

Tofu Steaks? Developments on the Naming and Marketing of Plant-based Foods in the Aftermath of the TofuTown Judgement

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I. INTRODUCTION

The report addresses developments on the naming and marketing of plant-based foods in the aftermath of the judgment of the Court of Justice of the European Union (CJEU) in Case C-422/16 *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH (TofuTown)*.

France is currently considering banning “meaty” names like steak, filet, bacon or sausage for plant-based foods and introducing a list of protected denominations for meat products. After the adoption by the French National Assembly (*Assemblée nationale*) of an amendment to this effect, the Draft law for the balance of commercial relations in the agricultural and food sector and a healthy and sustainable food (*Projet de loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine et durable*), currently under consideration by the French Parliament, contains a provision that aims to regulate the naming of plant-based food products. If adopted, denominations associated with products of animal origin may no longer be used to market food products containing a significant proportion of plant-based materials. The details would be elaborated at a later stage through implementing acts.

At the same time, EU dairy industry associations have been urging the EU to continue to ensure that dairy products are protected against misleading sales descriptions of plant-based foods in EU legislation and the future Common Agricultural Policy.

Arguably, the existing provisions of the EU's Food Information Regulation, 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 (hereinafter, FIR) provide sufficient legal basis to protect consumers from being misled by denominations for plant-based meat alternatives, if those are also denominated “vegan” or “vegetarian”. Defining both terms is currently debated at the EU level, while in Germany definitions were established in 2016. This report concludes that establishing a list of reserved terms

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for meat products in the EU appears challenging and that national lists of protected meat names would not do the EU Single Market justice.

II. LEGAL, CUSTOMARY AND DESCRIPTIVE NAMES FOR FOOD

There is a long-lasting controversy regarding designations such as “soy milk”, “veggie milk”, “vegan steak” or “veggie sausage”, used for food products that are not or not entirely based on animal products. Article 17(1) of the FIR requires that a food’s name be its legal name (as in coffee,¹ jam,² honey³). In the absence of such a name, the name of the food must be its customary name, or, if there is no customary name, or the customary name is not used, a descriptive name of the food must be provided.

Article 78 of 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 products⁴ sets out that the definitions, designations or sales descriptions provided for in Annex VII for the following sectors or products may be used in the EU only for the marketing of products of the respective sectors or products: (1) beef and veal; (2) wine; (3) milk and milk products intended for human consumption; (4) poultry meat; (5) eggs; (6) spreadable fats intended for human consumption; and (7) olive oil and table olives. As regards meat products, Part I of Annex VII of Regulation (EU) No 1308/2013 contains only general sales descriptions, in all official languages of the EU, for meat of bovine animals, such as “veal” in English, but currently no different language versions of terms for meat products like sausage, prosciutto or steak. Part III of Annex VII reserves a large number of names in different languages exclusively for milk products, namely whey, cream, butter, buttermilk, butteroil, caseins, anhydrous milk fat (AMF), cheese, yogurt, kephir, koumiss, viili/fil, smetana, fil, rjaženka and rūgušpiens.

Therefore, for meat products, with a few exceptions, there are no legal names. In their absence, customary names should be used. According to a guidance to the FIR published by the UK’s Food Standards Agency,

*“[a] ‘customary name’ is a name which, over time, has come to be accepted by consumers as the name of the food without it needing further explanation. Some examples are ‘fish fingers’ and ‘Bakewell tart’. Some names of foreign origin, such as ‘muesli’ and ‘spaghetti’ have also become customary names. A name which is customary in a particular area (e.g. an ‘Essex Huffer’) might not be understood on its own if it is used as the name for the same food when it is sold outside that area. Consideration will therefore need to be given as to whether or not further information describing the food needs to be provided as part of the name of the food. A descriptive name must not be misleading”.*⁵

¹ Directive 1999/4/EC of the European Parliament and of the Council of 22 February 1999 relating to coffee extracts and chicory extracts, OJ 1999 L 66/26–29.

² Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, OJ 2002 L 10/67–72.

³ Council Directive 2001/110/EC of 20 December 2001 relating to honey, OJ 2002 L 10/47–52.

⁴ OJ 2013 L 347/671–854.

⁵ UK Food Standards Agency, Food Information Regulations 2014: Summary guidance for food business operators and enforcement officers in Scotland, Wales and Northern Ireland, available at <www.food.gov.uk/sites/default/files/media/document/fir-guidance2014.pdf> (accessed 13 July 2018).

In Germany and Austria, Schnitzel or Wurst are customary names that might also be understood by non-German speakers. But do these terms stand only for meat? Guideline 2.508.1 of the German Food Book (*Deutsches Lebensmittelbuch* or DLMB) provides that Schnitzel is, in the case of warm-blooded animals, a slice of naturally left lean and fatty tissue poor meat, suitable for short roast or grilling.⁶ According to the German reference dictionary *Duden*, “Schnitzel” comes from the middle-high German “Sniz”, which means “cut”. A Schnitzel is generally a “cut off, torn little bit of something”. Vegetarian cutlets, however, are typically not cut off, but are often pressed from, for example, soybean. Therefore, the term Schnitzel appears to imply that it is a meat product. A similar reasoning may apply to the Italian names prosciutto (ie raw cured ham) and bresaola (ie raw beef cured by salting and air-drying). For the term Wurst (ie sausage), the situation is clearer. Guideline 2.2 of the German Food Book describes sausages as certain cut-resistant or spreadable mixtures, prepared using flavourings and/or technological ingredients, of minced meat, fatty tissue and partly also offal, as well as other animal parts. According to *Duden*, Wurst is indeed a “food of crushed meat and spices, which is filled in casings”, but also, in general, “something that looks like a sausage, has the form of an elongated roll”. From the wording, the term Wurst (or sausage) could be used for meat replacement products in the form of an elongated roll. However, whether a product name may be misleading must be established on a case-by-case basis, taking into consideration all elements, including labelling, advertising and packaging. If animals are depicted on a plant-based (ie vegetarian or vegan) sausage’s product label, or if such product is sold in transparent packaging in order to create the impression of a meat product, there may be misleading elements at play.

III. THE LANDMARK DECISION *TOFU TOWN*

The summary of the amendment that introduced the ban of “meaty” names for plant-based foods into the French Draft Law recalls and intends to be consistent with the *TofuTown* judgment of the CJEU.

On 14 June 2017, the CJEU delivered its judgment in *TofuTown*. Tofu is made from soya beans, and the German company *TofuTown.com* sold alternatives to butter and cheese from mammalian origin. The company marketed its tofucheese and tofubutter as plant-based alternatives to traditional cheese and butter. Neither products contained any milk and were marketed towards vegetarians and/or vegans, who prefer plant-based alternatives. In *TofuTown*, the CJEU asserted that the legislation in force, namely Article 78(2) of and Annex VII, Part III, to Regulation (EU) No 1308/2013, must be interpreted as precluding the term “milk” and the designations reserved by Regulation (EU) No 1308/2013 exclusively for milk products from being used to designate a purely plant-

⁶ German Food Book. Guidelines for meat of 25 May 2015, available at <www.deutsche-lebensmittelbuch-kommission.de/sites/default/files/downloads/leitsaetzefleisch.pdf> (accessed 13 July 2018). The German Food Book is a collection of guidelines describing the manufacture, nature and characteristics of food. It is drafted by the German Food Book Commission in several expert committees and published by the Federal Ministry of Food and Agriculture (Bundesministerium für Ernährung und Landwirtschaft, BMEL). The legal basis is § 15 and § 16 of the Food, Commodities and Feed Code (*Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch*, LFGB).

based product in marketing or advertising, even if those terms are expanded upon by clarifications or descriptive terms indicating the plant origin of the product at issue.⁷

Sales descriptions for vegetarian or vegan substitutes for meat or fish are not subject to restrictions comparable to those to which vegetarian or vegan substitutes for milk or milk products are subject, pursuant to Annex VII, Part III, of Regulation No 1308/2013. The principle of non-discrimination requires comparable situations not to be treated differently and different situations not to be treated alike unless such treatment is objectively justified.⁸ *TofuTown* established that each sector of the EU's common organisation of the markets in agricultural products (CMO) has different characteristics. Thus, the different requirements for producers of vegetarian or vegan substitutes for meat or fish and for producers of vegetarian or vegan substitutes for milk or milk products are not inconsistent with the principle of equal treatment.⁹ Moreover, the comparison of the technical rules adopted in order to regulate the various sectors of the market cannot constitute a valid basis for the purpose of proving the complaint of discrimination between dissimilar products, which are subject to different rules.¹⁰

IV. SUBSTITUTION INGREDIENTS

Where the average consumer expects that a particular food is normally produced with certain ingredients, or that certain ingredients are naturally present in the food, the application of Article 7(1)(d) of the FIR would be triggered. This provision states that food information must not be misleading as to the characteristics of the food and, in particular, as to its nature, identity, properties and composition, or by suggesting, by means of the product's appearance, description or pictorial representations, the presence of a certain ingredient or food, when, in reality, a component being naturally present, or an ingredient normally used in that food, has been substituted with a different component or a different ingredient. In addition, under Annex VI, Part A, Point 4 of the FIR, where a substitution ingredient is used in a product, the name of the product should be followed in close proximity by the name of the substitution ingredient(s). Arguably, a product denominated "steak" containing plant-based ingredients instead of meat could be a "substitution" product, which might mislead consumers.

The Commission notice on questions and answers on the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers¹¹ was elaborated by the Commission's Directorate-General for Health and Food Safety (DG SANTE), discussed with experts from EU Member States and published in June 2018. It provides the following examples for such "substitution foods": (1) a food in which an ingredient normally used in that food has

⁷ Case C-422/16, *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH (TofuTown)* ECLI:EU:C:2017:567, para 52. See case review D Pisanello and L Ferraris, "Ban on Designating Plant Products as Dairy: Between Market Regulation and Over-Protection of the Consumer" (2018) 9 *European Journal of Risk Regulation* 170.

⁸ Case C-422/16, para 49 (referring to judgments of 6 December 2005, C 453/03, C 11/04, C 12/04 and C 194/04, *ABNA and Others*, EU:C:2005:741, para 63, and 30 June 2016, C 134/15, *Lidl*, EU:C:2016:498, para 46).

⁹ Case C-422/16, para 50.

¹⁰ Case C-422/16, para 51.

¹¹ OJ 2018 C/196, p 1–14 of 18 June 2018.

been substituted with a different component or a different ingredient (eg a pizza for which the presence of cheese is expected, while cheese has been substituted with another product), named otherwise, made from raw materials used for the purpose of replacing, in whole or in part, any milk constituent; and (2) a food in which a component naturally present in that food has been substituted with a different component or a different ingredient (eg a product that looks like cheese, where fat of milk origin has been replaced by fat of vegetable origin).¹² As regards the labelling of foods, the Commission notice states that, where a substitution ingredient is used in a product, the name of the product must be followed in close proximity by the name of the substitution ingredient, printed on the package or on the label in such a way as to ensure clear legibility. It is up to the food business operator to find an appropriate denomination for this “substitution food”, in accordance with the rules concerning the name of the food. In addition, the provisions of the product-specific legislation in place, where appropriate, shall also be respected. For example, as noted above, it is forbidden to use the name “imitation cheese”, because the name “cheese” is reserved exclusively for milk products by Part III of Annex VII of Regulation (EU) No 1308/2013. “Milk” means exclusively the normal mammary secretion obtained from milking.

V. FRANCE IS DEBATING A BAN OF MEATY NAMES FOR PLANT-BASED PRODUCTS

A provision in the French draft law for the balance of commercial relations in the agricultural and food sector and a healthy and sustainable food currently under consideration by the French Parliament, provides, in relevant part, that “Names associated with products of animal origin may not be used to market food products containing a significant proportion of plant-based materials”.¹³ The proposed text also provides that violations of this requirement would be subject to fines and that further details are to be determined by implementing acts.

The summary of the amendment stated that its purpose is to prohibit certain marketing practices that mislead consumers associating terms such as steak, filet, bacon or sausage with products that are not solely, or not at all, composed of meat.¹⁴ More generally, the amendment’s summary states that it addresses denominations referring to products of animal origin, in particular milk, cream or cheese. Therefore, a preparation based on meat and on vegetable matter, such as soy, which is typically more profitable for the producer than a pure beef steak, could be considered a “marketing presentation”, alluding to a meat product. Similarly, some vegetarian or vegan products use, quite paradoxically, according to the summary, meat vocabulary to highlight their products: “bacon taste”, “merguez vegan” or “substitute sausage”. The French draft law, as

¹² The document ‘Questions and Answers on the application of the Regulation (EU) No 1169/2011 on the provision of food information to consumers (Part II)’ is available at < www.wko.at/branchen/handel/lebensmittelhandel/faqs-lmiv-teil-2.pdf > (accessed 13 July 2018). The document notes that the Commission’s Health and Food Safety Directorate-General (DG SANTE) had discussed each section of the document in the context of a Working Group with experts from EU Member States.

¹³ The French text provides: “Les dénominations associées aux produits d’origine animale ne peuvent pas être utilisées pour commercialiser des produits alimentaires contenant une part significative de matières d’origine végétale”.

¹⁴ Available at < www.assemblee-nationale.fr/15/amendements/0627/CIION-ECO/CE2044.asp > (accessed 13 July 2018).

amended, was adopted by the French National Assembly on 30 May 2018¹⁵ and then considered and slightly amended by the French Senate.¹⁶ Only once both chambers have agreed on the same text will it become law. However, as regards the provision on the naming of plant-based products, it appears that both chambers agree on the inclusion of the rule and only disagree on some minor technicalities.

Similar calls have been made in Germany and the European Parliament. In Germany, focusing on vegetarian currywurst, a typical German sausage (ie Bratwurst) sliced and covered in curry sauce, and vegan schnitzel, Germany's former Minister of Food and Agriculture, Christian Schmidt, stated that the use of meat names for plant-based alternatives was "completely misleading and confusing consumers".¹⁷ No one may "pretend that such pseudo-meat dishes are meat", Schmidt argued. The topic of potentially misleading names of certain vegetarian and vegan foods was also the subject of Parliamentary questions for written answer by the Commission.¹⁸ The Members of the European Parliament (MEPs) basically asked whether the Commission intended to intervene and regulate this particular issue by introducing legislation to safeguard certain names relating to meat products, as is already the case for dairy products. The Commission, in its reply to the MEPs, referred to the applicable legal framework, noting that it already provided sufficient legal basis to protect consumers from being misled.

VI. MISLEADING DENOMINATIONS

To assess whether the denomination used for a food product is misleading, the relevant provisions of the FIR must be assessed. As noted above, Part I of Annex VII of Regulation (EU) No 1308/2013 contains only general sales descriptions, in all official languages of the EU, for meat of bovine animals. Therefore, a meat product denominated "veggie veal" could, arguably, be considered as misleading under the FIR. A list of reserved terms for meat products in the EU's different languages could be drafted as an amendment to Regulation (EU) No. 1308/2013 and the use of terms like sausage or steak could be banned for products that are not meat-based. However, there are currently no signs that the Commission is inclined to introduce such reserved terms for meat products.

In the cases of plant-based steak, prosciutto or bresaola, there are certain parallels to the developments on so-called "imitation foods", such as the so-called "analogue cheese", which must be made clear in the labelling. According to Articles 7(1)(d) and 17(1) of the FIR and Annex VII of Regulation (EU) No 1308/2013, such plant-based "cheese" products may no longer be denominated as cheese, as had been done by food businesses. However, there is an important difference: in shops, "analogue cheese" was not named, for example, as "vegan cheese", but simply as "cheese". Perhaps nobody

¹⁵ The adopted text is available at < www.assemblee-nationale.fr/15/ta/ta0121.asp > (accessed 13 July 2018).

¹⁶ The adopted text is available at < www.senat.fr/leg/tas17-132.html > (accessed 13 July 2018).

¹⁷ Frankfurter Rundschau, Darf die Vegi-Wurst weiter Wurst heißen?, 15 August 2017, available at < www.fr.de/politik/vegane-curry-wurst-darf-die-vegi-wurst-weiter-wurst-heissen-a-1332130 > (accessed 13 July 2018).

¹⁸ Parliamentary questions, Deception with vegetarian and vegan foods, 4 May 2016, available at < www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2016-003771+0+DOC+XML+V0/EN and <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2016-008161+0+DOC+XML+V0/EN> > (accessed 13 July 2018).

would have complained if it had been named “plant-based cheese without milk”. A steak without meat is, however, often denominated “vegetarian steak”. Traditional meat terms, such as prosciutto, are used to guide consumers to the products they want. Certain vegetarian alternatives are developed and produced in order to match the “original” as closely as possible in terms of shape, texture, taste, and preparation, which is why traditional terms are useful. The vegetarian “character” of the product is, in most cases, unmistakably clear and clarified by using words such as “vegetarian” or “vegan” in the product’s name. In addition, the plant ingredient is normally indicated in close proximity to the product name. It is up to the food business operator to find an appropriate name for this “substitution food” in accordance with the rules concerning the name of the food.

In a joint statement of 27 April 2018, the European Dairy Association (EDA), the Association of Dairy Trade (Eucolait) and the EU trade association Copa-Cogeca, representing EU farmers and their cooperatives, urged the EU to continue to ensure that dairy products were protected against misleading sales descriptions in EU legislation and in the future Common Agricultural Policy. Recalling the *TofuTown* judgment, the associations stressed that the aim of EU legislation on labelling was to provide consumers with information about their food and to make sales descriptions more transparent so as to avoid misleading practices. The issue is not about having plant-based, innovative products on the market, but about ensuring that consumers are not misled or confused vis-à-vis the nutritional characteristics of livestock produce and plant-based products. The EDA, Eucolait and Copa-Cogeca urged the EU to ensure that dairy terms and marketing standards remained protected under EU legislation and respected by all supply chain partners.¹⁹ In June 2018, the EDA published the EDA Guidelines on the principles and enforcement of the Protection of Dairy Terms.²⁰ These dairy industry guidelines intend to address the use and misuse of protected definitions, designations and sales descriptions of milk and milk products within the European Single Market and to serve as a tool to facilitate their enforcement at national level.

VII. DEFINING VEGETARIAN AND VEGAN FOOD

The topic of plant-based meat substitutes is closely related to the matter of defining vegetarian and vegan food. At the EU level, Article 36(3)(b) of the FIR expressly requires the Commission to adopt an implementing act on how to provide information on the suitability of foods to vegetarians or vegans, which is currently only provided on a voluntary basis. Such implementing act should ensure that the labelling is not ambiguous or confusing for the consumer, and must, where appropriate, be based on relevant scientific data. The FIR does not provide for a date by which the Commission is required to adopt such implementing act and the Commission has not yet done so. On 24 October 2017, the Commission announced in its Regulatory Fitness and Performance Programme

¹⁹ Food Ingredients First, EU industry calls for protection of dairy produce in future legislation of “misleading” descriptions, 30 April 2018, available at <www.foodingredientsfirst.com/news/eu-industry-calls-for-protection-of-dairy-produce-in-future-legislation-of-misleading-descriptions.html> (accessed 13 July 2018).

²⁰ European Dairy Association (EDA), *EDA Guidelines on the principles and enforcement of the Protection of Dairy Terms* <eda.euromilk.org/fileadmin/user_upload/Public_Documents/EDA_Position_papers_-_Fact_Sheets/Guidelines/2018_06_21_EDA_Guidelines_on_the_Protection_of_Dairy_Terms_FINAL.pdf> (accessed 13 July 2018).

(REFIT) that, in 2019, it would begin the drafting process for an implementing act to the FIR, establishing legal definitions of the terms “vegetarian” and “vegan” food. In response to the inaction by the Commission, there have been efforts at the EU Member States’ level.

On 22 April 2016, the Consumer Protection Ministers of the 16 German Federal States (*Bundesländer*) unanimously adopted a decision on binding definitions of the terms “vegan” and “vegetarian”. Prior to the adoption, a working group of the German Federal States, the German Federation for Food Law and Food Science (*Bund für Lebensmittelrecht und Lebensmittelkunde* or BLL), and VEBU, the German branch of the European Vegetarian Union, jointly developed the wording of the definitions.²¹ Looking at the legislative history of the FIR, the European Parliament Legislative Resolution of 16 June 2010 on the proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers²² included definitions of the terms “vegan” and “vegetarian”. However, in finalising the FIR, no agreement on definitions of the terms “vegan” and “vegetarian” was ever reached.

Considering the growing proportion of vegans, vegetarians and flexitarians (ie persons that have a primarily vegetarian diet, but occasionally eat meat or fish) and the increasing market relevance of vegan and vegetarian products, a legally binding definition for the terms “vegan” and “vegetarian” appears essential for guaranteeing informed choices by consumers. The food industry has developed a range of products, which are offered as vegan, vegetarian or under similar terms, such as “plant-based” or “animal products-free” It appears that, in order to provide clarity and to avoid confusion among consumers, conditions for the use of the designations “vegan” and “vegetarian” of products are indeed needed.

Paragraph 1 of the decision adopted by the German Federal States’ Ministers defines “vegan” foods. Such foods may not be of animal origin and no (1) ingredients (including additives, carriers, flavourings and enzymes), or (2) processing aids or (3) substances, which are not food additives (but are used in the same way and with the same purpose as processing aids), of animal origin may be used or added, in either processed or unprocessed form, at any stage of their production and processing. According to paragraph 2 of the decision, “vegetarian” foods must meet the requirements of paragraph 1 with the difference that, in their production, the following may be added or used: milk, colostrum, eggs, honey, beeswax, propolis (a resinous mixture that honey bees collect from tree buds, or other botanical sources) and lanolin or their components or derivatives.

Importantly, the definitions not only include the substances contained in the final product, but also those used at all production steps. In particular, the concept of “food” of the FIR, the concept of “ingredient” of Article 2(2)(f) of the FIR, as well as the definitions of processing aids according to Article 3(2)(b) of Regulation (EC) No. 1333/2008 on food

²¹ Verbraucherschutzministerkonferenz, Definitionen vegan-vegetarisch, available at <www.verbraucherschutzministerkonferenz.de/documents/top20_definition_vegan_und_vegetarisch_1510317864.pdf> (accessed 13 July 2018); Verbraucherschutzministerkonferenz, Gründe und Ziele der Definitionen für die Begriffe vegan und vegetarisch, available at <www.verbraucherschutzministerkonferenz.de/documents/top20_gruende_und_ziele_der_definitionen_fuer_die_begriffe_vegan_und_vegetarisch_1510317878.pdf> (accessed 13 July 2018).

²² OJ 2011 C 236E/187–234.

additives and so-called “quasi-processing aids” according to Article 20(1)(d) of the FIR have been integrated. Therefore, as the use of processing aids cannot always be analytically detected in final products, monitoring depends on appropriate supporting documents. Under paragraph 3 of the decision, the labelling as “vegan” or “vegetarian” does not preclude unintended labelling of products that do not comply with the relevant requirements of paragraph 1 or 2, if and to the extent that this is technically unavoidable at all stages of production, processing and distribution, in spite of appropriate arrangements under good manufacturing practices. Paragraph 4 states that paragraphs 1 to 3 shall apply accordingly, if food information is used, which is equivalent for consumers to “vegan” or “vegetarian”. Plants before harvesting do not fall under the definition of food. Agricultural production methods would, therefore, fall outside the scope of the definition of “vegan” foods. The question arises whether, for example, animal fertilisers should be regarded in a broader sense as processing aids because they are “used” in the production process. If so, animal fertilised crops would not be “vegan” according to this definition. The decision of the German Federal States’ Ministers prompted the German Federal Government to urge the Commission to implement the FIR and to propose the adopted wording of the definitions. For the food industry, the definitions adopted might have far-reaching consequences. Products, including those of EU and third country companies supplying the German market, must be checked for compliance with the criteria.

It must be noted that the consumer protection Ministers of the German *Bundesländer* did not agree on a formal food labelling law, which is in the competence of the Federal German State. However, they agreed on joint political positions, which, in this case, have an important effect as the Ministers decided that the food control authorities within their jurisdictions would use the definitions whenever they have to decide whether a food may be labelled “vegan” or “vegetarian”. In March 2018, the German Food Book Commission announced that it is developing guidelines for vegan and vegetarian food.²³

The Commission’s inaction leads, ultimately and as the example of Germany and France shows, to the fragmentation of the internal market and to possible obstacles to the free movement of foodstuffs within the EU. Products that are labelled as “vegan” or “vegetarian” (or with similar terms) in other EU Member States, and which do not comply with the definitions established in Germany, will likely be considered misleading. To avoid this, changes to the labels are required and, in some cases, producers may be forced to reformulate their products to be able to access the German market.

When looking at the issue of defining terms like “vegan” and “vegetarian”, it is interesting to look at the international context. At the Codex Alimentarius level, between 1997–2000, proposals were presented for definitions of “vegan”, “ovo-lacto vegetarian” and “lacto vegetarian”, for possible inclusion in either the General Codex Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985), or, as conditional claims, in the General Codex Guidelines on Claims (CAC/GL 1-1979). In 2000, the Codex

²³ German Food Book, Decision of the temporary vegetarian and vegan food Commission of 8 March 2018, available at < www.bmel.de/DE/Ernaehrung/Kennzeichnung/Lebensmittelbuch/FachausschussSachstandsberichte/Fachausschuss_veg-Lebensmittel_Sachstandsbericht.html > (accessed 13 July 2018).

Committee on Food Labelling (CCFL) agreed to discontinue work on Proposed Draft Guidelines for the Use of the Term “vegetarian”, as the differences in the definition and understanding of the term from country to country were too wide to allow for the development of guidelines at the international level, and it was not possible to establish a common definition. However, most recently, at the 44th Session of the CCFL in Asunción, Paraguay, on 16–20 October 2017, delegates discussed a paper on so-called “consumer preference claims” (document number CX/FL 17/44/8): “Consumer preference means that the consumer likes one kind of product or production method over others which are available in the market due to one or more certain characteristic(s) presented in a way to make it preferable to consumers. Food package information and marketing approaches have extensive effects on consumer beliefs, preferences, and choices. Such food consumer preference claims most of the time involve higher cost compared to competitive products”. The paper went on to state that, in addition to mandatory information, food business operators use a number of marketing terms and claims, listed in the document, such as “natural”, “pure”, “no preservatives added”, “vegan”, and “vegetarian”.

VIII. CONCLUSION

Arguably, the existing provisions of the FIR provide sufficient legal basis to protect consumers from being misled by denominations for plant-based meat alternatives, if those are also denominated “vegan” or “vegetarian”. EU Member States have the primary responsibility to enforce, monitor and verify that the relevant requirements of food law are fulfilled by food business operators at all stages of production, processing and distribution. However, for the sake of clarity, the terms “vegan” and “vegetarian” should be defined at the EU level.

It appears likely that, sooner or later, the EU and its Member States will act on the labelling of products suitable for vegans and vegetarians. Establishing a list of reserved terms for meat products in the EU’s different languages for meat products would require amendment of Regulation (EU) No 1308/2013, which appears challenging. Unilateral solutions in individual EU Member States, such as in France or Germany, do not do the EU Single Market justice. Where warranted, operators should consider triggering domestic administrative procedures against anti-competitive, deceptive or misleading advertisements before competent national authorities, or even challenging these practices before judicial authorities.

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