

Netherlands

Recent FIC Rulings of the Dutch Advertising Code Committee

The Dutch Advertising Code Committee: a force to reckon with

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Like many countries, the Netherlands has an active self-regulatory body dealing with advertising regulations. The Advertising Code Committee (ACC) applies regulations on misleading and comparative advertising, which have their basis in statutory law. The ACC also applies specific self-regulatory codes on for example advertising directed at children and food advertising. Moreover, in recent years the ACC has become significantly more active in applying specific statutory food regulations, such as provisions on food information (FIC Regulation) and on nutrition and health claims (Claims Regulation). The aforementioned makes the ACC a force to reckon with in Dutch food law: especially since the ACC also decides over product packaging – even though it is not advertising in its strict meaning. A good reason for ACC-watching, and to discuss three interesting recent judgments of the ACC applying the FIC Regulation. All three judgments concern (supposedly) misleading product packaging.

Alpro Pur'Enjoy: deception as to added sugar?

Background

The *Alpro Pur'Enjoy* ruling deals with possible deception as to the characteristics and ingredients of a food product.¹ Alpro Pur'Enjoy is a soy milk product with fruit flavouring. The product is presented in the Netherlands using the claim “*geen zoetstoffen*”. This translates into English as “*no sweeteners*”, but in Dutch it strictly means “no artificial sweeteners”. The more general meaning of “sweetener” in Dutch would be “*zoetmiddel*” rather than “*zoetstof*”. We can imagine that this language game confuses you, and you are likely not to be the only one. In fact, the subtle difference between “*zoetstof*” and “*zoetmiddel*” is likely to cause confusion to the Dutch audience as well. This difference is important in this case, because the product that

bears the claim that it does not contain “*zoetstoffen*” (artificial sweeteners), does in fact contain “*zoetmiddel*” (sweetener), in the form of regular sugar.

Complaint

A complaint was brought before the ACC. The substance of the complaint: consumers are likely to think that Alpro Pur'Enjoy does not contain any sweeteners, while it does contain a significant amount of sugar. The complainant argues that the consumer does not understand the subtle difference between “*zoetstof*” and “*zoetmiddel*”, and expects that the product contains nor sugar, nor other sweeteners.

Ruling

According to the ACC, consumers may indeed be confused at first. They may think that the product is both free of artificial sweeteners and sugar. Nevertheless, the ACC does not find the product packaging misleading. The ACC argues that despite possible initial confusion, the consumer finds out about the actual ingredients while reading the table of ingredients, which clearly states that the product contains sugar. Moreover, a claim on the side of the packaging states that the product contains 30% less sugar than similar products in the market, which also indicates that the Alpro Pur'Enjoy does contain sugar.

Teekanne

The relationship between the table of ingredients on the one hand and potentially misleading elements of product packaging on the other, has been topic of dis-

* Hoogenraad & Haak advocaten, <<http://www.hoogenhaak.nl>>.

1 ACC 15 September 2015, 2015/00766 (*Alpro Pur'Enjoy*).

cussion for many years. Until recently, the main rule was that a correct table of ingredients in principle takes away the deceptive nature of the other elements on the product packaging.² However, that rule was nuanced recently in the *Teekanne* judgment of the European Court of Justice.³ The Court ruled that the test for deception concerns the entire product packaging. The assumption is still that the consumer looks at the entire packaging, but this does not exclude the possibility that other elements may still mislead the consumer. In short: the product packaging must be assessed as a whole in order to decide whether it is misleading or not.

Discussion

Although the ACC in its decision does not refer to the *Teekanne* judgment, it does take into account the product packaging as a whole. Still, one can imagine that the judgment could also have been different, ruling that the misleading elements are not sufficiently compensated for by the other elements. It remains to be seen what the new border will be between (legally) seducing consumers and (unlawfully) misleading consumers, both in European and in Dutch case law.

TV commercial

Apart from the product packaging, the Alpro Pur'Enjoy case also concerns a TV commercial for the same product. In that commercial, Alpro claims that the product is pure, 100% natural and that it does not contain *zoetstoffen* (i.e. artificial sweeteners). In the commercial, the consumer is not informed about the actual ingredients, as is the case for the product packaging. Consequence: this advertisement is found misleading by the ACC.

Holy Soda: holy as such

Complaint and background

Another recent case at the ACC concerns a soft drink of Vrumona marketed as "100% natural".⁴ The com-

plainant argues that the claim 100% natural is misleading, as the soft drink contains steviol glycosides. To substantiate the claim, the complainant refers to a website titled "*Many companies do wrong with description stevia*".

Holy Soda defends the use of the claim by referring to the website of the Dutch Food and Consumer Product Safety Authority (NVWA). This website states that when the ingredient steviol glycosides is used in a product, it is permitted to use the phrases "*with natural sweeteners*" and "*sweetened with natural ingredients*" on the label. Furthermore, Vrumona points out that the article mentioned by the complainant, is exclusively based on the situation in Belgium in 2012. According to Vrumona, the article should thus be disregarded. Vrumona also makes clear that the mere fact that an additive bears an E-number, does not necessarily mean that it is not natural. Finally, Vrumona emphasised that all other ingredients of Holy Soda (water, fruit juice derived from concentrate and natural flavouring) are natural as well.

Ruling

The ACC follows the arguments of Vrumona and rejects the complaint. In its ruling, the ACC also takes into account that the list of ingredients included the statements "*this is from a plant*" and "*naturally sweetened with stevia extract*". The ACC therefore concludes that the context of the term "natural" in relation to steviol glycosides is made sufficiently clear to the average consumer. The ACC also decides in favour of Vrumona as the claims "*with natural sweeteners*" and "*sweetened with natural ingredients*" are on the non-restrictive list of permitted phrases for the ingredient steviol glycosides on the website of the NVWA. The claim 100% natural, as seen in combination with the complete label, is therefore not incorrect.

Discussion

Interestingly, the ACC seems to directly apply the decision of the European Court of Justice in *Teekanne*, but without referring to it. The ACC states that the consumer for whom the content of the packaging is decisive in his decision to purchase the product, is expected to make himself known with the **full** content of the packaging, **more impor-**

² CJEU 4 April 2000, case C-465/98, ECR 2000, p. I-2297 (*Darbo*).

³ CJEU 4 June 2015, case C-195/14 (*Teekanne*) (not yet published in ECR).

⁴ ACC 15 september 2015, 2015/00862 (*Holy Soda*). Ebba Hoogenraad and Sarah Arayess represented Vrumona in this case.

tantly the label. Before *Teekanne*, the ACC regularly considered the list of ingredients as a decisive factor in determining whether a label is misleading or not. The ACC seems to still consider the list of ingredients as an important factor. However, we notice a minor shift towards a situation where the ACC gives more weight to all other elements of the packaging,

Peijnenburg: 18 portions, but non-sliced

Complaint and background

Peijnenburg is a large Dutch brand of *ontbijtkoek* (literally translated: breakfast cake), a traditional Dutch specialty similar to gingerbread cake. *Ontbijtkoek* is generally sold in two versions: pre-sliced or non-pre-sliced. A complaint was filed at the ACC in relation to the non-pre-sliced version of Peijnenburg, because the label states “content: 18 portions”. The complainant was disappointed to find out that the product, despite the statement that it contains 18 portions, is not pre-sliced. In its defense, Peijnenburg argues that the FIC Regulation 1169/2011/EC obliges companies to mention the number of portions on the list of ingredients.

Ruling

The ACC emphasizes that the FIC Regulation leaves the *possibility* to mention the nutrition declaration per portion, without obliging manufacturers to do

so. However: the ACC does not find the label misleading, arguing that the mere reference of “content: 18 portions” does not mislead the consumer. The average consumer will think that it is possible to divide the *ontbijtkoek* into 18 portions, without it being pre-sliced – contrary to what the complainant thought. Therefore, also this case is decided in favor of the advertiser.

Discussion

The Peijnenburg case is interesting because it shows that the ACC is increasingly well-aware of the rules applicable to food packaging. The ACC quickly adapts to new (European) developments, and – taking into consideration the limited number of court cases dealing with food law in the Netherlands – is often the first to deal with interpretive issues.

Conclusion

The rulings discussed are the result of self-regulation and are not binding law. However, ACC decisions tend to be taken seriously. This is the case for advertisers, who tend to comply with the ACC decisions (the compliance rate is over 90%), but also to food lawyers and courts. A good reason to keep watching the ACC. This applies especially in relation to important points of discussion in (European) food law, such as the impact of the *Teekanne* judgment and the interpretation of the new rules in the FIC Regulation. We will keep you updated.