

VERDICT

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COURT

Civil law

Case number / role number: 428586 / HA ZA 09-1631

Verdict of 19 January 2011

In the case of

Association STYBENEX,

located in Zaltbommel,

Plaintiff,

attorney R. S. - Le Poole, Amsterdam,

vs

The private company with limited liability

ROCKWOOL BENELUX BV

located in Roermond,

defendant,

attorney P.N. Regteren Altena in Amsterdam

The parties will hereafter be called Stybenex and Rockwool.

**1. The procedure**

1.1. The course of the proceeding consists of:

-the summons;

-the act of Stybenex submission on the part of the exhibits 1 to 15;

-the statement of defense with exhibits 1 to 21;

-the interim decision of 20 January 2010, the case is referred for reply and rejoinder;

-the statement of reply to the exhibits 15 to 34;

-the rejoinder to the production 22 to 28;

-the act utterance exhibits on the part of Stybenex.

1.2 Finally the verdict will be determined

## 2. The facts

2.1 Stybenex is the Vereniging Nederlandse Isolatie Industrie ('Association of Dutch Insulation Industry Trade Associations'; being the Association of Manufacturers of EPS-products) EPS is construction-, packaging, and insulation material, commonly known as Styrofoam. The EPS members (currently 13) are all Dutch producers and traders of EPS. Being a branch organisation, Stybenex represents the collective interests of these members. The main aim is to stimulate the use of EPS.

Article 1 paragraph 2 of the statutes state, as far as relevant:

The association aims to represent the interests of its members in the broadest sense.

The association tries to achieve this by:

-(...)

- collecting, processing, and providing data and information regarding EPS and its applications (...)

- and all other legal means, which could contribute to achieving this aim

2.2 Rockwool is a manufacturer of stone wool insulation and processes this material into products mainly intended for applications in the construction industry.

2.3 Rockwool and EPS are two products with different characteristics but they are both used for the same purposes, being insulation material for the construction industry. Stybenex and Rockwool are competitors in the market of insulation products.

2.4 September 2008 Rockwool issued a brochure '*Rockwool stone wool, fire prevention without tricks*' (hereafter 'the Brochure'). The Brochure has been distributed to contractors, architects, and firefighters. The Brochure could be read on the website of Rockwool and downloaded from the website of Rockwool. The Brochure has been highlighted in advertising and press releases in several construction-related magazines.

2.5 The Brochure mentions the following, as far as relevant.

On page 1:

*ROCKWOOL stone wool*

*FIRE PREVENTION WITHOUT TRICKS*

On page 2:

*The fire safety of a building deserves the highest priority! Fire safety of buildings mainly depends of the building materials applied. When inflammable materials have been used, such as synthetic insulation, this could cause very dangerous situations and may affect the rapid expansion and progress of a fire. over half of the companies which experience a big fire, go bankrupt within three years!*

On page 4:

*A fire occurs when there is at least the presence of oxygen, ignition energy, and combustible material. Oxygen is always plentiful. The ignition energy is usually the cause of the fire and is often caused by human action, whether deliberately or accidentally. The third factor; the combustible material, is the factor which we can influence. After all, without combustible material there could not be a fire. In order to reduce the risk of fire, a building should be built and furnished with a minimal amount of combustible material.*

*A fire might develop if enough combustible material is present. It is therefore very important to know what contribution the materials used have on a fire.*

*Synthetic insulation could contribute to a faster propagation of a fire.*

On page 5:

*By nature, Rockwool stone wool has a big advantage over other insulation materials with regards to fire safety. Stone is simply non-flammable. It does not develop any smoke and it is not toxic. Also the point of solidification is way above 1000 ° C. For all type of building components Rockwool has developed fireproof insulation solutions designed to meet the highest European fire standards. \**

*Stone wool is non-flammable according to EN 13501-1 and it is not included in the fire load calculation according to NEN 6090.*

*\* Rockwool also distributes some composite products. It is possible these products may fall in a different Euro-fire category. Per type of product users are to take notice of the product description prior to purchasing.*

**ROCKWOOL STONEWOOL NEVER CONTRIBUTES TO THE CREATION OF A FLASH-OVER**

*In case of a fire dangerous situations could occur due to using combustible synthetic materials. A so-called flash-over is a notorious phenomenon. It is the fear of every firefighter. When using Rockwool insulation there is no danger of an explosive combustion of any escaped inflammable gas.*

On page 6:

*Rockwool stone wool is classified as being incombustible in European fire category A1 (EN 13501-1) It hardly smokes. It does not drip and it does not cause flash-overs. (...)*

***The most common types of synthetic insulation fall in category D, E or F!***

On page 8:

**END-USE FIRE ARGUMENT**

**THE RISKS**

*The End-use fire argument is increasingly used by manufacturers of inflammable insulation materials. End-use concerns the fire behaviour of the overall composite structure of the system where the (insulation) material is part of. The fire behaviour is measured in the so-called SBI test. It is possible that an End-use condition in which inflammable insulation material has been used, still a reasonable fire rating is achieved. In such simulations the combustible material is more or less wrapped up and protected by other, more fireproof, materials.*

**END-USE HAS NOTHING TO DO WITH THE FACT WHETHER A PARTICULAR MATERIAL IS FIREPROOF OR NOT**

*End-use arguments are often used for products which are not fireproof as a material*

*(...)*

**FIRE SAFETY WITHOUT TRICKS**

*Rockwool stone wool is incombustible and falls into the category European fire class A1, which is the highest. Due to the way the stone wool is applied in practice, it always preserves the highest fire rating. There are no special tricks needed. Other roof insulation materials have been tested in vertical position and behind protective steel sheets where as the Rockwool insulation has been tested in several different situations without any protection*

2.6 Stybenex, in conjunction with another trade association, being the NRK federation, summoned Rockwool to cease any further distribution of the Brochure By letter of 27 November 2008,. 19 December 2008, Rockwool sent a letter stating they were not willing to oblige. 24 March 2009 Stybenex once again send out the same summons

2.7 20 October 2009, the 'Reclame Code Commissie' (the Dutch equivalent of the Committee of Advertising) took a decision between the Association of Polyurethane Rigid Foam Manufacturers vs Rockwool and elaborated on the Brochure, among other issues. The RCC dismissed the specific complaints against the Brochure.

2.8 13 January 2009, the construction magazine Cobouw published an article titled "Tougher standards regarding the use of Styrofoam" These findings include the following:

*Compulsory tests do not fully show how materials burn in practice. Therefore these tests are flawed. The use of EPS or Styrofoam, especially in apartments and hotels, should meet much more stringent requirements, according to chemist W. Duikhuizen from Zuidlaren.*

*(...) Expanded polystyrene (EPS, also known as Styrofoam) which led debate in Cobouw last week, burns in a completely different way. At a relatively low temperature of below 200 degrees it starts to fall apart into styrene, which has a boiling point of 146 degrees.*

*(...)*

*So even in case of a small fire, the solid matter changes into a gas which is very explosive at concentrations of 5 to 10 percent. (...). EPS, which (...) in an environment of hot smoke will depolymerise and will therefore easily create a new fire.*

2.9 11 May 2009, DGMR Bouw BV (hereafter: DGMR), following the discussion on the role of insulation materials in the case of a fire issued a report regarding the fireproof application of synthetic insulation products in buildings. This report includes the following:

On page 3:

*For years in Europe heated discussions have been going on regarding the role of insulation materials in case of fire between on the one hand representatives of industries which manufacture synthetic insulation, and on the other hand the industries which produce insulation materials which are classified as 'non-flammable'.*

*Also in the Netherlands this controversy is a current topic. The ongoing discussion has been prompted by some major fire incidents where an atypical fire course caused great uncertainty and unrest in firefighters and emergency helpers.*

On page 14:

## 8. Summary and conclusions

*Synthetic insulation products, provided they are chosen wisely, can almost always be used in a way which leads to the required level of fire safety regulations in buildings, or even on a higher level if desired. The functional reasons for choosing synthetic insulation products can therefore be allowed without compromising safety.*

*There is absolutely no need to reduce the need of these products for the benefit of insulation products with a non-combustible insulating core*

2.10 February 2010 Efectis Netherlands B V. (Formerly TNO Centrum voor Brandveiligheid, 'TNO Centre for Fire safety', hereafter Efectis) published a report relating to fire safety with the use of combustible insulation materials in construction. This report was commissioned by the Ministerie van VROM (the Ministry of Housing) following a letter from Rockwool regarding this subject to the Tweede Kamer (House of Representatives of the Netherlands). The report analyses some of the 'big fires' as mentioned by Rockwool. The summary includes the following:

### **Conclusion**

*Efectis is of the opinion that the fire safety level of the current EPS / PUR insulation applications are not significantly less safe than the overall fire safety level.*

*(...)*

## **3. The dispute**

3.1 Stybenex claims - summarised - and where possible:

- a declaration that Rockwool acted unlawfully towards Stybenex and its members by the disclosure and dissemination of the Brochure;

- a ban on any further publication and distribution of the Brochure, the misleading statements in the Brochure, as well as any other communications with the same content and purpose;

- a rectification (in various magazines and on the website of Rockwool);

- the above to be subject to a penalty or a fine;

- Rockwool is ordered to pay all costs of the procedure, plus statutory interest.

3.2 Stybenex claims that by distributing the Brochure, Rockwool is engaging in deceptive and unlawful comparative advertising and therefore acts unlawfully within the meaning of Articles 6:194 and 6:194a BW (Civil Code). Stybenex states that the Brochure is suggestive and incomplete and that the Brochure contains factually incorrect information.

3.3. Rockwool defends.

3.4 The positions of the parties are, where relevant, elaborated upon

#### 4. The assessment

##### **Collective action**

###### *Admissibility under Article 3:305a BW (Civil Code)*

4.1 Rockwool claims that Stybenex failed to identify which specific interests of its members it seeks to protect with this legal action and also whether these interests fall under the scope of the target definition in the statutes of Stybenex. According to Rockwool the scope of the statutes of Stybenex is described too broadly due to which it was not possible to precisely determine the interest of Stybenex to take legal action. It does not seem that the members of Stybenex believe the Brochure to be misleading or that they support the collective action. Also Stybenex did not prove itself sufficiently representative. Stybenex also did not claim that any activities in this field have been made. According to Rockwool this leads to Stybenex being inadmissible in its claim under Article 3:305a BW (Civil Code). The latter is contested by Stybenex.

4.2 Due to the statutes of the association whose mission it is to represent the interests of its members in the broadest sense the court judges that Stybenex may use all lawful means attributing to the purpose. This includes the present interests of the members of Stybenex which is to ensure that the public information regarding EPS is complete and comprehensive. These interests are sufficiently concrete and covered by the broad definition of the statutes. The court particularly mentions the disclosure of information regarding EPS and its applications stated in Article 1, Paragraph 4 of the statutes. The interests of the members of Stybenex are also sufficiently similar as its members all produce and trade EPS. The Court believes the present case of combined interests provides efficient and effective legal protection. Stybenex also claims - in contrast to what Rockwool states - it tries to achieve its objectives as set out in the statutes in practice in several different ways. Stybenex has a website specifically for the purpose and Stybenex defends the interests of its members through its membership of the Vereniging Nederlandse Isolatie Industrie ('Association of Dutch Insulation Industry Trade Associations') and the Vereniging voor Brancheorganisaties van Ondoorzichtige Isolatiematerialen ('Association for Opaque Insulation materials'). The fact that possibly not all members support the action taken by Stybenex or that Rockwool is unfamiliar with the fact that individual members of Stybenex have protested against the Brochure, does not alter the situation. Now that the action taken seeks to protect the similar interests of the members of Stybenex within the meaning of Article 3:305a BW (Civil Code), the special circumstances on the part of individual members is to be abstracted. Whether Stybenex is sufficiently representative, needs no answer. The legislature has deliberately refrained from including the representative of the plaintiff as a legal requirement by law. Stybenex does not have to prove that its members support the collective action. Any member who does not wish to be covered by the scope of the verdict, can easily escape the verdict based on paragraph 5 of Article 3:305a BW (Civil Code). It is to be concluded that the previously mentioned requirements of Article 3:305a BW (Civil Code) have been met. Stybenex is therefore (also) admissible in its claim to the extent that this is pursuant to Article 3:305a BW (Civil Code).

##### **Misleading advertising?**

###### *Target market*

4.3 When answering the question whether the Brochure is misleading, several important conditions apply, including the target group which could

be influenced. The parties disagree about the answer to the question who is the target market. According to Stybenex these are not only professionals but also consumers. According to Rockwool the Brochure solely focuses on building professionals.

In order to determine the target market the court focuses on the target market to whom the Brochure is directed to and / or who receives the Brochure. Rockwool primarily focuses on the 'business-to-business market'. The Brochure was distributed to contractors, architects, and firefighters and it has been brought to the attention of several construction-related magazines. The Brochure is therefore intended for professionals in their occupation with fire, fire prevention, and fire safety and to those who have a certain level of knowledge in this field. The target market is therefore not the "reasonably informed and reasonably observant and circumspect consumer". The fact that there may be consumers who purchase Rockwool products available on the consumer market and then find their way to the website of Rockwool, where the Brochure is available to read and to download, is no reason for the court to choose a different target market. These consumers have an increased level of attention and will therefore be more critical. In their judgement they will not be very much different that the previously mentioned architect. The court will therefore consider professionals who have to deal with fire, fire prevention, and fire safety and which have a certain level of knowledge in this area field due to their occupation.

#### *Incorrect assumptions?*

4.4 Firstly Stybenex blames Rockwool that they state incorrect assumptions in the Brochure with regards to the properties of stone wool in the sense of the final use of the product. According to Stybenex in this context the statements are incomplete and suggestive, give a misrepresentation, and give the reader a false impression.

Rockwool wrongly made a connection between the use of stone wool and the fire safety of buildings. The Brochure solely discusses the flammability of stone wool as such but in practice the material is never used 'on its own'. It is always used behind a covering layer, such as chipboard, plywood, or plasterboard, or it is applied within a cavity or a flat roof underneath steel plates or underneath bituminous roofing sheets.

Erroneously the readers are not made aware of the fact that stone wool needs to be used with other materials and which impact this so-called "end use" application has on the fire safety. Fire safety of building structures is not determined by the individual materials but by the construction elements of which the individual building materials are only a part of.

According to Stybenex the Brochure wrongly overlooks that the fire safety of a building only contributes to a limited extent by the insulating materials used. According to Stybenex claiming that Rockwool does contribute to the fire safety of the overall building is even more imputable as nowadays under the applicable regulations regarding the burning behaviour of products it always has to be assessed in relation to the final application (Article 1 paragraph 2 of Decision 2000/147/EC of the European Commission). Based on these regulations the fire safety (elaborated upon in the Building Act 2003) is not determined by the individual building materials, but by the construction elements of which the individual materials are just one element.

Rockwool also gives a false impression that there is a link between the insulating material used and the real fire. By referring to the effects of fire implicitly the question raises how fire safety is best assured. In the Brochure Rockwool claims stone wool to be the basis

for a fireproof building construction. As an alternative to that solution Rockwool proposes the use of synthetic insulation, which is marked by Rockwool as being fire unsafe and hazardous. However, Rockwool fails to mention that the risk of fire and the severity of the consequences are only to a very limited extent determined by the insulating materials used but by other (unmentioned) factors, according to Stybenex.

4.5 Rockwool emphasis that the Brochure covers the use of bare stone wool. It is undisputed that this falls in the highest fire prevention category A1. The binder present in the stone wool does not influence the category. However, Rockwool does not deny that if Rockwool is applied in a combination of combustible materials this will have a negative effect on the fire safety. Still, according to Rockwool, the insulation material is one of the factors which affect fire safety. The subject of the Brochure is the fire safety properties of insulation material (not insulation products) and its impact on the fire safety. Therefore, Rockwool is allowed to highlight the positive qualities of stone wool. Although the Brochure clearly shows that it deals with insulation material, page 5 has a footnote mentioning that Rockwool also supplies some composite products which possibly fall in another Euro- fire safety class. On page 8 of the Brochure Rockwool also points out that they focus on the 'end-use application and its impact in case of a fire. The influence of the insulation material in case of fire is not as little as Stybenex claims.

The fact that Rockwool emphasis on the properties of the raw material is not incompatible with European law. The fact that the product should be assessed "in relation to the final application", such as Decision 2000/147/EC states, means that the products should be assessed in relationship to their application. For example how the product is applied, for example with screws. This is something else than 'end use', in the meaning in which way the product is applied in a structure or a building as Article 1, Paragraph 2 of the Decision 2000/147/EC does not cover that.

Rockwool disputes that the Brochure gives the impression that stone wool provides full protection against fire and the consequences of a fire.

In the Brochure Rockwool only highlights that the use of non-combustible materials is an important aspect in the context of fire prevention. And that there is a big difference between the 'performance' of the different insulation materials and their contribution to the emergence of a fire and the spread of fire.

Rockwool argues that in order to reduce the risk of fire and the effects of a fire, non-combustible materials (such as stone wool) should be applied as much as possible. The message of the Brochure is to aim for the maximum level of fire safety.

4.6 The court judges as follows regarding the allegation that the Brochure only discusses the flammability of stone wool as such, while stone wool is never used on its own in practice as a 'bare' material:

The fact that stone wool is not flammable, is not disputed. The target market of the Brochure, as referred to in 4.3 will be fully aware of the fact that stone wool as insulation material is used in combination with other less fire-safe products, mostly to cover the stone wool. It is not disputed that the insulation material is one of many factors which affect the fire safety. The parties might disagree regarding to which extend, but the answer to that question is not relevant here. Rockwool is allowed to recommend its materials and readers of the Brochure will understand that this emphasises the properties of the material (stone wool) which Rockwool manufactures. Readers of the Brochure will understand that the discussion in the Brochure concerns the 'basic' material.

Readers will also understand that in the final “end use” application it is combined with other, less fire resistant, materials. On page 8 Rockwool mentions this “end use” application and the footnote on page 5 of the Brochure refers to the fact that also Rockwool supplies composite products and that it could be that these composite products fall in a different European fire category. Rockwool points out that this is something else than assessing the material in “end use”. This leads to the conclusion that the mere fact that Rockwool’s Brochure does not emphasise (enough) that stone wool is usually applied in combination with other less fire-resistant material, and not that the Brochure is misleading.

4.7 The reference to NEN 13501-1 does not alter this. Even if the target group is informed about Decision 2000/149/EC of the Commission, still one has to assess the Euro-fire category in relation to the actual application the product. Article 1 of Directive 89/106/EEC answers the question what exactly is meant by the term ‘products’. Stone wool is a product covered by this directive, such as gypsum board, which can be used to cover stone wool. When assessing the fire safety of stone wool in (relation to) the “end use” application, it is vital to establish whether the “end-use” application affects the material (stone wool). This is also reflected in (the notes to the amendment) de Regeling Bouwbesluit 2003 (‘Building Regulations 2003’) (Order of May 15, 2003, No MJZ2003040335, amending the Building Regulations 2003). The explanation of this directive states the following:

*NEN-EN 13501-1.*

*The European classification and the associated assessment methods for the aspect ‘material behaviour in case of fire’ (reaction to fire) have been harmonised in NEN-EN 13501-1. This classification system for material behaviour in case of fire has a structure similar to the Dutch system as included in the Regeling Bouwbesluit 2003, being a limit and a corresponding assessment method. This method of assessment is based on the testers of the “end use” situation as much as possible. Meaning similar to the way the product is applied in construction. Therefore, the standard can be used to determine the material behaviour of a construction product and a (prefab) building construction or a structural component as part of a particular application. If a structure or a construction component for a particular application has been tested, another application also needs to be tested, unless it is clear that the test results for these other purposes will retain their value.*

4.8 So in the end the different applications of stone wool influence the final application to the behaviour of the material itself (in this case stone wool). It has not been proved that the behaviour of stone wool changes in the final application. Stone wool is still incombustible, even if covered with gypsum plaster board and the overall fire safety will be reduced by the use of less fireproof covering material. The target group of the Brochure will be aware of this, whether informed about the said decision or not. There for it is not a case of deception.

4.9 Nevertheless, the court believes that the Brochure contains misleading information. Primarily due to convey “a false sense of security” in the Brochure. First of all by elaborating on the severity and consequences of fire in the Brochure and

the need to reduce the risk of fire, whereby EPS and Rockwool stone wool are presented as opposites. Then stone wool is presented as a fireproof option and EPS as the unsafe option. The following two phrases in particular convey a false impression that stone wool leads to fire safety.

“Even above 1000 degrees Celsius (...), Rockwool stone wool protects constructions”

“Rockwool means ideal fire protection in any practical situation”

This suggests that any application whatsoever (in any situation in reality) ensures maximum fire safety.

However, many factors are involved when it comes to fire safety whereby the insulating material used only contributes for a small part. The contribution of stone wool to the overall fire safety is limited, let alone that the use of stone wool in itself would lead to an ideal fire safety. Therefore, the court refers to the Efectis report mentioned in 2.10 which concludes that the fire safety level of the current EPS / PUR - insulation applications is not significantly less safe than the overall level of fire safety. This means that the single application of stone wool does not necessarily lead to the protection of building structures. The mentioned communication wrongly gives the impression that the use of stone wool leads to a much higher, even ideal, level of fire safety. Rockwool did not prove that this is the case. Therefore, the statements made by Rockwool are misleading to that extent.

*Factually incorrect information?*

#### division fire categories

4.10 Stybenex states that the Brochure erroneously states that stone wool is non-combustible and is placed in the safest European fire category (A1) The average reader is meant to believe that the properties of the fireproof stone wool also apply to, and extrapolate to, a more or less combustible construction parts in which stone wool has been processed. No information is given regarding composite products which include Rockwool (which fall in different categories) however consistently the non-combustible properties of stone wool are mentioned. The footnote on page 5 of the Brochure does not alter this. According to Stybenex, the Brochure has several pages, and it is therefore not reasonable not to mention this as it concerns essential information seen from a perspective of fire safety. Rockwool argues that most of its range (90%), concerns bare stone wool and that the footnote is sufficient to inform the public about other, composite products.

4.11 As the court has considered, the material stone wool plays a central role in the Brochure. The fact that stone wool is placed in the highest European fire category is undisputed. Also in the sense of an ‘end use’ application stone wool is inflammable. To that extent, the claim that Rockwool stone wool falls in the highest European fire category is correct. Possibly, the classification is different in the case of composite products. The Brochure does not deal with this and on page 5 of the Brochure Rockwool emphasises that composite products possibly fall in a different class. As the Brochure does not give the impression that the classification concerns more than just the “bare” material (which is reinforced by the words on page discussing the ‘end use’ application) the footnote of Rockwool is sufficient. Therefore, the court considers the Brochure not to be incorrect or misleading to that extent.

#### impossibility of flash-over

4.12 According to Stybenex the Brochure wrongly states that in case of the use of Rockwool stone wool a 'flash-over' is impossible. According to Stybenex this is misleading. The ignition of a flash-over can not be prevented by the use of stone wool. The use of stone wool can not prevent that due to the heat of a fire objects in the respective space will start emitting fumes. At the right temperature, and in case of sufficient supply of oxygene, these gases could suddenly ignite and could - even when using stone wool for insulation - create a flash over. The fact that stone wool does not, or virtually not, contribute to a flash-over does not alter the fact that the nature of the quote is misleading, according to Stybenex.

4.13 Rockwool argues that the statements in the Brochure solely concern the contribution a particular insulating material has in case of a flash-over. Stone wool does not contribute. According to Rockwool Stybenex is taking the statements out of context.

4.14 Here the court does not agree with Rockwool. Rockwool tries to use the communication on page 5 in a framework which the reader of the Brochure would not place it. Although the bold headline mentions "Rockwool stone wool never contributes to the formation of a flash-over", the communication underneath the header completely derives from this statement, stating: "The use of Rockwool insulation does not impose any danger of the explosive burning of combustible gases released". This does not concern the contribution of Rockwool stone wool to a flash-over, but the danger of a flash-over when using Rockwool stone wool. Even when using Rockwool stone wool the risk of a flash-over remains. The statement that this is not the case is incorrect and therefore misleading.

#### *misleading use of NEN-standards?*

4.15 According to Stybenex Rockwool misleadingly uses the official standards and therefore acts in breach of Article 6:194 exordium and sub f BW (Civil Code) concerning NEN 6090 and EN 13501-1. The chart included by Rockwool on page 5 of the Brochure is allegedly taken from NEN 6090. The chart included in Appendix of NEN 6090 is not part of the standard text and is therefore informative by nature. Rockwool tries to give the impression that the figures in the chart on page 5 of the Brochure are based on proven and standardised data. Moreover, spruce wood and gasoline have been included. These materials are not reflected in Appendix C of NEN 6090 2006. Also Rockwool mentions the burning value of stone wool of 580 KT / kg, though Appendix C states a burning value of 29.000 KT / kg for the binding agent, a substance which is always present in stone wool products, according to Stybenex.

4.16 According to the court the table is not misleading. It is clear that the table has been derived from the NEN 6090. The figures have partly been taken from Appendix C. The fact that Appendix C is informative, does not mean that the figures included are incorrect. As far as the materials mentioned are not listed in Appendix C, Rockwool has pointed out that these are calculated conform the NEN 6090 regulations. Stybenex does not dispute this, nor does Stybenex dispute the figures themselves. The value stated in the table on page 5 has been given to stone wool, concerns stone wool, and not the binding agent. Stybenex does not claim the value given to stone wool in the table in the Brochure to be incorrect. Considering this and with the knowledge that NEN 6090 is based on a method of calculating which can be applied to any material in order to calculate the burning value, which has also not been disputed, the referral to NEN 6090 is not misleading.

4.17 With regards to EN 13501-1 Stybenex claims that again Rockwool fails to mention that the products are to be assessed in relation to the final application. Here the court refers to the previously stated arguments. Therefore this is not a case of misleading.

### **Comparative advertising**

4.18 Stybenex states the Brochure uses comparative advertising implicitly to the manufacturers and suppliers of synthetic insulation materials in general and EPS insulation specifically. According to Stybenex the comparison made to synthetic insulation is unauthorised within the meaning of Article 6:194a, Paragraph 2 sub a BW (Civil Code) and is disparagingly referred in the meaning of Article 6:194a, Paragraph 2, sub e BW (Civil Code) in relation to Stybenex and its members. False and degrading statements are made regarding synthetic insulation, reinforced by emphasising the benefits of stone wool and comparing stone wool to synthetic insulation materials. Emphasis is made to the following announcements:

“Flammable materials, such as many types of synthetic insulation, could cause very dangerous situations and may play a big role in the rapid expansion and progress of a fire.”

“Synthetic insulation materials could contribute to a faster expansion of a fire.”

“In case of fire the use of combustible synthetic materials could cause dangerous situations “

“The most common types of synthetic insulation fall in categories D, E and F!”

4.19 According to Stybenex also synthetic insulation may be applied in accordance with the requirements of the Bouwbesluit 2003. The relation between the use of synthetic insulation material and fire protection is limited. According to the report of Efectis mentioned in 2.10, and the report of DGMR mentioned in 2.9, in the Brochure Rockwool wrongly states that synthetic insulation materials are unsafe in case of fire. The Brochure creates an incomplete picture when synthetic insulation - in short - used in the final application is sufficiently fire safe.

4.20 Firstly, Rockwool argues that it is not a case of comparative advertising. Rockwool does not mention any name of the competitor in the Brochure, nor the name of a competitor's product. Rockwool has solely compared the different types of materials. According to Rockwool EPS is a material and not the product of the members of Stybenex.

4.21 The court passes the defense of Rockwool. According to fixed case law of the Hof van Justitie (The European Court of Justice) the concept of “comparative advertising” is to be interpreted broadly (Vgl. HvJEG 25 oktober 2001, *NJ* 2002/142, *Toshiba/Katum*; HvJEG 19 April 2007, *IER* 2007/68, *Champagne* beer). It is not necessary that the competitor or its product is mentioned explicitly. It is decisive whether the public will refer to the competitor. It is also not necessary to refer to one particular competitor. Even when mentioning a product category it could be a case of comparative advertising. The question is whether the public will be able to identify who the competitors of the comparison are. In this case the reader of the Brochure will understand that Rockwool compares its product, stone wool, (among others) to its competitor (the members of Stybenex). Although the Brochure mostly mentions ‘synthetic insulation materials’

in the broadest sense, (of which EPS is one), EPS is mentioned specifically in the Brochure. On page 5, below the chart derived from NEN 6090, a comparison is made to the fire load of EPS (as well as PUR and PIR). Therefore, it is clear to the reader that EPS is one of the synthetic insulation materials the Brochure refers to. Therefore, the court is of the opinion that this is a case of comparative advertising.

4.22 Furthermore, Rockwool argues that the Brochure is not misleading as in the past several large fires have shown that combustible materials can indeed create hazardous situations and fire safety was compromised.

4.23 The court states that due to the misleading nature of the Brochure on the previously mentioned points, it already implies that a comparison to competitive products is strictly prohibited (Article 6:194a, Paragraph 2, sub a BW (Civil Code)). The Court is of the opinion that the Brochure is also illegal as far as the image emerges that synthetic insulation in its final application could lead to fire hazards (including the so-called flash-over), or has a large impact on the spread of fire. Especially considering the reports as submitted by Stybenex, Rockwool did not sufficiently put up in order to reach a different conclusion. In this regard, the court cites both the report of Efectis as well as the report of DGMR. The reports submitted by Rockwool regarding “big fires” do not support the firm and general statements in the Brochure and the impression made by the Brochure that working with synthetic insulation is not safe. In the first place the court states that the reports do not elaborate on the various properties of the different synthetic insulation materials. The various synthetic insulation materials have significantly different properties with regards to fire behaviour. Therefore, general statements regarding fire resistant properties, such as made by Rockwool, - can not be made. The communications made by Rockwool are too general and the effects of insulation products on the fire safety of a building are too complex. The research reports mentioned by Rockwool concern individual cases and may justify the conclusion that the use of synthetic insulation in certain conditions could contribute to a fire. This is reflected by an article submitted by chemist W. Dijkhuizen. The fact that synthetic insulation materials could contribute to a fire is not in dispute. However, that does not mean that such materials in general have a significant effect on the rapid expansion of a fire. Nor can it be said that the use of these materials may be dangerous. This should be seen in a broader framework. The reports mentioned by Rockwool confirm this. The reports mention that in practice different factors (collectively) play a role<sup>1</sup>, including the specific end application.<sup>2</sup> Also Rockwool seems to draw that conclusion, whereby Rockwool asserts that the moral of the story is that synthetic insulation may play a role in the emergence and spread of fire. As Rockwool points out, no report has ruled out that synthetic insulation has played no role whatsoever in the creation or propagation of a fire. However, this is not Rockwool’s message in the Brochure. By being generally indiscriminate with regards to synthetic insulation materials (and EPS), in the sense that these materials lead to very dangerous situations

1 Please refer to the report “Onderzoek brandverloop in een woonblok in Hoofddorp”, the report “grote branden”, as well as the inspection report “Leren van incidenten, explosie aan de Flevoweg te Leiden”

2 Such as the use of ‘bare’ material in the report from the “Onderzoeksraad voor de Veiligheid” on the fire in “De Punt”.

and have a great influence on the rapid expansion and the progress of a fire. And due to the use of these materials dangerous situations may occur, the respective communications could cause the reader of the Brochure to keep away from flammable synthetic insulation materials. Therefore, the Brochure is unnecessarily degrading and unlawful within the meaning of Article 6:194a, Paragraph 2, sub e BW (Civil Code).

### **Conclusion**

4.24 The conclusion of the above is that parts of the Brochure contain misleading statements and unlawful comparative advertising. As no defense has been made against this, the declaration is declared as just, meaning tha Rockwool acted unlawfully towards Stybenex with the disclosure and dissemination of the Brochure.

4.25 The court summons Rockwool to cease further publication of the Brochure within three business days after this ruling. The court sees no reason as yet to ban any misleading statements in the Brochure publicly or in any way communicate the same content. The context in which the various communications are made could determine their legitimacy, so that it this could only lead to enforcement problems. The fact that this fear is justified, appears from statements made by Stybenex themselves in point 3 of the claim which are partly different from the communications as stated in the Brochure.

4.26 Given the way Rockwool brought the Brochure to the attention (placing on the website, distribution to contractors, architects, and firefighters and raising awareness in advertising and PR messages in several construction-related magazines) a rectification is justified. The rectification as claimed is too broad (and not only as the court considers a number of communications not to be misleading or inappropriate). In order to avoid execution problems, the court deems merely a rectification on the website to be appropriate. Also Rockwool will have to put a notice in the said magazines in the same size they placed an advert or PR message, referring to this sentence.

4.27 The rectification is to be placed entirely, unchanged, and without any additions, clearly visible and within three working days after signing of this sentence on the same page of the website [www.rockwool.nl](http://www.rockwool.nl) where the Brochure was (lastly) placed. The rectification is to be as follows

#### *RECTIFICATION*

*By decision of the Amsterdam court of 19 January 2011, Rockwool has been summoned to bring this rectification to your attention.*

*Rockwool publicly issued a brochure 'Rockwool stone wool - Fire Prevention without tricks'. This brochure is an unlawful expression of comparative advertising as it contains misleading communication regarding synthetic insulation materials, including EPS. Rockwool has falsely made the announcement that*

*the use of Rockwool insulation leads to a higher level of fire safety of buildings when compared to combustible synthetic insulation materials. Finally, Rockwool expressed itself to broadly and in an indiscriminate way about the fire safety of synthetic insulation materials. This could wrongly give the impression that these products can not be applied safely in a construction.*

*With the aforementioned decision of 19 January 2011 the Amsterdam court has decided that the publication of the brochure is unlawful towards the Vereniging van Nederlandse Fabrikanten van EPS-Producten ('Association of Dutch Insulation Industry Trade Associations') (Stybenex) and its members. The court summons Rockwool to place a rectification on the website of Rockwool ([www.rockwool.nl](http://www.rockwool.nl)) and to cease any further publication and dissemination of the brochure "Rockwool stone wool, fire safety without tricks".*

*The management of Rockwool Benelux B.V.*

4.28 Within 6 weeks after signing of this sentence, Rockwool is to place (with subsequent appearance of the magazine in the next issue) entirely, unchanged, and with the size of the advert or the PR message regarding the Brochure, the following rectification in the respective magazine:

*By decision of 19 January 2011 of the Amsterdam court, Rockwool has been summoned to bring this rectification to your attention.*

*Rockwool publicly issued a 'Rockwool stone wool - Fire Prevention without tricks'.*

*With the aforementioned decision of 19 January 2011 the Amsterdam court has decided that the publication of the brochure is unlawful towards the Vereniging van Nederlandse Fabrikanten van EPS-Producten ('Association of Dutch Insulation Industry Trade Associations') (Stybenex) and its members. The court summons Rockwool to place a rectification on the website of Rockwool ([www.rockwool.nl](http://www.rockwool.nl)) and to cease any further publication and dissemination of the brochure "Rockwool stone wool, fire safety without tricks".*

*The management of Rockwool Benelux B.V.*

4.29 The rectification is to be placed in the following magazines:

- DAKENRAAD Magazine for roof specialists, designers, builders, and managers (Publisher Dakenraad);
- Architectenweb Magazine AWM (Architectenweb B.V.);
- Roofs (Mandate Publishers B.V.);
- Nieuwsbrief Dakdekkers. nl (Quick Slide Dakbedekkingen);
- ZZP'er in de Bouw (Reed Business);
- Plafond & Wand. Magazine for the outfitting sector (Koninklijke BDU Uitgevers B.V.);
- Bouwwereld (Reed Business);
- Stedebouw & Architectuur (Arko Uitgeverij)

4.30 The court summons Rockwool to pay a penalty of € 5000,00 for each day Rockwool does not comply to one of the previously mentioned orders. The court forfeits the penalties to be paid and maximises these up to an amount of € 500000,00.

4.31 Being the general unsuccessful party, Rockwool is also sentenced to pay the costs of the proceedings. To date on the side of Rockwool estimated on:

Disbursements € 91,93  
Fixed fee € 313,00  
Lawyer € 904,00 (2 points according to rate II)  
€ 1308,93

17

4.32 The subsequent costs in the framework of this procedure are only attributable as far as these costs can be budgeted at the moment. Therefore, subsequent costs will be allocated in the manner as stated in this decision.

## 5. The verdict

The court

I declares that by the disclosure and dissemination of the Brochure Rockwool acted unlawfully towards Stybenex and its members;

II summons Rockwool to cease further publication of the Brochure within three business days after this ruling;

III summons Rockwool to place the rectification mentioned under 4.27 within three working days after the signing of this sentence, entirely, unchanged, and without any additions, clearly visible on the same page of the website [www.rockwool.nl](http://www.rockwool.nl) where the Brochure was (lastly) placed;

IV summons Rockwool to place the rectification mentioned under 4.28 of this ruling within 6 weeks after signing of this sentence, (with subsequent appearance of the magazine in the next issue) entirely, unchanged, and with the size of the advert or the PR message regarding the Brochure in the respective magazines mentioned under 4.29;

V summons Rockwool to pay a penalty of € 5000,00 for each day Rockwool does not comply to the orders mentioned under I up to IV with a maximum of € 500000,00;

VI summons Rockwool to pay the costs of the proceedings on the side of Stybenex estimated at € 1308,93;

VII summons Rockwool to incur the costs of this verdict, estimated at € 131,00 attorney's salary increased with an amount of EUR 68,00 to salary lawyer and the writ costs of signing the verdict provided that notification of the decision has been made and Rockwool did not comply within 14 days after the verdict;

VIII declares the convictions and summons mentioned in II up to VII to be enforceable.

428586 / HA ZA 09-1631 19 January  
2011

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This verdict has been reached by P.W. van Straalen and was publicly announced 19 January 2011

