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Misleading representations of new “Designer Food”

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If this is coffee, please bring me some tea; but if this is tea, please bring me some coffee.

Abraham Lincoln¹

¹ Abraham Lincoln, who was the 16th president of the United States (1861 – 1865), discovered more than 150 years ago that just because a foodstuff is labelled “coffee” or “tea”, that doesn’t mean it tastes like coffee or tea! While Abraham Lincoln expressed his frustration in the 19th century with a good quote, nowadays he might well complain that he is being misled as a consumer and that the company serving his coffee or tea is liable for unfair commercial practices.

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The European legal framework

1. In the European Union, misleading advertising is clearly unlawful. The Unfair Commercial Practices Directive No. 2005/29 prohibits misleading practices that contain false information and are likely to deceive the average consumer. Advertising is one of the most prominent commercial practices, with misleading advertising prohibited by the Misleading and Comparative Advertising Directive No. 114/2006 since it not only harms the consumer, but also injures or is likely to injure competitors.

A key element of the misleading nature of a commercial practice is its ability to influence the consumer's behaviour. Misleading commercial practices cover those practices which, by deceiving the consumer, prevent them from making an informed and thus efficient choice. A commercial practice will be misleading – and therefore prohibited – if it causes or is likely to cause consumers to take a transactional decision that they would not have taken otherwise.

2. The rules regarding unfair commercial practices and advertising apply to almost all sectors and industries, including the food industry. Because the free movement of safe and wholesome food is an essential aspect of the internal market and contributes significantly to the health and well-being of citizens, the European Parliament and Council adopted Regulation No. 178/2002/EC laying down the general principles and requirements of food law.

The main purpose of this Food Law Regulation is to protect the consumers' interests. The Regulation states in article 8: *"Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the*

foods they consume. It shall aim at the prevention of: (a) fraudulent or deceptive practices; (b) the adulteration of food; and (c) any other practices which may mislead the consumer."

The Food Law Regulation further provides that the labelling, advertising and presentation of food or feed, including their shape, appearance or packaging and the setting in which they are displayed, shall not mislead consumers.

The prohibition of misleading consumers is also a key element for nutrition and health claims made on food, governed by EU Regulation No. 1924/2006 although this is another topic which is not covered in this publication.

Finally, there is also the EU Regulation No. 1169/2011 on the provision of food information to consumers, which prescribes that the labelling, advertising and presentation of food shall not mislead the public as to the characteristics of the foodstuff. The manufacturer or retailer of a foodstuff may not mislead the public about the product's nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production.

If a product is offered for sale without having a regulated brand name, the name under which the product is sold shall be the name customary in the Member State concerned. A description of the foodstuff, which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused, is also required.

3. Similar legislation exists in many countries outside the European Union. In Switzerland, for instance, the Federal Foodstuffs Act provides in a clear and concise manner that:

- (1) *All information relating to a foodstuff, and in particular the properties that it is claimed to have, must be true.*
- (2) *Advertising for foodstuffs and their presentation and packaging must not mislead the consumer.*
- (3) *In particular, information about a foodstuff or the presentation thereof is considered to be misleading if it is liable to deceive the consumer as to the manufacture, composition, properties, method of production, storage life, origin, particular effects or value of the foodstuff.*

4. If Abraham Lincoln was living in Europe today, he would be well protected. A trader serving him coffee that was actually tea (or vice versa) would now be liable for misleading commercial practices.

5. Not only has the law been subject to evolution over the last 150 years, but also food itself has drastically changed. Coffee is still coffee and tea is tea, but for many foodstuffs it is not so clear anymore what they actually are. Is a beefburger designed and grown in a laboratory still a beefburger, even if it does not contain any beef? Can a producer present a soy bean product as vegetarian chicken? How can soymilk, coconut milk, rice milk and the like be labelled "milk" if they come from plants and not from animals? Must yoghurt or cream be made from cow's milk and can soymilk also be used to make yoghurt or cream?

6. Evolution in any industry leads to conflicts, as car sharing company Uber can demonstrate after many legal battles against traditional taxi drivers all over the world. In the food industry, several battles have already been fought before the courts and legislators will undoubtedly step in to set the rules and protect consumers.

Some interesting cases show that these are exciting times for producers, retailers and consumers.





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