Consumers May be Misled Despite the List of Ingredients Being Displayed on the Packaging of a Foodstuff

*Elisabet Ruiz Cairo**

Case C-195/14, Teekanne ECLI:EU:C:2015:361, not yet published

The labelling of a foodstuff must not mislead the consumer by giving the impression that a particular ingredient is present, even though it is not in fact present. The list of ingredients may, even though correct and comprehensive, not be capable of correcting sufficiently the consumer's erroneous or misleading impression that stems from such labelling (official headnote)

I. Facts

This preliminary ruling arises as the German Bundesgerichtshof (the German Supreme Court) asks the European Court of Justice ("ECJ" or "the Court") a question on the interpretation of Directive 2000/13.

The case at issue involves, on the one hand, Teekanne, an undertaking manufacturing fruit teas and, on the other hand, BVV, a consumer protection association in Germany. Teekanne markets a fruit tea called "Felix raspberry and vanilla adventure" and in addition to the name many items on the packaging may give the impression that the product contains vanilla and raspberry.

Indeed, the box contains pictures of raspberries and vanilla flowers, a text stating that the tea is made with "only natural ingredients" and that it is a "fruit tea with natural aromas", and a seal with the indication "only natural ingredients".

However, there is no vanilla or raspberry at all in the product which brings BVV to consider that consumers are being misled by the undertaking through the labelling of the good.

Teekanne notes that there is no such misleading because the list of ingredients in the back of the box expressly mentions that there are solely natural aromas which have the flavour of raspberries and vanilla. Indeed, the list of ingredients contained in the packaging reads as follows: "Hibiscus, apple, sweet blackberry leaves, orange peel, rosehip, natural *flavouring with a taste of vanilla*, lemon peel, natural *flavouring with a taste of raspberry*, blackberries, strawberry, blueberry, elderberry"[1].

After the Regional Court in Düsseldorf rules in favor of BVV, Teekanne appeals to the Higher Regional Court which reverses the first decision. It is interesting to note that the latter court in its ruling follows the traditional case-law of the ECJ. Hence, it states that the German legislation has to be interpreted according to an average consumer and that "in accordance with the case-law of the Court of Justice, correct and complete information provided by the list of ingredients on packaging constitutes sufficient grounds on which to rule out the existence of any misleading of consumers"[2].

As a consequence of this ruling, BVV appeals to the Supreme Court which refers the following question to the ECJ for a preliminary ruling:

"Is it permissible for the labeling, presentation and advertising of foodstuffs to give the impression, by means of their appearance, description or pictorial representation, that a particular ingredient is present, even though that ingredient is not in fact present and this is apparent solely from the list of ingredients?"

The preliminary question is brought in accordance with Article 267 of the Treaty on the Functioning of the European Union[3]. As the question was "raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national court"[4], the Ger-

* Academic Assistant, College of Europe, Bruges.

1 Emphasis added.

2 Case C-195/14, Teekanne ECLI:EU:C:2015:361, not yet published ('Teekanne'), at para. 21.

3 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 1-390 ('TFEU').

4 Ibid, Art. 267.

man Supreme Court was obliged to bring the matter before the ECJ.

II. Judgment

The Court starts with a reminder of the main goal of the directive, which is to establish "the need to inform and protect the consumer, with the detailed labeling, in particular giving the exact nature and characteristics of the goods, therefore having to enable the consumer to make his choice in full knowledge of the facts"[5].

More precisely, the Court underlines that Article 2(1)(a)(i) requires "that the labelling and methods used must not be such as could mislead the purchaser, particularly as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production"[6]. As interpreted by the Court in its previous case-law, this article "requires that the consumer have correct, neutral and objective information that does not mislead him"[7].

Therefore, the question that follows is when information can be considered as correct, neutral and objective. First, the Court notes that the list of ingredients is correct and complete in accordance with Article 3(1)(2) of Directive 2000/13[8]. Second, the Court establishes that in order not to mislead the consumer "the national court must in essence take account of the presumed expectations, in light of that labeling, which an average consumer who is reasonably well informed, and reasonably observant and circumspect has, as to the origin, provenance, and quality associated with the foodstuff" so that the consumer is not "induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine"[9].

Therefore, the question addressed by the Court is what the expectations of an average consumer are. The Court reminds that it has been established in the previous case-law that "consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 3(1)(2) of Directive 2000/13"[10]. To illustrate this point, the Court refers to Commission v Germany[11] and Darbo[12]. Indeed, in Darbo, the Court established that an average consumer could not be misled by the use of an inaccurate term on the label when the correct components are duly indicated on the list of ingredients[13].

However, the Court then departs from its previous case-law and states that "the fact that the list of ingredients is displayed on the packaging of the goods (...) does not in itself exclude the possibility that the labeling of those goods and methods used for it may be such as to mislead the purchaser"[14]. It further explains that "the list of ingredients, even though correct and comprehensive, may in some situations not be capable of correcting sufficiently the consumer's erroneous or misleading impression concerning the characteristics of a foodstuff that stems from the other items comprising its labeling"[15].

This reasoning leads the ECJ to answer to the national court in a positive way meaning that "Articles 2(1)(a)(i) and 3(1)(2) of Directive 2000/13 must be interpreted as precluding the labeling the labeling of a foodstuff and methods used for the labeling from giving the impression, by means of the appearance, description or pictorial representation of a particular ingredient, that that ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging"[16].

III. Comment

This judgment is significant because the Court departs from its previous case-law in terms of food labelling and packaging.

Indeed, as it has previously been noted, the Court has traditionally considered that a correct and com-

5 Teekanne, *supra* note 3, at para. 30.

6 *Ibid*,, at para. 31.

7 *Ibid*. at para. 32.

8 *Ibid*. at para 28.

9 *Ibid*., at para. 36.

10 *Ibid*., at para. 37.

11 Case C-51/94 Commission v Germany ECLI: EU: C:1995:352, I-03599 ('Commission v Germany').

12 Case C-465/98 Darbo ECLI:EU:C:2000:184, I-02297 ('Darbo').

13 *Ibid*., at para 22.

14 Teekanne, *supra* note 3, at para. 38.

15 *Ibid*., at para. 40.

16 *Ibid*., at para. 44.

plete list of ingredients is enough in order to avoid misleading consumers. This was highlighted in Commission v Germany where the Court also noted that even if a risk of misleading exists "that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue"[17]. The Court added that "for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which, pursuant to Article 6 of the Directive, must appear on the labelling"[18].

However, in paragraphs 38 to 41 of the ruling at stake, the Court takes a different position stating that the labelling of a product might be misleading to consumers despite the composition of the foodstuff being correctly described on the list of ingredients.

To justify this new position, we could take a look at the case law of the Frankfurt Court of Appeals. Indeed, this court stated recently that "the consumer, at least in a typical purchase situation in front of a supermarket shelf, does not have the necessary time and attention to examine the tables in detail"[19]. This case, which concerned nutritional tables contained on the packaging of a product, could be assimilated to Teekanne. Indeed, it can be considered that an average consumer, when doing the groceries, will not have the time to examine all the lists of ingredients of all the products purchased and will therefore only take a quick look to the general labelling. This has not been expressly mentioned by the ECJ in this preliminary ruling; however, it can be viewed as a good reason to consider the whole packaging and not only the list of ingredients when evaluating a food labelling.

In any case, the ruling underlines the increasing importance awarded by the ECJ to consumer protection. This is why this judgment is to be carefully considered by the food industry since it adds additional requirements to manufacturers and removes the safe harbour that up until now had been granted to products containing a complete list of ingredients.

One could nevertheless wonder why this decision would be of any importance given that Directive 2000/13 has been repealed by Regulation 1169/2011 on food information to consumers[20].

However, it must be recalled that the two articles at stake in this case have been transposed to the Regulation with no modifications at all. Hence, Article 2(1)(a)(i) of the directive is now Article 7(1)(a) of the regulation and Article 3(2)(1) is now Article 9(1)(b). Therefore, the findings of the Court in Teekanne will still be applicable in the future.

Moreover, it is interesting to read this ruling in conjunction with Regulation 1169/2011. Indeed, this piece of legislation mentions for the first time Article 169 TFEU on consumer protection. Therefore, the views of the Court in Teekanne together with the adoption of the regulation by the European Commission highlight the interest of the institutions in placing consumer protection at the forefront of EU food law.

Finally, it can be wondered what will be the outcome of this preliminary ruling. It has to be recalled, as the ECJ does in paragraph 35 of the ruling, that "it is not for the Court of Justice, pursuant to the division of jurisdiction between the EU courts and national courts, to rule on the question whether the labelling of certain products is likely to mislead the purchaser or consumer or to determine whether a sales description is potentially misleading. That task is for the national court". This has also been underlined in the Recommendations in relation to the preliminary ruling proceedings[21] where it is stated that "the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply the law to the factual situation underlying the main proceedings (...) and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law"[22].

However, the Court gives sometimes quite an extensive guidance to national courts therefore limiting their margin of appreciation. In terms of food labelling, the Court has definitely played a very prominent role. Indeed, already in Cassis de Dijon[23], the

17 Commission v Germany, *supra* note 12, at para. 34.

18 *Ibid.*, at para. 36.

19 Oberlandesgericht Frankfurt, Urteil v.20.10.2011 –Az.: 6 U 40/11, at para. 11 in Ignacio Carreño, "German Court orders change to nutrition labelling on Nutella due to its misleading nature", 3(1) *European Journal of Risk Regulation* (2012), pp. 91 *et sqq.*, at p. 92. The judgment is available on the Internet at http://www.lareda.hessenrecht.hessen.de

20 Commission Regulation (EU) No 1169/2011 on the provision of food information to consumers, OJ 2011 L 304, pp. 18-63 ("Regulation 1169/2011").

21 Court of Justice of the European Union Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ 2012 C 338, pp. 1-6.

22 *Ibid.*, at para. 7.

23 Case C-120/78, Rewe-Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42 1979/00649 ("Cassis de Dijon").

Court established the principle of mutual recognition and concluded that an appropriate label would be enough in the case at stake.

Moreover, in Severi[24] which dealt with a matter that was closer to the one in Teekanne, the Court expressed its point of view in the following terms:

"Among the factors to be taken into account in order to assess whether the labelling at issue in the main proceedings may be misleading, the length of time for which a name has been used is an objective factor which might affect the expectations of the reasonable consumer. On the other hand, any good faith on the part of the manufacturer or retailer, which is a subjective factor, cannot affect the objective impression given to the consumer by the use of a geographical name on a label".

This is also the strategy followed by the Court in Teekanne, where it describes extensively the factors to be taken into account by the German court:

"The referring court must in particular take into account the words and depictions used as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the fruit tea's packaging"[25].

The German court will therefore have to pay attention to these factors when taking its decision. However, the national judgment has not been issued yet and we will have to wait until then to see what happens.

To conclude, Teekanne is an illustration of the increasing importance that the European Union is giving to consumer protection. Indeed, from Cassis de Dijon to Teekanne, the Court has evolved from a market-access approach to a consumer protection approach and it focuses now on how labels have to be designed to inform consumers instead of focusing on how labels can assure the free movement of goods. This has been achieved not only by the Court but also by the Commission through the new Regulation 1169/2011. Indeed, this new piece of legislation has also been interpreted by the literature as "a departure towards a more balanced interpretation of compliance with Treaty obligations, assessing Community and national trading rules in a manner that considers the consumer and health-related issues alongside free movement concerns"[26].

24 Case C-446/07, Severi ECLI:EU:C:2009:530 I-08041, at para. 62.

25 Teekanne, *supra* note 3, at para. 43.

26 Caoimhin MacMaoláin, "Waiter! There's a beetle in my soup. Yes, Sir, that's E120: disparities between actual individual behavior and regulating food labelling for the average consumer in EU law", 45(4) *Common Market Law Review* (2008), pp. 1147 *et sqq.*, p. 1165.