

The TofuTown Decision: What does dairy's monopoly on words mean for plant-based businesses in the UK?



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Coverage of the European Court of Justice decision in *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH* gave the impression that the court decided that, objectively speaking, plant substances do not qualify as 'milk' or 'cheese'. In fact, the ECJ was bound to apply a longstanding EU regulation which restricts the use of these, and other related words, to products made from 'mammary secretions'. A detailed look at the regulation is required in order to assess what restrictions apply to plant-based businesses operating in the UK, and the potential for the current rules to be changed.

In *Verband Sozialer Wettbewerb eV v. TofuTown.com GmbH* (*TofuTown*), the European Court of Justice (ECJ) ruled that German company TofuTown could not call its plant-based products 'Soyatoo Tofu butter', 'Plant cheese', 'Veggie Cheese', or 'Cream.' From the existing coverage you would be forgiven for thinking that the ECJ was asked to consider the objective meaning of the words 'milk,' 'butter,' 'cheese' and 'cream' and concluded that plant milk does not qualify. In fact, the ECJ was bound to apply an EU regulation which precludes the use of these words to describe or market products that are composed of anything other than 'mammary secretions,' i.e. the secretions of the mammary glands of mammals, principally cows.

The ECJ did not 'ban dairy-style names for soya and tofu,' as reported by the BBC; it was bound to give effect to a prior political decision granting dairy a monopoly on these words. For plant-based food companies marketing their products in the UK, it is to the details of that regulation and the UK implementing rules that we need look for guidance as to what they currently can and cannot lawfully do in terms of marketing their products.

Background to the Regulation

The regulation applied in *TofuTown*, Regulation No 1308/2013, is the most recent iteration of a 1987 regulation, (EEC) No 1898/87, on 'the protection of designations used in marketing of milk and milk products,' and is part of a complex set of EU rules, which have the express purposes of protecting the dairy industry and promoting the consumption of dairy in the EU.

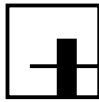
The regulations preclude the use of a set of words for the naming or marketing of any products which are not made from 'mammary secretions'. Only products made from mammary secretions can be designated or marketed as *inter alia*: milk, cream, butter, cheese or yoghurt. If the mammary secretions are not bovine, from cows, that must be specified in the designation, for example 'goat's cheese'. Marketing covers: 'holding or display with a view to sale, offering for sale, sale, delivery or any other manner of placing on the market.'

There are exceptions. The restricted words can be used to name non-dairy products where that is a use 'the exact nature of which is clear from traditional usage,' and a list of exceptions is maintained based on submissions from member states covering products such as: almond milk, coconut milk, nut butters (e.g. peanut butter), and ice-cream.

Plant-Based Foods in the UK

When Regulation 1898/87 was introduced soya milk was being marketed in the UK as 'soya milk' and had been for some time and reports indicate that many in the UK considered that soya milk fell within the common usage exception. The UK did not initially enforce the regulation with consistency and by the 1990's faced the prospect of being taken before the ECJ in relation to this failure. By 2001 it had introduced national rules implementing Regulation 1898/87 and since then soya milk has been marketed in the UK as 'soya drink.'

For many businesses marketing plant-based products in the UK the decision in *TofuTown* will not affect their product



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designations. In recent years there has been a proliferation of plant milks, including almond, oat, rice, hemp and coconut; almost all have followed the now longstanding approach of soya milk producers, calling their products 'oat drink', 'rice drink' etc. More recently however we have seen some plant-milk producers use the word 'milk' in their product name or description, with their marketing campaign openly setting their product up as a competitor to dairy equivalents.

For other plant-based products the picture is more mixed, with many businesses using restricted terms such as 'yoghurt' and 'cream,' and some using the word 'cheese'. Without exception, the plant-based nature of the product is specified alongside the restricted word, for example 'coconut yoghurt,' but the decision in *TofuTown* made it clear, if there was any doubt, that doing so does not effectively avoid the EU prohibition on use of the restricted words.

For producers and consumers alike, the prohibition on use of the restricted words has the potential to create issues, with businesses forced to avoid common terms which most effectively let the consumer know what to expect of a product; a consumer may not get the same impression of a product called 'Mediterranean block' as they would from a designation such as 'coconut milk halloumi,' for example. For consumers interested in purchasing plant-based products this can make product selection more difficult, while for plant-based businesses looking to expand their market this creates real challenges.

Possible Solution

In the UK, under the terms of the UK implementing rules, there is a half-way option for plant-based businesses. The implementing rules state:

'Use of dairy terms to clearly and unambiguously describe a 'non-dairy' product as 'non-dairy' is acceptable. Example: Describing a soya product as a 'non-dairy alternative to cheese.'

While perhaps not attractive to plant-based businesses who have decided to openly challenge the restrictions, this does offer an alternative approach which could be a solution for some businesses, enabling them to make the connection with the commonly understood term so that the consumer knows what to expect, without breaching the rules. However, there

is no express provision for this approach in the Regulation itself, which reads as a complete prohibition on the use of the restricted words. It is yet to be seen if the UK's interpretation of the regulation would be upheld by the ECJ.

As these are European regulations, the UK leaving the EU opens up the possibility of change. However, these rules are part of the overall single market arrangement, and we do not yet know what the outcome of the Brexit negotiations will be with regard to the UK's position in the single market. In addition, there is pressure on the UK government to confirm that it will continue the same level of support for the dairy industry regardless of the outcome of the negotiations.

There is also the possibility of adding plant-based products to the list of exceptions. While the UK was unsuccessful in having 'soya milk' added to the list in the 1990's, it is possible that efforts to secure a political change might gain more traction now given the rapid growth of the plant-based sector.

Finally, a rights-based challenge to the regulation is a possibility, given that veganism is protected under the European Human Rights Convention and the Equality Framework Directive, and there may be an argument that the protections afforded dairy are unlawfully discriminatory against vegan business owners and/or consumers.

Conclusion

While the *TofuTown* decision did not 'ban dairy-style names for tofu and soya', but rather enforced a political decision to give dairy a monopoly on those words, it did confirm that plant-based companies cannot get around the restrictions by using a plant-based description alongside the restricted word. Within the UK there is an option available to plant-based businesses, whereby they can name their products as non-dairy versions of the restricted terms, at least unless and until that interpretation is reviewed by the ECJ.

A more detailed analysis of this topic is provided in an article published in the **EUROPEAN FOOD AND FEED LAW REVIEW, VOLUME 12 (2017), ISSUE 5.**

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