The Netherlands

Dutch Interpretations of "Teekanne" and Related Topics

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I. Introduction

Once in a while, we are happy to give an overview of the latest food law related decisions of the Advertising Code Committee ("ACC"), the self-regulatory institution in the Netherlands. We also refer to issue EFFL 6/2015, in which we gave an overview of the most important FIC-Regulation related decisions of 2015.

The ACC (and in appeal the Court of Appeal) is known to regularly issue decisions on food law. As in the Netherlands relatively few food law cases are brought before the courts, it is important to closely follow the ACC's interpretation of food laws. In EFFL 6/2015 we concluded that ACC decisions also tend to be taken seriously by food law professionals. This is the case for advertisers, who regularly comply with the ACC decisions (the compliance rate during 2015 was 96%), but also for food lawyers and courts. Also, some interesting food laws decisions have been published so far in 2016, of which we will discuss a few.

II. Dutch Saying Analysed: "Broodnodig"

One of the largest supermarket chains in the Netherlands ran a TV commercial for its bread, which stated: "This bread only contains the bread-needed ingredients."[1] The Dutch saying "broodnodig" means something like "very essential", "core", and "much-needed". The ACC rejected the complaint that the claim "broodnodig" was misleading, considering the fact that the bread contained the ingredient *dextrose*. The advertiser explained that some types of bread still contain dextrose for the purpose of optimizing the taste of the bread. The advertiser claimed to be searching for a substitute for this ingredient, which is according to the advertiser still not existent. The ACC agreed with the advertiser: the fact that dextrose was used to optimize the taste does not mean that the claim is misleading. Lesson learned: taste is also essential!

III. Claim: "100% Allergen Free"

Recently, the ACC handled two complaints regarding the claim "100% allergen free".[2] The products concerned (a meat product and tomato soup) were claimed to be 100% allergen free. The complainant found that this claim was misleading, as some persons may be allergic to meat or tomatoes. The advertiser defended itself by stating that the products do not contain any of the allergens listed in the FIC-Regulation. However, the ACC considered the claim "100% allergen free" to be misleading. The average consumer may think that the product would not contain allergens *at all*. The ACC takes into consideration that this claim tries to attract specific consumers that need or want to avoid allergens. In so far as these consumers are not aware of the fact that these products could still contain allergens, the information could influence the economic behaviour of these consumers.

It is remarkable that the ACC specifically mentions that *even* the consumer with a specific interest in allergens could be misled by this claim. In general, the consumer with a specific background or knowledge would be *less* sensitive to such claims. Furthermore, the ACC normally only focusses on the fictitious figure "the average consumer", without making a specific assessment of "sub-groups" as in this case.

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1 ACC 14 July 2016, 2016/ 00407 (Broodnodig).

2 ACC 21 July 2016, 2016/00430 (Tomatensoep) and ACC 21 July 2016, 2016/00432 (Weilands).

IV. What's in a Name? Goody Good Stuff

In a recent case, the ACC decided on a complaint regarding a type of candy named "Goody Good Stuff".[3] The complainant argued that this name was misleading, as it suggests that this candy would be better or healthier than other candy. The complainant looked at the list of ingredients and found out that this product is not better compared to other candy, in terms of sugar and carbohydrate levels. The ACC did not agree with the complainant. The average consumer will not interpret the name of the product as a claim within the meaning of the Claims Regulation. In the unlikely situation that the consumer would interpret the name in a way that the product is better or healthier than other candy, this wrong impression will be corrected by the list of ingredients. What stands out in this case is that the ACC attaches great importance to the list of ingredients, without really taking the rest of the labelling and advertising into account. Viewed in the light of Teekanne, this could also have taken a different turn.

V. Board of Appeal: 100% Xylitol is Misleading

The ACC considered the claim "100% xylitol", which was made several times on the packaging of chewing gum, to be misleading.[4] The complainant pointed out that the list of ingredients showed that it consisted of 99.7% xylitol, instead of 100%. The chewing gum also contained a small percentage of aspartame (0.1%) and acesulfame-K (0.1%). The complainant wondered: "What if someone is allergic to aspartame?"

The advertiser pointed out that the list of ingredients is important and will be read by consumers who are interested in the composition of the product, especially the consumers that have an allergy for a specific ingredient. Furthermore, according to the advertiser, the Guidance Document of the European Commission to the FIC-Regulation allows advertisers to round off 99.7% to 100%. The packaging also mentioned: "Sugar free chewing gum, sweetened with sweeteners". The plural form would make clear to consumers that more than one type of sweetener is used. Lastly, the list of ingredients also included a warning: "contains a source of phenylalanine". All of this justifies the conclusion that the claim is not misleading, according to the advertiser.

The ACC starts by pointing out the *labelling doctrine*. The consumer who is interested in the composition of a product will read the list of ingredients. However, in this specific case, the consumer could be truly misled by all the other statements on the packaging, resulting in the feeling that the consumer does not need to check the list of ingredients anymore. Since aspartame is an ingredient that is known to trigger allergies for some consumers, it is even more important not to suggest that the product contains 100% xylitol, according to the ACC. The ACC seems to imply that in case of an allergen, there is a(n) (higher) obligation to disclose correct and unambiguous information.

The advertiser filed an appeal, referring to *Teekanne* and the ACC decision *Holy Soda*[5], but without success. The advertiser also tried to draw a parallel with claims such as "gluten free" and "alcohol free beer". These claims can be made, although the product still contains (a bit of) the ingredient. Why not apply principle to xy litol? This argument did not convince the Board of Appeal. The claims on the packaging have an absolute character, and therefore the claim 100% is unsuitable to be qualified. *100% is 100%* may be the take home message of the ACC.

VI. Court on Misleading Food Advertising: Heksn'kaas

Sporadically, some food law cases are brought before the court. The first national interpretation by a court of the ECJ decision *Teekanne* concerned the product Heksn'kaas.[6] This is a one of a kind product, and can be best described as an herb cream spread for bread. The Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*, "NVWA") found that the name was misleading because it would suggest that the product is a type of cheese.

3 ACC (chairman) 26 July 2016, 2016/00431 (Goody Good Stuff).

4 Board of Appeal 23 June 2016, 2016/00105 (100% Xylitol).

5 Discussed in EFFL 6/2015.

6 District Court of Rotterdam 13 May 2016, ECLI:NL:RBROT:2016:3513 (*Heks'nkaas*).

The court referred to *Teekanne* and concluded that the name was *not* misleading. The court found that the list of ingredients was correct and crystal clear. The list of ingredients started with the name of the product: *spread with 16% cream cheese and fresh herbs*. The average consumer will not be misled because the list of ingredients clearly indicates that the product is made *of* 16% cream cheese, and it does not refer to other ingredients that could lead to a different interpretation. Also, the rest of the labelling does not lead to the conclusion that the product would be or would contain cheese. Conclusion: "Heksn'kaas" can keep its name. The court also included in its decision that the hypothetical name "spread *of* cream cheese and fresh herbs" may be misleading, since in that case the name would suggest that the product is made of cream cheese. This is very interesting because it seems that the court feels the need to give guidelines on when a product label could be misleading. A very slight amendment (using the word "of" instead of "with") could make the difference between misleading and non-misleading advertising. Of course, according to Teekanne, this highly depends on the design of the rest of the labelling.[7]

VII. Conclusion

Both the ACC/Board of Appeal and the courts seem to be fully aware of Teekanne and its implications. Although in some cases these institutions seem to follow their own course, the bottom line is that all elements of the packaging are being taken into account in case of allegedly misleading advertising. Over time, individual decisions in specific cases slowly form a clear (new) doctrine that can be used to assess (misleading) advertising.

7 It is remarkable that this case does not focus on the question whether or not the product complies with the requirement to use the name "cheese". These rules are implemented in the Dutch Commodities Act Decree for Dairy.