

## Case law

### Case Details

**National ID:** 6 U 219/09

**Member State:** Germany

**Common Name:** link

**Decision type:** Court decision in appeal

**Decision date:** 25/03/2010

**Court:** Higher Regional Court (Frankfurt on the Main)

**Subject:**

**Plaintiff:** not disclosed

**Defendant:** spirit producer - name not disclosed

**Keywords:** alcohol, average consumer, material distortion, product origin, professional diligence

### Directive Articles

Unfair Commercial Practices Directive, [Chapter 2, Article 5, 2.](#)

### Headnote

(1) A spirit which consists of whiskey and cola is not "diluted" in the sense of article 10, item 1 of the Council Regulation No 110/2008 (on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks) and may therefore be labelled with the term "whiskey".

(2) The infringement of a market behaviour rule in the sense of § 4 Nr. 11 UWG (the German Unfair Competition Act) will only constitute an unfair commercial practice, if at the same time the requirements specified in § 3 II 1 UWG are fulfilled.

### Facts

The defendant used the labels "Whiskey & Cola" and "Bourbon Whiskey & Cola" for a mixed spirit. The plaintiff requested a cease-and-desist order for this labelling, based on an alleged violation of § 4 No. 11 UWG (the German Unfair Competition Act) in connection with article 10 of Council Regulation 110/2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks. According to this Regulation, the usage of the label "Whiskey & Cola" is prohibited if the addition of the cola would be a dilution in terms of article 10 of the Regulation.

### Legal issue

The court considered that the respective labels used by the defendant for its spirits do not infringe article 10.1 of Council Regulation 110/2008/EC. The "Whiskey & Cola" drink is well known and the labelling is therefore not misleading for consumers, as consumers will likely not think that the drink consists of pure whiskey. Even if the Regulation would be infringed, it would not constitute an unfair commercial practice according to § 4 Nr. 11 UWG if the requirements of § 3 II 1 UWG are not fulfilled.

An unfair commercial practice only meets the requirements of § 3 II 1 UWG when the defendant's behaviour is contrary to the requirements of professional diligence, and is likely to materially distort the ability of the average consumer to decide upon the provided information, and thus leads him to a transactional decision which he otherwise would not have made. The court assessed that these requirements were not met by the behaviour of the defendant, and therefore declined the claim of an unfair commercial practice.

### Decision

Does a violation of article 10, item 1 of Council Regulation No 110/2008 (on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks) constitute an unfair commercial practice?

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### Related Cases

No results available

### Legal Literature

No results available

### Result

The plaintiffs request was denied.