

# Report

## The Netherlands

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### Portion Sizes in the Netherlands: Confusing, Yet Compliant?

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#### I. Introduction

These days producers of prepacked foods seem to make daily life a lot easier for consumers seeking to buy their essentials in the supermarket. Whatever product you are looking for, the packaging often tells you exactly how much one portion is and how many calories that portion contains. Stating portion sizes has the potential of providing clarity for consumers and could prevent consumers from eating too much of one product.

However, it implicitly follows from the Regulation on food information (1169/2011) that producers are free to decide what one portion of their product amounts to. As a result, differences exist between similar products in the same product category. Consumers might simply pick the product within a range which states the lowest energetic value, thinking that product is the healthier option. In practice, it could be the case that the producer merely suggests a very small portion compared to its competitors. Although the requirements on the European level are clear, this Country Report aims at giving an insight as to how portion sizes are being handled in the Netherlands in practice. Should consumers just turn to the packaging to read the details of the product? Or should they be able to rely on representative and clear portion sizes? In other words, do portion sizes have the potential to mislead consumers?

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1 Article 33 Regulation (EU) No 1169/2011 of the European Parliament and of the Council.

2 Article 33(5) Regulation (EU) No 1169/2011 of the European Parliament and of the Council.

3 See E Hoogenraad and S Arayess, 'Dutch Interpretations of "Teekanne" and Related Topics' (2016) 11 (5) EFFL, 433-435, in which the role of the ACC is explained.

#### II. European Law on Portion Sizes: Regulation (EU) 1169/2011

This is a brief overview of the applicable rules on portion sizes. The Regulation on food information (1169/2011) allows individual portions to be identified on packaging and facilitates portion-based declarations on them. The energy value *may* be expressed per portion, provided that it is easily recognisable by the consumer that the portion used is *quantified* on the label and that *the number of portions* in the package is stated.<sup>1</sup> Where the size of a single portion has been voluntarily mentioned, the energy value has to be expressed per portion *and* per 100g/ml. The portion size has to be indicated in close proximity to the nutrition declaration.

Furthermore, the regulation explicitly states that, taking consumption behaviour and dietary recommendations into account, the European Commission will adopt rules on the expression per portion for specific categories of foods.<sup>2</sup> However, such category-specific rules do not yet exist to date.

#### III. The Dutch Way – Portion Sizes in Practice

The Regulation clearly leaves it up to producers to decide on the size of portions for their products as long as they comply with the requirements stated. However, one of the regulation's main principles is that food information must not be misleading. Do (unrealistic or confusing?) portion sizes have the potential to be misleading? Only two complaints on portion sizes have been filed before the Dutch Advertising Code Committee (ACC), the self-regulatory body dealing with advertising regulations.<sup>3</sup> The ACC handles many complaints regarding allegedly misleading food packaging.

The first case about portion sizes was brought before the ACC in 2015, and discussed in more detail in EFFL 5/2016.<sup>4</sup> The complainant bought a package of (typically Dutch) gingerbread, called '*Ontbijtkoek*'. This gingerbread is generally sold in two versions: pre-sliced and non-pre-sliced. On the back of the package it was stated "content: 18 portions". The complainant bought the non-pre-sliced version, and found the statement confusing and misleading as the product did not contain separate portions. The ACC decided that the advertiser Peijnenburg did nothing wrong. According to the labelling requirements it is allowed to voluntarily mention the nutritional value per portion. In that case, however, advertisers are required to quantify the portion and to specify how many portions can be obtained from one pack. Therefore, the labelling was found not to be misleading, since consumers will understand the portion statement as it being *possible* to divide the product into 18 portions.

The second complaint with the ACC is a recent one and considered a package of sliced goat cheese.<sup>5</sup> The front of the label mentioned that the package contained 6 *slices*, and that each *portion* amounted to 75kcal. Although the complainant must have assumed the package consisted of 6 portions, on the back it was stated that the product contained 9,5 portions. The complainant found the portion size misleading, as consumers expect a portion to be a slice and will never cut off 1/3 of a slice in order to just eat one portion. The ACC found that these portion sizes did not mislead consumers. Misleading packaging is being assessed on the basis of the *whole* package, and consumers are expected to read all the information stated on it. Taking the whole package into account, the ACC took the view that it was sufficiently clear for consumers that in this case, a portion is not the same as a slice.

#### IV. Conclusion: Confusing, Yet Compliant?

It appears that in the Netherlands producers are compliant with the labelling requirements for as long as they quantify the portion size, mention the amount of portions the package consists of and state the energetic value per portion and per 100g. However, it follows from the well-known *Teekanne*<sup>6</sup> judgment that misleading packaging is being assessed taking into account the whole package. Even when all the information on a label is correct and compliant, a label can still be considered misleading if it creates an overall misleading impression. Nevertheless, when it comes to portion sizes, it seems that the threshold for misleading packaging is high in the Netherlands. Consumers should be observant and should simply read all the information before they make a purchase decision. Does this mean that advertisers can go ahead indicating somewhat confusing portion sizes? It seems that things may start to change in the near future. In the beginning of 2016, the Dutch Consumers Association '*Consumentenbond*' drew media attention when it raised awareness for 'misleading' and confusing portion sizes. The food industry announced that it would take this topic under investigation and would try to harmonise guidelines on portion sizes for different food categories to provide clarity for consumers. So far, no news yet, but perhaps we can expect self-regulatory and category-specific rules on portion sizes soon.

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4 ACC 5 October 2015, 2015/00830 (*Peijnenburg*).

5 ACC 23 May 2017, 2017/00180 (*AH Geitenkaas*).

6 C-195/14 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* [2015] ECLI-361.