

## Dairy's Monopoly on Words: the TofuTown decision and what it means for plant-based businesses marketing in the UK

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For the full version of this paper, please visit <https://www.goveganscotland.com/single-post/2017/11/25/Why-is-there-milk-in-everything>

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

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

### Background to the Regulation

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

Regulation 1898/87 precluded the use of a set of words for the naming or marketing of products other than those made from "milk", where "milk" was defined as "mammary secretions". Only products made from mammary secretions could be designated or marketed as *inter alia*: milk, cream, butter, cheese or yoghurt. If the mammary secretions were not bovine, from cows, that had to be specified in the designation, for example "goat's cheese". Marketing covered "holding or display with a view to sale, offering for sale, sale, delivery or any other manner of placing on the market." The Regulation applied in *TofuTown* restated these rules.

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

When Regulation 1898/87 was introduced soya milk was being marketed in the UK as "soya milk" and had been for some time. The UK did not enforce the regulation with consistency and by the 1990's faced the prospect of being taken before the ECJ in relation to this failure. Reports indicate

that many in the UK considered that soya milk fell within the common usage exception, but the UK was not successful in having it added to the list of exceptions and by 2001 had introduced national rules implementing Regulation 1898/87. Since then soya milk has been marketed in the UK as “soya drink.”

### Plant-Based Foods in the UK

For many businesses marketing plant-based food products in the UK the decision in *TofuTown* will not affect their product designations. In recent years there has been a proliferation of plant milks, such as almond, oat, rice, hemp and coconut; almost all have followed the now longstanding approach of soya milk producers, calling their products “oat drink”, “rice drink” etc. More recently, however, we have seen some plant milk producers use the word “milk” in their product name or description, with their marketing campaign openly setting up their product as a competitor to the dairy equivalents.

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

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

### Possible Solution

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

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

While perhaps not attractive to plant-based businesses who have decided to openly challenge the restrictions, this does offer an alternative approach which could be a solution for some businesses, enabling them to make the connection with the commonly understood term, so that the consumer knows what to expect, but without breaching the rules. However, there is no express provision for this in the Regulation itself, which reads as a complete prohibition on the use of the restricted words in any way. It is yet to be seen if the UK’s interpretation of the regulation would be upheld by the ECJ.

As these are European regulations, the UK leaving the EU opens up the possibility of change. However, these rules are part of the overall single market arrangement, and we do not yet know what the outcome of the Brexit negotiations will be with regard to the UK’s position in the single

market. In addition, there is pressure on the UK government to confirm that it will continue the same level of support for the dairy industry regardless of the outcome of the negotiations.

As the plant-based food sector grows there is more potential for a challenge to the regulation. Vegan convictions have been recognised as protected and as a result vegans have protections under international, EU and UK law, including the right not to be discriminated against on account of their vegan beliefs, either directly or indirectly. It is possible that we could see a challenge by either vegan consumers or vegan business owners against the restriction on naming plant-based products on the basis that it is unlawfully discriminatory, particularly given the primacy of equality and non-discrimination in the EU system.

### Conclusion

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

[Note: An extended paper on this topic has been submitted to a journal for consideration. If they agree to publish it I may need to tweak the content of this short summary to ensure it does not undercut the novelty of that longer article.]