

The Netherlands

The Best Tasting Cheese: Taste Test Claims in the Netherlands

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I. Introduction

Taste is by definition subjective. But does that mean that it cannot be tested? And that the results of those tests cannot be advertised? A recent judgment of the Dutch Advertising Code Committee deals with taste test claims, and is one in a series of judgments relevant to the food sector. Time to provide a short overview.

II. Taste is subjective...

Because taste is subjective, advertisers can, in principle, freely claim that their food products are “great tasting” or perhaps even “the best you have ever tasted”. This is very similar to calling your products “great looking” or “the most beautiful thing you have ever seen”. Consumers know that these claims are subjective, and do not expect any underlying objective meaning. It is simply advertising language that should be taken with a grain of salt.

III. ...but can be compared objectively

But can taste also be compared objectively? An important legal barrier in this context is that in the European Union comparative advertising is allowed only if it “objectively compares one or more material, relevant, verifiable and representative features of those goods and services”.¹

Does taste qualify? According to the Dutch courts and self-regulation, it does. The fact that taste is subjective does not mean it cannot be objectified. This was recognised in the *Royal Canin/Hill's Pet Nutrition* case, concerning pet food.² The pet food manufacturer advertised that research showed that its new products were the preferred choice for cats and dogs, arguing that nine out of ten dogs and eight out of ten cats preferred Hill's products compared to similar

products of competitors. The Court was clear: taste is an important aspect of products like pet food, and taste comparisons in advertising are allowed as long as they are based on objective evidence.

IV. Not any test suffices

This requirement of objective evidence means that not any test suffices. The advertiser has to be able to show exactly how the test was conducted, and the methodology as well as the execution of the tests is open to scientific scrutiny. For example, taste tests should as a general rule be blind, conducted on sufficient test subjects, and include comparable alternatives. As a consequence, these types of tests have to be designed and conducted carefully. Otherwise, manufacturers end up investing significant amounts of money for tests that, as soon as they are published, are successfully challenged by competitors. In the case of Hill's pet food claims, the tests were judged to be sufficiently objective. Hill showed that it used sound scientific methods, presenting protocols on the design and execution of the tests.³

As an alternative to conducting taste tests as a manufacturer, it is also possible to rely on taste tests of third parties such as newspapers, magazines and consumer organisations. Producers can use these tests in their own advertising, but also here the tests have to be sufficiently objective. In practice, this means

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1 Article 4(c) Misleading and Comparative Advertising Directive (2006/114/EC).

2 Rechtbank Breda 16 August 2002, ECLI:NL:RBBRE:2002:AE6819, IER 2002, 58 (*Royal Canin/Hill's Pet Nutrition*). Confirmed in appeal by Hof Den Bosch 24 March 2003, ECLI:NL:GHSHE:2003:AK4762, IER 2003/54. Ebba Hoogenraad represented Hill's Pet Nutrition in the appeal procedure.

3 See, in particular, paragraphs 3.5-3.7 of the judgment.

that advertisers cannot hide behind poor tests of third parties. Rather, they become responsible for the quality of the tests, as if they were their own. For example, a taste test for ice-cream conducted by the main Dutch consumer organisation was held insufficient by the Dutch Advertising Code Committee, taking into consideration – amongst having other objections regarding the methodology – that only nineteen test subjects were included in the study. As a consequence, the advertising claims based on these tests were found to be misleading.⁴

V. Stick to the test results

Apart from basing claims on a sound study, it is also essential that claims do not exceed the results of the study. In several cases, the Dutch Advertising Code Committee applied this rule, both in relation to taste tests and other test results.⁵ The key rule is that the consumer should, on the basis of the claim, not get the impression that the test awarded more than it actually did. For example, the advertised claim “best tested laundry detergent” was found misleading because the test results referred to “white” detergent only. Although the advertisement only showed products from the “white” detergent range, the Advertising Code Committee ruled that consumers were likely to overlook this detail and understand the slogan as being applicable to the brand in general.⁶ The Advertising Code Committee repeated this reasoning in a case concerning a taste test of coffee cups for Nespresso machines. The proceedings included studies on the consumer perception of the claims, but these could not sufficiently prove that the claims were in fact misleading.⁷

4 RCC 1 August 2014, 2014/00524 (*Cornetzo*).

5 RCC 20 March 2014, 2014/00137 (*Lidl, De beste in groente en fruit*). RCC CVB 26 March 2014, 2014/00120 (*Formil*).

6 RCC CVB 26 March 2014, 2014/00120 (*Formil*).

7 RCC 8 October 2014, 2014/00673 (*Nespresso coffee cups*). Hence, in this case the taste test was found sufficient, but the survey conducted in the context of the proceedings in relation to consumers’ perceptions of the advertising claims was not. The survey was held to be insufficiently objective, taking into consideration that the questions were leading and, therefore, not sufficiently open.

8 RCC 19 March 2015, 2014/00935 (*Milner – Nationale Kaastest*).

9 For the report, see http://www.natuurenmilieu.nl/media/1424370/nationale_kaastest_2014.pdf.

VI. Small print helps

The examples above show that advertisers have to be careful, making sure that consumers’ expectations on the basis of the claims are not higher than justified by the test results. The most recent decision of the Advertising Code Committee on the topic of taste tests, in relation to cheese advertising, shows that small print in advertising helps.⁸ The case concerned a newspaper advertisement by Gouda cheese producer Milner, stating: “National Cheese Test 2014: Milner tested as best tasting”. The test was conducted by environmental interest group Natuur & Milieu, and aimed at finding “the best tasting and most environmentally friendly Gouda cheese of the Netherlands”.⁹ The test contained both an environmental test and a tasting test, the latter being conducted by seven food bloggers who awarded the highest rating to Milner.

Although the claim “tested as best tasting” is rather broad, especially for a test in which only seven Gouda cheeses were tasted, the claim was held not to be misleading by the Advertising Code Committee. Two elements were of help to Milner. Firstly, the complainant had not elaborated why the National Cheese Test provided insufficiently objective results. Secondly, and more importantly, Milner was saved by the fact that it had placed an explanation in small print in the newspaper advertisement, stating how the test was conducted and containing a clear reference to its source. As a consequence, the Commission held that it was sufficiently clear to consumers that the claims related to a small scale test performed by food bloggers, rather than elaborate consumer opinion research. Explanation helps.

VII. Closing remarks

Clearly, Dutch law and self-regulation allows for comparative taste claims based on test results. However, claims should be sufficiently grounded on objective evidence, and advertisers cannot hide behind third parties’ poor test results. Moreover, it is important for manufacturers not to get carried away while designing advertising that is based on taste tests. Still, if you stick to the facts and inform the consumer well, good tests results are great publicity.