

LOYENS  LOEFF



Advertising Food

How to navigate in the European context?

Aude Mahy & Filip Pauwels - Dutch Food Law Association – Amsterdam, 14 /11/2013

How to assess compliance of a food ad?



Food advertising = partially harmonised at EU level





Methodology:

STEP 1:

Compliance with **EU requirements** + local requirements of **first EU country**

- **Horizontal legislation** (e.g. *FIC Regulation/ Belgian R.D. on Food Advertising*)
- **Vertical legislation** (e.g. *Directive on Cacao; Regulation on milk products/ Belgian R.D. on the marketing of cheese; R.D. on lemonades*)

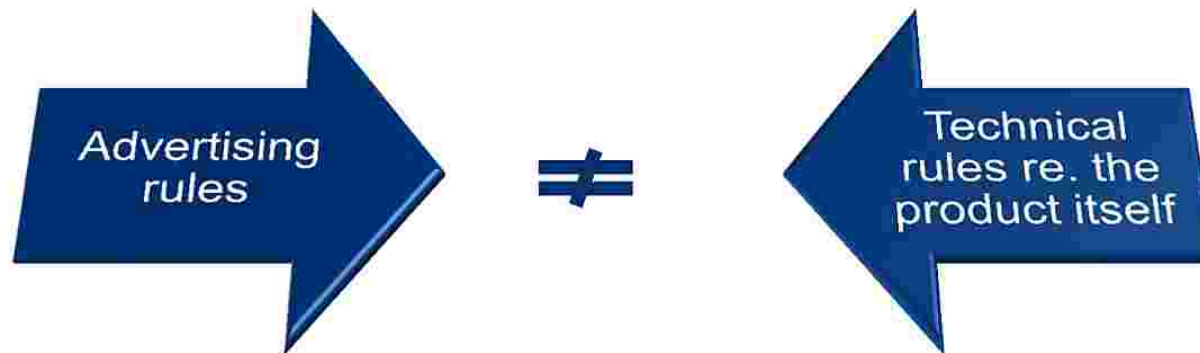
STEP 2:

Compliance with local requirements of the **new EU country (market expansion)**



Only if these local requirements do not infringe the principle of free movement of goods!

Relation between rules on food ad. & free movement of goods?



Food ad rules may constitute an obstacle to trade when:



Concrete relation between national measure & access to the market of the relevant product.

Concrete assesement

E.g.

Discontinuing an ad scheme particularly effective
(*C-239/02 Douwe Egberts*)

Absolute prohibition to advertise on a product's characteristic
(*Case C-241/89 SARPP, C-239/02 Douwe Egberts*)

Authorised obstacle to trade:



A national measure representing an obstacle to trade may be admissible if duly justified by an **imperative requirement** :

Such
as:

→ Public health

Eg: Restriction on marketing of certain plants; measures alcoholic beverages

Case C-405/98 Gourmet International Products

→ Consumer protection

Eg: Misleading information

→ Industrial & commercial property

Eg: national trademarks; PDO, PGI

Authorised obstacle to trade is always subject to:



Proportionality

If a Member State has a choice between various measures to attain the **same objective**, it must choose the **means which restricts free trade the least**.

[Case 261/81 Rau v De Smedt; Case C-241/89 SARRP; Joined Cases C-34/95 to C-36/95 De Agostini and TV-Shop [1997]; Case C-239/02 Douwe Egberts].

**Specific issue of
misleading advertising**



Misleading advertising



European ban

A food ad/label may not mislead the consumer to a material degree, particularly:

- ➔ As to the **characteristics** of the food
- ➔ By attributing to the foodstuff effects or properties which it **does not possess**
- ➔ By suggesting that the foodstuff possesses special characteristics when in fact **all similar foodstuffs possess such characteristics**

Directive 2000/13, Art. 2(1) and (3)/ FIC Regulation, Art. 7.

Misleading advertising



European definition of consumer

→ **'reasonably well-informed, observant and circumspect' person.**

CJEU, 6 July 1995, Case Mars; CJEU, 16 July 1998, Case C-210/96 ('Marketing standards for eggs').

Misleading advertising

BUT:



National interpretation as to the identification of the consumer that could be misled



Possible justification to impose national measure & impede the free movement of goods

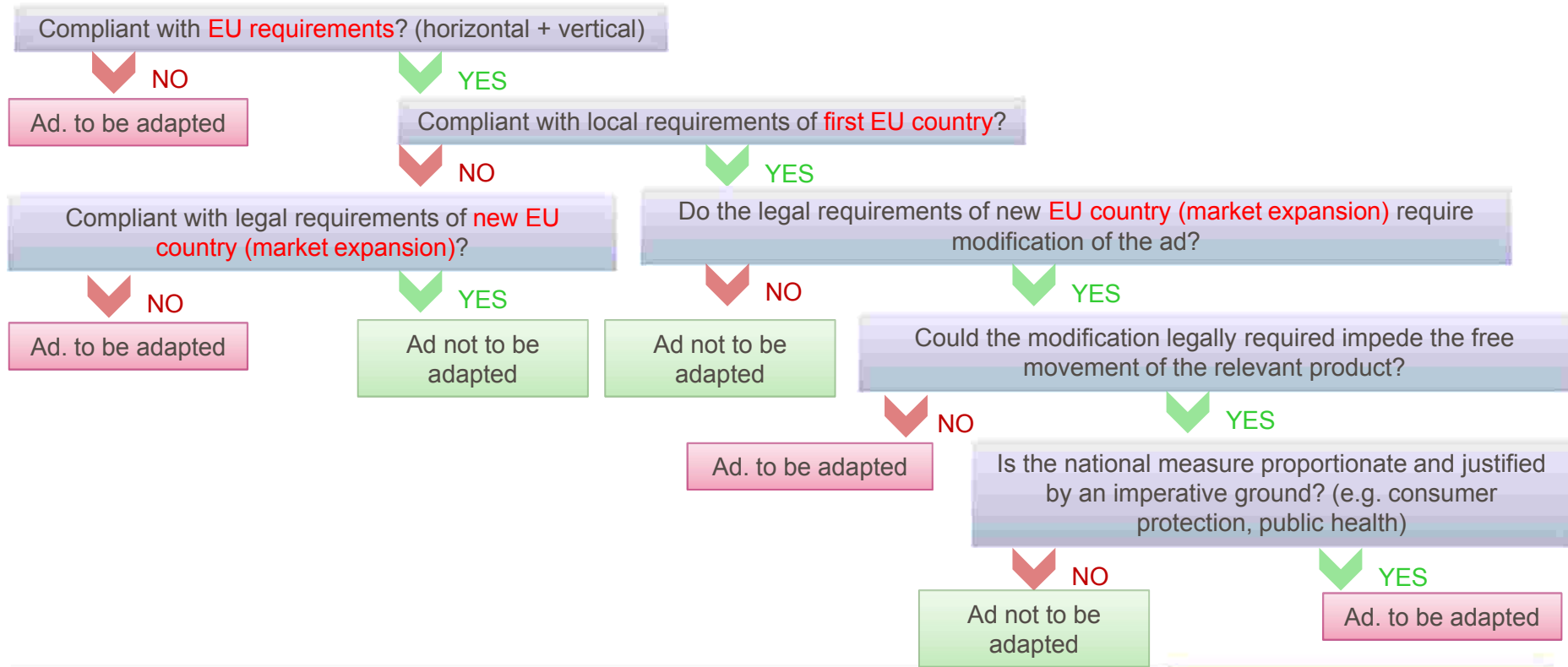


Understanding of national contexts is essential!

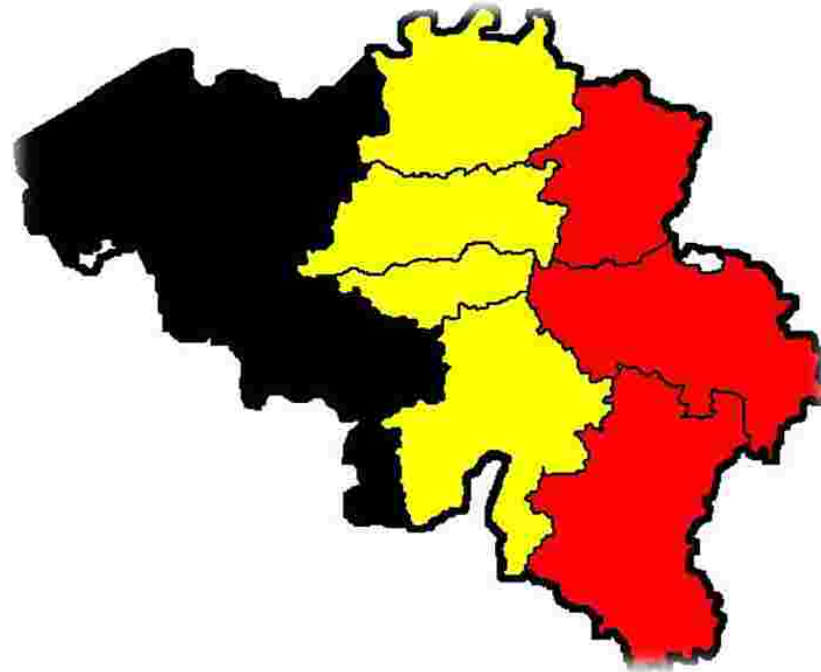
Case C-210/96 ('Marketing standards for eggs')

**Conclusion:
Key tool when advertising at EU level**

ADVERTISING FOOD AT EU LEVEL



Advertising Food in Belgium



Advertising Food in Belgium



- **Legislation:**

In general → Royal Decree of 17 April 1980 on Food Advertising
Certain foodstuffs → # legislative acts

- **Self regulation (codes of conducts)**

- Code on the Promotion of Foodstuffs
- Code on the Promotion of Alcoholic Beverages





Royal Decree on Food Advertising

First category of prohibitions

- 'ill', name of illness, reference to symptoms of illness or of ill people (except if authorised health claim)
- Use or represent people, clothing or devices that evoke (para)medical / pharmaceutical professions
- References to medical recommendations, certificates, etc. containing claims unauthorised under EU Claim Regulation
- Reference to a Minister or government body competent for public health without approval



JEP, 7 October 2005, www.jep.be



Royal Decree on Food Advertising

Second category of prohibitions

- Statements, indications, names, references, images or signs that **are or could be misleading** as to the nature, the identity, the capacity, the composition, the method of production / preparation, the condition, the storage, the characters, the origin, the provenance or the use of the foodstuffs or of the raw materials and ingredients
- References that incite or exploit emotions of fear or anger;
- Claims involving objective and measurable elements with respect to the composition of the product, that cannot be justified;
- mention the fact that vitamins and provitamins have been added if they have only been added for technologic and organoleptic purposes;
- provisions set out in **Directive 2000/13/EC**, which are now embedded in FIC Regulation



Royal Decree on Food Advertising

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JEP decision 21 November 2005



Court of appeal of Brussels, 29 May 1996



Court of appeal of Brussels, 12 September 2000



Royal Decree on Food Advertising

First category of prohibitions

Second category of prohibitions



Not applicable to foodstuffs legally manufactured and/or marketed in other EU member states, in Turkey or in countries that have co-signed the agreement of the European Economic Area.

Applicable apply to domestic products and products imported from third-countries (except EEA and Turkey)



Self-regulation

Code on the advertising of foodstuffs

- Inspired by the ICC Code
- Nutrition and health claims, misleading advertising and advertising targeted at children

Code on the advertising of alcoholic beverages

- Very practical code
- Contains various restrictions

Examples: Educational slogan
Children / Pregnant women



Enforcement by JEP



Clean labels

- 'Farmhouse', 'from the farm', 'farmer' dairy farm products → only if it originates from the same 'farm' as the milk
- 'Pure', 'natural', 'fresh' → Since 2012



JEP, 5 March 2008

- Home-made (artisanal) / Grand-mother's recipe



JEP, 23 November 2010

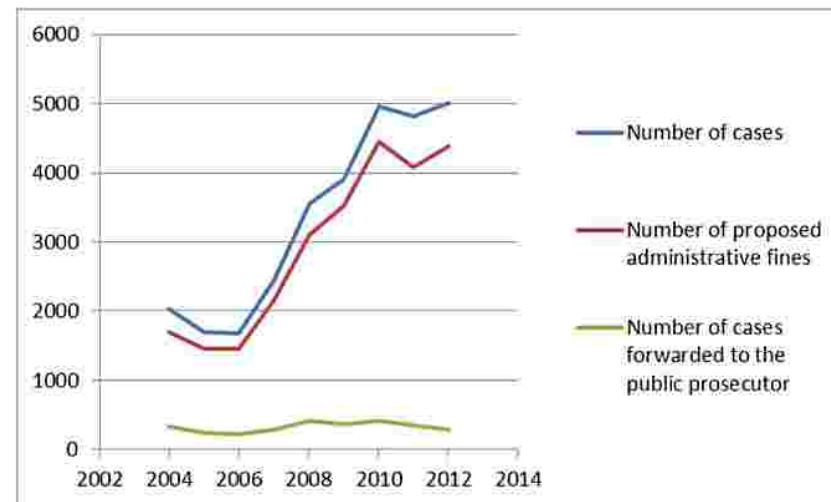
- 'Additive-free' or 'preservative free'

Assessment based upon general principles

Enforcement by public authorities



- Warning
- Administrative fines
- Criminal sanctions
- Preventive attachment & rendering unusable



Enforcement of food law in general by the FAHV



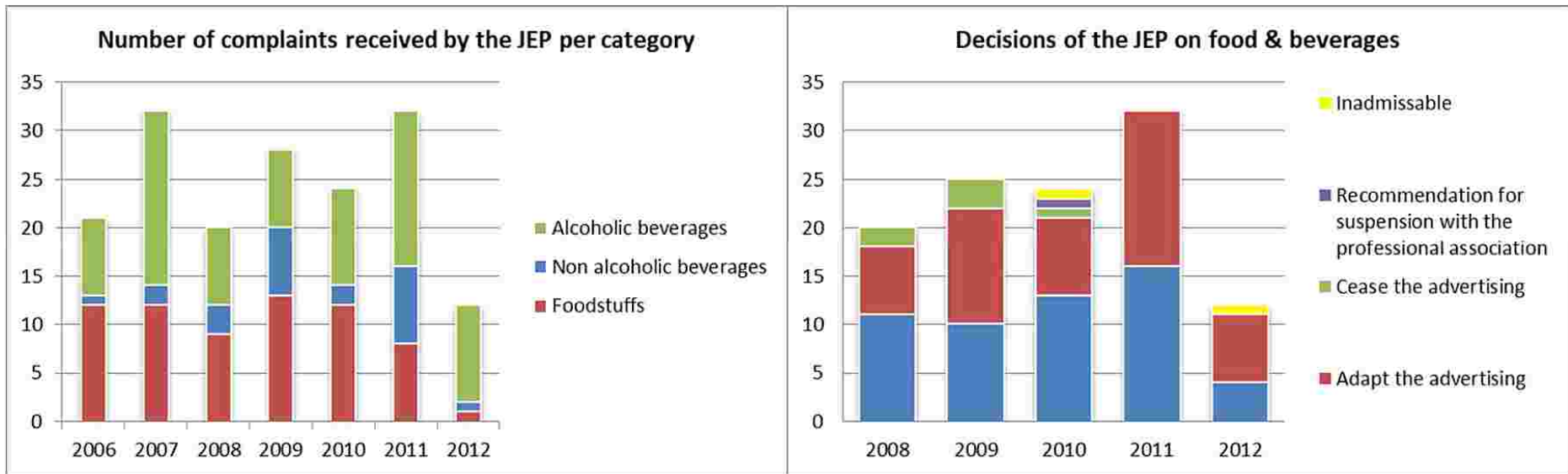
Enforcement by others

- File a complaint with  **economie** or  **FAVV** → **common practice**
- File a criminal complaint
- Civil proceedings for damages
- Summary proceedings
- Injunction proceedings → **common practice** of consumer / professional organisation
- File a complaint with JEP → **common practice** but not open to food business operators



Enforcement by JEP

JEP = self-disciplinary body





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Brussel
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Hong Kong
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Luxemburg
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Singapore
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