

relating to *quality* only if: (a) The chocolate has a total dry cocoa solids content of at least 43 per cent, including at least 26 per cent cocoa butter (emphasis added).²⁰

Thus the EC has decided that certain chocolate products will not be entitled to bear the name chocolate. But the consumer could read the cocoa content on the label and make his own decision. The EC has opted for greater consumer protection at the cost of greater interference in the market-place.

Again a glance at comparable US regulations helps place the significance of progressive standards in perspective. As has already been noted, US regulations place minimum cocoa requirements on chocolate products as well. However, the US Food, Drug, and Cosmetic Act contains the following provision:

A food shall be deemed to be misbranded . . . (c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated.²¹

The EC standards do not provide such an exception. An imitation chocolate product may not contain the word chocolate. When viewed in the context of how chocolate products are marketed, this difference is especially significant. For example, many sweets are thought of as containing at least some chocolate even though the word chocolate does not appear in the name. One would have to look at the small print of the list of ingredients to see the word 'imitation' beside the word 'chocolate'. One would then have to reason that what appears to be chocolate in the sweet is something other than chocolate. The inability of the consumer to make this logical step is discussed in detail below.

The standard requiring products to be sold only in certain quantities clearly acknowledges this competition-on-the-merits strategy. In the preamble, it states that 'for a given product, the number of quantities which are so close to each other that they risk confusing the consumer should be reduced as far as possible, in the interest of greater market transparency.'²² The EC has furthermore made the decision that 'the obligation to indicate the unit price should, wherever possible, be replaced by standardization of quantities of pre-packaged foodstuffs'.²³ Thus, the EC is clearly relying on

the progressive strategy as the preferred method to direct competition to the merits.

Philosophy of the Progressive Strategy

Consumer contracts

Is this second strategy really needed? To answer this question the philosophy of the second goal must first be defined clearly. Although the relationship between the consumer, the buyer, and the seller is that of arm's-length bargaining, legal systems have long recognised that special rules should control it.²⁴ A consumer is not a market professional. He knows little about market conditions, production methods, or methods of judging quality. The consumer's information plight is especially severe in a developed society where the consumer buys more than a few basic items. A modern consumer is faced with hundreds if not thousands of products in a single day. To argue that a consumer could intelligently protect his interest on each transaction is absurd. Marketing theory describes this inability of the consumer to digest information needed to make a purchase of certain goods such as foodstuffs. Such goods are termed 'convenience goods' and are described as goods which:

are usually sold by brand name and are low priced. They fall into three subcategories: staples, impulse items, and emergency items. Many of them — such as bread, milk, and gasoline — are staple items, the consumer's supply of which must constantly be replenished The consumer rarely visits competing stores or compares price and quality when purchasing convenience goods. The possible gains from such comparisons are outweighed by the costs of acquiring the additional information.²⁵

Predictably, then, the price is not seen as an important factor in marketing such goods, but convenience of location is.²⁶

One might argue that, in the long run, the market itself will protect the consumer through various market mechanisms: A competitor may point out the poor quality of a producer's product in advertisements. A particular product's image may be damaged by word of mouth, bad experiences, or a consumer report. The product will eventually have to be taken off the market or improved. Strong arguments exist that the market alone cannot

20 Chocolate Directive, see Note 7 above, at Article 8.

21 21 USC §343 (1992).

22 Quality Directive, see Note 10 above, at 1. This Directive actually does not govern chocolate products but the principle applies to chocolate products since the Chocolate Directive contains similar quantity requirements and makes almost the identical statement. See Council Directive (amending the Chocolate Directive) 76/628, OJ 1976 L223, at 1.

23 Foodstuff Pricing Directive, see Note 9 above, at 1.

24 In civilian jurisdictions, the law governing the relationship between merchants has long been different from the law governing a relationship when a non-merchant is involved. Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska, Peter-E. Herzog, *Comparative Law: Cases, Text, Materials*, Foundation Press, NY, 1988 (5th edn), at 301 to 304. This distinction continues today, *ibid.* at 542 to 546.

25 Boone and Kurtz, Note 16 above, at 272.

26 *Ibid.* at 275.