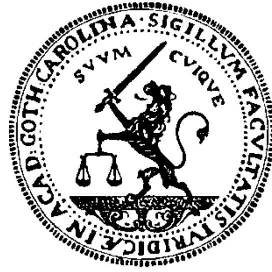

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Labels Misleading Courts Rather Than EU Consumers:

Understanding Restrictions on the Designation of Plant-Based Alternative Products

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Abbreviations

AG .... Advocate General
BSE .... Bovine Spongiform Encephalopathy
CAP .... Common Agricultural Policy
CJEU .... Court of Justice of the European Union
CMOR.................... Common Market Organisation Regulation
EC.......................... European Community
ECJ .... European Court of Justice (Court of Justice of the European Union)
EEC .... European Economic Community
EU.......................... European Union
EUIPO.................... European Union Intellectual Property Office
FIR......................... Food Information Regulation
GC .... General Court
GFLR .... General Food Law Regulation
GMO .... Genetically Modified Organism
IP .... Intellectual Property
LPAFD .... Labelling, Presentation and Advertising of Foodstuff Directive
MS .... Member State(s) of the European Union
NHCR .... Nutrition and Health Claims Regulation
PMDR .... Protection of Milk Designations Regulation
TFEU .... Treaty on the Functioning of the Union
TM .... Trademark
UCPD..................... Unfair Commercial Practices Directive
UDL .... Union Deutsche Lebensmittel
US .... United States (of America)

1 Introduction

1.1 Background: Plant-based Alternatives for Everyone?

Plant-based alternatives to meat and dairy products are no longer a niche market for people following a trend or a strict diet. Over a third of European Union ('EU') consumers are willing to replace meat with plant-based protein alternatives, as a study carried out by the European Consumers Organisation revealed in 2019.[1] Research in the US has shown that 86% of plant-based substitutes are consumed by people who see themselves as neither vegan nor vegetarian.[2] This growing consumer interest has not gone unnoticed: During the past years, companies tried to respond to it by addressing broader consumers groups beyond the niche market for vegans and vegetarians.[3]

Investigations on the marketing of companies that target broader consumer groups have shown that the products are often marketed with a two-sided strategy. On the one hand, the alternatives are presented as *different* compared to conventional products. The plant-based products should be more ethical, more sustainable, and healthier than the conventional products.[4] On the other hand, the plant-based substitutes are marketed as *similar* compared to the products which they aim to replace. The alternatives should be useable in a comparable manner, have a meat-like or dairy-product-like taste, and their shape and nutritional value are also often supposed to resemble.[5]

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[1] The full report is available here: https://www.beuc.eu/publications/one-bite-time-consumers-and-transition-sustainable-food [accessed: 25.05.21].
[2] According to a study conducted in 2017 in the US by the NPD Group, see the press release from 6th June 2018: https://www.npd.com/wps/portal/npd/us/news/press-releases/2018/plant-based-proteins-are-harvesting-year-over-year-growth-in-foodservice-market-and-broader-appeal/ [accessed: 25.05.21].
[3] This is also demonstrated by the current rapid growth of Europe's plant-based industry: See report published by the SMART PROTEIN project, available at: https://smartproteinproject.eu/wp-content/uploads/Smart-Protein-Plant-based-Food-Sector-Report.pdf [accessed: 25.05.21].
[4] Christian Fuentes and Maria Fuentes, 'Making a market for alternatives: marketing devices and the qualification of a vegan milk substitute' (2017) 33 Journal of Marketing Management 529, 530-532; Arte Reportage ‚Re: Schnitzel 2.0 Pflanzliche Alternativen erobern Europa' (Re: Schnitzel 2.0 Plant-based alternatives conquer Europe) (15th March 2020) https://www.arte.tv/de/videos/093706-004-A/re-schnitzel-2-0/ [accessed: 25.05.21], https://www.youtube.com/watch?v=8iRfnnodn8o [accessed: 25.05.21].
[5] ibid.

It seems like a logical implication that producers of plant-based substitutes try to facilitate for 'new arrival' consumers the purchase of their products by describing on the product's package to which conventional product it should be an alternative to or how it should be used. However, the use of terms like 'yoghurt', 'sausage', or 'cheese' for purely plant-based products is contested for a good reason. They bear the risk of confusing consumers who intend to buy the conventional products but are misled by the terms and accidentally buy the plant-based substitute. The underlying issue is therefore that one group of consumers (those who intend to buy the alternative products) is interested in having explanations on the product's label which tell them how the product should be used; the other group of consumers (those who intend to buy the conventional products) is interested in not being misled by the terms on the product's label which do not correspond to what they indent to buy. The use of terms describing similar products like 'crème fraiche', 'cream cheese', or 'mascarpone' is thus at the same time beneficial for one consumer group and disadvantageous for another consumer group.

Balancing these two conflicting consumer interests is not evident. On the one hand, food is associated with European diversity and its cultural and gastronomic heritage.[6] The EU aims at preserving this heritage by legally protecting food names for instance when they are associated with traditional production methods.[7] To exemplify the issue, the Italian soft cheese 'mozzarella' may be only produced 'with whole milk which is raw when it arrives at the plant and adjusted, if necessary, only for the fat content.'[8] From that perspective, protecting terms related to traditional ingredients as part of protecting culinary traditions is understandable. On the other hand, as the Commission emphasised in 2020 in its 'Farm to Fork Strategy', there is a strong need to change current food consumption patterns for environmental and health reasons.[9] The aim to promote more plant-based diets is expressly mentioned as a means to decrease the risk of life-threatening diseases and to lower the environmental impact of food production.[10]

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[6] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L 343/1, recital 1.
[7] ibid arts 17-26.
[8] Commission Regulation (EC) No 2527/98 of 25 November 1998 supplementing the Annex to Regulation (EC) No 2301/97 on the entry of certain names in the 'Register of certificates of specific character' provided for in Council Regulation (EEC) No 2082/92 on certificates of specific character for agricultural products and foodstuffs [1998] OJ L 317/14.
[9] Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' (Communication) COM(2020) 381 final, point 2.4.
[10] ibid.

How EU law balances the two conflicting consumer interests under the current legislative framework has been implicitly interpreted by the Court of Justice of the European Union ('CJEU') in *TofuTown*.[11] When being asked whether clarifying or descriptive terms indicating the plant origin of the product at issue (for example "tofu-butter") would make the use of dairy related terms permissible, the Court responded in the negative. Commentators pointed to the long-standing legislation which strictly reserves dairy related terms to milk and its derivates.[12] They thereby implied that the Court "had no choice" in the sense that the legislation left no margin of discretion for interpretation and that the unbalanced approach arose because of the legislator's failure to intervene before.[13] However, did the Court really have no choice? Does EU law aim to grant a stronger protection to consumers of conventional dairy products? But before having a closer look at this ruling, it is important to understand the underlying issues by some key notions.

1.2 Key Notions

The CJEU emphasised in *TofuTown* that the idea behind the exclusive reservation of dairy-related terms for milk products is to protect consumers from being confused about the ingredients of the product they intend to purchase.[14] Even descriptive or explanatory words would be insufficient to 'prevent with certainty any *likelihood of confusion* in the consumer's mind'.[15] Thus, following the Court's approach, the starting point for explaining the key concepts of this thesis is the notion 'likelihood of confusion'.

'Likelihood of confusion' refers to a standard,[16] rooted primarily in Trademark law,[17] which serves the assessment of whether a consumer correctly associates a word, a sign, a slogan, or a sound with a company or a specific product manufactured by that company.[18]

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[11] Case C-422/16 *TofuTown.com* EU:C:2017:458.
[12] Barbara Bolton, 'Dairy's Monopoly on Words: the Historical Context and Implications of the *TofuTown* Decision' (2017) 12(5) Eur Food & Feed L 422; Daniele Pisanello and Luchino Ferraris, 'Ban on Designating Plant Products as Dairy: Between Market Regulation and Over-Protection of the Consumer' (2018) 9(1) EJRR 170.
[13] See in particular: Annisa Leialohilani and Alie de Boer, 'EU food legislation impacts innovation in the area of plant-based dairy alternatives' (2020) 104 Trends Food Sci. Technol. 262.
[14] *TofuTown.com* (n 11) para 48.
[15] ibid para 48 (emphasis added).
[16] See for a discussion on whether the term 'standard' is appropriate to describe the 'average consumer'-test: Rasmus Dalgaard Laustsen, *The Average Consumer in Confusion-based Disputes in European Trademark Law and Similar Fictions* (Springer 2020) 129ff.
[17] ibid 254-255: The Paris convention does not expressly refer to this notion with the same wording, but the idea was introduced.
[18] See Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, OUP 2019) 388-396.

Suppose, for example, company A uses a sign similar to the sign registered as a trademark by company B. In that case, consumers might be confused about the origin of the product and wrongly think they would purchase a product from company B, even though it is in reality produced by company A. In such a scenario, the court or the relevant authority will assess how likely a consumer is confused by company A's sign and whether company A thereby infringed company B's trademark rights.[19] Even though the CJEU commonly employed the notion "likelihood of confusion" in its jurisprudence on food law,[20] in many cases it has referred to the notion "misleading to consumers" instead.[21]

"Misleading to consumers" embraces the idea that false information or a presentation that gives a wrong impression was provided to the consumer.[22] Following the definition laid down in Directive 2005/29/EC ('Unfair Commercial Practices Directive'; 'UCPD'), a misleading commercial practice 'deceives or is likely to deceive the average consumer [and] causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.'[23] The prohibition to mislead consumers in the area of food law is expressly foreseen in Article 16 of Regulation (EC) No 178/2002 laying down the general principles and requirements of food law ('General Food Law Regulation', 'GFLR') and in Article 8(4) of Regulation (EU) No 1169/2011 on the provision of food information to consumers ('Food Information Regulation'; 'FIR').[24] In accordance with these norms, food business operators have an obligation to ensure that neither the advertising and

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[19] See ibid.

[20] *TofuTown.com* (n 11); Case C-101/98 *UDL* EU:C:1999:615, [1999] ECR I-08841; Case 261/81 *Rau v De Smedt* EU:C:1982:382, [1982] ECR 03961.

[21] Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* EU:C:1998:369, [1998] ECR I-04657, paras 32-37; Case C-51/94 *Commission v Germany* EU:C:1995:352, [1995] ECR I-03599, para 34; Case C-686/17 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main* EU:C:2019:659.

[22] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'; 'UCPD') [2005] OJ L 149/22, art 6(1).

[23] ibid.

[24] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 [2011] OJ L 304/18 ('Food Information Regulation', 'FIR'); Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1 ('General Food Law Regulation', 'GFLR').

presentation, nor the information accompanying the food, nor the 'shape, appearance or packaging'[25] of the product misleads consumers.[26]

To which extend these two concepts ('likelihood of confusion' and 'misleading to consumers') are the same or whether they represent different tests has been widely argued by scholars in the area of trademark law.[27] In the trademark case *L'Oreal* the CJEU considered that comparative advertising is only permissible if the consumer is neither mislead nor likely to be confused.[28] The Court then went on with stating explicitly that the requirements not to be misleading and that there is no likelihood of confusion are to be considered as distinct conditions.[29] In the area of EU food labelling law, it seems that the Court preferably used 'likelihood of confusion' when it comes to cases on the name of the product;[30] whereas 'misleading to consumers' is more used in cases about other elements or claims on the package, such as the graphic depiction of ingredients which are not appearing in the ingredients list,[31] or way to refer to the product's place of provenance.[32] However, this distinction is not entirely clear for several reasons. First, the CJEU has not consistently followed this differentiation. In particular in older cases, the Court referred within the same assessment to both: to the consumer being misled and the consumer being confused.[33] Second, the General Court ('GC') in the more recent *Dextro Energy* case (concerning health claims made on a food package) employed in its reasoning both terms 'confusing' and 'misleading' simultaneously.[34] Third, Advocate General ('AG') Saugmansgard in *Scotch Whisky Association* and AG Hogan in *Groupe Lactalis* seem to

[25] FIR (n 24) art 16.
[26] See also: Case C-195/14 *Teekanne* EU:C:2015:361.
[27] Rasmus Dalgaard Laustsen (n 16) 255; Alice Blythe, 'Misrepresentation, Confusion and The Average Consumer: To What Extent Are The Tests for Passing Off and A Likelihood of Confusion Within Trade Mark Law Identical?' (2015) 37(8) EIPR 484.
[28] Case C-324/09 *L'Oréal u.a.* EU:C:2011:474, [2011] ECR I-06011, para 74.
[29] ibid.
[30] *TofuTown.com* (n 11), which is also in line with the terminology used of the case to which *TofuTown.com* refers to: *UDL* (n 20).
[31] *Teekanne* (n 26), which is also in line with the terminology used of the case to which *Teekanne* refers to: Case C-465/98 *Darbo* EU:C:2000:184, [2000] ECR I-02297.
[32] Case C-363/18 *Organisation juive européenne and Vignoble Psagot* EU:C:2019:954; *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main* (n 21).
[33] Both terms were used simultaneously for example in Case C-303/97 *Sektkellerei Kessler* EU:C:1999:35, [1999] ECR I-00513; in Case C-51/94 *Commission v Germany* (n 21); and in Case 216/84 *Commission v France (milk substitutes)* EU:C:1988:81, [1988] ECR 00793; Note that the court referred in the later *Teekanne* (n 26) (where it exclusively employed the term 'misleading') to Case C-51/94 *Germany vs Commission*; the court however used only 'confusing' in *Rau v De Smedt* (n 20).
[34] Case T-100/15 *Dextro Energy v Commission* EU:T:2016:150, see in particular paras 32, 53, 58, 60, 75, 127, 64-66, 68-69, 71, 83, 85; GC confirmed by the CJEU in Case C-296/16 P *Dextro Energy v Commission* EU:C:2017:437.

use the two expressions in an interchangeable manner in their recent opinions, respectively.[35]

Due to the limited scope of this thesis, the author will not elaborate in detail how best to approach the similarity and/or distinctiveness of the notions 'misleading' and 'confusing'.[36] The two concepts will be considered in the assessment together since they both embrace the idea to delude the consumer regarding the content of the food product. It will be considered that the terms 'misleading' and 'confusing' can both be used when it comes to the assessment of whether a consumer is induced to believe by the appearance of a word, for example 'milk', on a package, that it must necessarily have an animal origin. Independently of the question of whether consumers are confused or rather mislead by meat- and dairy-related terms on the packages of plant-based products, both notions lead ultimately to the person who is confused: the 'average consumer'.

The 'average consumer' is a legal standard introduced by the CJEU to substantiate its view on who the consumer is, who is confused or mislead.[37] Laustsen argues that the Court intended with the introduction of the 'average consumer' to close the loophole left by the European legislator when requiring for an infringement to take place, that the *relevant part of the public* must be likely to be confused. He concludes that the 'average consumer' should define *what* the relevant part of the public is.[38] It was argued by many scholars that the CJEU laid down the notion of the 'average consumer' in *Gut Springenheide*.[39] The case concerned the description 'six-grain – 10 fresh eggs' on egg packs and supplementary information on the benefits of eggs stemming from hens that are fed with six varieties of cereals. The six varieties of cereals in the hens' feed mix, however, accounted for only 60%. The CJEU ruled that to ascertain whether the description was misleading, the expected perception of the 'average consumer who is reasonably well-informed and reasonably observant and circumspect' should be taken into account.[40] The 'average consumer' is thus to be understood as a representative of the

[35] Case C-44/17 *Scotch Whisky Association* EU:C:2018:415, Opinion of AG Saugmansgaard, 'confusion' in footnote 60 and paras 78 and 79, 'misleading' frequently throughout the entire Opinion; Case C-485/18 *Groupe Lactalis* EU:C:2020:763, Opinion of AG Hogan, footnote 17.
[36] To the author is no case or legislation known which would elucidate expressly the difference between the two concepts with regards to the providing of food information.
[37] Rasmus Dalgaard Laustsen (n 16) 3, see also 128-131 for extensive list of wording employed by courts and leg to refer to average consumer.
[38] Rasmus Dalgaard Laustsen (n 16) 3 (emphasis added).
[39] Rasmus Dalgaard Laustsen (n 16) 225; Aleksandra Nowak-Gruca, 'Consumer Protection against Confusion in the Trademark Law' (2018) 5 Eur J Econ L & Pol 1, 3.
[40] *Gut Springenheide* (n 21) para 31; Monika Zboralska, 'Trap of Stereotypes - The EU Model of a Consumer' (2011) 6 Eur Food & Feed L Rev 283, 286.

relevant public, through whose eyes the assessment of whether something is misleading or confusing is carried out.[41] For that purpose, the judge may put herself into the shoes of the average consumer and presume the consumer's expectations.[42]

Even though the CJEU and the EU Legislator relied later on the definition set out in *Gut Springenheide,* scholars argued that both became increasingly protectionist towards consumers in the area of food labelling law and thereby moved away from the initial 'average consumer' concept.[43] The assessment carried out in Chapter 2 of this thesis will support this argument. Irrespective of the question, whether this shift was beneficial or rather detrimental to the protection of consumers, one can wonder how it impacted the *TofuTown* decision. Could the protectionist approach to consumers not being misled have had negative implications for other consumers – those who require the information at stake to make their purchase decision? The question is not straightforward to answer as the consumer concept has undergone a considerable development since *Gut Springenheide,* and many legal instruments contributing to the vast European consumer protection framework have been adopted since. But before diving more deeply into this matter, there is one further notion that is worth being mentioned to obtain a complete picture of the issues at stake.

'Informed choice' refers to the idea that consumers should have all relevant information available when intending to purchase a product so that they are able 'to make their choice in full knowledge of the facts.'[44] As relevant information is to be understood the entire communication with the consumer and not only descriptions, statements, and facts on the product's label. It is thus presumed that the consumer takes the presentation and advertising of a product into account when deciding to purchase the product.[45] Ensuring that consumers are able to make an 'informed choice' should protect the consumers' interests and is part of the general principles of EU food law.[46] Edinger argues that the

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[41] Justine Pila and Paul Torremans (n 18) 381.
[42] *Gut Springenheide* (n 21) paras 31-34; Justine Pila and Paul Torremans (n 18) 381.
[43] Case C-342/97 *Lloyd Schuhfabrik Meyer* EU:C:1999:323 [1999] ECR -03819; See UCPD (n 22) recital 18; and to a lesser extent Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304/64, recital 17; Wieke Huizing Edinger 'Promoting Educated Consumer Choices. Has EU Food Information Legislation Finally Matured?' (2016) 39(1) J Consum Policy 9, 10.
[44] Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* EU:C:1990:102, [1990] ECR I-00667, para 17.
[45] FIR (n 24) art 2(2)(a) and (b); Wieke Huizing Edinger (n 43) 12.
[46] GFLR (n 24) art 8.

concept of 'informed choice' has undergone three stages until its current codification in the FIR. In the first phase, national laws on food labelling were harmonised during the 1970s to smoothen the functioning of the common market. During the second phase the idea, that the information provided to consumers on labels has to be suitable, was further developed. In the third phase, the focus shifted towards nutrition labelling and assisting the consumer in making healthy dietary choices.[47] These three stages and their impact on the perception of the 'average consumer' will be assessed in more detail in Chapter 2.

What should already be said is that nowadays, the notion of 'informed choice' is understood by means of Article 7 of the FIR. Article 7 provides that to ensure informed consumer choices, food information shall not be misleading to consumers. Thus, 'not being misleading' is part of the idea of 'informed choice' – which in turn leads again to the notion of the 'average consumer'. This situation shows not only how the notions are all intertwined, but it also demonstrates that the concept of 'informed choice' is applicable to both our consumer groups. The same information is within the concept of informed choice beneficial for one consumer group and disadvantageous for the other group. It could be considered that for the purpose of allowing an informed choice for consumers intending to buy a substitute product, the product's label must include information on what the substitute could be used as an alternative to. At the same time, it could also be considered that such information on the product's label should be removed as the concept of informed choice requires that the information should not be misleading – in this case for the other consumer group who does not intend to buy the alternative product. The concept of 'informed choice' is thus so far not really helping to solve the issue of how to balance these two conflicting consumer interests.

1.3 Purpose

1.3.1 Research Question

The purpose of this thesis is to have a closer look at these difficulties as presented above and to assess how the perception of the consumer notion impacts the balancing of the conflicting interests in the case of plant-based product labelling. The view on the consumer in *TofuTown* will be examined and whether the CJEU' approach has been accurate to

[47] Wieke Huizing Edinger (n 43) 14-18.

arbitrate between the two conflicting consumer interests. This thesis will thus seek a response to the following question:

To which extent is the perception of the consumer notion in restrictions on the designation and marketing of plant-based alternative products inaccurate?

In answering this question, further questions will be raised throughout the thesis.

The author aims to provide a new angle on the issues at stake. A critical assessment of the consumer notion and of the balancing between diverging consumer interests should approach the naming of plant-based alternative products with a different view.

1.3.2 Delimitations

The assessment carried out in this thesis will be in general limited to EU law. Within EU law, the analysis of the consumer notion will focus on the protection of consumers regarding confusing or misleading contents. Consumer law or consumer protection as a legal area beyond the focus described before will not be part of the assessment. There is also no intention to explain how national courts interpret EU law in general. Even though the analysis targets substitutes for both, dairy and meat products, some parts of the assessment will focus more on alternatives to dairy products. The reason is that the restrictions have been stricter, and there has been more jurisprudence on the matter. It will also not be assessed which types of plant-based alternative products are offered, how they are produced or how they are marketed to the consumer.

1.4 Methodology and Outline

The answer to the research question will be provided in two parts.

Part I will explain in a descriptive manner the background to the *TofuTown* ruling. It should help the reader to understand in which legal and judicial context the CJEU issued its decision and how the consumer notion has been understood over time.

Part II will use the functional comparative method. This method should allow putting in relation the practical implications of different laws.[48] The focus will be less on the rules themselves but more on their effects and on 'judicial decisions as responses to real-life situations.'[49] This method will be applied to assess the outcome of *TofuTown* in three steps:

1. It will analyse to which extend the ruling fits into preceding jurisprudence on the matter. This Chapter will come back to some of the cases explained in Part I.
2. A brief digression to neighbouring legal areas will be provided, which should indicate the leeway the Court had in approaching the consumer notion.
3. It will look at the interpretation of *TofuTown* by national courts and whether the recent GC ruling in *Oatly* could be seen as a change in forthcoming jurisprudence.[50]

Part I will be composed of Chapters 2, 3 and 4, which provides a detailed assessment to the reader on two evolutions in parallel: On the one hand, it will set out how and why the restrictions on the naming of meat and dairy products were introduced and which of them were maintained until today. On the other hand, it will guide the reader through the genesis and evolution of the notion 'average consumer' in respect of confusing or misleading information. The Chapters will be divided into the time periods 1957-1990 (Chapter 2), 1990-2005 (Chapter 3), and from 2005 onwards (Chapter 4).

Selected cases will demonstrate in these Chapters how the restrictions on food names and the perception of the consumer notion have evolved over the years. The cases have been selected for the analysis carried out in this thesis either because the CJEU referred to them in key food labelling cases or because various scholars have identified them as contributing considerably to the evolution of the naming restrictions or of the consumer notion. The cases chosen for the development of the consumer concept will stem from various legal disciplines since the notion has been developed in an interdisciplinary manner.

The assessment in Part II will be carried out in Chapters 5, 6 and 7.

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[48] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 65.

[49] Ralf Michaels, *The Functional Method of Comparative Law* in *The Oxford Handbook of Comparative Law* (OUP 2006) 342.

[50] Case T-253/20 *Oatly v EUIPO (IT'S LIKE MILK BUT MADE FOR HUMANS)* EU:T:2021:21.

Chapter 5 will assess *TofuTown* in light of the previous findings. It will demonstrate to which extent the Court deviated from its previous line of cases, how this deviation could be explained and to which extent it can be criticised as inappropriate for solving the issues at stake.

Chapter 6 will explain how the consumer- and likelihood of confusion notion is approached in other neighbouring legal areas, namely Trademark- and Design Law; Unfair Commercial Practices Law; and the Law on Indications on the Place of Provenance. As the consumer concept is relevant for various legal disciplines, the concept should not be treated in isolation within food naming law. The idea of this Chapter is also to make some comparisons of the CJEU's view in *TofuTown* with these neighbouring legal areas. The legal areas were chosen either because the consumer notion has its roots or was to a large extent developed in that area, or because the Court's approach to the consumer notion is particularly relevant for the analysis in this thesis since it could be transposed to the *TofuTown* case.

Chapter 7 will examine two national cases which referred in their respective rulings to *TofuTown*. It will be assessed how the national courts interpreted and applied *TofuTown,* and if they share in all aspects the same view. Chapter 7 will end with the GC's ruling in *Oatly*, which could be interpreted as a shift in how European Courts approach consumers of plant-based alternative products.

For the assessment in Parts I and II, it will be further considered that there are three consumer groups:

1. Consumers who do not want to buy the alternative products (Group 1)
2. Consumers who want to buy the alternative products occasionally but who are not well informed regarding the substitute products which are on the market and/or how to use them (Group 2)
3. Consumers who buy the products frequently as part of their daily diet and who are well informed about the substitute products on the market and how to use them (Group 3)

It will be argued that the average consumer, which is referred to by the CJEU in *TofuTown,* resembles Group 1 consumers and that it fails to take into account consumers of Group 2. It will then be argued that this approach is not in line with the Court's case-law in neighbouring legal areas, where it was recognised that different degrees of consumer

expertise and consumer interests need to be distinguished. This thesis will support the view that, whereas in other legal areas, the court had a refined view on different consumer types; in the case of misleading labels on plant-based products, such refined view was not adopted, and Group 2 and Group 3 consumers were left out in the assessment. The thesis will approach *TofuTown* in this regard with a critical view.

Finally, the analysis of *TofuTown* will be supported by the views of Mr Michael Beuger, Attorney at WBS Law (Cologne), and who represented TofuTown.com GmbH during the proceedings before the CJEU. He was so kind to provide an interview in German for this thesis. The transcript of the interview (including an English translation) can be found in the Appendix of this thesis.

PART I

This Part will map out the evolution which the restrictions on the designation of dairy products and the perception of the consumer who is confused or misled have undergone. It will be pointed out that whereas the naming restrictions were introduced very early and stayed almost the same until today, the perception of the consumer has developed a lot. In the beginning, it was considered that for consumers to make an informed choice, it would be necessary only to have the relevant information available; however, more recent legislation and jurisprudence adopted a more protective approach which should assist the consumer in making healthy dietary choices and in not being misled by the first impression which a product's label may give.

2 1957-1990: Agricultural Policy and the Common Market Shaping the Genesis of European Food and Consumer Law

The focus of this Chapter will be on the period from 1957 to 1990, where first cases and legal provisions on consumer and food law emerged in the European Economic Community ('EEC' which developed into the EU). The roots of nowadays legislation on dairy products will be explained, which will help the reader to understand in which context the naming restrictions were introduced. This Chapter will further set out how consumer protection was mentioned only 'by the way' and how this impacted the early perception of the 'average consumer'.

2.1 The Origin of the Naming Restrictions: Establishing and Protecting the Common Dairy Market

One of the primary goals of the Treaty Establishing the European Community ('Rome Treaty'), the establishment of a common market, should be achieved for agricultural products by means of a common policy.[51] This Common Agricultural Policy ('CAP') aimed 'to increase agricultural productivity', 'to ensure a fair standard of living for the agricultural community', 'to stabilise markets', and 'to assure the availability of supplies [...] at reasonable prices.'[52] For milk and milk products, the establishment of the common organisation of the market started in 1964 and was complemented in 1968 by Regulation No 804/68 on the common organisation of the market in milk and milk products.[53]

[51] Treaty Establishing the European Community ('Rome Treaty') [1957], art 32.
[52] ibid art 33.
[53] Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products [1968] OJ L 148/13, recitals 1-2; due to the limited scope of this thesis, it is not possible to set out all details of the European support system for milk and milk products, for more details, see: Roland E Williams, 'The Political Economy of the Common Market in Milk and Dairy Products in the European Union' (1997) FAO Economic and Social Development Paper 142.

The restriction on the naming of milk products was subsequently introduced by Regulation 1898/87 on the protection of designations used in the marketing of milk and milk products ('Protection of Milk Designations Regulation'; 'PMDR'). Following Article 2,

> '[t]he term 'milk' shall mean exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom.'[54]

The provision foresees that the same restrictions as for 'milk' apply to milk products figuring in a list in the Annex.[55] The list mentions terms such as cream, butter, buttermilk, cheese or yoghurt.[56] Article 2 of PMDR further contains permissible exceptions, amongst which figures the use of the word 'milk' together with one or several words which 'designate the type, grade, origin and/or intended use of such milk.'[57]

The regulation further requires that the origin of milk and milk products must be specified if the mammary secretions are not bovine.[58] Hence, it is mandatory to label products such as goat milk or sheep cheese with reference to the animal species.

So far, the exceptions set out concerned the use of the term 'milk' with one or several other expressions, provided that the origin of the milk is a mammary secretion. The PMDR provided for a further exception for the use of traditional expressions and/or words that 'describe a characteristic quality of the product.'[59] For this exception, a system was introduced where the expressions submitted by Member States ('MS') are referred to in a list adopted by the Commission.[60]

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[54] Council Regulation (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products ('Protection of Milk Designations Regulation', 'PMDR') [1987] OJ L 182/36, art 2(1).
[55] ibid art 2(2).
[56] ibid Annex.
[57] ibid art 2 (1)(b).
[58] ibid art 2 (4).
[59] ibid art 3(1).
[60] ibid art 4(1); Today: Commission Decision of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007 [2010] OJ L 336/55 Annex I; Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ('Common Market Organisation Regulation', 'CMOR') [2013] OJ L 347/671, art 91(1)(a).

The definition of 'milk' and the aforementioned exceptions have been maintained until today[61] and, following *TofuTown,* are not applicable to products whose origin is purely plant-based.[62] To which extent the Court's hands were bound by these naming restrictions when issuing its ruling in *TofuTown*, will be further discussed in Chapter 5. Turning now to the appearance and development of consumer protection, which took place in parallel to the regulation of the dairy industry.

2.2 An Incidental Debut: Consumer Protection Emerging as a 'By-Product' to the Single Market

Consumer protection was introduced less because of an explicit intention of the European legislator to create a common legal standard, but more incidentally to the creation of the single market and the enforcement of fundamental freedoms.[63] Whether consumers enjoyed any explicit protection before 1979 is debatable, though some scholars argue that the Rome Treaty provided an indirect protection.[64]

The aim to protect consumers' basic rights was put into concrete terms when national laws were harmonised in 1979 by Directive 79/112/EEC ('Labelling, Presentation and Advertising of Foodstuffs Directive'; 'LPAFD').[65] The approximation of laws intended to smoothen the functioning of the common market, yet the Directive recognised that the adoption of further rules on labelling would still be necessary to ensure full protection and information of the consumer.[66] During the same year, the Commission further proposed a draft for a directive on misleading advertising.[67] Edinger qualifies this harmonisation of national rules as the first stage in the development of the concept of 'informed choice'.

[61] CMOR (n 60), Annex VII Part III.
[62] *TofuTown.com* (n 11) para 23.
[63] Monika Zboralska (n 40) 284.
[64] ibid.
[65] Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer ('Labelling, Presentation and Advertising of Foodstuffs Directive', 'LPAFD') [1979] OJ L 33/1.
[66] ibid recitals 6, 8.
[67] Commission, 'Amendment to the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and unfair advertising' (1979) OJ C 194/3; which resulted in the final adoption in 1984: Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L 250/17.

According to her, the second phase was introduced simultaneously by the CJEU with its seminal decision in *Cassis de Dijon*.[68]

The CJEU recognised in *Cassis de Dijon* that consumer protection is part of the mandatory requirements, which may justify the introduction of stricter national laws. These mandatory requirements were foreseen by Article 36 of the Rome Treaty, though textually limited to 'the protection of health and life of humans'.[69] *Cassis de Dijon* introduced a novelty by expressly mentioning 'the defence of consumers' as part of these mandatory requirements.[70] The Court dismissed the claim that the national rules in question would ensure proper labelling of the product (the fruit liqueur 'Cassis de Dijon' could be labelled as such in Germany only if it contained an alcohol content above 24%), as consumer health was not at stake.[71] The Court stated that the national interventions would be disproportional as indicating the origin and the alcohol content would be sufficient to provide suitable information to the consumer.[72] Edinger argued that the Court's choice to give priority to the mere providing of food information over stricter and more protective measures indicates that the Court is of the opinion that consumer demand is sufficient to adjust the products' quality standards. To put it in Edinger's words, 'if choice is the end, consumer information is the means to achieve such end.'[73]

The Court perceived the consumer as being sufficiently able to make a choice with the help of standard information on the product's package, whereas the product's name, which could be considered as misleading, was irrelevant for that purpose. This case shows how different the Court approached the consumer notion at the end of the 1970s compared to the recent *TofuTown* case. Whereas in *TofuTown,* considerations on the confusing aspect of the product's name prevailed,[74] the Court in *Cassis de Dijon* seemed to trust the consumer more that he or she will read the information on the label beyond the product's name to make his or her choice.

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[68] Wieke Huizing Edinger (n 43) 14-15; Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (‚*Cassis de Dijon*') [1979] ECR 00649.
[69] *Cassis de Dijon* (n 68) para 8 ; Rome Treaty (n 51).
[70] ibid.
[71] Caoimhín MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market (Modern studies in European law ; no. 13)* (Hart Publishing Limited 2007) 23.
[72] *Cassis de Dijon* (n 68) para 13.
[73] Wieke Huizing Edinger (n 43) 15.
[74] *TofuTown.com* (n 11) para 48.

2.3 Case Law post-*Cassis de Dijon*

In the case law post-*Cassis de Dijon*, the CJEU often stayed strictly in the *Cassis de Dijon*-line when it comes to consumer perception. To begin with *Rau*[75], in this case, Belgian rules prescribed margarine to be sold only in cubic shaped packages and thereby prevented the German undertaking Walter Rau Lebensmittelwerke ('Rau') to sell its margarine in tubs with the shape of a truncated cone. The Belgian government argued that the obligation to sell margarine in cubic shaped packages would be necessary to protect consumers from being confused between butter and margarine and that it should protect the long-established habit of Belgian consumers to purchase margarine in cubic shaped packages.[76] The CJEU, after recalling the *Cassis de Dijon* doctrine, considered that even though the Belgian rules were clearly designed to prevent the consumer from being confused, they would go beyond what is objectively necessary.[77] The Belgian Government could, however, adopt uniform rules on the labelling of margarine to ensure that consumers are properly informed.[78] *Rau* confirms the *Cassis de Dijon*-perception of the consumer, as it emphasises that consumers have to be properly informed about the product on the package. Overly protective measures would though not be necessary for that purpose. Again, it seems like the Court trusts consumers to read the information on the package when deciding whether they want to purchase a product, instead of being merely guided by the shape of the package.

Shortly afterwards, the court reached to the same conclusion in the two infringement proceedings *Commission v France*[79] and *Commission v Germany*.[80] These two cases are particularly relevant for the assessment in this thesis, as they were both dealing with the selling of milk substitutes. It may be noted that the two cases were registered at the Court before the adoption of the PMDR, though the rulings of the Court were delivered after the adoption of the said Regulation. In *Commission v Germany*, the German Milk Law was at stake, which prohibited the selling of imitated milk and milk products entirely;[81] in *Commission v France,* the Court dealt with the French prohibition to sell products having the appearance of milk powder or concentrated milk and intended for the same uses under

[75] *Rau v De Smedt* (n 20).
[76] *Rau v De Smedt* (n 20), para 16.
[77] *Rau v De Smedt* (n 20) paras 12 and 17.
[78] *Rau v De Smedt* (n 20) para 19.
[79] *Commission v France (milk substitutes)* (n 33).
[80] Case 76/86 *Commission v Germany (milk substitutes)* EU:C:1989:184, [1989] ECR 01021.
[81] ibid.

the name 'milk powder' or 'concentrated milk', if the products did not originate exclusively from the concentration or drying of milk or of skimmed milk.[82]

The Court considered both MS had failed to fulfil their obligations under free movement provisions, as the prohibitions on the marketing of milk substitutes could neither safeguard 'the consumer's freedom of choice'[83] nor 'ensure fair trading and protect[ing] consumers'.[84] France and Germany had forwarded in their interventions their concerns about the use of the substitutes in catering where consumers could not be properly informed about the product.[85] In France, the substitutes were also sold in vending machines.[86] The Court recognised that the providing of full and detailed information may be difficult under these circumstances, however, they would not constitute a valid justification since this type of issue with properly informing the consumer would arise as well with all other ingredients used in foodstuff. The Court then continued in both decisions with stating that '[t]here is no particular reason for stricter consumer information where milk substitutes are involved.'[87]

Turning now to a case where the CJEU came to a slightly different conclusion than the cases mentioned before: *Smanor*,[88] where a 'substantial difference'-test was introduced by the Court. The case concerned French rules which prohibited the deep-freezing of yoghurt and fixed the minimum quantities of live bacteria which yoghurt must contain.[89] Smanor's sales name 'deep-frozen yoghurt' was thus prohibited, only 'deep-frozen fermented milk' was considered by the French authorities to be permissible.[90] The Court first admitted in its ruling that consumers might be less accustomed to the sales name 'deep-frozen yoghurt' than to 'deep-frozen fermented milk' and emphasised then with reference to *Cassis de Dijon* and *Rau,* that justifications based on consumer protection need to be proportionate.[91] When assessing next whether the justification forwarded by the French government would be proportionate, the Court considered with reference to *Commission v France (milk substitutes)*, that it is a legitimate purpose 'to ensure that

[82] Case 216/84 *Commission v France (milk substitutes)* EU:C:1988:81, [1988] ECR 00793, First Opinion of AG Sir Gordon Slynn, para 1.
[83] *Commission v France (milk substitutes)* (n 33) para 12.
[84] *Commission v Germany (milk substitutes)* (n 80) para 18.
[85] ibid para 16; *Commission v France (milk substitutes)* (n 33) para 9.
[86] *Commission v France (milk substitutes)* (n 33) para 10.
[87] ibid.
[88] Case 298/87 *Smanor* EU:C:1988:415 [1988] ECR 04489.
[89] ibid para 3.
[90] ibid para 13.
[91] ibid paras 13 and 15.

consumers are properly informed about the products which are offered to them, thus giving them the possibility of making their choice on the basis of that information.'[92] The Court went on with stating that it would, however, not be necessary in that sense to prohibit the use of the name 'yoghurt' for the products in question, as the description 'deep-frozen' indicates clearly to the consumer that the product as undergone a particular treatment.[93] The Court then further recognised that it is possible to derogate from the strict definitions provided for milk products, if descriptions accompanying the product's name indicate how the product in question is different from conventional dairy products.[94]

Smanor is different when being compared to previous rulings, because the Court left the door open for MS to justify national requirements on the naming of products if there is a 'substantial difference' between products.[95] The Court did not explain in what the 'substantial difference test' consist in, but simply left it to the national court to decide, whether deep-frozen yoghurt differs in its characteristics as much from conventional yoghurt as to justify a different name.[96]

In conclusion, the naming restriction emerged in the context of the creation and harmonisation of the common single market and have been maintained in the same version until today. It was moreover in early cases important that the consumer had all information he or she needed to make a decision; state measures going beyond the mere providing of information were considered as disproportionate. The concept of 'informed choice' was seen as providing information in a 'neutral' form and the idea of free movement of goods and that trade should be as undistorted as possible from state interventions prevailed. Unfortunate events made the European legislator however realise during the 1990s that only ensuring free flow of foodstuff is not sufficient and that further legal regulation of food would be required to ensure product safety.

[92] ibid para 18.
[93] ibid para 19.
[94] ibid para 23.
[95] ibid.
[96] ibid para 24.

3 1990-2005: Systemised Codification of Food Law and Strengthening of the Consumer Notion

The following Chapter will explain how food law became a proper legal area in EU law, which has become more extensively regulated than just in relation to the assurance of the functioning of the single market. The Chapter will furthermore explain how the consumer notion was further developed in the CJEU case law and analyse the case in which the interpretation of the naming restriction adopted in *TofuTown* has its origin.

3.1 Adoption of the GFLR in Response to Food Safety Concerns

As it became apparent from the previous Chapter, in the beginning food labelling law and the development of the consumer notion were largely influenced by the construction of the internal market. Following the internal market imperative, the CJEU restricted justifications based on health or consumer protection to cases where there was a sufficiently serious risk. Two issues pointed during the 1990s out that the European legislative framework was unable to ensure food safety sufficiently.[97] First, the crisis concerning BSE ('bovine spongiform encephalopathy', or commonly known as the 'mad cow disease') led the EU to impose in 1996 a ban on exports of British beef.[98] The second issue related to concerns about the potentially damaging impact of the consumption of Genetically Modified Organisms ('GMOs') on human health. Consumer groups had criticised gaps in legislation which allowed the presence of a GMO in food without being properly disclosed.[99] The Commission's ambition to prevent these safety concerns in future led to the adoption of the GFLR, which codified for the first time systematically European Food Law.

The GFLR embraces in its first article the context in which it was adopted by stating that it should assure 'a high level of protection of human health and consumers' interest in

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[97] Caoimhín MacMaoláin, *Food Law: European, Domestic and International Frameworks* (Hart Publishing 2015) 1-2; See also Caoimhín MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market* (n 71) 176ff.

[98] ibid.

[99] Caoimhín MacMaoláin, *Food Law: European, Domestic and International Frameworks* (n 97) 2.

relation to food, [...] whilst ensuring the effective functioning of the internal market.'[100] The Regulation embodies general principles and responsibilities in the production and distribution of foodstuff, in particular the principle of food safety (Article 14) and the principle of informed choice (Article 8). With the latter was given thus for the first time an explicit expression of the idea that consumers have a right to make informed food choices.[101]

3.2 Judicial Delimitation of the 'Average Consumer' Notion

The consumer notion was in parallel to the codification of European food law further developed by the CJEU' case law. In *GB-INNO-BM,* the Court emphasised in 1990 for the first time the importance of providing accurate information to consumers in connection with consumer protection.[102] *GB-INNO-BM* was described as a 'ground-breaking' ruling, as the Court set the base for a 'uniform European consumer image.'[103]

Which information consumers are not taking into account for their choice was clarified three years later in *Twee Provincien*, where the Court had to decide whether a national cheese mark (composed of a serial number and a combination of letters/numbers) would constitute 'labelling'. In accordance with the definition of 'labelling', which required there to be a specific intention 'to inform the consumer as to the characteristics of the product', the Court considered that the national cheese mark would not have such intention and could thereby not fall under the definition of 'labelling'.[104] The Court's ruling thus distinguished consumers from professionals and entailed that consumer information needs to be understandable without having specific knowledge.

[100] GFLR (n 24) arts 1(1), 5(1)-(2).
[101] The LPAFD (n 65) contained provisions on the need that the purchaser should be adequately informed. However, that was not a Regulation but merely a harmonisation directive; GFLR (n 24) laid down expressly the principle, whereas in the LPAFD it is mentioned only 'by the way'.
[102] *GB-INNO-BM* (n 44) paras 14-16 (emphasis added); See also Gert Straetmans, 'Misleading Practices, the Consumer Information Model and Consumer Protection' (2016) 5(5) J. Eur. Consumer & Mkt. L. 199, 200 (the online version misses some footnotes, the same information incl. footnotes can be found on page 4 of the *Satzfahne* (galley proof), provided by the author by mail on 28th Apr. 2021).
[103] Gert Straetmans (n 102); even though the LPAFD (n 65) mentions the need of the consumer to be adequately informed, it does nowhere in connection with misleading claims or advertising.
[104] Case C-285/92 *Twee Provinciën* EU:C:1993:894 [1993] ECR I-06045, paras 16-18.

Whereas consumers may not be able to understand such technical information, they are able to understand that the size of a marketing claim on a product's package, which emphasises an increase of the product's quantity, may not correspond to the actual supplementary quantity. Such claim was at stake in *Mars*, where the company depicted a '+10%' sign on the package of its ice cream bars, which occupied however around 50% of the package's total surface. A German court had decided that such marketing would mislead the consumer, as it gives the impression that the product's quantity had increased by 50% and not by 10%. The CJEU disagreed with the following reasoning:

> 'Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.'[105]

This reasoning shows a 'matured' view on the consumer, setting aside the approach in the German Law which scholars qualified as exaggerated (also in respect of other cases).[106] The Court showed in *Mars* consumers regarding advertising the same trust, as it did before regarding the naming of products: It expects consumers not to be deluded by the first impression.

This approach of the Court, as to which extend consumers base their decision on information provided on the package, was further developed in *Commission v Germany*.[107] The question here was, whether hollandaise sauce or béarnaise sauce could be marketed as such in Germany when the sauce is prepared from vegetable fats. The German government argued that the marketing prohibition is justified by the protection of consumers from purchasing a product which does not contain the traditional ingredients he or she would expect.[108] The Court dismissed this claim with reference to *Commission v France (milk substitutes)* and by holding that

> 'consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients [...]. Even though consumers *may*

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[105] Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* EU:C:1995:224, [1995] ECR I-01923, para 24.
[106] K. Jasiriska, ‚Nailadownictwo produktow markowych w swietle priwa wlasnosci intelektualnej", (Oficyna Wolters Kluwer business, Warsaw 2010) p. 105 and A.Mokszyrz-Olszyriska ‚Niemieckie prawo o nieuczciwe konkurencji na rozdrozu? Ewolucja niemieckiego prawa o nieuczciwej konkurencji" KPP (2001), vol.2, p. 329 found in: Monika Zboralska (n 40) 286.
[107] C-51/94 *Commission v Germany* (n 21).
[108] ibid paras 22-24.

sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods [...].'[109]

In essence, I consider that the Court approached *Commission v Germany* with a 'purpose-oriented' view. If the product fulfils a certain purpose – it tastes like or is to be used like a hollandaise/béarnaise sauce – it may be designated by a traditional name, even though the plant-based ingredients correspond not to the traditional recipe. Part of what probably prevented the Court to adopt a similar view in *TofuTown* was the shift towards a more protectionist approach towards consumers – an approach which clearly diverges from the case which laid down the fundaments of the consumer notion in 1998: *Gut Springenheide*.[110]

Laustsen argues that the characteristics used by the CJEU in *Gut Springenheide* to picture the average consumer demonstrate 'a fairly high confidence in the abilities of EU consumers to understand what happens in the marketplace'.[111] The Court thereby adopted a technical vision of the consumer.[112] He further concludes that the Court showed to be ready to count only those parts of the public who are able to grasp what happens in the marketplace and to discount thus those who do not.[113] AG Jacobs reached in fact exactly to this conclusion in his Opinion on *Marca Mode*, where he stated that 'it can no longer be relevant that a minority of particularly inattentive consumers might possibly be confused.'[114] If and to which extent such 'a minority of particularly inattentive consumers' should not have taken into account in *TofuTown* will be further discussed in Chapter 5. But before that, it is necessary to have a closer look at the case on which the Court relied heavily in *TofuTown*:[115] *Union Deutsche Lebensmittel ('UDL')*.[116]

[109] ibid para 34 (emphasis added).
[110] *Gut Springenheide* (n 21); for a summary of the facts, see: Section 1.2.
[111] Rasmus Dalgaard Laustsen (n 16) 323.
[112] ibid.
[113] ibid.
[114] C-425/98 *Marca Mode* EU:C:2000:339, [2000] ECR I-04861, Opinion of AG Jacobs, para 30.
[115] *TofuTown.com* (n 11) paras 18, 26, 40, 45, 46, 48.
[116] *UDL* (n 20).

3.3 *UDL* - Setting the Base for a Strict Application of the Dairy Naming Restrictions

The company UDL produced food whose animal fats have been replaced by vegetable fats having the property of lowering cholesterol levels.[117] UDL marketed its cheese under the designation 'Dutch appertiser[118] – Dietary cheese containing vegetable oil for a fat-modified diet'[119] and 'Dietary soft cheese containing vegetable oil for a fat-modified diet'.[120] The names of the products were accompanied by descriptions on the package, in the first case 'This dietary cheese is rich in poly unsaturated fats'[121] and in the second case 'This dietary cheese is ideal for a cholesterol-conscious lifestyle'.[122] The question referred by the German national court aimed at knowing whether the products in question could be marketed under the designation 'cheese' and if not, whether the supplementary descriptions and explanations could change that finding.

The Court first found that UDL's food could not be marketed as 'cheese', since Article 2(2) of the PMDR clearly states that if a constituent of milk has been replaced, also if only partially, the product may no longer be named after a milk product.[123] Second, the Court held that the supplementary descriptions could not change that finding, as they would not indicate sufficiently clear that the products contain vegetable instead of milk fat. This would thus 'increase the risk of confusion in the consumer's mind'[124] and make him or her believe that the dietary food in question would fall under 'milk products', even though they are not fulfilling the requirements to be designated as such.[125]

UDL is thus the first case enforcing strictly the restrictions imposed by Article 2(2) of the PMDR. The Court gave thereby a slightly different interpretation compared to its previous ruling in *Smanor:* Whilst acknowledging in the latter that Article 2(2) reserves the name 'yoghurt' to milk products alone, the Court also emphasised the fact that the PMDR 'essentially does no more than refer to the applicable national rules.'[126] It is not entirely

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[117] *UDL* (n 20) para 11.
[118] It was written with the 'r' in the court's ruling – probably a spelling mistake.
[119] *UDL* (n 20) para 12; original name: ‚Holländisches Appetitstück — Diät-Käse mit Pflanzenöl für die fettmodifizierte Ernährung'.
[120] ibid; original name: ‚Diät Weichkäse mit Pflanzenöl für die fettmodifizierte Ernährung'.
[121] ibdi; original description: ‚Dieser Diät-Kase ist reich an mehrfach ungesättigten Fettsäuren'.
[122] ibdi; original description: ‚Dieser Diät-Kase ist ideal für eine cholesterinbewußte Lebensweise'.
[123] ibid paras 22-24.
[124] ibd para 27.
[125] ibid paras 26-28.
[126] *Smanor* (n 88) para 16.

clear what the Court meant with this reference to 'the applicable national rules', but as the Court stated in the following paragraphs that Article 2(2) would prohibit 'yoghurt' only as a lone-standing term, but not 'deep-frozen yogurt'; and since consumers would understand that the product has undergone a particular treatment by adding 'deep-frozen' in front of 'yoghurt', it can be questioned why the same reasoning was not applied in *UDL*. An explanation could be the fact (and as it was also mentioned by the Court in *Smanor*[127]) that the LPAFD foresaw that the name of a product shall be accompanied by descriptive terms if it has undergone a particular treatment – 'deep-frozen' is expressly listed as an example.[128]

As it was demonstrated in this Chapter, the early codification of Food Law focused on tackling food safety concerns. Where issues arose in relation to misleading or confusing advertising, the consumer was merely protected from manifestly wrong information. If a product's name indicated sufficiently the key ingredients which are to be expected, companies could market their product under such name. Only in *UDL*, the addition of terms such as 'dietary' in front of 'cheese' was insufficient to explain that the animal-based fats have been replaced with plant-based fats and thus the company could not market its products under that name. In conclusion the trust in the consumer which was developed in previous cases remained strongly visible between 1990 and 2005. The Court showed an intention to protect consumers only where the information provided on the product's package was manifestly incorrect.

During the years following the codification of EU food law, an increasing amount of information and quality labels was provided on food packages. In addition, the providing of food information pursued frequently public policy objectives: People's dietary choices should be directed towards a healthier lifestyle in order to decrease obesity numbers. These new circumstances caused a shift, first in legislation and then followed by the CJEU. Consumers should not anymore only be able to make informed choices, their choices should be *facilitated*. This shift towards protecting consumers more from being misled or confused, and towards directing consumers in making conscious and healthy food choices is referred to in this thesis as a 'more protectionist approach' and will be further explained below.

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[127] ibid para 20.

[128] LPAFD (n 65) art 5(3).

4 From 2005 Onwards: Focus Shift Towards Facilitating Consumers Choice and Growing Importance to Avoid Misleading Consumers

The previous Chapters were mainly concerned with what is often also referred to as 'mandatory food information' - the type of information producers must obligatorily provide on the labels of their products.[129] This concerns information such as the product's name, the list of ingredients or nutrition information.[130] Regulating the proving of mandatory food information was at the core of the European legislator's ambition during the early days of European Food Law.[131] However, the providing of so-called 'voluntary food information' became during the 2000s increasingly a concern as well – this notion refers to the type of information producers provide on their package to emphasise specific qualities of their product or to promote and advertise their product.[132]

This Chapter will first explain how the rules on the providing of voluntary food information became more detailed and complex after 2005. Next, it will be demonstrated how the protectionist shift in legislation was mirrored in EU jurisprudence shortly after the adoption of the FIR. Finally, different academic views will be presented in an assessment of whether the protectionist shift is to be seen as beneficial or detrimental to consumers.

4.1 From *Ensuring* to *Facilitating* Informed Choice – Legislative Initiation of the Shift

The first legislation adopted with the background set out above was Regulation (EC) No 1924/2006 on nutrition and health claims made on foods ('Nutrition and Health Claims Regulation'; 'NHCR').[133] The Regulation set up a system of pre-market approval for claims,

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[129] 'Mandatory food information' was referred to as 'compulsory information' under LPAFD (n 65) art 3; later defined in FIR (n 24) art 2(2)(c).
[130] See for a full list of mandatory food information: FIR (n 24) art 9.
[131] LPAFD (n 65) art 3.
[132] FIR (n 24) recital 38; Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods ('Nutrition and Health Claims Regulation', 'NHCR') [2006] OJ L 404/9, art 2(2) points 4-5.
[133] NHRC (n 132).

which should ensure that every statement on nutrition of health benefits made on a product's package is verified by a scientific assessment.[134] It complements the general rules laid down in the UCPD with provisions specifically adapted to the advertising of foodstuff.[135] It should thus provide appropriate rules for marketing tools which aim at conferring a 'positive image'[136] to the product in question, and thereby assist 'consumers when trying to make healthy choices in the context of a balanced diet.'[137]

The Regulation aims at achieving this goal by permitting nutrition and health claims only if they are expected to be understandable to the *average consumer* with regards to the product's beneficial effects.[138] The 'average consumer' concept as it was interpreted by the CJEU was thereby expressly introduced into the legislative food labelling framework.[139] Moreover, the Regulation emphasises repeatedly its intention to *facilitate* consumers choice by ensuring adequate labelling.[140] Whereas before the focus was on *ensuring* that the consumer has all information available to make a choice, now the provisions go further and aim at *facilitating* consumers the making of their decisions. Edinger describes this alteration as the beginning of the third phase in the development of the concept of 'informed choice'. She argues that even though the Regulation's intention was to provide assistance to consumers when opting for a healthy diet, it 'turned out to be another element in the prevention of misleading advertising rather than a tool of informing and educating consumers.'[141]

That the NHCR would not suffice to ensure appropriate food labelling was also clear to the European legislator. The FIR reviewed the previous legislative requirements which must be respected by food business operators when providing mandatory or voluntary food information to consumers.[142] Article 17 (1) FIR foresees the following:

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[134] ibid arts 4-6; Caoimhín MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market* (n 71) 230; See also: Wieke Huizing Edinger (n 43) 17.
[135] Wieke Huizing Edinger (n 43) 17; Note: LPAFD (n 65) had already expired and was therefore not applicable anymore.
[136] NHRC (n 132) recital 18.
[137] ibid recital 10.
[138] ibid art 5(2) (emphasis added).
[139] See also NHRC (n 132) recital 15; See for further analysis: Monika Zboralska (n 40) 288.
[140] NHRC (n 132) recital 1 (emphasis added); recitals 9, 10.
[141] Wieke Huizing Edinger (n 43) 17.
[142] FIR (n 24) art 1; For a more detailed assessment of the requirements see Caoimhín MacMaoláin, *Food Law: European, Domestic and International Frameworks* (n 97) 168ff; Bernd M J van der Meulen, 'The Structure of European Food Law' (2013) 2 Laws 69, 83ff.

> 'The name of the food shall be its legal name. In the absence of such a name, the name of the food shall be its customary name, or, if there is no customary name or the customary name is not used, a descriptive name of the food shall be provided.'[143]

Article 17(4) sets additionally out that '[t]he name of the food shall not be replaced with a name protected as intellectual property, brand name or fancy name.'[144]

As 'legal name' is to be understood the situation where a Union legislation expressly lays down the conditions which must be fulfilled for a product to bear the name.[145] This applies for instance to coffee,[146] jam,[147] honey,[148] or – as it was already explained – to milk and milk products. As there is currently no Union wide legal name for plant-based alternative products, this first option is not applicable.

As 'customary name' is to be understood the situation where the name is accepted by consumers as designing a specific food without needing any further explanation in the MS where the food is merchandised.[149] This name refers not to an EU wide standard, but to a usage whose understanding is defined individually in each MS.[150] Referring to a plant-based alternative product by a customary name could be a valid option – though the admissibility of each product name must be assessed for every MS individually.

To determine for example which names are customary in Germany, the guidelines of the German Food Code serve as the main tool of interpretation.[151] According to these guidelines are considered as customary (and therefore permissible for plant-based products) names such as 'Schnitzel', 'Goulash', 'meat balls', 'sausage spread' or 'bratwurst'.[152]

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143 FIR (n 24) art 17(1).
144 ibid art 17(4).
145 ibid art 2(2)(n).
146 Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts [1999] OJ L 66/26.
147 Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption [2002] OJ L 10/67.
148 Council Directive 2001/110/EC of 20 December 2001 relating to honey [2002] OJ L 10/47.
149 FIR (n 24) art 2(2)(o).
150 Astrid Seehafer and Marvin Bartels, 'Meat 2.0 - The Regulatory Environment of Plant-Based and Cultured Meat' (2019) 14 Eur Food & Feed L Rev 323, 328.
151 ibid.
152 Leitsätze für vegane und vegetarische Lebensmittel mit Ähnlichkeit zu Lebensmitteln tierischen Ursprungs (Guidelines for Vegan and Vegetarian Food With a Similarity to Food of Animal Origin) 2.1.

Not every MS has, however, an elaborate system to provide guidance on names which are considered as customary, and even the German system has been argued to not to meet the actual needs.[153] The assessment of whether a designation may be used for plant-based substitutes may thus entail considerable efforts in practice and creates thereby barriers of trade between MS which are not necessary.

A 'descriptive name' refers to designations which contain a description of the food and should allow the consumer to distinguish the products from one and another.[154] The use of terms relating to milk or milk products in a descriptive name of a purely plant-based substitute product has been expressly ruled out by the CJEU in *TofuTown*.[155] Plant-based products must thus, if there is no customary name, bear a descriptive name without reference to the animal based product which they aim to replace. Food business operators came in consequence up with quite creative names – for example ‚Vegan Mediterranean Flavour in block'[156] for plant-based Greek cheese; ‚Oatgurt Plain'[157] for an oat-based alternative to natural yoghurt without flavours; ‚Cashewbert'[158] for a Camenbert cheese alternative made from cashew nuts; or 'Vegan crispy tenders chicken Southern fried'[159] for a chicken filet alternative.

Names such as these may not necessarily fulfil their purpose regarding the consumers at which they are targeted. To demonstrate this statement, the model composed of three consumers groups which was explained in Chapter 1 will serve for the assessment (Group 1 does not intend to buy the plant-based products; Group 2 intends to do so but does not have extensive knowledge on the products available on the market; Group 3 consumes the products on a regular basis and has extensive knowledge on the products available). Two questions can be raised with regards to the perception of these names by the model consumer groups: First, whether Group 2 consumers will be able to effectively understand which animal product should be replaced by the plant-based alternatives; and second,

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153 Hildegard Schollmann, "Die neuen Leitsätze für vegane und vegetarische Lebensmittel mit Ähnlichkeit zu Lebensmitteln tierischen Ursprungs' (2019) 2 ZLR 301, 304, found in: Astrid Seehafer and Marvin Bartels (n 150) 329.
154 FIR (n 24) art 2(2)(p).
155 *TofuTown.com* (n 11) paras 23-25.
156 https://www.greenviefoods.com/Vegan-Mediterranean-Flavour-in-block-greenvie-11-en.html [accessed: 12.05.21]
157 https://www.oatly.com/int/products/oatgurt-plain-2 [accessed: 22.05.21]
158 https://veganz.de/produkt/bio-veganz-cashewbert/ [accessed: 12.05.21]
159 https://vivera.com/de/produkte/vivera-vegane-knusprige-tenders-haehnchen-art-southern-fried/ [accessed: 12.05.21]

where the threshold lies for these names to fall under the Article 17(4) (no fancy name) prohibition.

Regarding the first question, one can ask whether a 'Mediterranean Flavour in block' suffice to explain to consumer Group 2 what the product should be. Even if he or she understands that 'block' should refer to 'cheese', there are many different types of cheese produced in the Mediterranean area, so this name is not really indicating whether the flavour, use and consistency should resemble to halloumi, feta, mozzarella, ricotta or rather parmesan.[160] Group 3 consumers might not have the same issue, since they are able to base their purchase decision on previous experience with cheese alternatives. However, as it was demonstrated in the Chapter 1, Group 3 consumers currently make up a small part of the total amount of consumers. The main focus should therefore be rather at how the 'new arrival' (Group 2) consumers perceive the product names in question.

When it comes to the second question, no case or guideline has to the knowledge of the author interpreted so far which requirements a 'fancy name' needs to fulfil. To understand better how 'fancy names' are to be understood, I will have a short look at other language versions of the FIR. The German and the French versions translate 'fancy' with a 'fantasy-designation' ('Fantasiebezeichnung' in German; 'dénomination de fantaisie' in French), the Swedish version translates it similarly with 'fantasy-name' ('fantasinamn'). The common element of a 'fancy name' seems thus to be that the name is invented, that it does not represent anything which exists in reality. Though, are names such as 'Oatgurt' or 'Cashewbert' then not all fantasy-names? Moreover, as these names often enjoy trademark protection, other companies may not use the same names and must in consequence create their own product names.[161] So if five companies offer an oat-based alternative to yoghurt on the supermarket shelf, each of them needs to find a different descriptive name which explains sufficiently to the consumer what their product should be, but without mentioning the word 'yoghurt' and without being too fancy.

One can wonder why famous brand names such as 'Coca Cola',[162] 'Oreo',[163] or 'Pringels,'[164] are allowed to be used, even though they could be covered by the Article

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[160] Similar concerns were expressed by Babara Bolton (n 12) 429.
[161] Oatly AB for instance has registered the TM 'Oatgurt', see EUIPO TM Number 016287666, registered on 19.05.2017.
[162] https://www.coca-cola.com/ [accessed: 22.05.21].
[163] https://www.oreo.com/ [accessed: 22.05.21].
[164] https://www.pringles.com/us/home.html [accessed: 22.05.21].

17(4) prohibition. An explanation which was suggested is that these companies are not actually using their brand name as product name – Coco Cola states for example at the backside of its cans/bottles 'Sparkling soft drink with vegetable extracts'[165] which can be considered as a descriptive name.[166] Moreover it shall be noted that Article 17(4) says that name of the food shall not be *replaced* – since the plant-based products simply have no name yet, it may be argued as well that they are not covered by the prohibition at all.

Notwithstanding the question of whether the current provisions on the providing of food information are sufficiently adapted to plant-based alternative products, a judicial reflection of the legislative shift can be seen during the years following the adoption of the FIR.

4.2 Judicial Reflection of the Shift: Case Law on the Renewed Consumer Approach

The CJEU confirmed the shift notably in *Newby Foods* (2014)[167] and in *Teekanne* (2015).[168]

In *Newby Foods*, the Court considered that if a product is of inferior quality, it must 'be subject to specific labelling which informs consumers in clear terms by removing any ambiguity as to its exact nature',[169] otherwise competition would be distorted.[170]

In *Teekanne*, the CJEU added that the presence of the list of ingredients would 'not in itself exclude the possibility that the labelling of those goods and methods used for it may be such as to mislead the purchaser.'[171] Furthermore, 'where the labelling of a foodstuff and methods used for the labelling, taken as a whole, give the impression that a particular ingredient is present in that foodstuff, even though that ingredient is not in fact present, such labelling is such as could mislead the purchaser as to the characteristics of the foodstuff.'[172]

[165] 'Labelling of prepacked foods: product name - Labelling requirements for packaged food products, specifically relating to the name of the product' https://www.businesscompanion.info/en/quick-guides/food-and-drink/labelling-of-prepacked-foods-product-name [accessed: 22.05.21].
[166] ibid.
[167] Case C-453/13 *Newby Foods* EU:C:2014:2297.
[168] *Teekanne* (n 26).
[169] *Newby Foods* (n 167) para 65.
[170] ibid para 66.
[171] *Teekanne* (n 26) para 38.
[172] ibid para 41.

4.3 The Shift Towards Stronger Consumer Protection – Beneficial or Not?

Many scholars pointed to the changed context in which the FIR was adopted – a context in which informing the consumer had become increasingly challenging.[173] Finardi and Vaqué emphasised for example the real risk of providing consumers a barely comprehensible information overhaul on food labels.[174] Also Edinger stressed that with this recent information overload, consumers would have increasingly difficulties to make healthy dietary choices, because they do 'not necessarily possess the relevant knowledge to make discriminating choices.'[175] She derives the protection standard chosen for the FIR from Directive 90/496/EEC, which described the average consumer as well 'as having a "low level of knowledge on the subject of nutrition."'[176]

Meisternest considers that the benchmark for the consumer has changed, as it 'is now the casual, inattentive consumer, who does not properly read food labels but is guided by first impressions.'[177] Nevertheless, the FIR did not completely lay aside the 'average consumer' standard. The preamble states that the yardstick for the comprehensibility of nutrition information should be the average consumer.[178]

With regards to the labelling of plant-based food products, the use of meat- and dairy style terms is a hot topic in the current negotiations on the Common Market Organisation Regulation ('CMOR').[179] Two amendments had been recently proposed, which both aimed at extending the current restrictions on the naming of plant-based products. The EU Parliament had rejected in October 2020 the amendment intending to extend the list of protected meat-style terms (amendment 165).[180] The other amendment which aimed at

[173] See for a systematic review on nutrition labels: Sarah Campos and others, 'Nutrition Labels on Pre-Packaged Foods: a Systematic Review' (2011) 14 Public Health Nutrition 1496.
[174] Corrado Finardi and Luis González Vaqué, 'European Food (Mis)Information to Consumers: Do Safety Risks Lie Just Around the Corner?' (2015) 10(2) Eur Food & Feed L 92, 93.
[175] Wieke Huizing Edinger (n 43) 19.
[176] ibid; Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs [1990] OJ L 276/40 recital 9.
[177] Wieke Huizing Edinger (n 43) 20.
[178] ibid.
[179] CMOR (n 60).
[180] European Parliament, 'Amendments adopted by the European Parliament on 23 October 2020 on the proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying

increasing the protection already granted to the naming of dairy products (amendment 171) was adopted during the same vote. [181]

After amendment 171 was passed in the European Parliament, the discussions continued in negotiations in and between the European Council, the European Commission, and the European Parliament.[182] The consequences of if amendment 171 would have been passed by the EU institutions together, have been described as prohibiting: the providing of 'essential health and allergen information such as "lactose-free alternative to dairy milk"';[183] the use of 'packaging that is similar to those used for dairy products, such as cartons';[184] the use of 'images of the product being poured at a breakfast table, or white foam swirling in a cappuccino';[185] '[to inform] consumers about the climate impact of foods, such as by comparing the carbon footprint of plant-based and conventional dairy';[186] or the use of 'helpful descriptions such as "creamy" or "buttery"'.[187] After intense lobbying from the plant-based product industry,[188] the European Parliament withdraw the amendment on 25th Mai 2021.[189]

To conclude on Part I, the protection of the consumer within EU law has certainly developed with EU law itself. In early days, the priority of the CJEU was to protect one of the main achievements of the EU – the single market. National derogations were seen more as a threat to the EU's objectives, than as a means to achieve consumer protection.

down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands' COM(2018)0394 – C8-0246/2018 – 2018/0218(COD), amendment 165.

[181] ibid amendment 171.

[182] Benjamin Ferrer, 'Amendment 171: 34 politicians protest plant-based dairy censorship in European Parliament' (01.04.2021) https://www.foodingredientsfirst.com/news/amendment-171-34-politicians-protest-plant-based-dairy-censorship-in-european-parliament.html [accessed: 26.05.2021].

[183] 'BREAKING! DAIRY LOBBY'S AMENDMENT 171 IS REJECTED BY THE EU PARLIAMENT' (25.05.2021) https://vegconomist.com/politics/breaking-dairy-lobbys-amendment-171-is-rejected-by-the-eu-parliament/ [accessed: 26.05.2021].

[184] ibid.

[185] ibid.

[186] ibid.

[187] ibid.

[188] Flora Southey, '"Plant-based dairy censorship": Oatly, Upfield and ProVeg petition to overthrow Amendment 171' (14.01.2021) https://www.foodnavigator.com/Article/2021/01/14/How-Oatly-Upfield-and-ProVeg-plan-to-overthrow-Amendment-171 [accessed: 26.05.2021]; Victoria Waldersee, 'Plant-based food industry fights EU proposal to ban dairy comparisons'(20.04.2021) https://www.reuters.com/article/us-europe-dairy-regulation-idUSKBN2C71I2 [accessed: 26.05.2021].

[189] 'BREAKING! DAIRY LOBBY'S AMENDMENT 171 IS REJECTED BY THE EU PARLIAMENT' (n 183).

With the enlargement of the EU's competences and the gradual introduction of consumer protection as an EU objective by itself,[190] the EU legislator enacted on numerous occasions on the consumer's behalf. Many legislative instruments were introduced which strengthened the protection of the consumer. Reflections on 'modern' consumer behaviour started influencing the legal area as well – which led to a new approach on how the average consumer decision is made. *TofuTown* was given at a point where the legal situation had considerably changed within a few decades. At the same time, the rules dominating *TofuTown* are sort of an 'old relic' from the legislation introduced in the EU's early days and have 'side-effects' nowadays which were very likely not intentional at the moment of their introduction.

[190] Consolidated version of the Treaty on the Functioning of the European Union ('Treaty on the Functioning of the European Union' ('TFEU')) [2012] OJ C 326/47 rendered consumer protection one of the EU policies (art. 3 (1)(t)).

PART II

Part II will first assess *TofuTown* in light of the historical developments. Chapter 5 will come back to the legislative restrictions and selected cases discussed in Part I. Next, an excursus in Chapter 6 to neighbouring legal areas should put the consumer notion in a bigger picture. It should engage the reader in a reflection on whether the CJEU could not have adopted a different approach in its reasoning on *TofuTown*, where consumer groups with varying perceptions are differentiated. In the last Chapter of Part II, the outcome of *TofuTown* will be further assessed. It will be argued that the ruling did not provide sufficient guidance to national courts on how to best deal with plant-based labelling cases in practise. Part II will conclude with a reflection on whether the recent *Oatly* case indicates a diversion from the consumer approach in *TofuTown*.

5 *TofuTown* in Light of the Historical Developments

Chapter 5 will first assess to which extent the CJEU' 'hands were bound' by the strict protection of dairy related names when issuing the ruling in *TofuTown*. It will be argued that the Court did not have much leeway since the rules prohibiting the use of protected names are quite strict. It will, however, also be argued that the CJEU reasoning could have been more intelligible, as it neither states clearly what is prohibited, nor, what is allowed. It will be outlined why the ruling created more insecurities amongst plant-based food producers and did not contribute a clarification of the legal situation.

Next, Chapter 5 will come back to selected cases which were examined in the previous part. It will set out how the protectionist shift is likely to have impacted the outcome of *TofuTown* by comparing the Court's reasoning with previous case law.

5.1 The Court's Heavy Reliance on the Dairy Product Naming Restrictions

The definition of 'milk' and 'milk products', as well as the exceptions to the naming restrictions introduced by the PMDR have been maintained until today.[191] The CJEU made it clear in *TofuTown*, that none of the exceptions would be applicable to products whose origin is purely plant-based.[192] The decision of the Court seems logical when adopting a literal interpretation of the legal provisions in question – a soja drink has no mammary secretion origin, thus it may not be labelled as 'milk'. The same applies to other milk products – a plant-based 'tofu-butter' has no animal origin, thus, TofuTown.com GmbH could not name its products in the way shown in the figure below.

[191] CMOR (n 60), Annex VII, Part III.
[192] *TofuTown.com* (n 11) para 40.

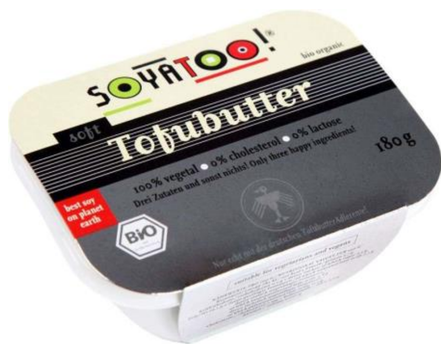

Figure 1: TofuTown Packaging Image[193]

However, the Court employed in *TofuTown* the term ‘designation’ to refer to the way how the term ‘milk’ is to be used.[194] In different terms, ‘milk’ may only designate a product which fulfils the requirements of the definition. Does that mean, that the term ‘milk’ is completely banned from appearing on a package at all, if the product does not fulfil the requirements of the definition? May formulations such as ‘to be used as milk’ or ‘intended use: the same as milk’ still be used, if the product’s name is different? Or may the legally protected terms be used in the marketing and advertising of the plant-based product, describing it for example as alternative to conventional products?

‘Designation’ is nothing else than the name of or on a product.[195] To which extent it would be permissible to use a name which does not contain any of the legally protected notions, is not entirely clear from the reasoning in *TofuTown*. At first glance, it seems the Court sees the prohibition to use dairy related terms as applicable only to the designation of the plant-based products:

> ‘[...] the term ‘milk’ and the designations reserved exclusively for milk products cannot be lawfully used to designate a purely plant-based product [...]. The addition of descriptions or explanations indicating the plant origin of the product at issue, such as those at issue in the main proceedings, does not affect such a prohibition [...].’[196]

The picture becomes different, however, when looking on how the Court continues after the previously cited paragraph. The Court takes a broader view by stating in paragraph 41

[193] https://www.retaildetail.eu/en/news/food/eu-bans-soy-milk-and-tofu-butter [accessed: 24.05.2021].
[194] *TofuTown.com* (n 11) paras 20, 21, 24, 29, 31, 32, 33, 37, 38, 39, 40, 43, 44, 48, 52, 53.
[195] PMDR (n 54) art 1(b).
[196] *TofuTown.com* (n 11) para 40.

that the 'prohibition applies equally to marketing and publicity.'[197] The Court makes this statement with reference to Point 6 of Part III of Annex VII of the CMOR, which foresees that 'no label, commercial document, publicity material or any form of advertising … or any form of presentation may be used which *claims, implies or suggests* that the product is a dairy product.'[198] It is interesting here how the Court made a rather general statement about a more narrow prohibition. Point 6 of Part III of Annex VII of the CMOR can be interpreted as stating merely that the protected names may not be used in the presentation and advertising of a plant-based product in way which suggests that the product is a conventional milk product. But not that there is a general prohibition of using the protected terms in the presentation and advertising of the plant-based products. By simply stating that the naming restrictions would apply equally to the advertising of plant-based products, the Court's reasoning suggests that the protected designations may not be used at all, no matter if their use *claims, implies or suggests* that the plant-based product is a conventional dairy product. Unfortunately, the Court did not come back in the subsequent parts of its reasoning on how paragraph 41 is to be understood and whether it would broaden the prohibition set out in Annex VII of the CMOR.

Has *TofuTown* now banned the use of dairy-related terms only within plant-based product names, or also regarding statements made on the package/while advertising the product? The question can be answered rather in the negative – not because such conclusion can be distilled from the CJEU's reasoning, but rather from the interpretations taken by national courts following *TofuTown* (as it will be further explained in Chapter 7).

5.2 Discussion of TofuTown by Means of Selected Cases

5.2.1 Milk Substitute Cases

Beginning with the two milk substitute cases,[199] it appears to be the case that there is some degree of contradiction between them and *TofuTown*. Whereas in *France v Commission* consumers were not able to read the entire label of the package (or only to the extent to which the vending machine would allow it), consumers could read without

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[197] ibid para 41.
[198] CMOR (n 60), Annex VII Part III point 6 (emphasis added).
[199] *Commission v France (milk substitutes)* (n 33); *Commission v Germany (milk substitutes)* (n 80).

any problems all information provided on the package in *TofuTown*, as they were purchasing the products in question in grocery stores. Moreover, in *France v Commission* the substitute products were referred to as 'milk powder' or 'concentrated milk' (or 'milk imitation' in *Germany v Commission*) without any further indication on what other ingredients than milk they would contain. In *TofuTown*, on the contrary, even the products' names were accompanied by descriptive or explanatory terms, such as 'Veggie Cheese',[200] 'Tofu-butter',[201] or 'Soya-milk'.[202]

The discrepancies could though be explained, first, by the fact that in the two milk substitute cases absolute selling prohibitions were at stake; whereas *TofuTown* was only concerned with restrictions on the product names to be used – in principle all products could be lawfully sold on the market. Second, there are in general stricter labelling requirements nowadays.[203] Since requirements such as these were not mandatory at the time when the Court issued the two milk substitute rulings, it can be doubted whether the factual comparison is accurate. Third and as mentioned before, the EU wide restrictions on the naming of milk products were adopted only after the two cases were registered at the CJEU. In response to the last argument, however, it shall be mentioned that the Court responded in *Commission v Germany* to arguments forwarded by the German government, based on (in the meantime adopted) PMDR Article 5, which provided that MS may for a certain time maintain or restrict the manufacture and marketing of products which are not fulfilling the conditions of the definition of 'milk', or 'milk product'.[204] The Court dismissed the intervention on the ground that the German restrictions did not comply with fundamental treaty provisions in the first place.

It is regrettable that the CJEU neither referred to *Commission v France*, nor to *Commission v Germany* in its *TofuTown* decision. Having had some guidance on the extent to which and why (or why not) the two older cases are still applicable, would have been desirable. In particular the justifications forwarded by the CJEU in its reasoning in *TofuTown* can be questioned. In the 1980s, the Court expressly stated that concerns about Unfair Competition could not justify stricter information requirements for milk substitutes.[205] The statement is interesting since the claims forwarded against TofuTown.com GmbH were

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[200] ibid para 15.
[201] ibid para 17.
[202] ibid para 19.
[203] FIR (n 24) art 44(1)(a).
[204] *Commission v Germany (milk substitutes)* (n 80) para 22; PMDR (n 54) art. 5.
[205] *Commission v France (milk substitutes)* (n 33) para 10.

also based on the German Law against Unfair Competition.[206] Even though in *TofuTown* the Court did not elaborate expressly on any Unfair Competition provisions, it did state that the naming restrictions would be 'a guarantee, in particular, to the producers of those [dairy] products of undistorted conditions for competition.'[207] Why the dairy product market would be in need of a stronger protection regarding unfair competition concerns in 2017 than in 1989 lacks further explanations.

Moreover, when the Court expressly emphasised in *TofuTown* with reference to the CMOR recitals, that 'the objectives pursued by the provisions at issue consist, in particular, in *improving the economic conditions* for the production and marketing as well as the quality of such [dairy] products',[208] it seems a bit like the Court was 'fishing' for explanations for enforcing the harsh naming restrictions. Indeed, the Court continued here its reasoning with stating that without the limits on the use of dairy product names, consumers would not be able to 'identify with certainty'[209] milk products. This, in turn,

> 'would be contrary to the protection of consumers because of the likelihood of confusion which would be created. That would also be contrary to the objective of improving the economic conditions for production and marketing and the quality of 'milk' and 'milk products'.[210]

The Court created here some sort of a link between the producers' and the consumers' interests. If some consumers are confused by an alternative product's name, the economic interests of dairy producers are negatively affected. Although that reasoning seems in principle logical, in can be argued that some other interests where completely left out and not even put on the balancing scale. For example, what about the interest of climate-change-conscious consumer to be able to identify correctly alternative products having a lower environmental impact? Or what about the economic interest of plant-based producers to be able to effectively offer their products with sufficient explanations on the market? Is the Court here expressly offering a stronger protection not only to a single consumer group but also to a single producer group? Was it necessary to justify the enforcement of the naming restrictions with reference to the objective of improving the economic conditions for dairy producers?

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[206] *TofuTown.com* (n 11) para 14.
[207] ibid para 48.
[208] ibid para 43.
[209] ibid para 44.
[210] ibid.

One can ask at this point the question whether the Court could not have gone a completely different road by considering some of the provisions on the naming restrictions as incompatible with internal market provisions. It creates not only an increasing amount of market barriers, if every MS has different exceptions for the use of protected names by plant-based products, but it also creates disadvantageous conditions for both, plant-based consumers, and producers. A claim based on incompatibility with fundamental market freedoms was indeed forwarded on behalf of TofuTown.com GmbH according to Mr. Beuger.[211] Back in the 1980s, the German Milk Law prohibited not only milk substitutes but also the production of tofu as such, since it was considered that it could potentially be confused with a milk product because of its white colour and its consistency. The CJEU ruling in *Commission v Germany (milk substitutes)* had the effect of lifting the tofu production ban.[212]

5.2.2 Smanor

The Court recognised in *Smanor*[213] that it is possible to derogate from the strict definitions provided for milk products, if descriptions accompanying the product's name indicate how the product in question is different from the conventional one.[214] Even if it is possible to argue that the initial product in *Smanor* was still a dairy product fulfilling the requirements of the definition provided in the PMDR, whereas in *TofuTown* the products in question never reached that stage in the production process, the approach of the Court as to when explanations or descriptions accompanying the product's name provide sufficient clarification to the consumer as to ensure that he or she can make an informed choice, is everything else than clear. If consumers are supposed to understand that a 'deep-frozen yoghurt' will not have the same characteristics as a normal yoghurt, why should they not be able to understand that a 'soya-based alternative to yoghurt' will also not have the same characteristics as ordinary yoghurt?

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[211] Interview with Michael Beuger, Attorney at WBS Law (conducted virtually on 11.05.2021 and answers provided in writing per Email on 14.05.2021).
[212] ibid.
[213] *Smanor* (n 88).
[214] ibid para 23.

5.2.3 Commission v Germany (hollandaise/béarnaise sauce)

It has been argued already that the Court adopted in *Commission v Germany* a 'purpose-oriented' view.[215] Could such a 'purpose-oriented' view not have been adopted in general regarding plant-based products? Plant-based yoghurt for instance is fermented by adding the same yoghurt cultures as there are added to conventional yoghurt – the only difference is that the milk which is used for the fermentation is not cow-based but *inter alia* soya-, coconut-, or oat-based.[216] *TofuTown* contains unfortunately no reference to *Commission v Germany*, and merely relied on the wording of the legislation which states that substances added during the manufacturing should not have the function of 'replacing, in whole or in part, any milk constituent'.[217] Hollandaise and béarnaise sauces are admittedly as such not covered by the legislation on the designation of milk and milk products, the question remains if it was not possible to adopt a 'purpose-oriented' view in *TofuTown* as well.

5.2.4 Gut Springenheide

It has been argued before that *Gut Springenheide* and the Opinion of Advocate General Jacobs in *Marca Mode* shortly afterwards allowed for the view that particularly inattentive consumers should not be taken into account in the assessment. If I apply this reasoning to *TofuTown*, Group 1 consumers should not be taken into account, as consumers probably need to be 'particularly inattentive' to confuse a 'soya-based alternative to milk' with a regular milk package. Only Group 2 and Group 3 consumers should be counted for the assessment. However, the Court did exactly the opposite: it took only the perception of Group 1 consumers into account, without even mentioning Group 2 and Group 3 consumers. The Court unfortunately did not explain in its reasoning, why only Group 1 consumers should be relevant. The Court solely relied on the wording of the naming restrictions and on the case which will be set out below.

[215] *Commission v Germany* (n 21).
[216] See for further information on the production process of yoghurt: Ettore Baglio, *Chemistry and Technology of Yoghurt Fermentation* (Springer 2014).
[217] *TofuTown.com* (n 11) para 25.

5.2.5 UDL

When comparing *UDL* to *TofuTown*, the first conclusion one can draw is that the facts of the two cases are considerably similar: The products in question were named after milk products, even though they were not exactly milk products in terms of ingredients; in both cases the products' names were accompanied by explanatory terms or descriptions which should inform the consumer about the difference compared to conventional milk products. Thus, the finding that the same restrictive approach should be applied, in the sense that the products in question could not bear a dairy-style name, seems logical. However, when having a closer look at the two cases, one important difference catches my eye: the consumer taken as a standard for the assessment is not the same. The intention of the Court in *UDL* was to prevent the consumer who buys the product to believe that it would in all aspects fulfil the definition of a 'milk product'.[218] So consumers, who presumably want to buy a dietary milk product or a product contributing to a decrease in cholesterol level, should not think that the cheese they are buying is a 'cheese' with all ingredients there to be expected. But still, the consumer *wants* to buy the dietary cheese product.

On the contrary in *TofuTown*, the consumer based on which the assessment was made *does not want* to buy the plant-based cheese product. To put it differently, in *UDL* the supplementary terms and descriptions were not sufficiently explaining to the consumer intending to buy the product, what the product is or how it is different compared to the conventional product. In that sense, the assessment in *TofuTown* should have also been focusing on whether consumers intending to buy the plant-based products sufficiently understand from which ingredients it is made of and in what aspect it is not a conventional milk product. The Court could have, for instance, assessed instead the question of whether consumers wanting to by a substitute product understand that a 'soya-based alternative to milk' is not containing any conventional milk but constitutes only a drink made by processing soya beans.[219] In conclusion, even though it might seem at first sight that *TofuTown* is in line with *UDL* since both prohibit in similar circumstances dairy style names, a closer look at the two cases reveals that the fundament of their assessment diverges – a different consumer group is taken respectively as a standard.

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[218] *UDL* (n 20) para 26.

[219] It shall be noted that the CJEU has the discretion to reformulate questions submitted by the national court if it considers it to be more appropriate to provide a useful answer. See for further information: Urška Šadl and Anna Wallerman, '" The referring court asks, in essence": Is reformulation of preliminary questions by the Court of Justice a decision writing fixture or a decision-making approach?' (2019) 25(4) European Law Journal 416.

5.3 Concluding Remarks

The Court's reasoning in *TofuTown* can be criticised in several regards.

First the reasoning on the claims regarding the naming restrictions were based almost entirely on a single case, without clarifying whether other (older) cases would not be applicable or good law anymore.

Second, the focus of the Court on the consumer group who might in a very unlikely case be confused fails to take the entire picture into account. It fails to balance the different consumer and producer interests at stake. A reason for this outcome could be a certain gap in the perception of plant-based food between generations. Mr. Beuger confirmed that *TofuTown* did not take into account the perception of all relevant groups. In his view,

> '[t]he ECJ decided the question of possible consumer deception on the basis of its own "expertise ", and [Mr. Beuger is] quite sure that the origin and age of the judges played a not insignificant role and that here the view of the younger population as consumers fell by the wayside.'[220]

This leads also to the third point of criticism: It can be questioned on which (empirical) basis the decision of the judges was taken. Mr. Beuger pointed out in this regard that '[t]here are no statistics proving a risk of confusion and none was claimed or presented in the proceedings by any of the parties. On the contrary, surveys have shown the opposite.'[221] The reasoning of the case could have been different, if the judges would have relied on empirical evidence.

Fourth, the justifications forwarded by the CJEU in its reasoning which were based on the protection of the economic interests of dairy producers seem more like a last resort to justify the harsh restrictions than an actual well-founded reason and where probably not necessary to be mentioned at all.

Fifth, vague formulations did not indicate sufficiently, which use of the protected terms in which type of statements and/or marketing would be still allowed.

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[220] Interview with Michael Beuger (n 211) answer to question 7.
[221] ibid answer to question 6.

Even though the legislation at stake did not leave much leeway to the CJEU, the general approach of the Court is far from merely enforcing the restrictions on dairy product names. It is not entirely clear why the Court chose such restrictive approach, in particular when looking at the leeway the CJEU had in approaching the consumer notion, as the following Chapter will demonstrate further.

6 Seeing the Consumer in the Bigger Picture: A Brief Digression to Neighbouring Legal Areas

This Chapter will set out how the consumer notion is seen in other legal areas, which, like food naming law, rely a lot on consumer perception. The comparison with neighbouring legal areas will try to shine more light on if it is possible with regards to the research question to adopt a more nuanced approach to the consumer notion. In the area of Intellectual Property ('IP') Law, the focus will be on Trademark and Design Law.

6.1 Likelihood of Confusing the Consumer in IP Law

Comparing how the consumer sees the label on a food product to how he or she sees a trademark or a design boils down to comparing the same idea: how the trader or producer communicates with the consumer. Whereas the food business operator aims at communicating what taste, use, texture, or health benefit the product has; the owner of a trademark or a design intends to send a message on the quality standard, the product's origin or the recognition value.[222]

But where there is commercial communication, there is a risk of misunderstanding and confusion. Trademark or design owners rely on a protection mechanism where the idea is to ensure that no design, word, sign or slogan are confused with the protected design or trademark.[223]

Even though we talk in all cases here about communication with the consumer, the consumer's level of attention in IP Law is considered not to be the same in each of the cases. Same as the level of attention when scrolling through a social media news channel is often not the same as when reading an exciting book – in the latter situation, minor

[222] There are more functions than set out here which a trademark may fulfil, See: Aleksandra Nowak-Gruca (n 39) 7.

[223] See for more extensive definition: Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks ('Trademark Directive', 'TMD') [2015] OJ L 336/1, art 3; Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark ('Trademark Regulation, 'TMR') [2017] OJ L 154/1, art 4.

details or differences are more likely to be perceived by the reader than in the first case. The level of attention is part of what makes the difference between the consumer standards respectively in trademark law and design law. This difference will be further explained below, and it will question whether such a nuanced consumer approach could not have been adopted in *TofuTown* as well.

6.1.1 The 'Average Consumer' Standard in EU Trademark law

The basic function of trademarks is to guarantee that the consumer identifies the origin of the goods or services which bear the trademark. It should ensure that the consumer rightly associates all goods with the undertaking which manufactures or supplies them. One of the conditions to register a trademark is therefore that the sign has to be 'distinctive'. This condition refers to the idea, that aspects which are regularly used in the presentation of a product prevent a trademark from being registered, as the mark does not have the ability be associated with a particular undertaking.[224]

Directive (EU) 2015/2436 relating to trade marks,[225] and Regulation (EU) 2017/1001 on the European Union trade mark[226] set out different situations in which an infringement might happen.[227] In every case, the potential confusion or dilution of the consumer is assessed with regards to the 'average consumer' standard explained in Part I. This perception of the 'average consumer' differs from the perception of the 'informed consumer', a concept which will be further set out below.

6.1.2 The 'Informed Consumer' Standard in EU Design Law

As a 'design' in the context of EU design law is to be understood 'the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.'[228]

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[224] Justine Pila and Paul Torremans (n 18) 356-357
[225] TMD (n 223).
[226] TMR (n 223).
[227] TMD (n 223) art 10(2); ibid art 9(2).
[228] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L 289/28, art 1(a); Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs ('Design Directive') [2002] OJ L 3/1, art 3(a); Justine Pila and Paul Torremans (n 18) 462.

In order to enjoy protection, designs need to fulfil two conditions: First, they need to be 'new' (novelty requirement); and second, they need to have individual character (individual character requirement).[229] In particular the last criterion is interesting for the comparison in this Chapter, as it leads to the concept of the 'informed consumer'.

As having 'individual character' is to be understood the situation where the overall impression of a design on an informed consumer is different from the overall impression of other designs.[230] What matters thus is how the informed consumer (often also referred to as the 'informed user') perceives the designs in question. The CJEU defined the concept of the 'informed user' in *Pepsico*, where it stated the following:

> '[...] the qualifier 'informed' suggests that, without being a designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them.'[231]

The 'informed consumer' is accordingly defined as laying somewhere between the 'average consumer' and an expert. The informed consumer normally compares the two designs directly next to each other and observes the differences between the designs with a higher level of attention than the average consumer.[232] The CJEU thus recognised that the impression which a product or elements on a product produce on a consumer may vary, depending on a detailed analyse of the product's features; the consumer's previous knowledge or experience; or his or her level of attention.

If we compare these different notions, the average trademark law consumer and the informed design law consumer, with the consumer groups at stake in the labelling of plant-based alternative product, who would be whom? Group 1 consumers pay probably very little attention to their purchase, as they miss the parts of the product's label which indicate that the product is not a conventional animal-based product. They are thus comparable either to the average consumer, or maybe even below the average consumer. Group 2 consumers have likely little knowledge or experience on/with plant-based products.

[229] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs ('Design Regulation') [2002] OJ L 3/1, art 4.
[230] Design Directive (n 228) art 5; Design Regulation (n 229) art 6.
[231] C-281/10 P *PepsiCo v Grupo Promer Mon Graphic* EU:C:2011:679, [2011] ECR I-10153.
[232] Justine Pila and Paul Torremans (n 18) 467.

However, since they have the intention to purchase a substitute product, they probably pay a higher level of attention to the label when trying to figure out which product is suitable for their intended purpose. Group 2 consumers lies accordingly between the average and the informed consumer. Many of Group 3 consumers will buy the substitute products on a regular basis. They are then aware of the different types and brands of existing products, of the differences between the products and of the stores which offer them respectively in their shelfs. Group 3 consumers are likely to resemble to the informed consumer or maybe even above, depending on the time length and frequency the consumers have already been buying the substitutes on a regular basis.

What should be demonstrated here is that the same criteria, which the CJEU used to distinguish different consumer types in IP law, could be applied to consumers in the area of food labelling law as well.

The notion of the 'average consumer' is, however, not only interesting with regards to the consumer notion in Design Law, but also regarding its use under Unfair Commercial Practices Law. In fact, according to the Guidance on the Implementation/Application of the UCPD, an analogous application of the CJEU' and GC's jurisprudence developed before the Directive's adoption under Free Movement and trademark law is permissible when applying the provisions of the Directive.[233]

6.2 Misleading Consumers as Unfair Commercial Practice

The main legislative tool which regulates on an EU level this legal area is the UCPD. The Directive aims at addressing practices which are directly related to a distortion of consumers' economic behaviour.[234] For the assessment of whether a practice is misleading, the 'average consumer' benchmark plays again an important role. This role should rely not only on the objective 'average consumer' concept, but take additionally 'established findings from consumer behaviourism', as well as 'social and cultural factors' into account.[235] The UCPD modified the 'average consumer' concept developed before its

[233] See also: UCPD (n 22) recital 18.
[234] Willem van Boom and others (eds), *The European Unfair Commercial Practices Directive : Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014) 1; Geraint Howells and others, *Rethinking EU Consumer Law* (Routledge 2017) 46.
[235] Geraint Howells and others (n 234) 68-69.

adoption for two particular consumer groups: the ‘average targeted consumer’ and the ‘vulnerable consumer’.

The ‘average targeted consumer’ refers to an average consumer standard which is adapted to a commercial practise directed at a specific consumer group. In different terms, the ‘average targeted consumer’ is an average consumer taken from the group at which the commercial practice is targeted.[236] Laustsen refers to the same concept with the notion ‘a particular group of consumers’,[237] and the EU Commission describes it in the Working Paper on the Directive as off-setting the average consumer ‘by modulating the test when a trader targets a specific group of consumers.’ [238]

The ‘vulnerable consumer’ embraces the idea that consumer groups which are considered as vulnerable, due to aspects such as ‘mental or physical infirmity, age or credulity’,[239] should enjoy an extended protection regarding commercial practices. An example for such vulnerable consumer groups are children.[240] The ‘vulnerable consumer’ demonstrates again the capacity of the European legislator to expressly differentiate between different types of consumers and individual aspects which are relevant for the assessment.

The UCPD nuances aspects which determine who the average consumer is, or why the relevant consumer is different from the average one. One can wonder thus if similar considerations could not have been taken into account in *TofuTown* as well.

So far, the focus of the comparison with *TofuTown* has been on the impact on consumer choice by virtue of the consumer’s level of attention, previous knowledge or experience, age, education, etc. The last comparison will elaborate further on a new aspect: whether ethical considerations may be considered as a factor influencing informed choice as well.

[236] ibid 69.
[237] Rasmus Dalgaard Laustsen (n 16) 213; with reference to UCPD (n 22) recitals 18-19 and art 5(2)(b).
[238] Commission, ‘Extended impact assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)’ (Commission staff working paper) COM(2003) 356 final, 26.
[239] UCPD (n 22) art 5(3).
[240] ibid recital 18.

6.3 Indications of the Place of Provenance Misleading Consumers

Ethical considerations have the potential to influence consumers' choices, as it was acknowledged as well expressly by the FIR.[241] The CJEU was confronted in the recent *Psagot* case with the question whether a place of provenance could be associated with such ethical considerations and thereby have an impact on consumers' informed choice.[242] The FIR prescribes that indicating the country of origin or the place of provenance is mandatory, 'where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food.'[243] Thus, where the true country of origin or place of provenance has the potential to impact consumers' informed choice due to the fact that it is associated with ethical considerations, an exact reference to the product's origin is to be made. This should ensure that consumers' varying perceptions and information needs are taken into consideration.[244]

In *Psagot*, a French Ministerial Notice prescribed with reference to a Commission Interpretative Notice, that merely stating 'product from Israel' would indicate insufficiently a product's origin if it stems from the Golan Heights or the West Bank (including East Jerusalem).[245] 'Product from Israel' is considered an incorrect reference to these territories occupied by Israel since 1967, because 'the European Union, in line with international law, does not recognise Israel's sovereignty over the territories occupied by Israel.'[246] The goods in question must thus be designated with 'product originating in the Golan Heights (Israeli settlement)' or 'product originating in the West Bank (Israeli settlement).' An action seeking the annulment of the Ministerial Notice was brought and the question asked by the Conseil d'État (Council of State) aimed at knowing whether it would be mandatory under the FIR to indicate 'Israeli settlement'.

The CJEU first recognised that the indication of the State of Israel as 'country of origin' for products originating from the Golan Heights or the West Bank 'would be liable to deceive

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[241] FIR (n 24) recital 3.
[242] *Psagot* (n 32).
[243] FIR (n 24) art 26(2)(a).
[244] ibid art 1(1); *Psagot* (n 32) para 52.
[245] Avis aux opérateurs économiques relatifs à l'indication de l'origine des marchandises issues des territoires occupés par [l'État d']Israël depuis juin 1967 (Notice to economic operators concerning the indication of origin of goods originating in the territories occupied by the State of Israel since June 1967), JORF 2016, No 273, text No 81.
[246] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 [2015] OJ C 375/4, para 1.

consumers.'[247] In addition, it would be incorrect to refer to the State of Israel when referring to products which stem from an area where 'Israel is present [...] as an occupying power and not as a sovereign entity.'[248] The Court then further concludes that the omission of the indication 'Israeli settlement' is liable to mislead consumers, because

> '[c]onsumers cannot be expected to guess, in the absence of any information capable of enlightening them in that respect, that that foodstuff comes from a locality or a set of localities constituting a settlement established in one of those territories in breach of the rules of international humanitarian law.'[249]

Building upon the considerations above, the Court found that

> 'the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions.'[250]

Thus, omitting an information on a product's label which can impact a consumer's choice based on ethical considerations is violating the principle of informed choice.

Psagot was decided after *TofuTown* and is interesting as it recognises first, that ethical considerations may impact consumers in their decision-making process; and second, that consumers have an interest to obtain all relevant information on a product's label in order to be able to take these ethical considerations into account. It raises the question whether such approach could not have been adopted in *TofuTown* as well. Even though there is a variety of reasons which lead consumers to the purchase of plant-based alternative products, ethical considerations are often one of them.[251] Could the Court in *TofuTown* have ruled that consumers have the right to pursue a diet following ethical considerations, and that in consequence consumers must be able to purchase products which allow to make informed choices regarding such diet? If yes, should it be allowed to label plant-based substitute products for example as 'vegan milk' or 'vegan steak'? The chain of reasoning to reach such conclusion is admittedly quite farfetched when comparing *Psagot* to *TofuTown* - not least when taking the critics of *Psagot* into account. Olia Kanevskaia

[247] *Psagot* (n 32) para 36.
[248] ibid para 37.
[249] ibid para 56.
[250] ibid para 57.
[251] Matthew B Ruby, 'Vegetarianism. A blossoming field of study.' (2012) 58(1) Appetite 141.

describes the Court's ruling a missed opportunity to clarify some fundamental concepts in European food law. She qualified the Court's reasoning as unconvincing, flawed and poorly substantiated. In her view, the Court and the AG should not have omitted to rely on the UCPD and should have elaborated on the 'average consumer' notion, furthermore the concept of 'ethics' should have been defined.[252]

The previous two chapters have discussed now in length where the Court's ruling in *TofuTown* fits with previous case law and neighbouring legal areas, and where it does not. Disregarding the issues discussed with the consumer notion and the concept of 'informed choice', the next Chapter will try to assess the outcome of *TofuTown*. Has there been a uniform understanding in the EU of the implications of the *TofuTown* Decision?

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[252] Olia Kanevskaia, 'Misinterpreting Mislabelling: The Psagot Ruling' (2019) 4(3) European Papers 763.

7 Consequences of the Stir Created: Dissonant Court Rulings and a Shift in EU Jurisprudence?

Diverging national derogations for dairy- or meat related names create accumulating internal market barriers and highlight the imperative need to reform this legal area. ‘Almond milk’[253] may for example be sold under this name in France and Italy, but not in all other MS.[254] ‘Vegan sausage’ is allowed as a designation in Germany, but not in France.[255]

The European legislator was already aware of the need to adopt further rules on the labelling of vegetarian and vegan food when the FIR was passed in 2011.[256] This implementing act on the ‘information related to suitability of a food for vegetarians or vegans’[257] was, however, never adopted – it has been argued that the Commission’s failure to act upon its responsibility was due to the lack of a specific deadline.[258]

Even though the Commission started elaborating an EU-wide definition of vegan and vegetarian food, so far, no EU wide solution has been adopted.[259] Several national courts have thus been confronted with interpreting *TofuTown* in a national context.

This Chapter should shine some light on the implications of the *TofuTown* ruling: It should assess how the ruling was translated and applied in practise by national courts. It will be demonstrated that even though the two national courts did not adopt exactly the same approach; they still provided some clarifications to plant-based producers. The Chapter will conclude with the GC’s decision in *Oatly*, which could be seen as approaching consumers in a different manner than the CJEU in *TofuTown*.

[253] ‘lait d’amande’ in France/’Latte di mandorla’ in Italy.
[254] Commission Decision (n 60) Annex I.
[255] LOI n° 2018-938 du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous (Law No. 2018-938 of 30 October 2018 for balanced trade relations in the agricultural and food sector and for healthy, sustainable and accessible food for everyone), JORF 2018, No 253.
[256] art 36(3)(b).
[257] ibid.
[258] Felix Domke, 'Vegetarian and Vegan Products - Labelling and Definitions' (2018) 13 Eur Food & Feed L Rev 102, 103.
[259] ibid 104.

7.1 Ruling of the Dutch Court of Appeal (Gerechtshof Den Bosch) On Alpro's Marketing of Plant-Based Alternatives to Dairy Products

The Dutch Dairy Organisation claimed that Alpro, an undertaking selling plant-based alternatives to dairy products, unlawfully used designations relating to milk and milk products[260] The Dutch Court of Appeal, by taking *TofuTown* into account, presented its ruling on 19 December 2017 in two parts. The first part was dedicated to discussing the designation of four of Apro's product types. The second part was devoted to the way how Alpro presents its products. Both parts of the judgement will be further discussed below.

First, the Court ruled that the description 'alternative to yoghurt' would be permissible since it does not constitute the product's name but communicates to the consumer the message that it is a plant-based substitute for conventional yoghurt. Alpro is thus also allowed to use the word 'cream', provided it does not designate or name the product itself. The Court ruled, however, that Alpro was not allowed to use 'custard' to designate its products, since it is a protected name in the Netherlands.[261]

The Dutch court further found that Alpro is allowed to refer to the term 'yoghurt cultures' since it tells the consumer that the product is manufactured with the identical cultures as conventional yoghurts. The Court applied the equivalent reasoning to the reference that the product can be found in the 'yoghurt section'[262] or 'yoghurt category'.[263] The same reasoning was applied to 'soja drinks.' Alpro may communicate to the consumer that the substitute product can be found in the 'milk section'. Alpro is moreover allowed to use the word 'dairy' because it does not constitute a reserved designation.[264]

What becomes clear from the judgement is that the Dutch Court of Appeal interprets *TofuTown* as prohibiting only the use of dairy related terms for the designation of the product itself – in combination with 'alternative to...' or 'can be found in the ... section', the use of protected terms is permissible. This interpretation is interesting as it does not

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[260] Gerechtshof Den Bosch, 19 December 2017, zaaknr. 200.165.890_01, ECLI:NL:GHSHE:2017:5731.
[261] Sarah Arayess and Fleur Jeukens, 'The Netherlands: Alpro's Dairy Alternatives: What Is Allowed and What Is Not in the Light of ECJ's TofuTown?' (2018) 13(1) Eur Food & Feed L Rev 55, 55.
[262] ibid.
[263] ibid.
[264] ibid.

emerge clearly from the CJEU' reasoning in *TofuTown* that such use would be permissible.[265]

Turning now to the second part of the judgement where the Dutch found that some aspects of the presentation and advertising of Alpro's plant-based substitutes would mislead consumers. Even though the packages themselves were not found to give a misleading impression, the Court ruled that the marketing of the products as a whole constitutes an infringement. The Dutch Court justified this finding with the fact the advertising showing Alpro's products was accompanied by the words 'New in the yoghurt section.'[266] The fact that below these words, the text 'stay curious enjoy plant power' was printed, would not sufficiently ensure that consumers understand the plant-based origin.[267]

The Dutch court thus followed the CJEU on the prohibition to use dairy designations in the marketing of plant-based products.[268] In exactly this point, the Dutch approach diverges from the German ruling which will be seen in the next section.

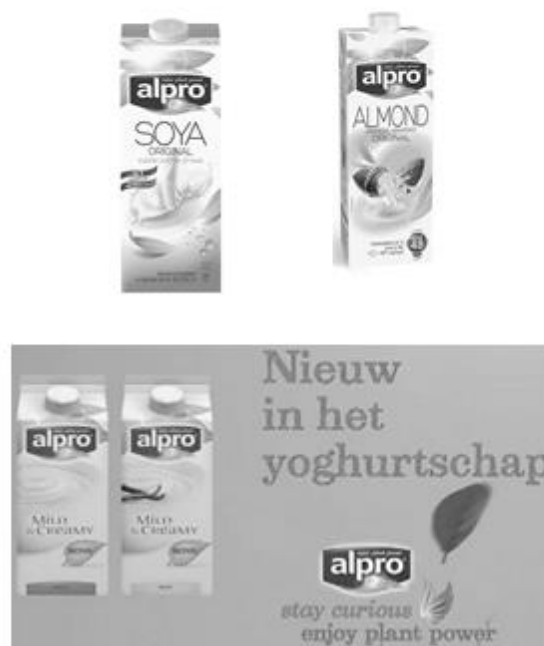

Figure 2: Alpro Packaging Images[269]

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[265] See in particular: *TofuTown.com* (n 11) para 43.
[266] Sarah Arayess and Fleur Jeukens (n 261).
[267] ibid.
[268] *TofuTown.com* (n 11) para 41.
[269] Sarah Arayess and Fleur Jeukens (n 261) 57.

7.2 Ruling of the German Higher Regional Court (Oberlandesgericht) Celle on Happy Cheeze' Marketing of Cheese Alternatives

The case concerned a plant-based cheese alternative made from cashew-nuts by the company Happy Cheeze GmbH. Happy Cheeze GmbH described and advertised the cheese alternative as 'vegan cheese alternative' and 'matured cheese alternative'.[270]

The applicant claimed that Happy Cheeze GmbH's use of dairy designations would be contrary to the CJEU' findings in *TofuTown*.[271] The Regional Court dismissed the action on the grounds that the designation 'cheese alternative' was permissible according to the Law against Unfair Competition in conjunction with CMOR Annex VII, Part III. Although a foodstuff made from cashews could not be called 'cheese', the designation 'cheese alternative' merely placed the product in a relationship with the dairy product cheese without designating it as such. The combination of the words 'cheese alternative' did not advertise the product as cheese and thus as an animal milk product, but as an alternative to it.

The Court considered that *TofuTown* would not affect the situation at stake, as there is no

> 'comparable risk of misleading the average consumer who is reasonably well informed and reasonably observant and circumspect. The average consumer understands an "alternative" neither as a clarifying nor as a descriptive designation of the term "cheese", but rather as a clarification to the effect that the product is not cheese, but something else.'[272]

The Regional Court further found that the cheese alternative was advertised without 'any visual emphasis of the word "cheese" that could possibly justify a different decision.'[273] Thus the German Court took an approach which is slightly different from what the *TofuTown* might suggest: First it expressly took the perception of the average consumer into account, which the CJEU had not done. Second, it considered that the mere appearance of the word 'cheese' on a plant-based product would not in itself be a problem,

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[270] OLG-Celle, Beschluss vom 06.08.2019, 13 U 35/19, para 2.
[271] ibid para 4.
[272] ibid para 30.
[273] ibid para 31.

as the addition of the word 'alternative' makes it sufficiently clear to the consumer that the product in question is not an animal product. Third, the Regional Court found that, as long as the marketing puts no unjustified emphasis on the protected terms, the latter could be used to advertise the product.

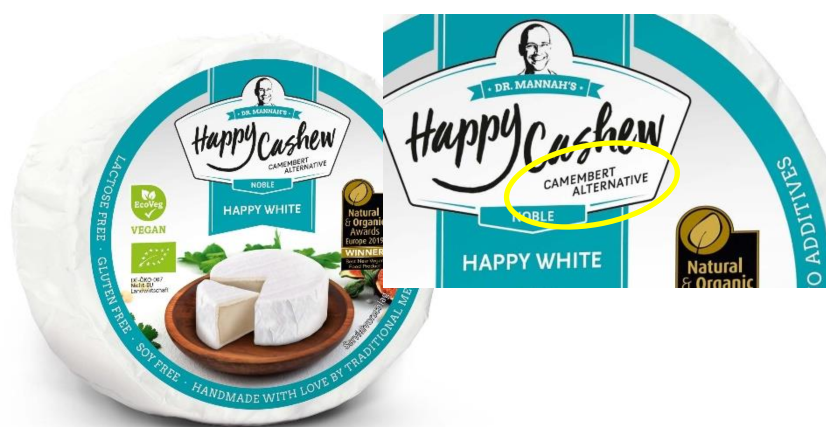

Figure 3: Happy Cheeze Packaging Image[274]

When comparing the German to the Dutch ruling, and both rulings together to *TofuTown*, some differences can be perceived. First, both national rulings considered that the addition of 'alternative to...' in front of protected dairy designations would make their use permissible. Such conclusion cannot be drawn directly from the CJEU ruling in *TofuTown*, where the Court merely stated that descriptive or explanatory terms could not make the use of protected dairy designations permissible.[275] Second, the German Court adopted a slightly different approach when it comes to the marketing of plant-based alternatives. Whereas the Dutch Court found that the general impression of the marketing would suffice for an unlawful use of the protected terms, the German Court considered that as long as there is no 'visual emphasis' on the dairy wording, their use is permissible. Neither of the two national courts explained how their findings would relate to the CJEU extension of the prohibition to use protected designations in the advertising and marketing of plant-based products.[276] To sum up, the two national courts do not seem to have adopted a coherent response to *TofuTown*, which is likely due to the lack of intelligibility in the CJEU' reasoning.

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[274] https://happy-cheeze.com/products/vegane-camembert-kaese-alternative-dr-mannahs [accessed: 24.05.2021]
[275] *TofuTown.com* (n 11) para 52.
[276] ibid para 41.

7.3 The Judgement of 20th January 2021 in *Oatly* – Is the General Court Marking a Shift in EU Jurisprudence?

Earlier this year there has been a case decided by GC on a similar matter. A Swedish Court had previously prohibited Oatly AB to market its oat-based milk alternative under the slogan 'It's like milk, but made for humans', as it would constitute an unfair commercial practice.[277]

Oatly subsequently tried to register the slogan as a trademark, which was refused by both, the European Union Intellectual Property Office ('EUIPO') and the board of appeal. The GC allowed on appeal the registration.[278] In its reasoning, the Court considered that the 'relevant part of the public [...] will perceive – and probably approve of – the message [that milk is essential to a human diet] conveyed by the mark applied for, which calls that perception into question.[279] The GC further considers that consumers would not be misled as to the origin of the product, as they would be able to 'perceive an opposition between the first part of the mark ("it's like milk") and the second part of the mark ("made for humans").'[280] EUIPO's allegation, questioning the claim that milk would not be apt for human consumption, could not change this finding, as 'a *non-negligible* part of the relevant public, for ethical or physiological reasons, avoids consuming dairy products.'[281]

It seems that the GC adopted a more refined approach towards the consumer, which could be seen as hinting at a general shift in EU jurisprudence on the matter. First, the GC recognised that consumers are aware of the underlying reasons for people switching to plant-based alternative products. Second, the Court considered that consumers would not be misled by the appearance of the word 'milk' on a plant-based product, as there were sufficient other elements clarifying to the consumer that the product in question is not a conventional dairy product. Third, the GC expressly emphasised that the part of the population which for various reasons avoids the consumption of dairy products is 'non-negligible'. All of these three aspects diverge from how the CJEU approached the consumer in *TofuTown*. Whereas consumers would, according to CJEU, be led by the first impression given of a product's package, the GC seemed to recourse to the original

[277] Marknadsdomstolen, dom 2015-11-19 i mål nr C 23/14.
[278] *Oatly* (n 50) para 51.
[279] ibid para 48.
[280] ibid para 44.
[281] ibid para 47 (emphasis added).

consumer perception, as someone who engages further with the product's label. In that regard the GC followed as well the CJEU' approach in *Psagot* by considering that consumers who base their purchase decision on the product's ethical aspects should not be left out.

To conclude on Part II, not every consumer is the same and the variety of consumer perceptions in EU law is more colourful than a flower meadow. The CJEU might not have had much room for manoeuvre when ruling on the legislation protecting dairy names; however, the manner how it approached the consumer could certainly have been different. The focus on only one, small consumer group to the detriment of all other consumers intending to buy the products in question is inexplicable. It neither fits with previous case law, nor with the manner how the Court employed the consumer notion in neighbouring legal areas. It is also likely to have led to national court rulings which are neither coherent, nor exactly fitting the wording used in the reasoning in *TofuTown*. If the CJEU confirms the GC's reasoning in *Oatly* remains to be seen, which will certainly depend as well on whether the currently debated legislative changes for plant-based product labelling are introduced.

8 Conclusion

The fact that legislation and jurisprudence try to protect the consumer in recent days more from being confused or misled is, as such, not necessarily bad for the consumer. It can be assumed that most consumers will probably not question themselves every time before they eat something about how it fits into their diet and responds to their nutritional needs. Not every consumer also turns around the package before buying an unknown product, studying the ingredients and the nutritional value before deciding whether to purchase the product. The problem is thus not the intention to facilitate the making of healthier dietary choices – but it is how the legislation and the jurisprudence on that matter were applied to the labelling of plant-based products.

The laws restricting the use of dairy related names were enacted in a context where the aim was to ensure proper quality standards within the internal market. However, the restrictions on milk product names are not designed to tackle the current issues with the labelling of plant-based products. There is thus certainly a need for the legislator to intervene to provide more clarity. If the *TofuTown* decision managed to make a bridge between the 'old' restrictions and modern consumer behaviour can, however, be strongly doubted. The Court maybe had no choice in deciding that the TofuTown.com GmbH used unlawful names, but there were no legal obligations to base the entire assessment on consumer Group 1.

In that regard, the question asked in the beginning of this thesis is answered with that the consumer notion used by the CJEU in *TofuTown* was inaccurate as it fails to take different consumer interests and degrees of perception into account. Even if the outcome of the decision would have remained the same, the Court could have provided more guidance in its reasoning on the terms, or formulations which would be permissible. It could also have further explained, how the extension of the prohibited use of dairy designations to marketing and advertising is to be understood. The CJEU could have clarified whether producers are allowed to print 'Alternative to...', or 'Intended use, the same as ...' on a product's package. By focussing the entire reasoning on consumers who do not intend to buy the products in question, the interests of consumer groups which are actually at stake were completely left out. In the end, the Court's decision has not helped consumers to make a conscious plant-based choice, but rather contributes to preventing them from doing so.

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Figure 1:
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Figure 2: Arayess S and Jeukens F, 'The Netherlands: Alpro's Dairy Alternatives: What Is Allowed and What Is Not in the Light of ECJ's TofuTown?' (2018) 13(1) Eur Food & Feed L Rev 55, 57

Figure 3:
https://happy-cheeze.com/products/vegane-camembert-kaese-alternative-dr-mannahs

Appendix

Left column: original version of the interview
Right column: interview translated into English

Interview mit Herr Michael Beuger, Rechtsanwalt bei WBS Law

Frage 1: *Halten Sie es für wichtig, dass pflanzenbasierte Produkte mit fleisch- oder milchproduktähnlichen Bezeichnungen verkauft werden dürfen? Warum ja/warum nicht?*

Ich halte das für sehr wichtig, um den Verbrauchern den Zugang zu pflanzlichen Alternativen zu erleichtern. Pflanzliche Alternativen zu Erzeugnissen aus oder mit tierischen Inhaltsstoffen sind relativ neu auf dem Markt und vielen Verbrauchern noch nicht bekannt. Es erleichtert dem Verbraucher den Zugang zu der pflanzlichen Alternative, wenn er durch eine ihm bekannte Produktbezeichnung weiß, was er von dem Produkt erwarten kann und zwar im Hinblick auf Geschmack, Sensorik und Verwendung des Produktes in der Küche. Das haben unter anderem vor einigen Monaten das Landgericht Stade und das Oberlandesgericht Celle in Deutschland auch so entschieden und die Bezeichnung „Käsealternative“ des Herstellers „Happy Cheese“ für rechtlich zulässig gehalten. Den Zugang zu pflanzlichen Alternativen zu erleichtern, kann einen wichtigen Beitrag dazu leisten, die Massentierhaltung und ihre negativen Folgen für die Tiere, das Klima, unsere Böden und das Grundwasser sowie den enormen Verbrauch von Ressourcen zu reduzieren.

Interview with Mr. Michael Beuger, Attorney at WBS Law

Question 1: *Do you think it is important to allow plant-based products to be sold under similar designations to meat- or dairy products? Why yes/why not?*

I believe this is very important to make it easier for consumers to access plant-based alternatives. Plant-based alternatives to products made from or containing animal ingredients are relatively new on the market and many consumers are not yet familiar with them. It makes it easier for consumers to access the plant-based alternative if they know through a product name to which they are familiar with, what they can expect from the product in terms of taste, sensory characteristics, and use of the product in the kitchen. This is what the Regional Court of Stade and the Higher Regional Court of Celle in Germany decided a few months ago, among others, and considered the name "cheese alternative" of the manufacturer "Happy Cheese" to be legally permissible. Facilitating the access to plant-based alternatives can make an important contribution to reducing intensive livestock farming and its negative consequences for animals, the climate, our soils and groundwater, as well as the enormous consumption of resources.

Frage 2: Wie würden Sie den Einfluss der TofuTown-Entscheidung auf Produzenten pflanzenbasierter Ersatzprodukte einschätzen? Kam es danach vermehrt zu Unsicherheiten hinsichtlich der rechtlich korrekten, aber trotzdem verbraucherfreundlichen Bezeichnung und Beschreibung pflanzlicher Produktalternativen?

Ja die Verunsicherung ist auf der einen Seite immer noch groß und die Hersteller pflanzlicher Produkte sehen sich immer noch durch die von der Landwirtschaftsindustrie stark beeinflusste Politik bedroht, indem weitergehende Einschränkungen in der Bezeichnung pflanzlicher Alternativen zu Wurst und Fleisch diskutiert und in einigen Ländern, siehe Frankreich, bereits umgesetzt sind. Auf der anderen Seite ist der Schulterschluss der Hersteller pflanzlicher Alternativen und die Solidarität untereinander größer geworden. Die Bereitschaft, sich gemeinsam für eine verbraucherfreundliche Produktkennzeichnung einzusetzen, ist deutlich gewachsen.

Question 2: How would you describe the impact of the TofuTown decision on producers of plant-based substitutes? Did it lead to increased uncertainty regarding the legally correct, but still consumer-friendly designation and description of plant-based product alternatives?

Yes, on the one hand there is still a lot of uncertainty and manufacturers of plant-based products still see themselves threatened by the politics, which is strongly influenced by the agricultural industry, in that more far-reaching restrictions in the designation of plant-based alternatives to sausages and meat are being discussed and have already been implemented in some countries, such as France. On the other hand, producers of plant-based alternatives have become more united and show greater solidarity with each other. The willingness to advocate together for consumer-friendly product labelling has grown significantly.

Frage 3: Viele Produzenten pflanzenbasierter Alternativen greifen nun auf ausgefallenere Namen zurück, wie z.B. ‚Vegan Mediterranean Flavour in block‘ für griechischen Käse; ‚Vegane knusprige Tenders Hähnchen-Art Southern fried‘ für eine Hühnerfleischalternative; oder ‚Cashewbert‘ für eine aus Cashewnüssen gemachte Camembert-Alternative. Denken Sie, dass solche Begriffe ausreichend informativ für die Kaufentscheidung des Verbrauchers sind? Warum ja/warum nicht?

Ich halte Begriffsbandwürmer für weder einprägsam noch für wirklich transparent. Auch die Fantasiebezeichnung Cashewbert klingt zwar witzig, lässt aber auch nicht direkt erkennen, dass es sich um eine pflanzliche Weichkäsealternative handelt, was aus meiner Sicht aber sinnvoll wäre.

Question 3: Many producers of plant-based alternatives are now resorting to more fancy names, such as 'Vegan Mediterranean Flavour in block' for Greek cheese; 'Vegan crispy tenders chicken Southern fried' for a chicken alternative; or 'Cashewbert' for a Camembert alternative made from cashew nuts. Do you think such terms are sufficiently informative for the consumer's purchasing decision? Why yes/why not?

I consider term tapeworms to be neither memorable nor truly transparent. Although the fantasy name Cashewbert sounds funny, it also does not directly indicate that it is a vegetable soft cheese alternative, which would make sense from my point of view.

Frage 4: Bietet die TofuTown-Entscheidung Ihrer Ansicht nach nationalen (bzw. deutschen) Gerichten und Behörden ausreichend Orientierung hinsichtlich der rechtlich korrekten Bezeichnung pflanzenbasierter Produkte? Wenn nicht, wo sehen Sie Schwierigkeiten?

Nein aus meiner Sicht hat die TofuTown-Entscheidung nur aufgezeigt, dass die europarechtliche Regulierung der Produktkennzeichnung von pflanzlichen Alternativen zu Produkten aus „tierischer Eutersekretion", wie es in der Verordnung heißt, am Verbraucherverhalt und Verbraucherverständnis vorbei führt. Während die Verbraucher mit aller Selbstverständlichkeit ihren Kaffee mit Sojamilch bestellen, dürfen die Hersteller der pflanzlichen Alternativen diese nicht so bezeichnen. Das hat der Europäische Gerichtshof in der TofuTown-Entscheidung noch einmal ausdrücklich bestätigt und ist genau damit auf das Unverständnis der Verbraucher und das starke Interesse der Medien an dieser Entscheidung gestoßen. Nichts ist durch diese Entscheidung des EUGH klarer in der Rechtsanwendung geworden, aber es ist klar geworden, dass die staatliche Regulierung überflüssig ist und sie nicht den Verbraucher, sondern nur die Milchindustrie schützt.

Question 4: In your opinion, does the TofuTown decision provide sufficient guidance to national (or German) courts and authorities regarding the legally correct designation of plant-based products? If not, where do you see difficulties?

No, in my view the TofuTown decision has only shown that the European legislation on the labelling of plant-based alternatives to products from "animal mammary secretion", as it is called in the regulation, miss the point of consumer behaviour and consumer understanding. While consumers order their coffee with soy milk as a matter of course, manufacturers of plant-based alternatives are not allowed to call them by that same name. The European Court of Justice expressly confirmed this once again in the TofuTown decision and encountered precisely with that the incomprehension of consumers and the strong media interest in the decision. Nothing has become clearer in the application of the law as a result of the ECJ decision, but it has become clear that state regulation is superfluous and that it does not protect the consumer, but only the dairy industry.

Frage 5: Begriffe wie ‚Soja-Milch' oder ‚Tofu-Würstchen' werden heutzutage von vielen als Teil der täglichen Sprache gesehen. Inwiefern denken Sie hätte der EuGH TofuTown im Sinne dieses Gewohnheitssprachgebrauches interpretieren können? Oder denken Sie, dass dies EU-weit aufgrund der Festlegung verkehrsüblicher Bezeichnungen in den Mitgliedstaaten nicht möglich gewesen wäre?

Die Rechtslage hat dem EuGH nicht viel Spielraum gelassen. Wir hätten es natürlich sehr begrüßt, wenn der EuGH unserer Argumentation gefolgt wäre, dass die MilchVO den freien Warenverkehr behindert und die Hersteller pflanzlicher Alternativen gegenüber den Herstellern von Produkten tierischen Ursprungs benachteiligt. Mit dieser Argumentation hatte der EuGH schon Ende der 80iger Jahre das Verbot der Tofuproduktion für den Bereich der Bundesrepublik Deutschland gekippt. Vielleicht kam die Tofutown-Entscheidung noch etwas zu früh; allerdings hat sie durch die öffentliche Aufmerksamkeit eine breitere öffentliche Diskussion zu diesem Thema angestoßen und es ist vor dem Hintergrund des bestehenden Klimawandels und des bestehenden Handlungsdrucks auf die Politik in allen Wirtschaftsbereichen durchaus vorstellbar, dass sich auch im Bereich der Europäischen Gesetzgebung hier etwas „pflanzenfreundliches" entwickelt.

Question 5: Terms like 'soy milk' or 'tofu sausages' are nowadays seen by many as part of everyday language. To what extent do you think the ECJ could have interpreted TofuTown in line with this customary usage? Or do you think that this would not have been possible EU-wide due to the determination of customary terms in the Member States?

The legal situation did not leave the ECJ much room for manoeuvre. Of course, we would have been very pleased if the ECJ had followed our argumentation that the Milk Regulation hinders free movement of goods and puts producers of plant-based alternatives at a disadvantage compared to producers of products of animal origin. With this argumentation, the ECJ had already overturned the ban on tofu production for the area of the Federal Republic of Germany at the end of the 1980s. Perhaps the Tofutown decision came a little too early; however, due to the public attention it has triggered a broader public discussion on this topic and, against the background of the ongoing climate change and the existing pressure on politicians to act in all economic sectors, it is quite conceivable that something "plant-friendly" will also develop here in the area of European law.

Frage 6: Aus welchen Gründen denken Sie hat sich der EuGH in der TofuTown-Entscheidung auf jene Verbrauchergruppe fokussiert, für die das Verwechslungsrisiko besteht?

Das ist eine Frage, auf die ich keine Antwort weiß. Der verständige Verbraucher unterliegt keinem Verwechselungsrisiko. Es gibt auch keine Statistik, die ein Verwechselungsrisiko belegt und wurde auch im Verfahren von keiner der Beteiligten behauptet oder vorgelegt. Umfragen haben vielmehr das Gegenteil ergeben. Es gibt auch kein besonderes Risiko für den Verbraucher durch eine Verwechselung, vor der der Verbraucher geschützt werden muss. Gesundheitliche Schäden nach dem versehentlichen Verzehr von Hafermilch oder Lupinensteaks sind mir nicht bekannt.

Question 6: For what reasons do you think the ECJ focused in the TofuTown decision on the consumer group for which there is a risk of confusion?

That is a question to which I do not know the answer. The reasonable consumer is not subject to any risk of confusion. There are also no statistics proving a risk of confusion and none was claimed or presented in the proceedings by any of the parties. On the contrary, surveys have shown the opposite. There is also no particular risk of confusion for the consumer from which the consumer must be protected. I am not aware of any health damage following the accidental consumption of oat milk or lupine steaks.

<u>Frage 7</u>: In Ihrem Interview mit dem vegconomist am 17. Juli 2020 erwähnen Sie, dass sich jüngere Generationen der Verwendung von fleisch- oder milchproduktähnlichen Begriffen in der Bezeichnung pflanzlicher Alternativen oft stärker bewusst sind. Denken Sie, dass die TofuTown-Entscheidung dahingehend die Wahrnehmung des Verbrauchers unausgeglichen darstellt bzw. nicht die Wahrnehmung aller relevanten Gruppen miteinbezogen hat?

Ja davon gehe ich stark aus. Es wurde keine Verbraucherbefragung durchgeführt, um den „Tofutown“-Rechtsstreit zu entscheiden. Der EuGH hat die Frage der möglichen Verbrauchertäuschung aufgrund eigener „Sachkompetenz“ entschieden und ich bin ziemlich sicher, dass hierbei Herkunft und Alter der Richter eine nicht unwichtige Rolle gespielt und hierbei die Sichtweise der jüngeren Bevölkerung als Verbraucher unter den Tisch gefallen ist.

<u>Question 7</u>: In your interview with the vegconomist on 17 July 2020, you mention that younger generations are often more aware of the use of meat- or dairy-like terms in the designation of plant-based alternatives. Do you think that the TofuTown decision is unbalanced in this respect or that it did not take into account the perceptions of all relevant groups?

Yes, I strongly believe so. No consumer survey was conducted to decide the "Tofutown" dispute. The ECJ decided the question of possible consumer deception on the basis of its own "expertise “, and I am quite sure that the origin and age of the judges played a not insignificant role and that here the view of the younger population as consumers fell by the wayside.

<u>Frage 8</u>: Um für mehr Klarheit zu sorgen werden derzeit gesetzliche Änderungen auf EU-Ebene diskutiert. Welche Änderungen würden Sie befürworten, bzw. erachten Sie als sinnvoll?

Regulierungen der Produktkennzeichnungen pflanzlicher Alternativen halte ich für überflüssig. Anders als beim „Analog-Käse-Skandal“, wo pflanzlicher Käse als Käse aus tierischer Milch ausgegeben wurde und dem Verbraucher die pflanzliche Alternative „untergeschoben“ wurde, haben wir eine solche Situation heute nicht mehr. Die Hersteller von pflanzlichen Alternativen halten den pflanzlichen Ursprung der Produkte für das Verkaufsargument und weisen deshalb darauf hin, aus welcher Pflanze der Hauptbestandteil des Produktes stammt (Soja, Hafer, Lupine, Erbse usw.) z.B. und stellen ausdrücklich heraus, dass das Produkt eben nicht vom Tier stammt (Bezeichnung Veggie oder vegetarisch) oder sogar ganz frei von tierischen Inhaltsstoffen ist (Bezeichnung vegan oder pflanzlich). Das machen die Hersteller freiwillig, weil es ihr Produkt aus ihrer Sicht „veredelt. Dazu braucht es keiner gesetzlichen Regelungen.

<u>Question 8</u>: In order to provide more clarity, legal amendments are currently being discussed at EU level. Which changes would you support, or do you consider as reasonable?

I believe that regulations on the product labelling of plant-based alternatives are superfluous. Unlike the "analogue cheese scandal", where plant-based cheese was passed off as cheese made from animal milk and the plant-based alternative was "foisted" on the consumer, we no longer have such a situation today. Manufacturers of plant-based alternatives consider the plant origin of their products to be the selling point and therefore point out from which plant the main ingredient of the product comes (soy, oat, lupine, pea, etc.), for example, and explicitly state that the product does not come from animals (designation veggie or vegetarian) or is even completely free of animal ingredients (designation vegan or plant-based). Manufacturers are doing this voluntarily because, in their view, it "refines" their product. No legal regulations are needed for this.