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in CJEU's case law?  
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## **The behaviour of the average consumer: A little less normativity and a little more reality in CJEU's case law? Reflections on *Teekanne***

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### **Abstract**

In *Teekanne*, the Court of Justice held that the labelling of foodstuffs may not give the impression that an ingredient is present in a product where it is in fact not present, and this is apparent solely from the list of ingredients on the packaging. The judgment marks a significant realignment of previous cases that had considered the behaviour of consumers regarding the list of ingredients. In prior case law the Court had found consumers to be adequately protected if they had the possibility to gather the respective information from the list of ingredients. In *Teekanne*, the Court stipulated that such information of the ingredients list is not able to "correct" a "consumer's erroneous or misleading impression" created by the "overall labelling" taken as a whole. The ruling is potentially the first case in a series of judgments that understands the "average consumer" in a less normative way, and opens up to arguments about the real-world vulnerability levels of consumers.

*Key words:* Unfair Commercial Practices, EU law, Average Consumer, Behavioural Law

## **Introduction**

In its judgment in *Teekanne*, the Court of Justice of the European Union<sup>1</sup> held that the labelling of foodstuffs may not give the impression that an ingredient is present in a product where it is in fact not present, and this is apparent solely from the list of ingredients on the packaging.

Due to the date of the dispute, the Court interpreted Directive 2000/13 on labelling, presentation and advertising of foodstuffs (the 'Labelling Directive'). The latter was repealed by Regulation 1169/2011 on the provision of food information, which took effect from 13 December 2014 (the 'Food Information Regulation'). While the preliminary question arose with regard to the Labelling Directive, the judgment retains relevance for the corresponding provisions of the Food Information Regulation. Additionally, it gives guidance on the interpretation of the "average consumer" test in other areas of internal market law.

The question at issue was whether a consumer could be misled by the labelling about the ingredients in a product, despite the fact that the list of ingredients was accurate. First, the Court had to weigh the legal value of compliance with the requirements for the list of ingredients against the more general prohibition to mislead consumers. Second, the reference raised the issue of what kinds of labelling may mislead consumers, and therefore how the average consumer is defined.

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<sup>1</sup> Hereinafter "the Court" or the CJEU.

The judgment provides a straightforward answer that will be noted by the stakeholders with interest as it challenges some currently widely held assumptions: an accurate and comprehensive list of ingredients is necessary, but of itself not sufficient, to preclude that consumers are misled through other labelling elements. *Teekanne* may well be the first one in a series of judgments that understands the “average consumer” in a less normative way, and opens up to arguments about the real-world vulnerability levels of consumers.<sup>2</sup> However, by doing so, the present case risks to provide too little guidance as to what packaging, in fact, misleads consumers with respect to the ingredients contained.

### **Factual and Legal Background**

The German company Teekanne produced a fruit tea ‘Felix Himbeer-Vanille Abenteuer’ (‘Felix raspberry and vanilla adventure’), the packaging of which included i) depictions of *inter alia* raspberries and vanilla flowers, ii) indications stating ‘fruit tea with natural flavourings’ and ‘fruit tea with natural flavouring and iii) a seal with the indication ‘only natural ingredients’ inside a golden circle. However, the fruit tea did not in fact contain any vanilla or raspberry constituents or flavourings. The list of ingredients accurately stated that the fruit tea contained ‘flavouring with a taste of vanilla’, and ‘aromas with a taste of raspberry’.

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<sup>2</sup> See for an assessment with a view on the Unfair Commercial Practices Directive B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (New York et. al.: Springer 2015).

The German Federal Union of Consumer Organisations and Associations brought an action against Teekanne, arguing that the items on the fruit tea packaging misled the consumer with regard to the content because the consumer would expect vanilla/raspberry ingredients or at least natural flavouring. The Regional Court Düsseldorf upheld this action<sup>3</sup>, while the Higher Regional Court dismissed it<sup>4</sup>, ruling that consumers were not misled. This reiterates the view of the Commission, which held in an earlier statement that consumers were not misled under these circumstances.<sup>5</sup> . It based this interpretation on the expectations of the average consumer, finding that the list of ingredients expresses in a manner free from doubt that the flavouring only tastes like vanilla and raspberries but does not actually derive from natural produce. The general argument was that correct and complete information provided on the list of ingredients would suffice to ensure that the consumers are not misled. The Consumer Organisations appealed to the Federal Supreme Court, which stayed the proceedings and referred the following questions to the CJEU<sup>6</sup>:

“Is it permissible for the labelling, 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

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<sup>3</sup> LG Düsseldorf, BeckRS 2012, 07130.

<sup>4</sup> OLG Düsseldorf, GRUR-RR 2013, 300.

<sup>5</sup> See the decision of the BGH, who refers to this Commission’s view: BGH, GRUR Int. 2014, 599.

<sup>6</sup> See BGH, GRUR Int. 2014, 599.



ingredient is not in fact present and this is apparent solely from the list of ingredients provided for under Article 3(1)(2) of Directive 2000/13/EC?"

### **Judgment of the Court of Justice**

The Court answered the question in the negative: the packaging may not give the impression that a product contains an ingredient that it does not in fact contain, although this is apparent from the list of ingredients. In other words: an accurate list of ingredients does not preclude other elements of labelling from being misleading with respect to the ingredients a product actually contains.

The Court argued as follows: it first pursued a teleological reasoning, stating that the main purpose of the directive was to inform and protect the consumer, "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"<sup>7</sup>. This objective was enshrined in Article 2(1)(a)(i) Labelling Directive which stated that the labelling must not 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". The provision is now included with a slightly different wording in Article 7 FIR. In *Teekanne*, the Court reaffirmed the consumers' right to have at their disposal correct,

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<sup>7</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 30.

neutral and objective information, which had been established in *Commission v Italy*<sup>8</sup>. After noting that the Labelling Directive is the more specific law, the Court reinforced its reasoning by referring to Article 16 of the horizontal Regulation No 178/2002 (hereafter, 'General Food Law'),<sup>9</sup> which contains a general provision that states that labelling, advertising and presentation of food may not be misleading.

The Court continued by pointing out the jurisdictional division between the national referring courts and the CJEU, and in particular that it is not for the CJEU to rule on the labelling of specific products and sales descriptions. However, it did provide guidance to the national court, which must take account of "the presumed expectations, in light of that labelling, 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, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine."<sup>10</sup> . This had already been held in *Severi*.<sup>11</sup>

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<sup>8</sup> *Commission v Italy* (C-47/09) [2010] E.C.R. I-12083.

<sup>9</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, O.J. 2002, L 31/1.

<sup>10</sup> Teekanne para 36

<sup>11</sup> See, to that effect, judgment in *Alberto Severi v Regione Emilia Romagna* (C-446/07) [2009] ECR, EU:C:2009:530, at 61 and the case-law cited.

The Court then referred to *Darbo* and *Commission v Germany*, stating that consumers interested in the composition of a product are expected to first read the list of ingredients. However, and this is the heart of the judgment, the Court then held that the fact that the list of ingredients is displayed correctly “does not in itself preclude the possibility that the labelling of those goods and methods used for it may be such as to mislead the purchaser”.<sup>12</sup> Labelling comprises “any words, particulars, trademarks, brand name, pictorial matter or symbol relating to a foodstuff and placed on its packaging. Some of those items may in practice be *misleading, erroneous, ambiguous, contradictory or incomprehensible* (emphasis added by authors).”<sup>13</sup> In such cases the list of ingredients may be insufficient to correct a “consumer’s erroneous or misleading impression”<sup>14</sup>. Therefore it is the impression of the overall labelling “taken as a whole”<sup>15</sup> which must be taken into account when ascertaining whether packing is misleading, in particular “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

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<sup>12</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 38

<sup>13</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 40.

<sup>14</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 40

<sup>15</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 41.

packaging.”<sup>16</sup> This examination is for the national court to carry out.<sup>17</sup>

### **The Case in Context of Earlier Jurisprudence: Cautious Progress towards a More Holistic Approach to Labelling and a More Realistic Average Consumer**

The preliminary question and outcome are straightforward, reflected in the fact that no Advocate General (hereafter AG) opinion was rendered. However, the smooth argumentation of the ruling conceals the extent to which the judgment pushes forward the interpretations rendered in prior case law.

The Court approached the legal question exclusively through the lens of secondary legislation, and did not enter into a fundamental, Treaty-based, discussion of the internal market dimension. In doing so, it took a consumer based perspective without examining the business interests.<sup>18</sup> The consumer interest is discussed by means of the “average consumer” benchmark, as determined by the Court in order to cope with the regulatory challenges in the multi-level internal market. Embarking from the “Mars” case, where the CJEU had already mentioned the

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<sup>16</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 43.

<sup>17</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 42.

<sup>18</sup> In secondary legislation and Court decisions in the field of consumer law, it is usually the consumer interest that ‘trumps’, see H Schebesta, “Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom” (2010) 18; H. Unberath and A. Johnston, “The double-headed approach of the ECJ concerning consumer protection” (2007) 44(5) *Common Market Law Review*, pp. 1237-1284. *European Review of Private Law*, pp. 847-880.

“reasonably circumspect consumer” benchmark as an aside<sup>19</sup>, the Court clarified in “Gut Springenheide” that such a consumer would be “reasonably well informed and reasonably observant and circumspect.”<sup>20</sup> EU legislation in the field of Unfair Commercial Practices, which nowadays reaches beyond the field of the Unfair Commercial Practices Directive but comprises eg specific information law such as the one at issue here, needed to be designed to protect such a normative “average consumer.” *Teekanne* marks a significant realignment of prior cases that had considered the behaviour of consumer specifically regarding the list of ingredients. It was a common assumption that in determining the question of misleading measures, consumers were expected to have read the list of ingredients. The average consumer was “quasi-obliged to read the list of ingredients in order to avoid the danger of being misled”<sup>21</sup>. Consequently, a correct list of ingredients was presumed to shield all labelling from claims of being misleading in terms of ingredients. Such view was reasonable given older CJEU jurisprudence. For example in *Commission v Germany*, the Court had quite clearly stated that “for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which, (...) must appear on the labelling”.<sup>22</sup> The case concerned the labelling of sauce béarnaise/hollandaise made with vegetable

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<sup>19</sup> *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* (C-470/93) [1995] E.C.R. I-1923, at 24.

<sup>20</sup> *Gut Springenheide and Tusky* (C-210/96) [1998] E.C.R. I-4657, at 31.

<sup>21</sup> M. Hagenmeyer, *Food Information Regulation* (Berlin: Lexxion, 2012), p. 81.

<sup>22</sup> *Commission v Germany* (C-51/94) [1995] E.C.R. I-3599 [ECLI:EU:C:1995:352], at 36.

fats and E 160 F. In the same dispute, the European Commission had submitted that “in determining whether consumers need protection, the assumption must be that consumers are attentive and aware of the contents of the list of ingredients displayed on foodstuffs which they buy”<sup>23</sup>. The AG agreed with this view, indicating that in his opinion, consumers will first view the list of ingredients: “[i]f a consumer is sufficiently sensitive to the composition of the foodstuffs in question as to feel confused or misled on discovering that vegetable fats or E 160 F were present, then such a consumer would read the list of ingredients.”<sup>24</sup> (The view promulgated in *Commission v Germany* had been confirmed by the Court in the *Darbo* judgment rendered in 2000, which concerned the labelling as 'naturally pure' to describe a strawberry jam which contains the gelling agent pectin and traces or residues of lead, cadmium and pesticides. Here, the Court ruled: “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 6 of the Directive. In those circumstances, an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term 'naturally pure' used on the label simply because the jam contains pectin gelling agent”.<sup>25</sup> Information requirements often are the favoured

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<sup>23</sup> *AG Jacobs Commission v Germany* (C-51/94) E.C.R. I-3599, C-51/94, at 17.

<sup>24</sup> *AG Jacobs Commission v Germany* (C-51/94) E.C.R. I-3599, C-51/94, at 39.

<sup>25</sup> *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV -v- Adolf Darbo* (C-366/08) [2009] E.C.R. I-2297, at 22.

solution in internal market law, for example in the famous “Cassis de Dijon” judgment.<sup>26</sup> The information paradigm required entrepreneurs to provide all information available to consumers while consumers had to bear the burden of processing this information on potentially hazardous products and services.<sup>27</sup> The underlying consumer model in unfair commercial practices law was (and still primarily is) a normative concept for the sake first and foremost of internal market integration, largely uninspired by the behaviour of “real world consumers”.

The CJEU in *Teekanne* developed this approach further. Although acknowledging the older case law and accepting the assumption that consumers read the list of ingredients, the Court considered that a list of ingredients is not always sufficient in order to “correct” other elements of the labelling which triggered an “erroneous or misleading impression” with the consumer in the first place.<sup>28</sup>

The judgment marks two shifts: the first is the product appreciation by the CJEU and referring court. Both courts handled a holistic description of the product labelling for ingredients instead of a narrow view that would consider the list of ingredients only. In the particular case, the CJEU described the

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<sup>26</sup> See *REWE v Monopolverwaltung für Branntwein (Cassis de Dijon)* (120/78) [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494., On the information paradigm in this judgment K. Purnhagen, “The Virtue of Cassis de Dijon 25 Years Later – It Is Not Dead, It Just Smells Funny” in K. Purnhagen and P. Rott (eds), *Varieties of European Economic Law and Regulation* (New York et. al.: Springer, 2015), pp.329-332.

<sup>27</sup> E. Steindorff, *EG-Vertrag und Privatrecht* (Baden-Baden: Nomos, 1996), p. 195.

<sup>28</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 40.

product in question with respect to depictions, indications and seals – which means that a number of packaging elements were taken into account at the same time. Labelling was described as a composition of different elements, namely “words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on its packaging” (Article 1(3)(a)).<sup>29</sup> This marks a shift from text to overall consumer perception. In this, the judgment follows developments in other areas such as Trademark law and responds to the general criticism that traditional legal scholarship pays little attention to non-textual information.<sup>30</sup>

The second element is the question of who the average consumer is, and what constituted (in this case) labelling liable to mislead consumers, specifically what courts may expect from the average consumer’s behaviour.<sup>31</sup> Which kinds of labelling give the consumer an *erroneous or misleading impression* of the ingredients, and is the list of ingredients capable of correcting for false impressions generated? The Court greatly alleviated the information processing presumptions that had burdened the ‘average consumer’, thus providing a necessary ‘update’ to the concept in older jurisprudence. This outcome reflects and sits

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<sup>29</sup> See *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 39.

<sup>30</sup> E. Porter, Elisabeth. “Taking Images Seriously” (2014) 114 *Columbia Law Review* 1687, p. 1752.

<sup>31</sup> See for the particularities on food law in this respect K. Purnhagen. , “Beyond Threats to Health: May Consumers’ Interests in Safety Trump Fundamental Freedoms in Information on Foodstuffs? Reflections on *Berger v Freistaat Bayern*” (2013) 38 *European Law Review* 711, pp. 718-719.



easier with contemporary consumer policy making, which is increasingly influenced by behavioural sciences.<sup>32</sup>

### **The Case in Light of Behavioural Science: Robust Progress Regarding both, a More Holistic Approach to Labelling and to a More Realistic Average Consumer**

Both developments (from textual to holistic labelling and the move away from a purely normative understanding of the average consumer when determining consumer's perception of the list of ingredients) are results that conform to insights from consumer behaviour in behavioural studies, in particular consumer decision-making.

In recent years, behavioural sciences advanced massively and adopted remarkably robust methods<sup>33</sup> to determine how and why consumers decide in competitive choice settings. These insights from behavioural sciences on consumer decisions can be

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<sup>32</sup> World Bank, "World Development Report 2015 : Mind, Society, and Behavior", available on the internet at <http://www.worldbank.org/en/publication/wdr2015>; Commission Communication Better regulation for better results – An EU agenda, COM(2015) 215 final; H. Luth, Behavioural Economics in Consumer Policy (Antwerp et al.: Intersentia, 2010); H. Micklitz and K. Purnhagen, Vorbem. §§ 13, 14, in: Münchener Kommentar BGB, (Munich: C.H. Beck, 2015), para 51; E. Tscherner, "Can behavioral research advance mandatory law, information duties, standard terms and withdrawal rights?"; (2014) *Austrian Law Journal*, pp. 144 et seq.

<sup>33</sup> See on the need for robust methodology in assessment of laws P. Hacker, *The Behavioral Divide. A Critique of the Differential Implementation of Behavioral Law and Economics in the US and the EU*, *European Review of Contract Law* (forthcoming); K. Purnhagen and P. Feindt, "Better Regulatory Impact Assessment: Making Behavioural Insights Work for the Commission's New Better Regulation Strategy", (forthcoming 2015) *European Journal of Risk Regulation*

extrapolated to understand better how consumers are misled in the real world when exposed to unfair commercial practices.<sup>34</sup>

With regards to a more holistic approach to labelling, behavioural studies show that consumers' attention to labels during shopping is limited only.<sup>35</sup> Complex information such as those on a list of ingredients will bypass most consumers. Instead, consumers tend to pay attention to visual elements and colours as they allow for rapid and automatic processing (so-called system 1 processing), whereas textual information generally requires more deliberate processing (so-called system 2 processing).<sup>36</sup> Visual elements are also highly context sensitive,<sup>37</sup> meaning that the attribution of meaning derives in part from other elements of the packaging. Similarly, different pictures have been shown to decisively affect consumer perceptions on an identical textual claim.<sup>38</sup> Behavioural

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<sup>34</sup> C. Poncibò, and R. Incardona, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution", (2007) *Journal of Consumer Policy*, pp. 21 et seqq.; A.-L. Sibony, "Can EU Consumer Law Benefit From Behavioural Insights?: An Analysis of the Unfair Practices Directive" in K. Mathis (ed), *Behavioural Law and Economics: American and European Perspectives* (New York et al.: Springer, 2015) pp. 71 et seqq.; J. Trzaskowski, "Behavioural Economics, Neuroscience, and the Unfair Commercial Practices Directive", (2011) *Journal of Consumer Policy*, pp. 377 et seqq.

<sup>35</sup> For example unobtrusively observed shopping studies, see K. Grunert, and J. Wills, "A review of European research on consumer response to nutrition information at food labels" (2007) 15(5) *Journal of Public Health*, pp. 385-399.

<sup>36</sup> See for the context of health claims K. Purnhagen, Erica van Herpen and Ellen van Kleef, "The Potential Use of Visual Packaging Elements as Nudges - an Analysis on the Example of the EU Health Claims Regime" in K. Mathis and A. Tor (eds.), *Nudging - Possibilities, Limitations and Applications in European Law and Economics*, (New York et al.: Springer, forthcoming 2016), preliminary published as Wageningen Working Papers in Law and Governance 5/2015.

<sup>37</sup> L. Scott, "Images in advertising: The need for a theory of visual rhetoric" (1994) 21(2) *Journal of Consumer Research*, pp. 252-273.

<sup>38</sup> H. S. Sørensen, J. Clement & G. Gabrielsen, "Food labels—an exploratory study into label information and what consumers see and

sciences therefore strongly support the Court's holistic approach to labelling.

Marketing practices, taking into account the insights of behavioural sciences, are based on the assumption that one can use the effect of slow processing textual and fast processing of pictorial information to communicate subtle and complex messages via pictures and colours.<sup>39</sup> In the present case, Teekanne made use of this effect by communicating the message "this tea contains raspberry and vanilla" by pictures. As the consumer's main attention is often to pictures and colours during their limited shopping time, these have the potential to serve as what behavioural scientists call anchors. Cognitive psychology has shown that people often rely excessively on their initial point of reference (the 'anchor'), so that estimates and projections are biased towards this initial value ('the anchoring effect').<sup>40</sup> Extrapolating these findings to the case, one may conclude that pictures first "anchor" the consumers' perception of the product, which then determines consumers' decision to buy the product. Additionally, the 'picture-superiority effect'<sup>41</sup> finds that visual

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understand" (2012) 22(1) *The International Review of Retail, Distribution and Consumer Research*, pp. 101-114.

<sup>39</sup> L. Scott, and P. Vargas "Writing with pictures: Toward a unifying theory of consumer response to images" (2007) 34(3) *Journal of Consumer Research*, pp. 341-356.

<sup>40</sup> See A. Tversky, and D. Kahneman, "Judgment under uncertainty: Heuristics and biases." (1974) 185 *Science*, pp. 1124-1131; R. Thaler, and C. Sunstein, *Nudge: Improving decisions about health, wealth, and happiness* (New Haven: CT: Yale University Press, 2008).

<sup>41</sup> See T. Childers and M. Houston, "Conditions for a picture-superiority effect on consumer memory" (1984) 11(2) *Journal of Consumer Research*, pp. 643-654; G. Stenberg, K. Radeborg and L. Hedman. "The picture superiority effect in a cross-modality recognition task" (1995) 23 *Memory & Cognition*, pp. 425-441; W. Hockley, "The picture superiority

elements vastly outperform textual elements in influencing consumer decision-making. Intuitively or implicitly, the Court seemed to rely on both of these effects when holding in para 40 of its judgment that “consumer’s erroneous or misleading impression” resulting from the pictures on the pack (anchor) may not be sufficiently “corrected” by the correct list of ingredients (picture superior effect). The Court has hence, wittingly or unwittingly, reflected insights from behavioural sciences to decide on the benchmark of the average consumer.

### **What is the guidance deriving from the judgment? National versus European dimension**

Although the wording of the judgment carries an undertone that in the concrete case at hand the product labelling might have been misleading, the CJEU defers, in line with past case law<sup>42</sup>, the ultimate application to the national court. This means that the application of the average consumer test in the concrete case remains at national level.<sup>43</sup> In this sense, the judgment does not strengthen an EU basis of the interpretation of the ‘average consumer’ very much. This has pros and cons: on one hand, uniform interpretation and application are intertwined. This blurriness might also threaten the uniform interpretation of what

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effect in associative recognition” (2008) 36(7) *Memory & Cognition*, pp. 1351-1359.

<sup>42</sup> See for an overview J. Stuyck, “The Court of Justice and the Unfair Commercial Practices Directive” (2015) *Common Market Law Review*, pp. 721 et sqq.

<sup>43</sup> H. Micklitz, “Unfair Commercial Practices and Misleading Advertising”, in N. Reich, P. Rott, K. Tonner, *European Consumer Law* (2<sup>nd</sup> edition, Cambridge: Intersentia, 2014) p. 98.

constitutes the 'average consumer', which might, consequently become fragmented across the EU. This is dangerous in 'technical' areas where producers may be faced with 28 different national applications of whether depictions of something that is not per se present in a food product are permissible. On the other hand, the EU preliminary reference mechanism is limited and the EU system of decentralized application does not lend itself well for answering many small technical questions, which are the kind of questions likely to arise and, due to their generalisability, would also call for a common European solution. This is a limitation inherent in the current judicial system of the EU. Secondly, the specific application sought concerned the average consumer. There may be some arguments in favour of a "decentralized" understanding of what may mislead a particular national consumer. A 'decentralized average consumer' in this sense may further the diversity in the Union and accommodate differences between national consumer cultures.

### **The Behavioural Dimension in Courts**

With respect to product packaging, the notion of the 'average consumer' opens the door to a number of legal questions where courts could potentially deploy behavioural sciences.

For example, the Teekanne tea-package contained many pictures, and the design was clearly geared towards a specific target group, namely children. The trademark and the font of the label were written in childlike handwriting, the product name was 'Felix' (a known children's book character) accompanied by a picture of

Felix the rabbit on a skateboard.<sup>44</sup> In fact, the comic character was more prominently placed than the raspberry and vanilla depictions, in an area of the packaging with the most potential to attract consumers' attention. This could have further legal implications.

Children as a special, more vulnerable, target group are less likely to (be able to) read and understand a list of ingredients. Further, *prima facie* they seem more likely to attribute to pictures of ingredients on a package the meaning that a product in fact contains the depicted ingredients. This effect is reinforced by their lack of knowledge on complex food production processes involving flavourings. For example, Art. 5 (3) of the general unfair commercial practices directive distinguishes different groups of consumers: "Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group." Perhaps, then, also in labelling the misleading potential of a package could be determined by reference to a different standard of the "target group consumer" in food law.

## **Conclusion**

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<sup>44</sup> See BGH, GRUR Int. 2014, 599.

The judgment is a clear message that an accurate list of ingredients does not exonerate products from claims of being misleading. This means that all product packaging now has to reconsider these questions, which is why the judgment is one that should be noted by industry. An intuitive assessment of the package, and certainly one based on behavioural studies, would have come to the same result. What stood in the way was a set of older cases, which led to an assumption that the consumer would have to rely on the list of ingredients. Teekanne developed the previous jurisprudence, aligning it with scientific findings on actual consumer behaviour.

The case further points to the necessity and potential of behavioural studies when addressing consumer behaviour. However, while the outcome of the judgment parallels behavioural insights, it also demonstrates an essential difficulty of proceedings in front of the CJEU. Rulings are made without additional expert reports, and the outcome justification, if lacking an articulated empirical basis on actual consumer behaviour, may strike as arbitrary for want of convincing legal arguments to decide one way or the other.