

Evocation in the Swiss Legal System & Jurisprudence

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Legal Framework

- Federal Act on Agriculture
- Federal Act on the Protection of Trademarks and Indications of Source
- PDO/PGI Ordinances
- Federal and cantonal legislations on GIs for wine
- Geneva Act of the Lisbon Agreement (WIPO)
- Bilateral agreements, such as the EU-Switzerland Agreement on trade in agricultural products (Agreement on Agriculture)

Evocation

Definition

❑ Switzerland →

No clear definition of the term 'evocation' in Swiss law

❑ EU →

Evocation of a geographical indication may arise, in particular, where **a link with the product** designated by the registered geographical indication, including with reference to a term, sign, or other labelling or packaging device, is present in the mind of the average European consumer who is reasonably well-informed, observant and circumspect.

PDO/PGI Ordinance for Agricultural Products (1997)

Art. 17: Scope of protection

- 1) The direct or indirect commercial use of a protected name is prohibited.
...
- 2) Paragraph 1 applies in particular where:
 - a. the protected name is imitated or evoked;
...
- 3) *The following are also prohibited:*
 - (a) any false or misleading indication as to its true origin, provenance, manufacturing process, nature or essential characteristics on the inner or outer packaging, advertising material or accompanying documentation of the product;
 - (b) any use of a container or packaging which could give rise to a false impression as to the origin of the product;
 - (c) any use of the specific shape of the product referred to in Article 7 (2) (b).

PDO/PGI Ordinance for Non-Agricultural Products (2015)

Art. 19: Scope of protection

- 1) Any commercial use of a denomination protected under this Ordinance is prohibited. ...
- 2) Paragraph 1 applies in particular if:
 - a. the protected denomination is imitated or evoked; ...
- 3) *The imitation of a protected denomination or the evocation within the meaning of paragraph 2 letter a shall consist in particular of:*
 - (a) any false or misleading indication about the origin of the product, the manufacturing process, the nature or essential characteristics of the inner packaging, outer packaging, advertising material or documentation of the product;
 - (b) any use of a container or packaging which may create a misleading impression about the origin of the product;
 - (c) any use of the distinctive shape under Article 6 paragraph 2 letter b.

Evocation

1. **Visual or Phonetic Similarity** (similarity between the names of the two products) → Partial reproduction of one or more elements of the name of the protected GI in one of the verbal elements of the disputed name → imitation of the name of the protected name

2. **Conceptual Proximity**
 - a) Between the two names (without visual or phonetic similarity)
 - b) Similarity in the characteristics of the packaging / use of a figurative or verbal sign referring to the geographical area from which the GI originates
 - c) Similarity in a characteristic of the GI product itself

Evocation

Conceptual Proximity

- ✓ no visual or phonetic similarity between the two names
- ✓ no partial repetition of part of the protected name in the other name

but rather

- ✓ conceptual proximity between a product name or characteristic and a protected denomination

Evocation

Conditions for evocation by conceptual proximity:

- 1) it essentially applies to **products** 'of the same type',
- 2) a **direct link** between the GI product and the other product is created in the consumers' mind, i.e. when they see the product, they think of the GI product
- 3) there must be a **risk of confusion** for the consumer between the two products



Evocation

Conceptual Proximity

Similarity of characteristics or presentation of the product itself

Tête-de-Moine vs Fratello/Mönchskopf (2013)



The case was reported to the European Commission by the Swiss FOAG.

Production was stopped following intervention by the DG Agri.



Evocation

Conceptual Proximity

Similarity of packaging characteristics

Vacherin Mont-d'Or AOP vs. Försterkäse (2010)

Decision of the Federal Supreme Court:

- ✓ No similarity between the two names,
- ✓ Art. 17, para. 3, letter b, of the PDO/PGI Ordinance: Any use of a container or packaging which could give rise to a false impression as to the origin of the product is prohibited.



Evocation

Conceptual Proximity

Similarity of packaging characteristics

Vacherin Mont-d'Or AOP vs. Försterkäse (2010)

Decision of the Federal Supreme Court:

- ✓ The reputation of an appellation of origin might be exploited; the consumer can be **misled** as to the origin of the product by the use of a **specific container or packaging** or a **particular shape of the product**

but

The wooden ring used for Vacherin Mont-d'Or has no particular shape. Similar wooden rings are also used for other cheese products.

→ No infringement of the Vacherin Mont-d'Or PDO

Evocation

Visual or Phonetic Similarity

Calvados PGI vs. Thurgados (2017)

Thurgados:

- Apple brandy from the canton of Thurgau in Switzerland
- ! "dos" has no specific meaning in DE, FR, IT or Swiss dialect!

Decision of the cantonal chemist: the name alludes to the Calvados appellation and may therefore mislead consumers → the name should be adapted so that it no longer refers to AOC Calvados.

Decision of the court of appeal of Thurgau:

- No reference to the name Calvados; only the ending in the two denominations (i.e. “dos”) are identical,
- no risk of deception,
- these are not the same categories of spirits (one is made from apples and the other from cider).

Evocation rejected

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Riso al salto
 Agnolotti al Plin vegetariani
 Schöne Gärten
 Aus Wald und Wiese

Das Pays d'Auge, östlich von Caen, ist das Zentrum des normannischen Apfelanbaus; Apfelbäume prägen hier die Landschaft. Aus Äpfeln werden Calvados hergestellt und Cidre. Genauso im schweizerischen Thurgau, nur dass sich hier der Calvados Thurgados nennt, der Cidre Apfelwein. Neben Äpfeln gibts in der Normandie viel lait,



Evocation

Visual or Phonetic Similarity

Other examples:



Calvalais

- cider brandy from the Valais
(Registered in 1992)

Évocation ???

Calvabry

- cider brandy from Bry (Fribourg)

→ The product name was probably changed following an intervention and is now called “Cabryos”



Evocation

Visual or Phonetic Similarity

Champagne AOP vs. Schlumpagner (2002)

SCHLUMPAGNER and **SCHLUMPENOISE** registered for beers, soft drinks, fruit juices, mineral waters and alcoholic beverages

→ The Commercial Court cancelled both trademarks:

1. risk of confusion between the German word “Champagner” and the name “Schlumpagner”,
2. The “oise” ending is not common in German. “Schlumpenoise” differs from “champenoise” only in the “l” that follows the “sch” sound without a vowel.

❖ **The Federal Supreme Court upheld this ruling.**



Evocation

Conditions for evocation by visual or phonetic similarity:

- 1) it essentially applies to **products ‘of the same type’**,
- 2) a **direct link** between the GI product and the other product is created in the consumers’ mind, i.e. when they see the product, they think of the GI product

→ The Swiss case law seems to slightly tend to consider the “risk of confusion” of the consumer as a prerequisite for evocation by visual and phonetic similarity, which is not the case in the EU.

A few Reflections

- ✓ No definition of evocation in the Swiss law
 - ✓ Tendency of the Swiss regulations and jurisprudence (even if the case law is still limited) to consider the “risk of consumer confusion” as a prerequisite of the evocation through visual and phonetic similarity
 - ❑ *narrower interpretation of evocation in comparison to the EU...?*

 - ✓ Switzerland has a generally favourable approach to GIs
 - ✓ In Switzerland analysis and revision of regulations (such as the PDO/PGI ordinance) is a standard process, which consists of analysing and revising laws on an ongoing basis in line with developments also in the European law.
- The new EU regulations are an occasion for Switzerland to analyse new trends and the scope of protection in the EU and, consequently, an opportunity for Switzerland to adapt, if necessary, some of its GI regulations maybe also on evocation.

**Thank you very much
for your attention!**

Questions & Discussion

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