

# IT Protection for food production

The case of meat-sounding food

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# Premise I

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Brussels, 7 November 2018

**The European Commission has today decided to register a European Citizens' Initiative entitled 'Mandatory food labelling Non-Vegetarian / Vegetarian / Vegan'.**

The initiative states that: ***"Vegetarians and vegans struggle across the EU to identify suitable food. We must study the ingredients list of a food product to determine if it is fit for purchase with a hyper-awareness of ambiguous ingredients that could either be plant or animal based"***. The organisers call on the European Commission to propose mandatory pictorial labels on all food products indicating whether they are non-vegetarian, vegetarian, or vegan.

The Commission's decision to register the Initiative concerns only the legal admissibility of the proposal. The Commission has not analysed the substance at this stage.

The registration of this Initiative will take place on 12 November 2018, starting a one-year process of collection of signatures of support by its organisers. Should the initiative receive one million statements of support within one year, from at least seven different Member States, the Commission will have to react within three months. The Commission can decide either to follow the request or not, and in both instances would be required to explain its reasoning.

The European Citizens' Initiatives were introduced with the Lisbon Treaty and launched as an agenda-setting tool in the hands of citizens in April 2012, upon the entry into force of the European Citizens' Initiative Regulation which implements the Treaty provisions. In 2017, as part of President Juncker's State of the Union address, the European Commission tabled [reform proposals for the European Citizens' Initiative](#) to make it even more user-friendly.

Once formally registered, a European Citizens' Initiative allows one million citizens from at least one quarter of EU Member States to invite the European Commission to propose a legal act in areas where the Commission has the power to do so.

# Premise II

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Labelling is not made of labels only...

According to Article 2.2a of Regulation (EU) 1169/2011, **“'food information' means information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication.”**

The rules (basically Reg. 1169/2011) refer to food information and not to labelling only.

Advertising is part of it.

Social media used to communicate information about the products we sell, is food information too.

New scenarios are on the track: influencers activity and new media above all.

# In Europe – The Case

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The Tofu Town case (14 June 2017)

Verband Sozialer Wettbewerb eV **vs** TofuTown.com GmbH.

**The VSW is a German association whose responsibilities include combatting unfair competition.**

**TofuTown is a company which produces and distributes vegetarian/vegan foodstuffs. It promotes and distributes, among others, pure plant-based products under the designations ‘Soyatoo tofu butter’, Plant cheese, ‘Veggie Cheese’, ‘Cream’ and other similar designations.**

Taking the view that the promotion by TofuTown of those pure plant-based products infringes the competition rules, the **VSW brought an action for a prohibitory injunction** against that company before the Landgericht Trier (Regional Court, Trier, Germany), relying on an infringement of Paragraph 3a of the Law on **Unfair Competition**.

# In Europe – The legal arguments

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Reg. 1308/2013 defines the **Common Market Organization**

**The recitals (preambles) state:**

‘(64) The application of **standards for the marketing of agricultural products can contribute to improving the economic conditions** for the production and marketing as well as the quality of such products. The application of such standards is therefore in the interest of producers, traders and consumers. ...

(76) **For some sectors and/or products, definitions, designations and/or sales descriptions are important elements for the determination of conditions of competition.** Therefore, it is appropriate to lay down definitions, designations and sales descriptions for those sectors and/or products, which should only be used in the Union for the marketing of products which comply with the corresponding requirements.’

**Milk and dairy products are defined in Annex VII**

# In Europe - Milk is

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Part III of Annex VII to Reg. 1308/2013 is entitled '**Milk and milk products**'.

It provides:

'1. The term "**milk**" shall mean exclusively **the normal mammary secretion obtained from one or more milkings** without either addition thereto or extraction therefrom.

However, the term "milk" may be used:

(a) for milk treated without altering its composition or for milk the fat content of which is standardised ...;

(b) in association with a word or words to designate the type, grade, origin and/or intended use of such milk or to describe the physical treatment or the modification in composition to which it has been subjected, provided that the modification is restricted to an addition and/or withdrawal of natural milk constituents.

The following shall be reserved exclusively for milk products: whey, **cream**, **butter**, buttermilk, **cheese**, **yogurt**.

An associated name defines the mammal species. In case of no specification, milk is **cow milk**.

# In Europe – Exceptions are regulated

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**Decision 791 adopted in 2010**, allowed each Member State to notify the EU the national **exceptions to the use of milk-related words** for other products.

The Germany declared the following exceptions:

Kokosmilch, Liebfrau(en)milch, Fischmilch, Milchner, Butterbirne, Rahmapfel, Butterbohne, Butterkohl, Butterpilz, Milchbrätling, Buttersalat, Erdnussbutter, Kakaobutter, Fleischkäse, Leberkäse, Käsekie, Butterhäuptel, Butterschnitzel, Faschiertes Butterschnitzel, Milchmargarine, Margarinestreichkäse.

All these **names are traditional** and for this reason, **even if they do not refer to animal products**, actually, they remain allowed.

Among them, there are no soy cheese, vegie cheese or soy milch or soy butter.

# In Europe – The judgement

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The German Landgericht asks if Article 78(2) and Annex VII, Part III, to Regulation No 1308/2013 must be interpreted as meaning that they preclude the use of the term ‘milk’ and the designations that the regulation reserves exclusively for milk products being used to designate a purely plant-based product in marketing or advertising **even if those terms are expanded upon by clarifying or descriptive terms indicating the plant-based origin of the products concerned.**

The EU Court of Justices states:

the term ‘milk’ cannot, in principle, be lawfully used to designate a purely plant-based product, since **milk is, within the meaning of that provision, ‘an animal product’;**

clarifying or descriptive terms indicating the plant-based origin of the product, such as soya or tofu, do not fall within the terms which may be used with the designation ‘milk,’ since **the alterations to the composition of milk that the additional words may designate are those which are limited to the addition and/or subtraction of its natural constituents, which does not include a total replacement** of milk by a purely plant-based product.

Therefore, it is clear that since a **‘milk product’ is derived exclusively from milk, it must contain its constituents.**

In Annex I to Decision 2010/791, **the list does not contain any reference to soya or tofu.**

# In Europe – What about meat and fish?

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Tofu Town affirmed to be a case of discrimination.

**Indeed, in Europe, there are no restrictions legally enforced to limit the use of ‘meat/fish-sounding’ names in order to refer to vegetable-based or insect-based products.**

Reg. 1308/2013 elaborated a category for milk and dairy product, but nothing similar has been stated with reference to meat and its derived products or fish.

Tofu Town affirms that different rules for different products families aren't fair.

The EU Court of Justice states:

**Each sector of the common organisation of markets for agricultural products established by that regulation embodies features specific to it. As a result, a comparison of the technical rules and procedures adopted in order to regulate the various sectors of the market cannot constitute a valid basis for the purpose of proving the complaint of discrimination between dissimilar products which are subject to different rules.**

# The US current situation

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Plant based burgers are getting more and more appreciated:

<https://www.usatoday.com/story/travel/experience/food-and-wine/2017/03/22/plant-based-burgers-trend/99446742/>

Impossible Food is the new trendsetter and a bleeding plant burger is its ultimate weapon:

<http://www.chicagotribune.com/business/ct-impossible-burger-meatless-20170320-story.html>

Here's the Bill Gates and Google venture favorite burger: [https://youtu.be/R\\_1VRJAuTy4](https://youtu.be/R_1VRJAuTy4)

On this side of the Atlantic Ocean some concerns seem to appear,

<https://www.theguardian.com/commentisfree/2017/apr/18/veggie-burger-clean-meat-revolution-plant-foods-animals>, when in America the Dep. Of Agriculture expects plant-based meat to grow 11,7% this year.

Here is the whole process to have an Impossible Burger explained:

<http://www.businessinsider.com/impossible-foods-meatless-burger-how-its-made-2017-8?IR=T#instead-impossible-foods-decided-to-whip-up-heme-in-the-lab-scientists-took-the-genetic-code-in-soybeans-that-makes-heme-and-injected-it-into-yeast-9>

# In the US, up to less than ten years ago

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The Taco Bell Case.

Beef that ain't actually more than 35% beef:

[https://www.huffingtonpost.com/2011/01/25/taco-bell-meat\\_n\\_813864.html](https://www.huffingtonpost.com/2011/01/25/taco-bell-meat_n_813864.html)

The position of 32 Congressmen against the use of the word milk for vegetable products:

<http://www.nmpf.org/files/Welch-Simpson%20Letter.pdf>

The definition of milk by FDA sounds definitely broader than the European one:

[https://www.ecfr.gov/cgi-bin/text-idx?SID=ea6e48f7387258be80adefdfa29ff64&mc=true&node=se21.2.131\\_1110&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=ea6e48f7387258be80adefdfa29ff64&mc=true&node=se21.2.131_1110&rgn=div8)

and a precedent has already been established:

[https://www.foodnavigator-usa.com/Article/2016/12/19/Is-it-legal-to-call-plant-based-beverages-milk?utm\\_source=copyright&utm\\_medium=OnSite&utm\\_campaign=copyright](https://www.foodnavigator-usa.com/Article/2016/12/19/Is-it-legal-to-call-plant-based-beverages-milk?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright)

# Gitson vs Trader Joe's – 1

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United States District Court, N.D. California. - October 4, 2013.

**Plaintiffs Amy Gitson, Christine Vodicka and Deborah Ross filed their First Amended Complaint ("FAC") on June 28, 2013, alleging that various of Defendant Trader Joe's Company's products are misbranded or bear misleading labels**

*Two facets:* Trader Joe's products violate California's Sherman Law **AND** apart from being unlawful under the Sherman Law, the plaintiffs allege that **Trader Joe's labeling and packaging is misleading, deceptive, unfair and fraudulent.**

The first amendment complaint individuates eight products allegedly purchased by the plaintiffs as "Purchased Products:" **French Village Mixed Berry Nonfat Yogurt, French Village Strawberry Nonfat Yogurt, Greek Style Vanilla Nonfat Yogurt, Organic Chocolate Soy Milk, Dark Chocolate Peanut Butter Salted Caramel Truffles, Organic Lowfat Strawberry Yogurt, Organic Soy Milk and Enchilada Sauce.**

# Gitson vs Trader Joe's – 2

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The FAC explains that the products at issue fit into three categories, those that allegedly:

1. **Are unlawfully and misleadingly labeled** with the ingredient evaporated cane juice or organic evaporated cane juice instead of sugar (the Cane Juice Products);
2. **contain added preservatives or artificial colors despite statements on the label stating otherwise** (the No Additives Products);
3. **are labeled milk, but do not comply with the standardized definition for milk promulgated by the Food and Drug Administration** (the Soy Milk Products).

According to the judge, the plaintiffs' allegations regarding products improperly labeled "milk" presumably apply to Trader Joe's Organic Soy Milk and Organic Chocolate Soy Milk, the only products which could conceivably "represent[]" to be a form of milk.

# Gitson vs Trader Joe's – 3

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The Court rejects the argument that the term "soy milk," standing alone, is so well-established that a reasonable consumer, as a matter of law, could not believe that it is some type of cow's milk. Indeed, the FDA warning letters advise against using the term at all.

But here, the allegedly misleading term is coupled with the explicit disclaimer on the product label that Organic Soy Milk is LACTOSE & DAIRY FREE and is an "alternative to dairy milk." It is not plausible to claim, as the plaintiffs do, that a reasonable consumer would believe that Organic Soy Milk is cow's milk and has the same qualities as cow's milk in light of the prominence of the disclaimer on the label.

The plaintiffs argue that Food and Drug Administration disagrees that the term soy milk is not misleading because, "[a]s set forth in the various FDA warning letters" excerpted in the FAC, the FDA views the term soy milk "as violating the requirement that food manufacturers like Defendant use the common and usual name of an ingredient."

The Court states that The plaintiffs place too much reliance on the FDA warning letters, which are "informal and advisory."

No reference is made to the unfair-competition issues related with this definition.

See you soon and

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**Thank you for  
the kind  
attention!**