Master thesis – The possibilities for Member States' regulation of the term 'artisan'

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Master thesis

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The legal framework that exists for Ireland, the Netherlands, the United Kingdom and Belgium to regulate the term artisan for food products

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Abstract

In 2015, the Dutch Consumer Association conducted a research on the authenticity of artisan food products in supermarkets. They concluded that there was no or almost no difference between artisan and normal products. Food producers who label their normal food products as artisan, may mislead the consumer and influence their buying behaviour. Regulating the term artisan on national level might be a possibility to protect consumers against these practices. The purpose of this research is to discover which legal framework exists for Ireland, the Netherlands, Belgium and the United Kingdom to regulate the term artisan for food products based on EU food law and marketing law. For this purpose, three sub questions need to be answered. Each chapter of this research represents a sub question. The first Chapter concentrates on the question what the scope of Member States is to regulate the term artisan according to EU food law and marketing law. The second Chapter concentrates on the question how Ireland, the United Kingdom, the Netherlands and Belgium applied the legal framework as established in Chapter 1, in local legislation. Chapter 3 concentrates on the question which of the regulated tools in line is with the legal framework as established in the first Chapter. To answer these questions, I used the doctrinal and the functional comparative method. Based on Directive 2005/29/EC, the Dyson case, Regulation 1169/2011, Member States can regulate the term artisan for food products to provide a higher level of consumer protection on the condition that it does not prohibit, impede or restrict the free movement of goods. Moreover, it may not constitute a quantitative restriction on imports or a measure having equivalent effect within the meaning of Article 34 of the Treaty on the Functioning of the European Union. Based on Directive 2005/29/EC and due to the harmonisation approach of this Directive, Member States are not allowed to regulate the term artisan for non-food products to provide a higher level of consumer protection. Ireland and Belgium adopted a guideline on the terms artisan/artisanal. In contrast to the Irish guideline, the Belgian guideline is not in line with EU law, because it is likely to constitute a measure having equivalent effect to quantitative restrictions. The Irish guideline is a good example of a national measure on the term artisan. However, due to the advisory nature of a guideline it is uncertain if consumers will actually enjoy protection. National regulation on the term artisan by more Member States, could result in different laws which could generate obstacles the proper functioning of the internal market. Therefore, in my opinion, in case regulation of the term artisan for food products deemed to be necessary, the term should be regulated on EU level.

List of abbreviations

CJEU	Court of Justice of the European Union
EU	European Union
FSA	Food Safety Agency
FSAI	Food Safety Authority of Ireland
MEQR	Measure(s) having equivalent effect
TFEU	Treaty on the functioning of the European Union

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Introduction

The label artisan on food products is an uprising phenomenon. The question is, however, if these products are actually artisan. In 2015, The Dutch Consumer Association compared six normal products with six artisan products in several supermarkets. There were no or almost no differences between the artisan products and normal products. Food producers' practices to label their normal products as artisan might mislead consumers. At this moment, the term artisan is not regulated on EU level. Regulating the term artisan might protect consumer against unfair commercial practices. The question is whether Member States can regulate the term artisan on national level based on EU law and if so in what manner. The objective of this research is to discover which legal framework exists for Ireland, the Netherlands, Belgium and the UK to regulate the term artisan for food products based on EU food law and marketing law. To reach this objective, in the first Chapter I will establish what the scope of Member States is to regulate the term artisan for food products based on Directive 2006/114/EC, Directive 2005/29/EC, Regulation 1169/2011 and other relevant EU law. I will mainly look at provisions on adopting national measures. In the second Chapter I will research how Ireland, the Netherlands, Belgium and the UK established the legal framework in their local legislation. Meaning did the Member States regulate the term artisan and if so, how. Afterwards, in the last Chapter, I will evaluate if the local legislation of those Member States is in line with EU law. The last Chapter is followed by the conclusion of this research and includes my personal opinion. In this research I use the doctrinal and functional comparative method.

Problem description

Producers' practices to label normal products as artisan may mislead consumers and influence their buying behaviour. In 2015, the Dutch Consumer Associations conducted a research on the authenticity of artisan food products in supermarkets. The Dutch Consumer Association found dozens of food products labelled as artisan in the supermarkets Albert Heijn, Aldi, Coop, Jumbo and Lidl. They compared six 'artisan' products with 'normal' products and concluded that there was no or almost no difference between the two.[1]

Based on a survey among 700 consumers, the Dutch Consumer Association concluded that consumers have little confidence in the authenticity of products that are labelled artisan.[2] The lack of confidence may have a negative effect on traders who produce actual 'artisan' products.

One possibility to protect consumers from such potential misleading practices is regulating the term artisan. In 2017, the European Consumer Organisation (BEUC) called "for clearer rules for the labelling of food and drink products, as well as for their effective enforcement, to avoid deceiving consumers as to the true nature of the food and drink they purchase."[3] This includes rules concerning the term artisan. The BEUC states that "the EU should define the key terms commonly used on labels to market quality aspects of foods and beverages to consumers, such as 'traditional', 'artisanal' or 'natural'".[4]

Some Member States have already established national measures concerning the term artisan. Ireland, for example, has established a Guideline for the use of marketing terms such as artisan, natural and traditional. Belgium established a Guideline concerning the use of terms such as artisanal (artisinaal), artisan (ambachtelijk) and terms thereof on products. The question is, however, if it is legally possible for the Member States to regulate the term artisan on national level based on European and marketing law. In this research I will answer the

[1] Foodlog Lekker en Betrouwbaar (2015). Ambachelijk als lokkertje. Retrieved from https://www.foodlog.nl/artikel/ambachtelijk-als-lokkertje/
Consumentenbond (2015). Ambachtelijke supermarktproducten wassen neus. Retrieved from https://www.consumentenbond.nl/nieuws/2015/ambachtelijke-supermarktproducten-wassen-neus
[2] Consumentenbond (2015). Ambachtelijke supermarktproducten wassen neus. Retrieved from https://www.consumentenbond.nl/nieuws/2015/ambachtelijke-supermarktproducten-wassen-neus
[3] BEUC (2018). *The Consumer Voice in Europe Food Labels: Tricks of the Trade. Our recipe for honest labels in the EU*[PDF]. BEUC: The European Consumer Organisation.
[4] BEUC (2018). *The Consumer Voice in Europe Food Labels: Tricks of the Trade. Our recipe for honest labels in the EU*[PDF]. BEUC: The European Consumer Organisation.

question which legal framework exists to regulate the term artisan for food products based on EU food law and marketing law. This research concentrates only on Ireland, the Netherlands, Belgium and the United Kingdom due to languages restrictions.

Research question and sub questions

The research question of this thesis is as following:
Which legal framework exists for Ireland, the Netherlands, Belgium and the United Kingdom to regulate the term artisan for food products based on EU food law and marketing law?

In order to answer this question, the following sub questions need to be answered.

1. What is the scope of Member States to regulate the term artisan according to EU food law and marketing law?
2. How did Ireland, the United Kingdom, the Netherlands and Belgium apply this legal framework in local legislation?
3. Which of the regulated tools is in line with the framework established in sub question number one.

Methodology

In this research I use two research methods, namely the doctrinal and the functional comparative method. The doctrinal research method is known "as pure theoretical research" and is commonly used for legal analysis.[5] Chapter 1 concentrates on the question what the scope of the Member States is to regulate the term artisan and requires a doctrinal legal analysis of the Directive 2006/114/EC, Directive 2005/29/EC, Regulation 1169/2011. In this Chapter I will mainly look at provisions concerning the adoption of national measures. Chapter 2 concentrates on the question how Ireland, the United Kingdom, the Netherlands and Belgium applied the legal framework, as mentioned in Chapter 1, in the local legislation. In this Chapter, I use again the doctrinal method to analyse how the before mentioned Member States applied the legal framework in their local legislation. I will look at all relevant legal documents that provide rules concerning the term artisan. In this Chapter I will also use the functional comparative method to compare the different local legislation with each other. The functional comparative method focuses on the effects of rules and events rather than the

[5] Gawas, V. M. (2017). *Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards the Research Development, 3*(5), September 2017, 128-130. Retrieved November 20, 2018, from www.lawjournals.org.

rules itself and doctrinal structures and arguments. This research method can also be used to compare which law fulfils its function better, the so called 'better-law comparison'.[6] Chapter 3 concentrates on the question which of the regulated tools in line is with the framework established in sub question one. In this Chapter I will use the doctrinal method to evaluate which of the local legislation is in line with the framework as mentioned in the first Chapter. The answers to all three sub questions will help me to answer the main question: *Which legal framework exists for Ireland, the Netherlands, Belgium and the United Kingdom to regulate the term artisan for food products based on EU food law and marketing law?*

[6] Michaels, R. (2008). The Functional Method of Comparative Law. In *The Oxford Handbook of Comparative Law* (pp. 339-382). Oxford: Oxford University Press. doi:10.1093/oxfordhb/9780199296064.001.0001

Chapter 1 The scope of Member States to regulate the term artisan

This chapter concentrates on the question what the scope of the Member States is to regulate the term artisan for food products according to EU food law and marketing law. To determine the scope of Member States to regulate the term artisan, I will analyse Directive 2005/29/EC concerning unfair commercial practices, Directive 2006/114/EC concerning misleading and comparative advertising and the Food Information Regulation (Regulation 1169/2011). I will also discuss Articles 34 and 36 of the Treaty on the Functioning of the European Union (TFEU). I will start my analysis by giving a brief overview of all the before mentioned legislation with the exception of the TFEU. I will not describe in detail what the Regulation and the Directives specifically stipulates. Moreover, I will mainly look at provisions concerning the adoption of national measures.

§ 1.1 Directive 2006/114/EC – misleading and comparative advertising directive

Directive 2006/114/EC contains rules concerning misleading and comparative advertising and could help answering the question what the scope of Member States is to regulate the term artisan because artisan is a marketing term used for advertising purposes. The purpose of Directive 2006/114/EC is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.[7] The purpose of the Directive is not to protect consumers, but traders. According to Article 2(d), 'trader' means any natural or legal person who is acting for purposes relating to his trade, craft, business of profession and anyone acting in the name of or on behalf of the trader. Consumers do not fall under this definition. To determine the scope of Member States to regulate the term artisan, I will give a brief overview of what the Directive includes.

The Directive stipulates, for example, which information is necessary in determining whether advertising is misleading (Article 3) and when comparative advertising is permitted (Article 4). Based on Article 6, voluntary control of misleading or comparative advertising is allowed on certain conditions. The Directive also stipulates that Member States shall ensure that adequate and affective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interest of trader and competitors

[7] Article 1 Directive 2006/114/EC concerning misleading and comparative advertising

(Article 5). However, Article 5 does not provide information about adopting national measures to regulate the term artisan or any other marketing term. Another article in the Directive, Article 7, stipulates that Member States shall confer upon the courts or administrative powers enabling them in the civil or administrative proceeding referred to in Article 5. Article 8 is interesting for this research because it stipulates that Member States are able to retain or adopt provisions with a view to ensuring more extensive protection, with regard to advertising, for traders and competitors. However, this does not apply to comparative advertising as far as the comparison is concerned. Comparative advertising means any advertising explicitly or by implication identifies a competitor or goods or services by a competitor according to Article 2(c). Article 8(2) explains that the provisions of the Directive apply without prejudice to Community provisions on advertising for specific product and/or services or to restrictions or prohibitions on advertising in particular media.

To conclude, based on Directive 2006/114/EC, Member States can regulate the term 'artisan' on national level to ensure more extensive protection for traders and competitors regarding advertising.[8] This Directive does not provide rules to adopt national measures to protect consumers. For this purpose, Directive 2005/29/EC concerning unfair business-to-consumer commercial practises in the internal market is of importance.

§ 1.2 Directive 2005/29/EC - unfair commercial practices directive

Directive 2005/29/EC is important because the use of the term artisan could be misleading and could therefore be considered as an unfair commercial practice which is regulated in this Directive. According to Article 1, the purpose of Directive 2005/29/EC is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests. The Directive was adopted because the laws of Member States showed marked differences relating to unfair commercial practices which could generate obstacles to the proper functioning of the internal market.[9] Unlike Directive 2006/114/EC, this Directive does protect consumers. To determine the scope of Member States to regulate the term artisan for food products, I will give a brief overview of what the Directive includes.

[8] Article 8 Directive 2006/114/EC
[9] Paragraph 3 of the Preamble of Directive 2005/29/EC

The Directive stipulates that Member States are not allowed to restrict the freedom to provide services or to restrict the free movement of goods for reasons falling within the field approximated by this Directive (Article 4). Article 5 prohibits unfair commercial practices and stipulates when a commercial practice shall be unfair. Articles 6 and 7 describe when a commercial practice shall be regarded as misleading. The Directive also stipulates when a commercial practice shall be regarded as aggressive (Article 8) and which information is important in determining whether a commercial practice uses harassment, coercion or undue influence (Article 9). Based on Article 11, Member States shall ensure that adequate and effective means exist to combat unfair commercial practices to enforce the compliance with this Directive. It explains how Member States shall enforce the Directive. The Directive contains many more rules, but they do not contain any valuable information for this research. Important to point out is that Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 12 June 2007 (transposition).[10] This Article does not explain if Member States can adopt national measures to regulate the term artisan to protect consumers. In fact, none of the Articles in the Directive provides information on adopting additional measures. More importantly, number 13 of the Preamble indicates that the Directive is based on the full harmonisation approach. This means that Member States cannot adopt stricter national measures on commercial practices to provide a higher level of consumer protection.[11] However, in relation to financial services and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates. The question arises if regulating the term artisan is a form of a national measure on commercial practices that provides a higher level of consumer protection which is stricter than the Directive. Therefore, the purpose of regulating the term artisan is important. Regulating the term artisan and the use of it, is to provide a higher level of consumer protection concerning unfair commercial practices and to protect traders and competitors regarding advertising. National measures relating to the term artisan would be stricter than Directive 2005/29/EC, because consumers may enjoy higher protection against unfair commercial practices, misleading actions or omissions. However, number 10 of the Preamble and Article 3(4) of the Directive stipulates that the Directive only applies in so far as there are no specific Community law provisions

[10] Article 19 Directive 2005/29/EC

[11] Engelbrekt, A. B. (2017). Chapter 7: The impact of the UCP Directive on national fair trading law and institutions: Gradual convergence or deeper fragmentation. In *Marketing and advertising law in a process of harmonisation*. Oxford: Hart Publishing.

regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. For this purpose, case C-632-16 (hereafter: Dyson case) is of significance. In the Dyson case, Dyson argued that BSH (BSH Bosch und Siemens Hausgeräte) 'carried out an unfair commercial practice by listing energy class A on the energy label of the vacuum cleaners it markets.'[12] 'The label reflects the results of tests which are carried out with an empty dust bag.'[13] For this reason Dyson believed that BSH carried out an unfair commercial practice. In this case the president of the Commercial Court in Antwerp referred two questions to the Court of Justice of the European Union for a preliminary ruling. One of the questions was:

'Can strict compliance with [Delegated Regulation No 665/2013] (without supplementing the label as defined in Annex II thereto with information about the test conditions which lead to the classification in an energy efficiency class in accordance with Annex I) be regarded as a misleading omission within the meaning of Article 7 of [Directive 2005/29]?'[14]

Important here is that the Delegated Regulation No 665/2013 contains specific rules concerning energy labelling of vacuum cleaners and as Article 3(4) Directive 2005/29/EC states, in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. However, the CJEU mentions that the Delegated Regulation 665/2013 prohibits references other than the reproduction of the EU Ecolabel from being added to the energy label.[15] The CJEU states 'it follows from that prohibition that, pursuant to Article 3(4) of Directive 2005/29, Article 7 of that directive cannot apply to the absence, from the energy label, of information on vacuum cleaner energy efficiency testing conditions.'[16] This means that Article 7 is not applicable to the absence of information on vacuum cleaner energy efficiency testing conditions because the Delegated Regulation 665/2013 contains specific rules. However, as the Advocate General mentions in his opinion, Article 6 and 7 of Directive 2005/29/EC 'are fully applicable to all the aspects not governed by Regulation No 665/2013, even in the case of conflict with that regulation.'[17] The question in this research is whether Directive 2005/29/EC is applicable or not taking in consideration the rulings in the Dyson case. First of all, Regulation 1169/2011 contains specific rules on unfair commercial practices

[12] C-632/16 *Dyson case.* ECLI:EU:C:2018:599. Paragraph 21
[13] C-632/16 Paragraph 20
[14] C-632/16 Paragraph 26
[15] C-632/16 Paragraph 40
[16] C-632-16 Paragraph 41
[17] Opinion of Advocate General Saugmandsgaard Øe of 22 February 2018. Case C-632-16. Paragraph 85

regarding food information to consumers. Paragraph 5 of the Preamble of the Regulation states that the general principles of the Directive should be complemented by specific rules concerning the provision of food information to consumers. This suggests that the Directive is not applicable with regard to unfair commercial practices concerning food information to consumers and means that the provisions of the Regulation in this aspect shall prevail.

To conclude, due to the full harmonisation approach adopted in Directive 2005/29/EC, Member States cannot adopt national measures on unfair commercial practices because it may result in different laws within the European Union which could generate obstacles to the proper functioning of the internal market. The Directive was established because the laws of Member States relating to unfair commercial practices showed marked differences which could generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market.[18] However, this Directive is not applicable based on the rulings in the Dyson case and article 3(4) of Directive 2005/29/EC because Regulation 1169/2011 contains specific rules on unfair commercial practices regarding food information to consumers. Thus, to determine the scope of Member States to regulate the term artisan for food products, Regulation 1169/2011 is of importance.

§ 1.3 Regulation 1169/2011 – the Food Information Regulation

Regulation 1169/2011 (hereafter: the Regulation) is important to analyse because the term artisan is a form of food information and this Regulation provides rules on food information to consumers. Regulation 1169/2011 was adopted with having regard to the Treaty on the Functioning of the European Union (TFEU). This means that the provisions in the Regulation apply without prejudice to the provisions in the TFEU. The Regulation provides the basis for the assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers.[19] It stipulates, for example, which information is mandatory, what the responsibilities are of food business operators and how food information should be presented on the label. In short, the Regulation describes what information shall be on a label and how it shall be presented. One article in the Regulation plays an important role in this research, namely Article 7. It stipulates that food information

[18] Paragraph 3 of the Preamble and Article 1 Directive 2005/29/EC
[19] Article 1 Regulation 1169/2011

shall not be misleading and shall be accurate. This means, for example that the term artisan on a food label may not mislead consumers.

Chapter VI of the Regulation is of importance because it could answer the question what the scope of Member States is to regulate the term artisan. Chapter VI provides rules concerning the adoption of national measures. Articles 39 to 45 provide rules concerning the adoption of national measures regarding additional mandatory particulars, milk and milk products, alcoholic beverages, expression of the net quantity, voluntary indication of reference intakes for specific population groups, non-prepacked food and the notification procedure. None of these articles provide information on adopting national measures concerning a marketing term such as artisan and are therefore irrelevant. The notification procedure, which is regulated in Article 45, is not relevant because this article only applies when reference is made to it. Article 38 is important for this research. Based on Article 38(1), Member States are not allowed to adopt or maintain national measures regarding matters that are specifically harmonised by the Regulation unless authorised by Union law. This indicates that the Regulation is based on the full harmonisation approach and means that Member States cannot adopt stricter national measures. Member States are allowed to adopt national measures only if Union law authorise it. However, those national measures may not give rise to obstacles to free movement of goods, including discrimination as regards food from other members. The term artisan is not specifically harmonised and therefore Article 38(2) is of importance. Article 38(2) states that Member States may adopt national measures concerning matters which are not specifically harmonised by the Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with the Regulation. This Article indirectly refers to Title III of the Treaty on the Functioning of the European Union (TFEU) which regulates the free movement of goods. In particular Article 34 TFEU. This Article prohibits quantitative restrictions on imports and measures having equivalent effect between Member States. This Article might help answering the question whether Member States may adopt national measures on the term artisan. Paragraph 1.3.1 of this Chapter concentrates on the free movement of goods.

Important to point out is that although the Regulation allows Member States to adopt national measures on certain conditions, it does not indicate which documents, legal or non-legal, are considered a national measure.

§ 1.3.1 TFEU – The free movement of goods

Part III Title II of the TFEU provides rules concerning the free movement of goods. Article 38(2) of Regulation 1169/2011 indirectly refers to TFEU and in particular Article 34. Article 34 TFEU states that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. Based on Article 36 and the relevant case law, quantitative restrictions and measures having equivalent effect may be justified. The first question is whether Article 34 is applicable. Article 34-36 TFEU 'do not apply when the free movement of a given product is fully harmonised by more specific EU legislation, i.e. especially where the technical specifications of a given product or its conditions of sale are subject to harmonisation by means of directive or regulations adopted by the EU.'[20] As mentioned before, the term artisan is not specifically harmonised by Regulation 1169/2011 or any other directive or regulation adopted by the EU. Therefore, Article 34 is applicable.

In the next paragraphs I will solely describe the definitions of quantitative restrictions and MEQR and outline the possible justifications.

§ 1.3.1.1 Quantitative restrictions and measures having equivalent effect

The definition of 'quantitative restrictions' can be found in the Geddo case: *The prohibition on quantitative restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit*.[21] Thus, "the concept of a 'quantitative restriction' thereby refers to measures that directly concern the quantity or the number of products that may be imported or exported" (Cuyvers, 2017, p. 333).[22]

The definition of 'measures having equivalent effect' (MEQR) is more complicated. In the Dassonville Case, the Court of Justice of the European Union (CJEU) defined MEQR as: *any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having*

[20] European Commission (2013). Free movement of goods – Guide to the application of Treaty provisions governing the free movements of goods. P. 9
[21] Case 2/73, *Geddo case,* ECLI:EU:C:1973:89, paragraph 7
[22] Cuyvers, A. (2017). Free Movement of Goods in the EU. In *East African community law: Institutional, substantive and comparative EU aspects* (pp. 326-344). Leiden: Brill Nijhoff.

equivalent effect to a quantitative restriction.[23] The broad definition of MEQR was further developed in the cases Cassis de Dijon, ANETT and Keck. Based on the Cassis de Dijon case "even measures that in no way distinguish between national and foreign products, therefore, qualify as MEQRs if they in any way hinder foreign goods that want to enter the national market" (Cuyvers, 2017, p. 334). Cassis de Dijon also introduced the principle of mutual recognition. Based on the ANETT all trading rules enacted by a Member States of which the object or effect of which is to treat goods coming from other Member States less favourably are to be regarded as MEQR.[24] Rules that lay down requirements to be met by such goods, even if such rules apply to all products alike and any other measure which hinders access of products originating in other Member States are also considered MEQR.[25] In the Keck case the CJEU has held that selling arrangements do not constitute a MEQR under Article 34 TFEU and are therefore not prohibited, provided that those selling arrangements apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (Cuyvers, 2017, p. 336-337). The CJEU did not provide a clear definition of 'selling arrangements'. "The concept of selling arrangements, however, was not really defined, but it includes those rules dealing with *how* a product is sold, rather than rules on how the product itself is made."[26] In subsequent case law, the concept of selling arrangements was clarified. The concept covers the following categories of measures[27]:

- restrictions on when goods may be sold;
- restrictions on where or by whom goods may be sold;
- advertising restrictions;
- price controls.

Important to point out is that Keck 'has been widely criticized over the years by both Advocate Generals and others, as it is said to create an artificial and largely unworkable distinction'. In the Trailers case the Court 'succumbed' to the criticism on Keck in an ambiguous way. "It appeared to confirm the pre-existing law, but then

[23] Case 8/74, *Dassonville*, ECLI:EU:C:1974:82, paragraph 5
[24] C-456/10, *ANETT*, ECLI:EU:C:2012:241, paragraphs 32-34
[25] C-456/10 *ANETT*, ECLI:EU:C:2012:241, paragraphs 34-35
[26] Cuyvers, A. (2017). Free Movement of Goods in the EU. In *East African community law: Institutional, substantive and comparative EU aspects* (pp. 326-344). Leiden: Brill Nijhoff.
[27] Oliver, P., & Navarro, M. M. (2017). Free movement of goods. In *European Union Law* (pp. 339-368). Oxford, United Kingdom: Oxford University Press.

added that 'any other measure which hinders access to the market" also constitutes a MEE [MEQR] – language which broadly reflects the test proposed by many critics of Keck". Oliver and Navarro (2017) believe that the Trailers case rather obscured the term market access than illuminated it.

To summarise, measures having equivalent affect to quantitative restrictions are all trading measures which

1. are capable of directly or indirectly, actually or potentially, hindering intra-Community trade;[28]
2. have the object or effect of which is to treat goods coming from other Member States less favourably [29];
3. lay down requirements to be met by such goods, even if such rules apply to all products alike;[30]
4. hinders access of products originating in other Member States.[31]

Selling arrangements do not constitute a MEQR provided that they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

As I mentioned in paragraph 1.3, Regulation 1169/2011 does not indicate which documents, legal or non-legal, are considered as a 'measure'. The TFEU does not provide a definition of the term, but Article 5 TFEU holds a clue to its definition. 'This Article states that Member States shall coordinate their economic politics within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.' This last sentence indicates that guidelines are considered a 'measure'. Despite the non-binding nature of guidelines and based on the definition of the term 'measure' within the meaning of the TFEU, guidelines could also be considered a MEQR.[32] Since Regulation 1169/2011 is based on the

[28] Case 8/74, *Dassonville*, ECLI:EU:C:1974:82, paragraph 5
[29] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 35 and 37
C -108/09 *Ker-Optika,* ECLI:EU:C:2010:725, paragraph 49
[30] [30] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 35 and 37
C -108/09 *Ker-Optika,* ECLI:EU:C:2010:725, paragraph 49
[31] [31] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 37
C -108/09 *Ker-Optika,* ECLI:EU:C:2010:725, paragraph 50
[32] EU Monitor (2012, December 12). Legal Instruments. Retrieved from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh75mdhkg4s0

TFEU, the term 'national measures' as mentioned in Article 38 of the Regulation is likely to have the same definition. Meaning, guidelines are also national measures. More evidence is found in case C-249/81 of 24 November 1982. In this case the CJEU held that 'even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty [EEC]'.[33] The next paragraph provides more information on the justified grounds.

§ 1.3.1.2 Justified grounds

Article 36 TFEU contains a non-exhaustive list of justified grounds. This Article states that quantitative restrictions or MEQR are justified on grounds of public morality, policy, security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Article 36 also states that such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. As mentioned before, Article 36 contains a non-exhaustive list. More justifications can be found in case law. 'To defend indistinctly applicable national measures, Member States can, in effect, submit justification arguments based on any public interest grounds that they consider to be relevant.'[34] In Cassis de Dijon, for example, the Court considered that:

Obstacles to movement within the [Union] resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[35]

Some other examples of justification grounds that the Court recognized are

Europa Nu (2012, December 12). Rechtsinstrument. Retrieved from https://www.europa-nu.nl/id/vh75mdhkg4s0/rechtsinstrument?ksel=n3

[33] C-249/18, *Commission v Ireland,* ECLI:EU:C:1982:402, paragraph 28

[34] Shuibhne, N.N. (2017). Exceptions to the Free Movement Rules. In *European Union Law* (p.p. 477-508). Oxford, United Kingdom: Oxford University Press. (p.p. 483-484)

[35] Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), EU:C:1979:42, paragraph 8

36:

- protection of the environment;
- combating drug tourism;
- combating criminality linked to betting and gambling;
- ensuring road safety;
- maintaining press diversity;
- preserving the cohesion of a tax system;
- protection national or regional socio-cultural characteristics;
- protecting the recipients of a service through the application of professional rules;
- protecting workers.

Thus, a national measure might be justified on certain grounds. However, 'a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is *appropriate* to ensuring the attainment of the objective in question and does not go beyond what is *necessary* to attain that objective'. [37] This is called the proportionality principle.

Thus, to conclude, based on Article 38 of the Regulation, Member States may adopt national measures on the term artisan as long as it does not prohibit, impede or restrict the movement of goods. The Regulation is subject to the TFEU which provides, among others, rules concerning the free movement of goods. Based on Article 34 TFEU, quantitative restrictions and measures having equivalent effect are prohibited between Member States. Regulating the term artisan on national level may be considered as a MEQR, because it potentially hinders access to the market. In case it is not considered as a MEQR, Member States are free to adopt national measures. If it is a MEQR, then it may be justified on grounds mentioned in Article 36 TFEU. Article 36 contains a non-exhaustive list and more justification grounds can be found in case law. However, such prohibitions or restrictions shall not constitute a means of arbitrary discriminations or a disguised restriction on trade between Member States and are subject to the proportionality test. If Member States can justify such measures, then they are free to adopt national measures on the term artisan for food products. In case it cannot be

[36] Shuibhne, N.N. (2017). Exceptions to the Free Movement Rules. In *European Union Law* (p.p. 477-508). Oxford, United Kingdom: Oxford University Press. (p.p. 483-484)
[37] Case C-384/08, *Attanasio group*, ECLI:EU:C:2010:133, paragraph 51 (emphasis added)

justified on the grounds mentioned in Article 36 and in case law, then Article 34 is being violated and adopting national measures is not possible.

§ 1.4 Conclusion

The question in this Chapter is what the Scope of Member States is to regulate the term artisan for food products. Based on Directive 2006/114/EC, Member States can regulate the term artisan on national level to ensure more extensive protection for traders and competitors regarding advertising. This Directive does not provide rules to adopt national measures to protect consumers, but Directive 2005/29/EC does. However, due to the full harmonisation approach adopted in Directive 2005/29/EC, Member States cannot adopt national measures to regulate the term artisan to protect consumers, because it may result in different laws within the European Union which could generate obstacles to the proper functioning of the internal market. More importantly, based on Article 3(4) of Directive 2005/29/EC and the Dyson case, this Directive is not applicable because Regulation 1169/2011 contains specific rules on unfair commercial practices regarding food information to consumers. Based on Article 38(2) of the Regulation, Member States may adopt national measures on the term artisan as long as it does not prohibit, impede or restrict the free movement of goods. For this purpose, the Treaty on the Functioning of the European Union is important. Article 34 TFEU prohibits quantitative restrictions and measures having equivalent effect between Member States. Quantitative restriction and measures having equivalent effect (MEQR) can be justified on grounds providing that they shall not constitute a means of arbitrary discriminations or a disguised restriction on trade between Member States and are proportional.

Thus, to answer the question what the scope of Member States is to regulate the term artisan for food products. Member States can regulate the term artisan for food products if it is not considered as a MEQR or if the MEQR can be justified providing that it does not constitute a means of arbitrary discrimination or a disguised restriction on trade and is proportional.

Chapter 2: The application of the legal framework by Member States in local legislation

In the previous Chapter I described the scope of Member States to regulate the term artisan for food products. In this Chapter I will research how Ireland, the United Kingdom, the Netherland and Belgium applied this legal framework in their local legislation. I will also compare the different local legislation with each other. To answer the question, I will search for (legal) documents concerning the term artisan/artisanal.

§ 2.1 The Netherlands

An important Dutch legal document regarding food is the Commodities Act. The Commodities Act (Warenwet) provides rules concerning public health, product safety, fair trading and adequate information. The Act is based on several regulations and decrees that include rules for specific foods and consumer products.[38] The Act does not include any information on the term artisan. Moreover, in the Netherlands the term artisan is not regulated at all, legal or non-legal.

§ 2.2 United Kingdom

Based on a search on legislation.gov.uk no legal document exists concerning the term artisan or artisanal. [39] In 2002, the Food Standards Agency established criteria for the use of the terms fresh, pure, natural etc in food labelling. In 2008, the Food Standards Agency revised the Guidance. Currently, the Guidance includes criteria for the terms fresh, natural, pure, traditional, original, authentic/real/genuine, homemade, farmhouse, farmhouse Pâté, handmade, premium/finest/quality/best. Criteria for the term artisan or artisanal, however, is not included in the Guidance.[40] The Guidance is non-binding and provides informal advice.

§ 2.3 Ireland

In 2015, the Food Safety Authority of Ireland (FSAI) established Guidance Note No. 29 The Use of Food Marketing Terms. It sets criteria on the terms natural, farmhouse, artisan/artisanal and traditional. The Guidance consist of five sections. The first section

[38] Netherlands Enterprise Agency. (n.d.). Commodities Act. Retrieved December 6, 2018, from https://business.gov.nl/regulation/commodities-act/
[39] The National Archives. (n.d.). *Artisan*. Retrieved December 9, 2018, from http://www.legislation.gov.uk/all?title=Artisan
[40] Food Standards Agency (UK). (2008). *Criteria for the terms fresh, pure, natural etc in food labelling* [PDF].

includes the background of the Guidance. In the second section the purpose of the Guidance is explained. Its purpose is to guide food manufacturers, retailers and food services businesses to assist in the responsible use of marketing terms when placing their products on the Irish market to ensure they convey clear meanings and are not misleading to consumers. These guidelines aid in the compliance with Article 16 of Regulation 178/2002 and Article 7 of Regulation 1169/2011. Section three states that the 'Guidance applies to all food placed on the Irish market except where European or Irish national law cover the use of certain marketing terms for specific foods, e.g. traditional specialities guaranteed (TSG), protected designation of origin (PDO) or protected geographical indication (PGI).'[41] Section four provides information on the responsibilities of food business operators based on Regulation 1169/2011. Section five provides criteria on the terms artisan/artisanal, farmhouse, traditional and natural. The Guidance provides the following criteria for the term artisan/artisanal:

> *The terms 'artisan' or 'artisanal' or similar descriptions using these terms should only be used on foods or in advertising of foods that can legitimately claim to meet all of the following criteria:*
>
> *1. The food is made in limited quantities by skilled craftspeople*
>
> *2. The processing method is not fully mechanised and follows a traditional method*
>
> *3. The food is made in a micro-enterprise at a single location*
>
> *4. The characteristic ingredient(s) used in the food are grown or produced locally, where seasonally available and practical*

The term artisan is not regulated in any other (legal) document in Ireland.

§ 2.4 Belgium

In 2017, the Federal Public Service Economy[42] established a guideline on the use of the terms artisanal (artisanaal) and artisan (ambachtelijk) and terms thereof in product names.[43] The Guideline contains six paragraphs which are formulated as questions.

The first paragraph of the Guideline includes the scope of the Guideline. This paragraph states that all food and non-food products which are put on the Belgian market are subject to the criteria adopted in the Guideline unless more specific rules exist. It also states that

[41] FSAI. (2015). Guidance Note No. 29 The Use of Marketing Terms.
[42] Federale Overheidsdienst Economie, K.M.O, Middenstand en Energie (Federal Public Service Economy, SMEs, Middle Classes and Energy.)
[43] Michail, N. (2018, April 30). Galicia sets legal definition of artisan food. Retrieved December 6, 2018 from https://www.foodnavigator.com/Article/2018/04/30/Galicia-sets-legal-definition-of-artisan-food

organisations which are not situated in Belgium or any other EU Member State should also apply this Guideline, a similar guideline or guidelines adopted by other Member States. Paragraph two describes when a product may be called artisan or artisanal. The intrinsic characteristics of a product and its production process are important elements in determining whether a producer may call his product artisan/artisanal. A producer may call his product artisan if:[44]

1. the ingredients or a substantial part of it have intrinsic qualities, i.e. unprocessed, additive free;
2. the product is a result of a process that mainly includes manual aspects and if the product has an authentic character, i.e. food preparation based on the traditional recipe;
3. the product is produced on a small scale.

These are cumulative terms. All terms need to be fulfilled and may not be in conflict with each other. Paragraph two also states that producers shall positively justify the label 'artisan' or 'artisanal' on their product via advertising or the product label. Justification is also possible via a website, but only if the advertisement or product label refers to this website. It also states that the label artisan/artisanal shall not be justified based on missing criteria in a specific regulation. Paragraph three indicates that there are specific rules concerning food. This paragraph refers to Regulation 1169/2011 and states that food information shall not be misleading. Paragraph four states that products of a qualified craftsman are not necessarily artisan or artisanal. The product, even crafted/produced by a qualified craftsman, need to comply with the criteria mentioned in paragraph two of the Guideline. Paragraph five states that the Guideline only covers the terms 'artisan', 'artisanal' and 'artisan prepared'. Terms such as 'homemade', 'traditional' and other comparable terms are not covered by the Guideline. Paragraph six stipulates the sanctions in case of violation of the Guideline. These sanctions are adopted in Article XV.83 Code of Economic Right[45] (Belgian Law) and can be imposed on those who violate part VI of the Code of Economic Right.[46] Labelling a normal product as artisan might be considered as an unfair commercial practice and is based on part VI.95 Code of Economic Right prohibited which can lead to sanctions. In Belgium, this Guideline is the sole document regulating use of the term artisan.

[44] FOD Economie. (2017). *Guidelines over het gebruik van de terminologie "artisanaal", "ambachtelijk" en afgeleiden hiervan in productbenamingen* [PDF], paragraph 2
[45] Article XV.83 Wetboek van Economisch Recht (Code of Economic Right)
[46] FOD Economie. (2017). *Guidelines over het gebruik van de terminologie "artisanaal", "ambachtelijk" en afgeleiden hiervan in productbenamingen* [PDF].

§ 2.5 Comparison of local legislation

First of all, the Netherlands and the UK did not regulate the term artisan in any legal or non-legal document. However, the UK regulated other marketing terms in a non-binding guideline. Ireland and Belgium both adopted a guideline. In this paragraph I will discuss the difference between these two guidelines.

First of all, the Irish guideline covers more terms than the Belgian guideline. Both guidelines apply to all foods placed on their market. The Belgian guideline also includes non-food products, while the Irish guideline solely speaks of food. The Irish guideline provides, in contrast to the Belgian guideline, clear criteria on the terms artisan/artisanal, farmhouse, traditional and natural. The Belgian guideline also provides criteria on the terms artisan/artisanal but in a less clear manner. The purpose of the Irish guidelines is to guide 'manufacturers, retailers and food service businesses to assist in the responsible use of marketing terms when placing their products on the Irish market to ensure they convey clear meaning and are not misleading consumers.'[47] The purpose of the Belgian guideline is not clear. Its purpose is mainly to assist businesses in the lawfully use of the terms artisan/artisanal.[48] A clue to the purpose of the Belgian guideline lies in the violation clause. The sanctions named in the violations clause are based on Belgian law, namely the Code of Economic Right. A food producer who violates the Belgian guideline, carries out an unfair commercial practice within the meaning of the Code of Economic Right and Directive 2005/29/EC. The provisions in the Code of Economic Right concerning unfair commercial practices are based on Directive 2005/29/EC.[49] This suggests that the purpose of the Belgian guideline is not only to assist businesses but also to protect consumers against unfair commercial practices of food and non-food producers. The Irish guideline, however, does not include a violation clause and is more of an advisory nature.

§ 2.6 Conclusion

The question in this Chapter is how Ireland, the United Kingdom, the Netherlands and Belgium applied the legal framework, as mentioned in Chapter 1, in their local legislation.

[47] FSAI. (2015). Guidance Note No. 29 The Use of Marketing Terms. Section 2
[48] FOD Economie. (2017). *Guidelines over het gebruik van de terminologie "artisanaal", "ambachtelijk" en afgeleiden hiervan in productbenamingen* [PDF]. P. 4
[49] Art. VI.1 paragraph 8 Code of Economic Right

The Netherlands did not regulate the term artisan in a guideline or national law. In the UK the Food Standards Agency established criteria for the use of the terms fresh, pure, natural etc in food labelling. However, this Guidance does not include criteria for the term artisan. In 2015, the Food Safety Authority of Ireland (FSAI) established Guidance Note No. 29 The Use of Food Marketing Terms. This Guidance includes, among others, criteria on the term artisan/artisanal. Belgium established a guideline on the use of the terms artisan and artisanal and terms thereof in product names. There are a few differences between the Irish and Belgian guideline. The main difference between that the Belgian and Irish guideline is that the Belgian guideline includes a violation clause. A food producer who violates the guideline carries out an unfair commercial practice within the meaning of the Code of Economic Right and therefore indirectly Directive 2005/29/EC. The Irish guideline is more of an advisory nature and does not includes such violation clause. The two guidelines also differ slightly in purpose. The purpose of the Irish guideline is to guide manufactures, retailers and food service businesses to assist them in complying with the law. The purpose of the Belgian guideline is to assist businesses in the lawfully use of terms artisan/artisanal and to protect consumers against unfair commercial practices. The Belgian guideline applies to food and non-food products while the Irish guideline only applies to food products.

It is striking that the UK, Belgium and Ireland adopted guidelines and not law. A possible explanation why these Member States established a guideline instead of a law is the possible restriction of the free movement of goods as a law could be considered as a measure having equivalent affect and a guideline possibly not.

Chapter 3 The regulated tools that are in line with EU law

This Chapter concentrates on the question which of the regulated tools is in line with the framework established in sub question number one. To answer this question, I will evaluate which of the local legislation is in line with the framework as mentioned in the first Chapter. First, I will provide a short summary of the established legal framework.

§ 3.1 The legal framework as established in Chapter 1

In Chapter 1 I concluded that Directive 2006/114/EC allows Member States to adopt the term artisan on national level to ensure more extensive protection for traders and competitors. It precludes consumers. Based on Directive 2005/29/EC, Member States cannot adopt national measure on unfair commercial practices due to its full harmonisation approach. More importantly, the Directive is not applicable based on the rulings in the Dyson case and Article 3(4) of the Directive because Regulation 1169/2011 contains specific rules on unfair commercial practices regarding food information to consumers. Based on Regulation 1169/2011 Member States may adopt national measures concerning matters which are not specifically harmonised by the Regulation provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with the Regulation. Since the term artisan is not harmonised by the Regulation or any other European legislation, Article 34 TFEU is applicable. Article 34 prohibits quantitative restrictions on imports and measures having equivalent effect between Member States.

In Chapter 1 I explained the definition of a measure having equivalent effect (MEQR). In summary, measures having equivalent affect to quantitative restrictions are all trading measures which;

1. are capable of directly or indirectly, actually or potentially, hindering intra-Community trade;[50]
2. have the object or effect of which is to treat goods coming from other Member States less favourably [51];
3. lay down requirements to be met by such goods, even if such rules apply to all products alike;[52]

[50] Case 8/74, *Dassonville*, ECLI:EU:C:1974:82, paragraph 5
[51] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 35 and 37
C -108/09 *Ker-Optika*, ECLI:EU:C:2010:725, paragraph 49
[52] [52] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 35 and 37

4. hinders access of products originating in other Member States.[53]

To answer the question which local legislation is in line with the legal framework, I will analyse in the next paragraph whether the local legislation of Ireland and Belgium is in line with the Directive 2005/29/EC, Directive 2006/114/EC, Regulation 1169/2011 and/or TFEU

§ 3.2 Evaluation of the Irish guideline

First of all, the purpose of the Irish guideline is to assist manufactures, retailers and food service businesses to comply with Article 16 Regulation 178/2002 and Article 7 Regulation 1169/2011.[54] Since the guideline includes criteria on the term artisan, which is not specifically harmonised by Regulation 1169/2011, Article 34 TFEU is applicable. The question is whether the Irish guideline on marketing terms constitute a MEQR or not.

As mentioned in Chapter 1, guidelines can constitute a MEQR despite its non-binding nature However, since Ireland has adopted a guideline of an advisory nature and does not include any violation clause, it is not likely that the guideline is capable of hindering intra-Community trade directly or indirectly, actually or potentially. It is also unlikely that the guideline is capable of influencing the conduct of traders and consumers and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty.[55] For the same reasons it is not likely that the guideline hinders market access of products originating in other Member States. The guidelines have not the object nor the effect to treat goods coming from other Member States less favourably. The guideline is a mere guide to assist all European manufacturers, retailers and food service businesses to comply with the before mentioned regulations. Considering before mentioned, the Irish guideline does not constitute a MEQR.

§ 3.3 Evaluation of the Belgian guideline

The purpose of the Belgian guideline is to assist businesses in the lawfully use of the terms artisan/artisanal and to protect consumers against unfair commercial practices. The Belgian guideline sets criteria for artisan food and non-food products. Regarding non-food products

C -108/09 *Ker-Optika,* ECLI:EU:C:2010:725, paragraph 49
[53] [53] C-110/5, Commission v Italy (*Trailers)*, ECLI:EU:C:2009:66, paragraphs 37
C -108/09 *Ker-Optika,* ECLI:EU:C:2010:725, paragraph 50
[54] FSAI. (2015). Guidance Note No. 29 The Use of Marketing Terms. Section 2
[55] C-249/18, *Commission v Ireland,* ECLI:EU:C:1982:402, paragraph 28

Directive 2005/29/EC is applicable. In paragraph 3.3.1 I will evaluate if the guideline is in line with this Directive. Regarding food products, Regulation 1169/2011 is applicable. Since the guideline includes criteria on the terms artisan/artisanal which is not specifically harmonised by Regulation 1169/2011, Article 34 TFEU is applicable. In paragraph 3.3.2 I will evaluate if the guideline is in line with the TFEU.

§ 3.3.1 Directive 2005/29/EC

The guideline regulates the term artisan for non-food products. In case of non-food products, Directive 2005/29/EC is applicable. In Chapter 1 I concluded that Member States may not adopt national measures on commercial practices to provide a higher level of consumer protection. Regulating the term artisan provides a higher level of consumer protection regarding unfair commercial practices.[56] For this reason, the Belgian guideline is not in line with Directive 2005/29/EC

§ 3.3.2 Regulation 1169/2011 and TFEU

The guideline also regulates the term artisan for food products. In this case, Regulation 1169/2011 is applicable. Member States may adopt national measures on the term artisan as long as it does not prohibit, impede or restrict the free movement of goods. For this purpose, Article 34 TFEU is important. The question is whether the guideline constitutes a MEQR.

Once more, guidelines can constitute a MEQR despite its non-binding nature. As mentioned in Chapter 2, the Belgian guideline contains a violation clause. Meaning, in case a food producer, Irish or foreign, violates the guideline, sanctions can follow. This violation clause gives the impression that the guideline has a binding effect. Even if the guideline does not have binding effect, the guideline may be capable of influencing the conduct of traders and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty.[57] Therefore, the guideline could potentially hinder intra-Community trade. The guideline lays down requirements for food products without distinguishing between national and foreign products. Due to the strict requirements and the violation clause, the guideline potentially hinders foreign goods that want to enter the Belgian market. The guideline has not the object nor the effect to treat goods coming from other Member States less favourably. All food producers who want to place their product on the Belgian market

[56] See paragraph 1.2 of Chapter 1 of this research.
[57] C-249/18, *Commission v Ireland,* ECLI:EU:C:1982:402, paragraph 28

need to comply with the guideline. Due to the binding effect of the guideline, it is likely that the guideline hinders access of products originating in other Member States.

Considering that the Belgian guideline is likely to hinder intra-Community trade and capable of influencing the conduct of traders, it is likely that the guideline constitutes a MEQR. The question is whether the guideline can be justified or not.

In Chapter 1 I mentioned that Article 36 contains a non-exhaustive list of justifications. Other justification can be found in case law. One of those justification can be found in the Cassis de Dijon case:
Obstacles to movement within the [Union] resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the ***defence of the consumer.***
Considering that one of the purposes of the Belgian guideline is to protect consumers against unfair commercial practices, the justified grounds are to protect the fairness of commercial transactions and to the defend the consumer. Beside the justified grounds, the measure (guideline) should be proportional. Meaning, the guideline shall be '*appropriate* to ensuring the attainment of the objective in question and does not go beyond what is *necessary* to attain that objective.'[58] Answering the question whether the guideline is appropriate and necessary is not an easy task. The proportionality test requires scientific or other expert evidence.[59] In this research I will try to evaluate whether the guideline is proportional or not.

The first question is whether the guideline is appropriate (suitable) to achieve the objective. Meaning, does the guideline (the measure) protect consumers against unfair commercial practices concerning artisan products (the objective). First of all, the guideline is of an advisory nature but gives the impression of a binding effect. The binding effect is due to the violation clause which is actually a violation of Belgian law (Code of Economic Right). Those who do not comply with the guideline carry out an unfair commercial practice within the meaning of Directive 2005/29/EC. The violation clause would suggest that food producers

[58] Case C-384/08, *Attanasio groupd*, ECLI:EU:C:2010:133, paragraph 51 (emphasis added)
[59] Shuibhne, N.N. (2017). Exceptions to the Free Movement Rules. In *European Union Law* (p.p. 477-508). Oxford, United Kingdom: Oxford University Press. (p. 501)

will comply with the guideline. However, in case of providing food information to consumers, Directive 2005/29/EC is not applicable because Regulation 1169/2011 provides more specific rules concerning unfair commercial practices regarding food information. Therefore, it is uncertain whether food producers would actually comply with the guideline. Subsequently, the appropriateness of the guideline is also uncertain.

Another question is whether the guideline is necessary to achieve the objective. The actual question here is whether alternative measures have less restrictive effects on EU trade.[60] The objective is to protect consumers against unfair commercial practises relating to artisan products. Alternative measures would be, for example, national law (with binding effect) on the term artisan. A guideline has less restrictive effects on EU trade than a regulation with binding effect. Therefore, it is likely that the guideline is necessary to achieve the objective.

To conclude, the Belgian guideline constitute a MEQR, because it is likely to hinder intra-Community trade and capable of influencing the conduct of traders. The guideline could be justified on the ground to protect consumers. However, it is likely that the guideline is not proportionate because the guideline might not be appropriate.

§ 3.2.2.1 The violation clause in the Belgian guideline and EU law

This paragraph contains extra information which is not necessarily part of this research. During my analysis I noticed that other aspects of the Belgian guideline are potentially not in line with EU regulation. As mentioned before, the Belgian guideline contains a violation clause. According to the guideline, (food) producers who violate the guideline are carrying out an unfair commercial practice within the meaning of the Code of Economic Right and indirectly Directive 2005/29/EC. The Code of Economic Right is, among others, based on Directive 2005/29/EC concerning unfair business-to-consumer practices. An interesting question is whether Belgium may actually impose sanctions on food producers based on Directive 2005/29/EC considering that Regulation 1169/2011 contains specific rules on unfair commercial practices regarding food information to consumers.

[60] Shuibhne, N.N. (2017). Exceptions to the Free Movement Rules. In *European Union Law* (p.p. 477-508). Oxford, United Kingdom: Oxford University Press. (p. 500)

§ 3.4 Conclusion

The question in this Chapter is which of the local legislation is in line with the established framework. Belgium and Ireland have both established a guideline setting criteria on the terms artisan/artisanal. The Irish guideline does not constitute a MEQR because it is not likely to hinder intra-Community trade or market access. Therefore, the Irish guideline is in line with EU law.

The Belgian guideline focuses on two aspects, namely food products and non-food products. When a Member State wants to adopt national measures on commercial practices regarding non-food products, the provisions of Directive 2005/29/EC apply. Based on the Directive Member States may not adopt national measures on commercial practices to provide a higher consumer protection. In that aspect, the guideline is in violation of Directive 2005/29/EC. The part of the guideline regarding food products is not in violation of Directive 2005/29/EC, because Regulation 1169/2011 applies which allows Member States to adopt national measures as long as it does not prohibit, impede or restrict the free movement of goods. For this purpose, Article 34 TFEU applies. Based on thorough analysis, the Belgian guideline violates Article 34 TFEU, because it constitutes a MEQR which can be justified but is not proportional. The Belgian guideline is not in line with EU law, because it violates Directive 2005/29/EC and Article 34 TFEU.

Conclusion

The question in this research is which legal framework exists for Ireland, the Netherlands, Belgium and the United Kingdom to regulate the term artisan for food products based on EU food law and marketing law. First of fall, Member States that want to adopt national measures on the term artisan for non-food products to protect traders and competitors regarding advertising, are allowed to do so based on Directive 2006/114/EC. Member States that want to adopt national measures on the term artisan for non-food products to protect consumers against unfair commercial practices, the provisions of Directive 2005/29/EC are applicable. Based on the harmonisation approach adopted in the Directive and the Dyson case, Member States are not allowed to adopt national measures on unfair commercial practices which provide a higher level of consumer protection. With regard to food products, however, Member States are allowed to adopt national measures on matters that are not specifically harmonised on the condition that it does not prohibit, restrict or impede the free movement of goods. More specifically, such measures shall not violate Article 34 of the Treaty on the Functioning of the European Union (TFEU) which prohibits quantitative restrictions on imports and measures having equivalent effect (MEQR) between Member States. The term artisan is not specifically harmonised by Regulation 1169/2011 and therefore Member States can regulate the term artisan for food products provided that it complies with Article 34 TFEU. Belgium and Ireland both adopted a guideline setting criteria on the use of the term artisan. In contrast to the Irish guideline, the Belgian guideline sets criteria on both food and non-food products and includes a violation clause. Based on thorough analysis, the Belgian guideline is not in line with Directive 2005/29/EC, Regulation 1169/2011 and TFEU. The Belgian guideline is not in line with Directive 2005/29/EC because the guideline includes rules for non-food products to provide a higher level of consumer protection regarding unfair commercial practices which is not allowed by the Directive. The Belgian guideline is not in line with Regulation 1169/2011 and TFEU, because it constitutes a MEQR. Although the guideline can be justified on the ground of consumer defence, the guideline is likely not appropriate and therefore not proportional. To conclude, the Irish guideline is a good example of a national measure that is in line with EU Law. Adopting national regulation (with binding effect) or a guideline such as the Belgian's is not advisable. However, due to the advisory nature of a guideline it is uncertain if consumers will actually enjoy protection. More importantly, national regulation on the term artisan by more Member States, could result in different laws which could generate obstacles to the proper functioning of the internal market.

Therefore, in my opinion, in case regulation of the term artisan for food products deemed to be necessary, the term should be regulated on EU level.

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