if the reproduction is likely to mislead the consumer as to the true origin of the product in question (paragraphs 36, 37 and 38).

Whether the reproduction of the nature or appearance of a product covered by a registered designation, without that designation appearing either on the product in question or on its packaging, is susceptible of falling within the scope of Sections 13(1)(d) of the abovementioned regulations, reference must be made to the perception of an average European consumer, who is reasonably well informed and reasonably observant and circumspect and to take account of all relevant factors in the case in question, including the presentation to the public and the marketing of the products in question and the factual context (paragraph 39 of the (paragraph 39 of the CJEU judgment).

In a case concerning the interpretation of Sections 13(1)(b) of the above-mentioned Regulations, the CJEU ruled (judgment of May 2, 2019, Case C-614/17) that "the concept

of average consumer, who is reasonably well informed and reasonably observant and circumspect", to the perception of which the national court must focus on in order to determine the existence of an "evocation", within the meaning of Section 13(1)(b) of Regulation No 510/2006, must be understood as referring to European consumers, including consumers in the Member State in which the product is produced or to which the product is geographically linked, and in which it is predominantly consumed". The CJEU specifies in paragraph 48 of its judgment that "if the effective and uniform protection of registered designations requires that no account be taken of circumstances capable of excluding the existence of an evocation only for consumers in a Member State, that requirement does not require that an evocation assessed in relation to the consumers of a single Member State is insufficient to trigger the protection provided for in Section 13, (1)(b) of Regulation 510/2006" (see also paragraph 64 of the CJEU judgment of 9 September 2021 of 9 September 2021 C-783/19).

These last decisions are to be taken into account contrary to what Fromagère du Livradois maintains, in order to assess whether the nature and appearance of the product as a particularly distinctive reference characteristic evoke for the European consumer, who is reasonably well informed and reasonably observant and circumspect, the product covered by protected designation and origin, and therefore whether the use of this particularly distinctive reference characteristic, combined with other relevant factors, is likely to mislead the consumer as to the true origin of the product.

It is indeed the same consumer who must be taken into consideration to assess whether the appearance of the product constitutes a particularly distinctive reference characteristic and whether the reproduction of this characteristic is likely to deceive the consumer as to the consumer about the origin of the product.

It appears from the evidence provided at the hearing and the submissions from Interprofessional Union that the horizontal central dark stripe in the center of the Morbier PDO cheese is certainly included in the specifications approved by Decree No. 2011-441 of April 20, 2011, but it does not have a technical function nor does it result from the producing process of the cheese of origin, the technique of making Morbier cheese, which was originally done twice, the producer then using a layer of soot between the two milking, probably to avoid a poorly controlled mold layer, has not been in use for many years, the central stripe being nevertheless kept as a sign of recognition.

In this respect, the argument from Fromagère du Livradois that many cheese producers use this characteristic of the dark stripe is moot. Indeed, in addition to the fact that for some of them the presence of such a line is due to the aromatization of the product with truffles, herbs ..., other products are clearly distinguished from Morbier by their nature or their texture, and if this is not the case, the comments compare them to Morbier cheese, as it appears in particular from the Sections devoted to the English cheese "Ashcombe cheese" (Exhibit 29, Interprofessional Union).

In the same way, the fact that certain producers have used the name Morbier and the characteristics of this cheese such as the dark line to market a fresh cheese produced near its region of origin, is irrelevant, the reputation of Morbier cheese remains attached to the traditional matured product made in the name Morbier has not become the common name for a type of cheese, as decided by the Conseil d'État in its decision

dated November 5, 2003, rejecting the application for the annulment of the decree dated December 22, 2000, concerning the designation of origin Morbier.

It appears, moreover, from the surveys submitted at the hearing and in particular the one carried out by the company Occurrence in March 2020 (Exhibit 11, Interprofessional Union), not seriously contested by the respondent, among 1,200 people in three European countries, France (600), Germany (300) and the Netherlands (300), that if only 4% of the respondents, half of whom are French of origin, spontaneously cited "Morbier" cheese as a protected designation of origin cheese, this designation of origin is nevertheless known to a majority of them (63%) when it is expressly mentioned among others in the question, and is identified among several images of cheese by 51% of the respondents. Finally, of the 57% of respondents who cited a visual element of recognition for recognition of Morbier cheese, 47% said they could recognize "Morbier" cheese by the central dark line.

According to the Ifop survey (Exhibit 66, Fromagère du Livradois) conducted between February 2 and 18, 2022, among 6542 European consumers in 9 countries (Germany 15.4%, France 15.4%, Italy 15.4%, Spain 11.6%, Poland 11.6%, Netherlands 7.7%, Greece 7.7%, Sweden 7.7% and Portugal 7.7%), who are shown strictly a photograph of the Morbier cheese, without label, from the official website fromage-morbier.com, 81% of the country of origin of this cheese and 89% of them do not know its name. Interprofessional Union noted that in this survey, the detail of the responses by nationality is not communicated and does not allow to assess the relevance of the answers for the representative European consumer, notably the consumer from France or neighboring countries.

The survey of May 30, 2022, conducted at the request of Interprofessional Union (Exhibit 38) exclusively among French consumers (1001) who were presented with the same photograph as the Ifop study, shows that the majority of respondents (75% or 748 people) said they knew this cheese and, among them, 73% or 544 people refer to it as Morbier, 92% of them (500 people) having recognized it thanks to the middle band/line.

It follows from the above that for European consumers, as defined by the above-mentioned case law from the CJEU, who are familiar with the designation of origin Morbier, the existence of an evocation can be assessed in relation to the consumers of several Member States or even of a single one, the dark central stripe is an element that allows this cheese to be recognized as a designation of origin for about half of them.

Consequently, the horizontal blue line evokes for an average European consumer who is reasonably well informed and reasonably observant and circumspect a reference characteristic and particularly distinctive of the cheese of designation of origin "Morbier".

In this respect, Fromagère du Livradois does not sufficiently invoke the practice of marketing of downgraded products that cannot benefit from the designation of origin because they do not comply with the specifications but use the distinctive characteristics of the cheese of designation of origin Morbier, as this practice has not been demonstrated by the respondent. The certified report drawn up on December 3, 2014 (Exhibit 44, Fromagère du Livradois) which overviews the marketing of a "2nd choice" Morbier cheese, as well as Exhibits 71 and 81, which are photographs of "2nd choice" Morbier cheeses, of which the conditions of production are unknown to the court and therefore cannot be retained for lack of probative value. In any case, the cheese described in the

forementioned certified report bears the logo of the designation of origin and cannot be assimilated to a "downgraded product".

Similarly, the fact that a member of Interprofessional Union, the company Fromagerie Perrin, markets a pasteurized milk cheese similar to Montboissié under the name of Bleuets or Secret de Scey, is irrelevant in this case, as the absence of exclusion of this company by Interprofessional Union is not sufficient to show that the latter tolerated practices which, in any case, are not sufficient to remove the blue horizontal line as a reference characteristic of quality.

It is therefore necessary to determine whether the reproduction of this horizontal blue line, combined with all the relevant factors of the case, is liable to mislead the consumer as to the true origin of the product marketed under the name "Montboissié".

As Interprofessional Union argues, the mere reproduction of one or more black stripes on a cheese is not in itself wrong (p. 27 of its pleadings), and it is necessary to investigate whether other visual characteristics of the cheese likely to give rise to a risk of confusion in the mind of the consumer are included. Therefore, Fromagerie du Livradois mistakenly invokes a desire on the part of Interprofessional Union to use the protection offered by the Regulation of the European Union in order to prohibit the production of any cheese which would present a "stripe of any color whatsoever".

It appears from the information provided at the hearing that the cheese marketed under the name "Montboissié" since 2007 was previously distributed from 1979 to 2007 under the name Morbier.

According to the certified report drawn up by a bailiff on August 18 and 19, 2021 (Exhibit 12, Interprofessional Union), the cheese sold under the name Montboissié (purchased wheel) is cylindrical in nature, 6 cm high and 25 cm in diameter. Once cut in slices, the bailiff notes that the cheese sticks to the knife, ivory color, presenting a light opening with small, flattened holes and that a stripe of dark color appears in the central and horizontal part.

Interprofessional Union, invoking Section 2 of the specifications of the designation of origin, deduced from this observation that these characteristics of shape and appearance of Montboissié cheese are identical to those of Morbier cheese.

It appears from a report drawn up by a bailiff on May 27, 2022, at the request of Fromagère du Livradois (Exhibit 82) that the wheels of Montboissié cheese and Morbier cheese are of different sizes, with the Morbier wheel being significantly larger than the Montboissié one and that the appearance of the rind is not identical, that of Morbier not being uniform and having small round cavities whereas that of the Montboissié is regular and homogeneous and appearing more checkered. Moreover, the bailiff notes that Morbier cheese is homogeneous, of ivory color, has small, pronounced cavities on the whole cheese and a horizontal and continuous central black stripe. As for the Montboissié cheese, the bailiff noted that it is homogeneous of ivory color with some small, scattered cavities, the presence of a horizontal central purple stripe fading on the ends of the slice.

Fromagère du Livradois then invokes these differences in appearance (size of the cheeses, color of the rind, texture and color of the inside, color and length of the line

constituted by grape must for the Montboissié cheese, which gives a purple or even pink color and not the black color of the vegetable coal of the Morbier cheese, labelling with the PDO logo and the words "made from raw milk" for Morbier cheese) and adds composition - raw milk for Morbier cheese, pasteurized milk for Montboissié cheese which, according to the respondent, is of great importance, raw milk being the "D.N.A." of Morbier cheese and an essential factor for the consumers, some of whom cannot consume raw milk. It also points out the differences in the names of the cheeses, with the labelling precisely indicating the origin and the cheeses being distributed through different channels (collective restaurants, schools, and health care facilities for Montboissié cheese), to conclude that there is no risk of confusion.

Nevertheless, it is clear from the various reports drawn up by bailiffs on various websites or social networks such as Facebook in August and October 2021 (Exhibits 14 to 19 and 21, Interprofessional Union), that Montboissié cheese is likened to Morbier cheese by French and Danish consumers in particular, and that this assimilation is also done by professionals.

It also results from the above-mentioned survey conducted by Occurrence in March 2020, that 83% of the participants who were presented with a photograph displaying, side by side, a quarter of a wheel of Montboissié cheese (left) and Morbier cheese (right), answered that the cheese on the left of the photo could be confused with Morbier cheese (on the right of the photo).

It also results from the elements provided at the hearing such as the certified reports, that Montboissié cheese, like Morbier cheese, is most often presented to the consumer not in the form of a wheel but already cut in slices, revealing an almost identical texture of ivory color with small cavities and a central stripe of dark color.

Similarly, it is not established that Montboissié cheese uses different distribution channels from those of cheese of designation of origin Morbier, Montboissié cheese being distributed by large chains such as Intermarché (Exhibit 49, Fromagère du Livradois) or Promocash (Exhibit 21, Interprofessional Union).

These observations, which are made in France and in the European Union show that the general appearance of Montboissié cheese, both in terms of its shape and its color, its orange-colored rind, its ivory-colored interior comprising small cavities and in its center a darker line crossing it from one side to the other, evokes of the cheese of designation of origin Morbier and is susceptible to mislead the consumer as to the true origin of the product, the consumer associating it with Morbier cheese because of its appearance, the differences in the composition of the cheese or in the color of the central line being insufficient to rule out this risk of confusion, as are the differences in the labelling and the name.

The fact that these findings are made on third-party websites of which the respondent is not the individual publishing the content, is not such as to exclude the liability of Fromagère du Livradois, the risk of confusion noted above resulting from its own choices as to the characteristic visual elements of the Montboissié cheese, the prohibited use of the name MORBIER within the meaning of Section 13, (1)(a) not being at issue here.

The violation of the designation of origin Morbier pursuant to Sections 13, paragraph 1 d) of the European regulations is thus characterized even though, before the delimitation of the registered designation of origin Morbier in 2000, many producers located both inside and outside the geographical area defined in the decree of December 22, 2000, delimiting the designation of origin, including Fromagère du Livradois since 1979, have produced "Morbier" cheeses, those located outside the geographical area having had to stop using the name "Morbier" after July 1, 2007 while continuing to produce the same cheese continue to produce the same cheese, including the dark central stripe, which they now market under a different name.

Indeed, the reproduction of the distinctive characteristic of Morbier cheese, which is the dark central stripe, combined with the use of all the characteristics of shape and appearance of the cheese of designation of origin constitutes the evocation of the name Morbier in what the consumer in the presence of Montboissié cheese is led to have in mind, as a reference image, Morbier cheese.

The present judgment will therefore be reversed insofar as it dismissed all Interprofessional Union's claims.

#### On remedial measures

The measures of prohibition sought by Interprofessional Union appear justified in application of the provisions of Section L. 722-1 of the Intellectual Property Code and will be accepted in the terms of the order, it being noted that Interprofessional Union does not seek that this prohibition measure be accompanied by a penalty payment.

In addition, according to the provisions of Section L. 722-6 of the Intellectual Property Code:

"In order to fix the damages, the court shall take into consideration separately:

1° The negative economic consequences of the infringement, including the loss of profit and the loss suffered by the aggrieved party;

2° The moral prejudice caused to the aggrieved party;

3° And the profits made by the infringer, including the savings in intellectual, material and promotional investments that the infringer has made as a result of the infringement.

However, the court may, as an alternative and at the request of the aggrieved party, award as damages a lump sum. This sum is not exclusive of compensation for the moral prejudice caused to the aggrieved party.

Interprofessional Union claims the allocation of the sums of 90,000 euros as compensation for moral prejudice and the lump sum of 131,904 euros as compensation for economic prejudice.

As Interprofessional Union points out, its mission is to defend the Morbier PDO and the collective interest of its members, producers of Morbier PDO cheese. It is therefore entitled to claim compensation for the damages caused to the collective interest of its members because of the damage caused to the Morbier PDO.

Consequently, Fromagère du Livradois by marketing a cheese susceptible to create a risk of confusion in the mind of the consumer with Morbier PDO cheese, as the production of

this cheese is not subject to the constraints of the designation of origin and does not have the same taste properties, has damaged the reputation of the designation of origin by debasing and trivializing it. The respondent's argument that the health risks related to cheeses made from raw milk would be much more damaging to the image of the designation, is in this respect inoperative.

Similarly, Fromagère du Livradois has benefited from investments made by the profession of PDO Morbier cheese producers to promote their product, Interprofessional Union indicating having invested 1,378,813 euros in advertising and promotion between 2013 and 2020 (Exhibit 26, Interprofessional Union).

In view of the foregoing and the elements made available to the court, knowing that the present proceedings were initiated in 2013 and that it is not disputed that the sale of Morbier PDO cheeses has been constantly increasing between 2013 and 2018, it must be considered that the prejudice suffered by Interprofessional Union due to the harm done to the collective interest of the PDO Morbier cheese producers will be fully compensated by the award of 5,000 euros as compensation for moral prejudice and 10,000 euros as compensation for economic prejudice.

The length of time and the circumstances of the dispute do not justify the measures of judicial publication requested, which do not appear justified nor proportionate. Interprofessional Union's claims in this respect will be dismissed.

#### On the request of Fromagère du Livradois for abusive procedure

Interprofessional Union's claims having been successful, Fromagère du Livradois' claim for damages for abuse of process will be dismissed.

For these reasons, the judgment should be confirmed on this count.

#### On other requests

The meaning of the judgment leads to the reversal of the provisions of the judgment concerning costs and irrecoverable expenses.

The losing party, Fromagère du Livradois, is ordered to pay the costs of the proceedings at the trial level and on appeal and to pay Syndicat Interprofessionnel de Défense du Fromage Morbier pursuant to Section 700 of the French Code of Civil Procedure, an indemnity, which will be, in equity, fixed at the lump sum of 50,000 euros in respect of irrecoverable expenses at the trial level and on appeal, the respondent's claims in this respect being dismissed.

### **THEREFORE**

The court, within the limits of its seisin,

Sets aside the judgement referred to, except insofar as it dismissed Fromagère du Livradois' claim for abuse of process,

Ruling again,

Says that by producing and offering for sale a cheese marketed under the name "Montboissié" reproducing the central dark horizontal stripe, a reference characteristic and particularly distinctive of the cheese of designation of origin Morbier, combined with the characteristics of the shape and appearance of the designation of origin Morbier cheese, Fromagère du Livradois has violated the PDO "Morbier", as this cheese in this shape and appearance is susceptible to mislead the consumer as to its true origin,

Prohibits Fromagère du Livradois from producing and offering for sale a cheese reproducing the central and horizontal dark stripe, a reference characteristic and particularly distinctive of Morbier cheese, combined with the reproduction of the shape and appearance of the designation of origin Morbier cheese, this, within three months of the service of this judgment,

Orders Fromagère du Livradois to pay Syndicat Interprofessionnel de Défense du Fromage Morbier the sum of 5,000 euros in damages, as compensation for its moral prejudice,

Orders Fromagère du Livradois to pay Syndicat Interprofessionnel de Défense du Fromage Morbier the sum of 10,000 euros in damages, as compensation for its economic loss,

Dismisses Syndicat Interprofessionnel de Défense du Fromage Morbier's claim for judicial publication,

Orders Fromagère du Livradois to pay to Syndicat Interprofessionnel de Défense du Fromage Morbier the sum of 50,000 euros in respect of the irrecoverable expenses at the trial level and appeal,

Dismisses Fromagère du Livradois' claims under Section 700 of the Code of Civil Procedure,

Orders Fromagère du Livradois to pay the costs at the trial level and appeal which may be recovered pursuant to the provisions of Section 699 of the Code of Civil Procedure.

The Clerk

The Council member,  
Acting as President



