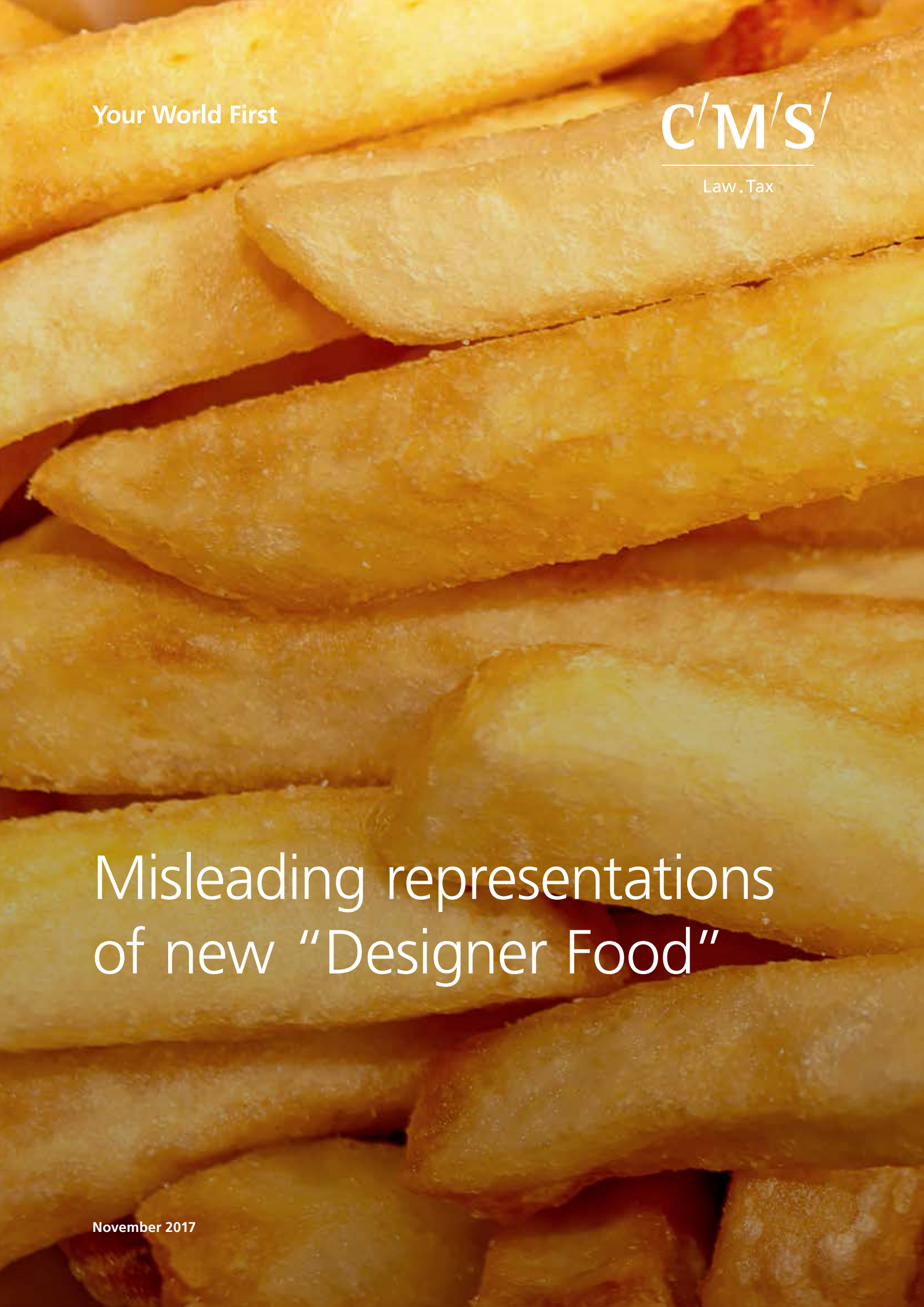

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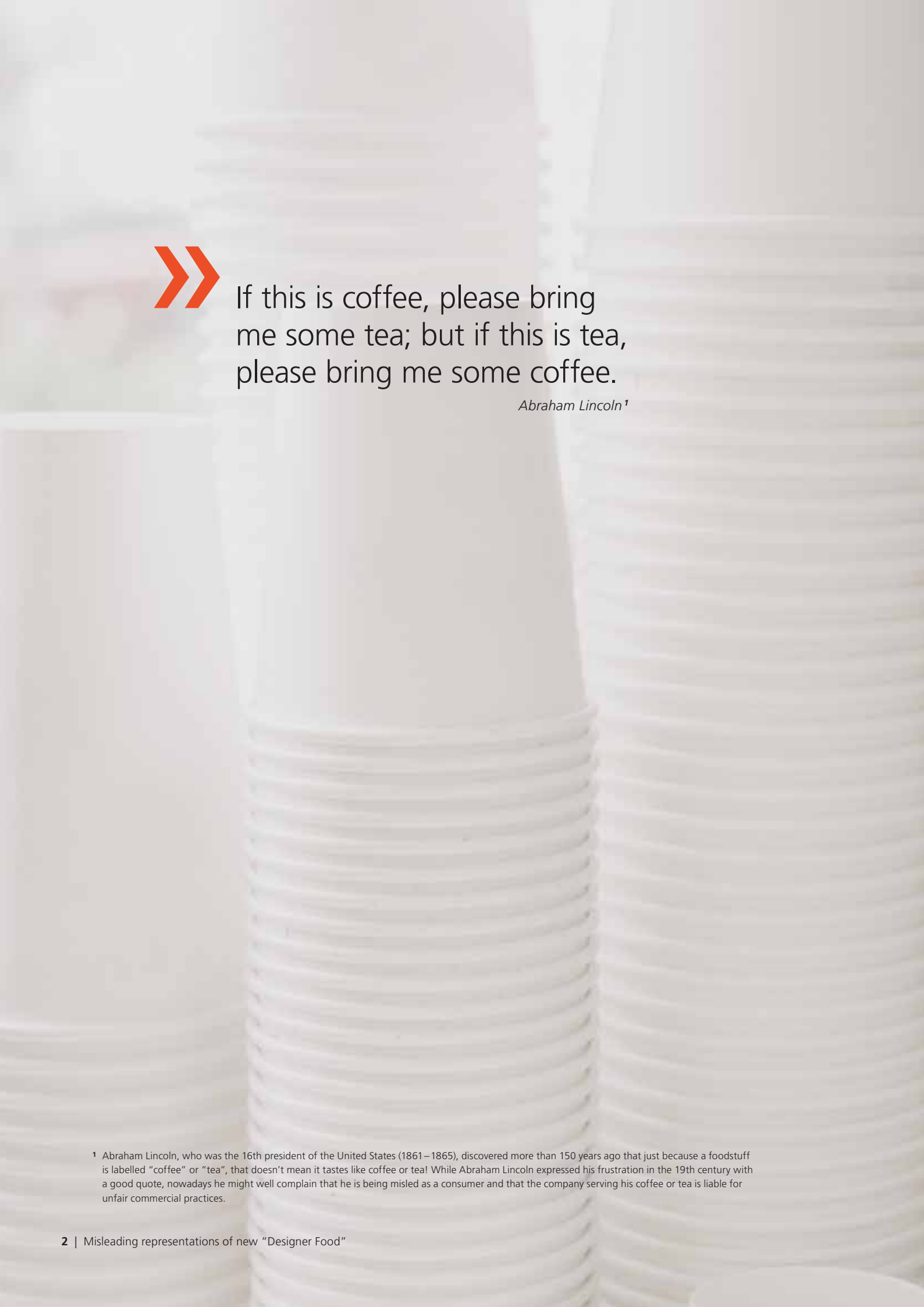
Misleading representations of new "Designer Food"

November 2017



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

Abraham Lincoln[1]

[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.

Contents

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:

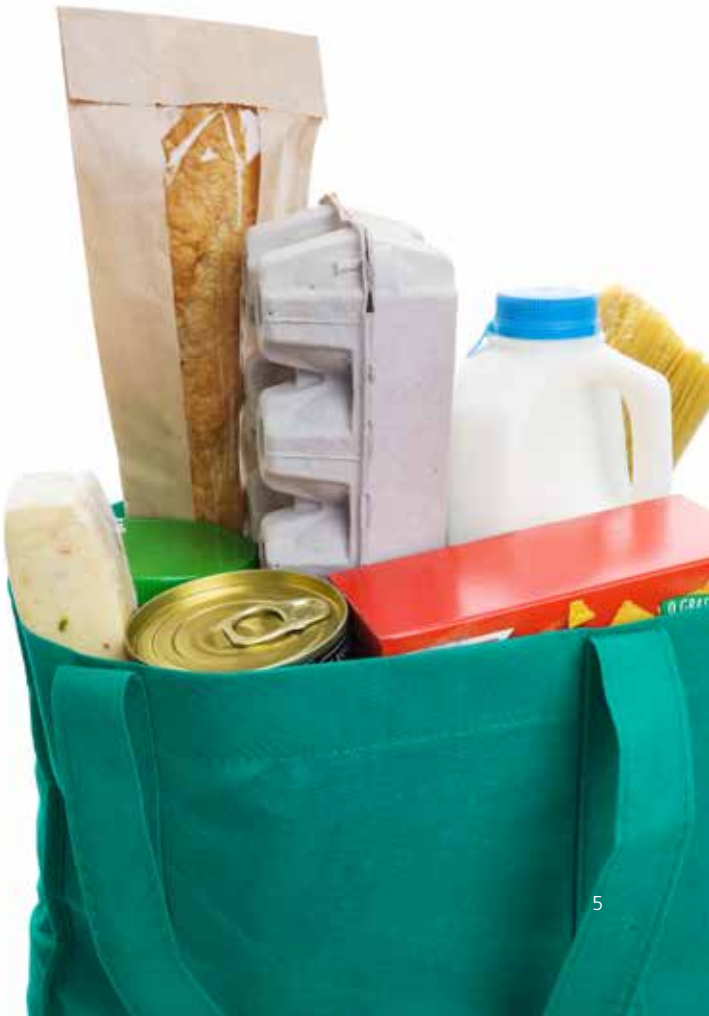
(1) *All information relating to a foodstuff, and in particular the properties that it is claimed to have, must be true.*
(2) *Advertising for foodstuffs and their presentation and packaging must not mislead the consumer.*
(3) *In particular, information about a foodstuff or the presentation thereof 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.*

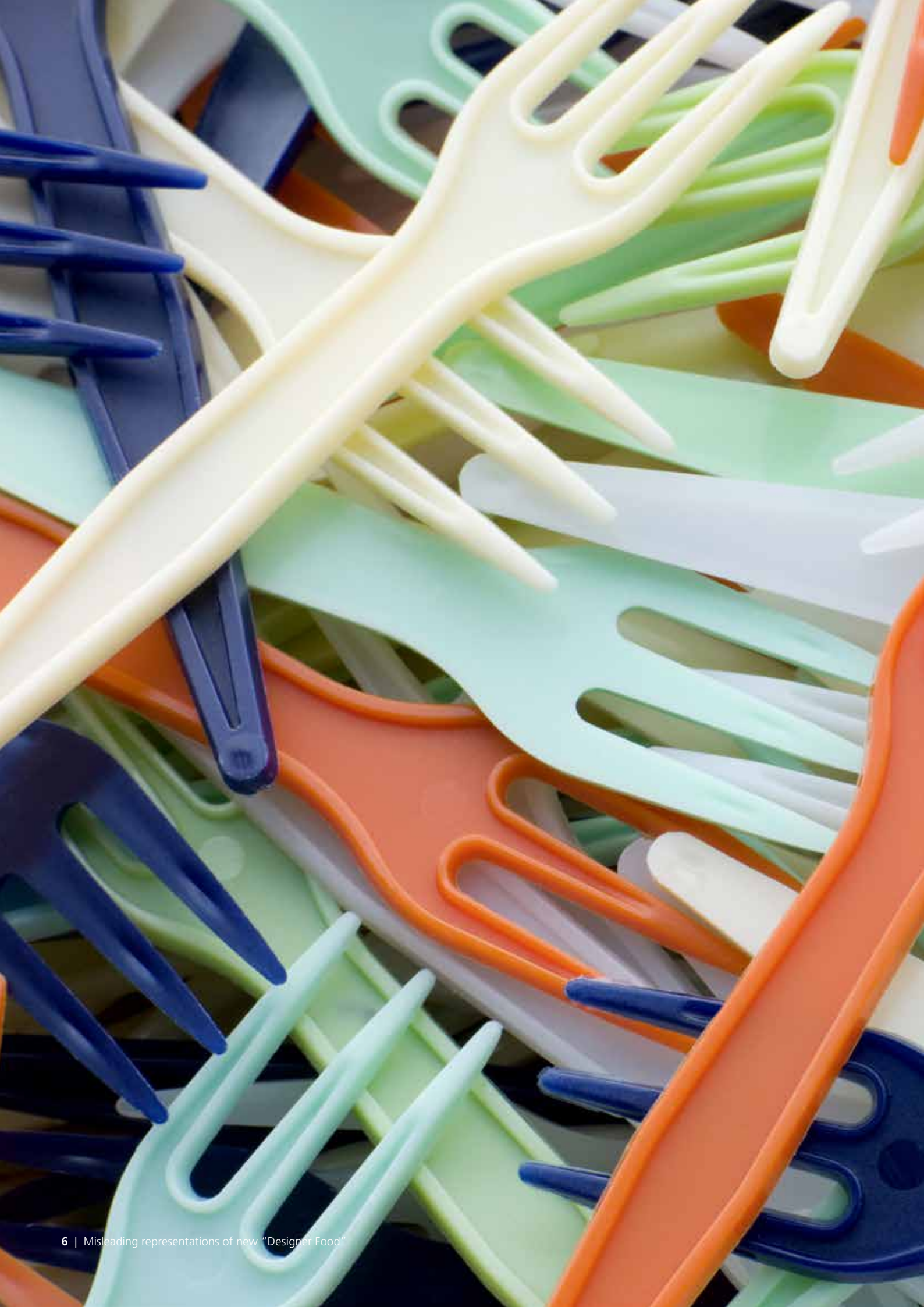
4. If Abraham Lincoln was living in Europe today, he would be well protected. A trader serving him coffee that was actually tea (or vice versa) would now be liable for misleading commercial practices.

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 yogurt 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.





Two recent judgments of the European Court of Justice

7. In 2015, the European Court of Justice dealt with the question of whether the packaging of a fruit tea called "Felix Himbeer-Vanille Abenteuer" ("Felix raspberry and vanilla adventure") could mislead the consumer.[2] The name and packaging of the tea, with depictions of raspberries and vanilla flowers, gave the impression that it contained natural ingredients from vanilla or raspberry, or flavouring obtained from them, even though they were not present in that tea. The tea contained natural flavourings with the 'taste of vanilla' and 'taste of raspberry'.

The Court of Justice ruled that EU food legislation precludes the labelling of a foodstuff and methods used for the labelling from giving the impression, by means of the appearance, description or pictorial representation of a particular ingredient, that such ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging.

8. On 14 June 2017, the Court of Justice rendered its decision in the TofuTown case. The Court had to decide whether it is forbidden to designate food products as *"veggie cheese", "tofu butter"* and the like if they are made without milk.[3]

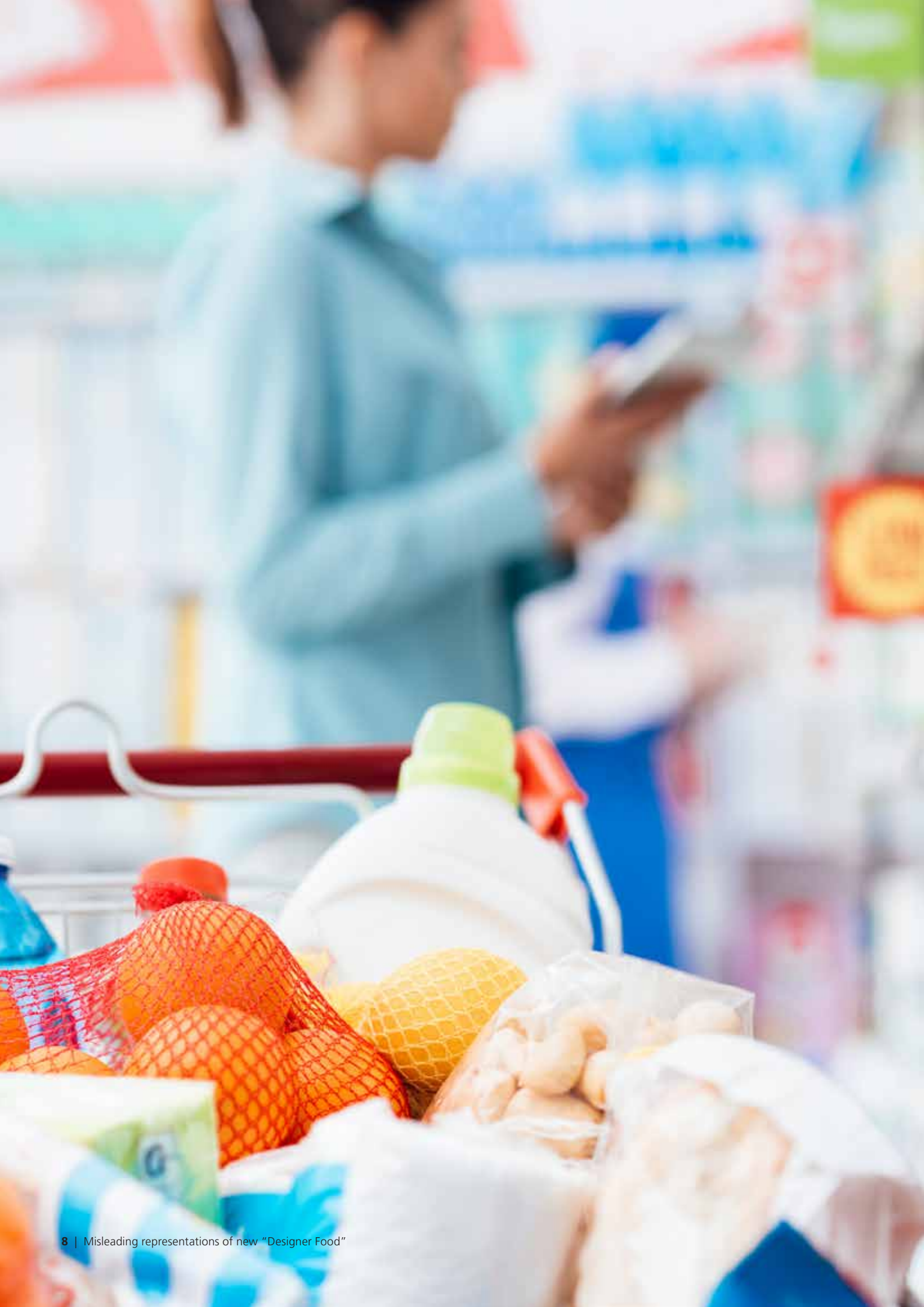
The Claimant was a German association whose responsibilities include combatting unfair competition. It argued that the use of designations such as *"veggie cheese"* and *"tofu butter"* by TofuTown constitutes an infringement of unfair competition law by violating article 78 of the EU Regulation No. 1308/2013 establishing a common organisation of the markets in agricultural products. According to this Regulation and its Annexes, the designation "milk" means an animal product gained from a milking process. Milk products designated in the Annex such as cheese and butter are exclusively derived from milk and it is prohibited to use such designations for plant based products. The interesting question in this case was, however, if it is permitted to use designations according to this Regulation for products which do not consist of milk but of vegetable-based ingredients *if clarifying or descriptive statements are added.*

In its decision of 14 June 2017, the CJEU affirmed that Regulation No. 1308/2013 precludes the use of the term 'milk' and the designations reserved by that Regulation for the designation of a plant based product in marketing or advertising, even if those terms are expanded upon by clarifying or descriptive terms indicating the plant origin of the product at issue. Therefore, the use of the terms *"Pflanzenkäse"/"veggie cheese"* or *"tofu butter"* is unlawful if it regards plant based products made without milk. The same applies for the terms 'whey', 'cream', 'butter', 'buttermilk', 'cheese' or 'yoghurt', which are reserved exclusively for milk products and cannot be used for plant-based/vegan products, with our without clarifying or descriptive additions.

In relation to milk products governed by EU Regulation No. 1308/2013, the decision of the CJEU in the TofuTown case is absolutely clear: explanatory terms are irrelevant if the product is purely plant-based. In the past, the CJEU was less clear. In the case regarding "Diät-Käse"/"diet cheese" the Court found the specific term "Diät-Käse" to be unlawful because it creates confusion on the market and may mislead consumers.[4] The specific term "Diät"/"diet" does not clearly indicate that the milk fat has been replaced entirely by vegetable fat and as a result, consumers may be misled. The Court stated that *"a milk product in which the milk fat has been replaced by vegetable fat for dietetic reasons may not be designated as cheese."* According to the Court, the additional descriptions on the products' packaging, such as "This dietary cheese is rich in polyunsaturated fats" or "This dietary cheese is ideal for a cholesterol-conscious lifestyle" did not alter the misleading character. Now we know that even if such additional descriptions took away the misleading character, the product would still not be allowed to be called "cheese."

It remains to be seen how the *TofuTown* decision will affect the designation of meat substitutes and other vegetarian alternatives.

[2] CJEU 4 June 2015, C-195/14, *Teekanne,* available at www.curia.eu
[3] CJEU 14 June 2017, C-422/16, *TofuTown,* available at www.curia.eu
[4] CJEU 16 December 1999, C-101/98, *Diätkäse,* available at www.curia.eu



National case law

9. In Germany, in an older case concerning the designation *"Schnitzel fleischfrei"* (meat-free Schnitzel) the administrative court of Gelsenkirchen (19 L 145/12 of 19 March 2012) decided that in order to assess whether the designation of a food product misleads the consumer, the overall getup of the food product is significant. In particular, the risk of misleading consumers shall not exist if other information on the packaging (such as the indication meat-free) excludes the misleading character.

It should also be noted that in Germany there is currently an ongoing debate on how to label vegetarian food products in order to improve the clarity of designations. One proposal is to incorporate and define vegetarian and vegan products explicitly in the German food code, one of the most relevant national set of rules for the designation of food products.

10. In Belgium, the Brussels Court of Appeal had to decide whether the producer of a soy milk product could use the name "yoghurt" for his product in an advertising campaign on Facebook. The Court ruled that he could not because the name "yoghurt" is exclusively reserved for cow milk products. The producer of the soy milk product was found liable for misleading advertising and was enjoined from further using the name "yoghurt" for soy bean products. The Court found that consumers could believe that the soy bean product was yoghurt or contained yoghurt and therefore decide to purchase a soy bean product rather than a traditional dairy product.[5] This decision is completely in line with the later decision of the CJEU in the *TofuTown* case.

In an interesting decision of 2 June 2017, the Brussels Court of Appeal ruled that a retailer may not use the terms "with choco" for describing a hazelnut spread containing cocoa powder but no real "chocolate". Alleging unfair competition with its famous Nutella hazelnut spread, Ferrero asserted that the retailer's choco spread misled consumers about a main characteristic of the product. The Court of Appeal agreed that the use of terms "with choco" created the impression that the product contained chocolate as defined in a Royal Decree of 2004, which was not the case. In relation to the use of the single term "choco", the Court of Appeal found that this term is not misleading as it is commonly used for choco spreads only containing cocoa and not real chocolate. The same applies to the terms "with chocolate taste" which were found not to be misleading because they only refer to the taste of the product and not to its ingredients.

The Court of Appeal of Antwerp had ruled many years ago that the representation of a chocolate bar on the packaging of a chocolate drink product was not misleading, even if the drink did not contain real chocolate, but only cocoa.[6] The question arises as to whether this case law would still stand today, after the decision of the Court of Justice of the EU regarding the fruit tea called "Felix Himbeer-Vanille Abenteuer"?

11. In France, the economic administration led an investigation in 2015 and 2016 in order to verify whether fruit juices were compliant with the provisions on misleading commercial practices. The investigation focused on compulsory and optional indications used on fruit juice packaging and claims relating to the absence of added sugars or unauthorized additives. Overall, no anomalies were observed concerning the compulsory indications and mono-fruit and multi-fruit juices designations. However, the optional indications were found less compliant and were sometimes likely to mislead consumers, for instance the use of the word "pure". Also the absence of the picture of an apple was found to be misleading where apples on the packaging of an apple-tropical fruit juice represented 70% of the fruit juice mixture. The French economic administration issued 31 warnings, imposed six injunctions and drafted two reports which may lead to criminal prosecution.

[5] Court of Appeals Brussels, 10 March 2015, available at www.ie-forum.be (ref. IEFbe 1288)
[6] Court of Appeals Antwerp, 31 August 1999, Jaarboek Handelspraktijken 1999, p. 152

12. Switzerland is not part of the European Union and its advertising policy for foodstuffs seems to be slightly less strict than in the EU. The use of the designation "Rama Cremefine", for instance, was found not to be unlawful even though the product does not contain cream ("crème").

In the *Cremefine* case, a national interest group filed a claim against the producer of alternative products to dairy products. The interest group complained that the designation "Rama Cremefine" would create confusion with "cream" and mislead consumers about the product's characteristics.

The Swiss Federal Supreme Court considered that the average consumer of cream products is confronted with many alternatives to classic cream and will examine those products very carefully to avoid buying the wrong product. Hence, the decision-making process of the average consumer is not surreptitiously influenced and there is no violation of the general prohibition of misleading statements under the Swiss Federal Act against Unfair Competition (4C.332/2006 of 20 December 2006).

13. In Italy, one of the leading cases related to consumer protection and misleading information in the food industry is the "Danone-Danaos" case (No. PS7186, 2012). In this case, the Italian Antitrust Authority (AGCM) had to examine an advertising campaign of Danone aimed at promoting a specific type of yogurt "Danaos" containing extra calcium, the consumption of which was recommended to middle-aged women. The campaign highlighted the inadequacy of some food items, like milk and cheese, to satisfy the necessary daily intake of calcium.

The Italian Antitrust Authority found that the advertising campaign for "Danaos" was misleading consumers, in particular the slogan *"two women out of three do not get enough calcium."* The slogan could lead the average consumer to believe that calcium deficiency affects 2/3 women and that the intake of "Danaos" was indispensable to remedy this deficiency. In reality, this is not the case since calcium deficiency can be easily overcome with a balanced and varied diet rather than with the consumption of Danaos. To create credibility, Danone referred in its advertising to an internationally renowned Italian hospital. It turned out, however, that the Italian hospital was not a neutral source of information; it was a commercial partner of Danone. The Antitrust Authority held this practice to be unfair since Danone took advantage of the reputation of the hospital and created the impression that specific validations and tests had been carried out by the hospital, which was not the case.

In two other cases involving the crisps manufacturers Pata[7] and Ica Foods[8], a complaint was made in respect of the expressions "hand-made" or "home-made" on the packaging of crisps that were produced industrially (AGCM, No. PS9524 and No. PS9525). The Competition Authority found those expressions to be misleading because they may induce consumers to choose products because of specific nutritional or health characteristics that the products do not actually have.

Another problem that consumers (and Italian undertakings) are facing all over the world regards the use of the slogan "made in Italy". Products such as mozzarella, butter or oil are sometimes marketed "made in Italy" which obviously is unlawful if the products are made elsewhere. However, consumers may also be misled if the origin of a product is presented as Italian (with the Italian colours and Italian words), while in reality the product was manufactured abroad.

14. In Spain, most of the disputes in relation to misleading advertising take place before the Jury of Autocontrol, the Spanish advertising self-regulation organisation (SRO). This body is very active in dealing with advertising disputes in the food and beverages sector, especially in relation to the veracity of the nutritional properties associated to products.

In October 2013, the Jury of Autocontrol obliged the beverage company "Grupo Leche Pascual" to withdraw TV Spots in relation to its mineral water brand "Bezoya" because of misleading advertising. Those spots contained two linked statements *"weak mineralization"* and *"[the product] helps you feel better"*. The Jury understood that there was not any causal link between a weak mineralization and feeling better, with a clear risk of misleading the consumer as a consequence.

Recently, in September 2016, the company specializing in baby food "Hero España" was sanctioned by the Jury of Autocontrol because of including the expression *"the cereal with higher nutritional value"* in its advertising on baby cereals. This advertising was considered as misleading given that the company could not demonstrate that said statement was supported by any scientific studies.

15. In the Netherlands, the food authority (*"Nederlandse Voedsel- en Warenautoriteit"* or NVWA) issued a formal warning to the company Vegetarische Slager, which specializes in the production and distribution of vegetarian products that replace meat. The product names of Vegetarische Slager directly refer to meat, for instance "vegetarian chicken chunks", "smoked bacon chunks" or "fishfree

[7] AGCM, case PS9524
[8] AGCM, case PS9525

prawns". According to the Dutch food authority, these names are misleading to the public because the product name refers to an ingredient that the product does not contain. Therefore, Vegetarische Slager acts in breach of the law, but the company reported to the press that it will not change its product names. It remains to be seen whether the case will eventually be brought before the courts.

16. Poland's Consumer Protection Authority (UOKiK) has on several occasions dealt with cases where the name and graphics on food packaging have given the wrong impression. The UOKiK's approach is fully in line with the CJEU ruling on Felix Himbeer-Vanille Abenteuer.

In 2012 the UOKiK challenged the representation of flavoured cappuccino drink powders under the trade names *Vanilla cappuccino* and *Chocolate cappuccino*. The packaging of the drinks depicted vanilla flowers and pieces of chocolate. However, both variants of the drink contained only artificial flavourings. The UOKiK found such representation to be misleading to consumers as it could give them the impression that the products contained natural vanilla and chocolate.[9]

A similar case adjudicated in 2014 concerned *Cherry flavoured fruit syrup*. Although the name of the product indicated that the syrup contained only cherry flavouring and not natural cherry juice, the UOKiK found that the picture of cherries on the packaging and the emphasis of the word *cherry* was misleading and may have influenced consumers' purchasing decisions.[10] In a case in 2016, the UOKiK challenged the misleading packaging of cocoa waffles called *"Lusette chocolate"* which depicted pieces of chocolate. The product contained only 0.5% chocolate but, according to the UOKiK, the picture on the packaging suggested that the waffles contained considerably more.[11]

The labelling of eggs as 'GMO-free' is another notable issue. The UOKiK recognised such labelling as misleading, since it suggests that the labelled eggs have special characteristics, i.e. they are GMO-free, when in fact there are no genetically modified eggs on the market, thus all eggs are GMO-free. The UOKiK emphasised that, according to current scientific knowledge, hens fed GMO-free feedstuffs lay eggs that are no different to hens fed GMO feedstuffs, as GMO components do not pass from the feedstuff to the eggs.[12] The Polish government is currently working on a piece of legislation which is expected to entirely reverse the UOKiK's approach. A recently published draft bill (which may still be subject to change) suggests that using the 'GMO-free' mark on products of animal origin (e.g. meat, milk, eggs, cheese) obtained or originating from animals fed GMO-free feedstuffs will be explicitly allowed.

17. Overall, it will be difficult to use terms on packaging and in advertising that do not reflect the true nature of a product. The designation *"vegetarian sausage"* will probably not be misleading as the word sausage is not exclusively used for a product containing minced meat. A product called *"vegetarian chicken",* to the contrary, may mislead consumers as they may think that the product consists of chicken meat in one or another way. If the product is truly vegetarian, it will not contain chicken meat and the presentation will be misleading. If, on the other hand, the product does contain chicken meat, it will not be truly vegetarian and the presentation will be misleading too. A real catch 22!

[9] Decision of the President of the UOKiK, DIH-1/14/2012, available at www.uokik.gov.pl
[10] Decision of the President of the UOKiK, DIH-1/72/2014, available at www.uokik.gov.pl
[11] Decision of the President of the UOKiK, DIH-1/47/2016, available at www.uokik.gov.pl
[12] Decision of the President of the UOKiK, DIH-1/69/2013, available at www.uokik.gov.pl

"Champagne beer" and comparative advertising

18. One way to assess the validity of the designation and presentation of new designer foods is to test whether they constitute misleading commercial practices. Another way is to examine whether the designation can be qualified as comparative advertising and if so, whether all the requirements of comparative advertising are met.

The notion of comparative advertising is extremely broad. In the Champagne beer case, the CJEU decided that a reference in an advertisement to a type of product and not to a specific undertaking or product can be considered to be comparative advertising.[13] The company that launched a new beer, calling it "Champagne beer" and using the terms "brut", "méthode champenoise" and "Reims-France", was liable for (unlawful) comparative advertising.

The Court of Justice first examined whether the producer of the Champagne beer and the plaintiffs (Comité Interprofessionnel du Vin de Champagne and Veuve Clicquot Ponsardin) were competitors. Only if they were would there be an issue of comparative advertising, as comparative advertising is defined as "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor." If there is a certain degree of substitution between the products beer and Champagne, there will be comparative advertising that is permitted only if all statutory requirements are met.

The Belgian court concluded that the producer of the Champagne beer was liable for unlawful comparative advertising because it compared its beer implicitly with the products of the Champagne producers without objectively comparing one or more material, relevant, verifiable and representative feature of those goods and services.

19. If we apply this reasoning to the case of alternative foodstuffs, any reference to the traditional foodstuff for which the alternative is a substitute, will constitute comparative advertising. The producers and resellers of the alternative foodstuffs must make sure to comply with all the comparative advertising requirements. They must in particular objectively compare one or more material, relevant, verifiable and representative feature of the respective goods.

20. In the case regarding the name "Rama Cremefine", referred to above, the Swiss Federal Supreme Court considered the advertising to be comparative. Because the advertising points out the differences between "Rama Cremefine" and a classic cream product (i.e. low fat content and vegetable nature of the fat), it was found to constitute lawful comparative advertising.

The goal of the advertisement for "Rama Cremefine" is to make the target market aware of the fact that they have the choice to purchase a product containing less fat as compared to cream. Thus, the comparison between "Rama Cremefine" and "cream" characteristics discloses the relevant information to the public and is therefore justified. The function of "Rama Cremefine" as an alternative product cannot be illustrated without a reference to the competing product "cream".

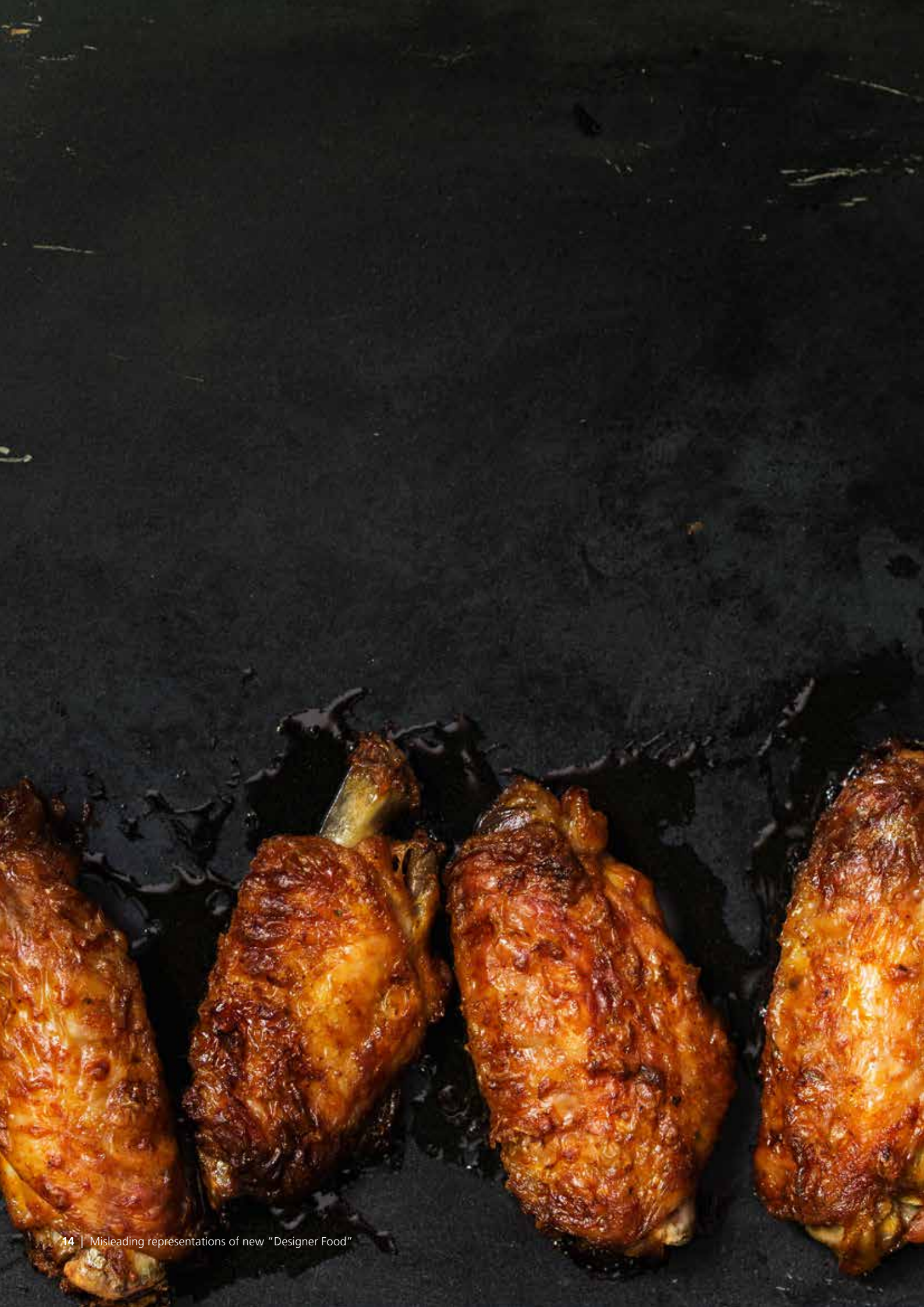
[13] CJEU 19 April 2007, C-381/05, De Landtsheer, available at www.curia.eu

21. The Champagne beer case is particular because it concerned Champagne as a protected designation of origin. The Court of Justice of the EU ruled that advertisements concerning a product without designation of origin and referring to another product with designation of origin are not, per definition, prohibited. Products without designation of origin may be compared to those with designation of origin, provided that the advertisement promoting a product without designation of origin does not aim at taking unfair advantage of the designation of origin of a competing product.

In Spain, the Supreme Court took a similar approach when it ruled that the fruit juice product Champín, packaged in a Champagne-like bottle, is not taking unfair advantage of the protected designation of origin of Champagne. Champín is a non-alcoholic drink aimed at children and, even though it was alluding to Champagne, the fact that the respective products are not substitutable allowed the Court to conclude that Champín was not able to harm the Champagne designation of origin (decision of 1 March 2016).

Moreover, the Court also ruled that Champín was not a misleading trademark because of the different nature of the respective products (a fruit juice for children versus an alcoholic beverage for adults). No customer would think of any possible relationship between a trademark for juices named Champín and a designation of origin for sparkling wines named Champagne. The consumer would rather perceive the trademark as a humorous trademark and not as a distinctive sign referring to Champagne.

Also in Spain, the Provincial Court of Pontevedra ruled on 22 January 2016 that the expression “bred on the shores of Galicia” placed on a non-prominent part of the packaging infringed the protected designation of origin of Mussels of Galicia since because several parts of the commercial process, such as the packaging, took place out of Galicia. So, even though the litigious mussels had indeed been bred in Galicia, the producers could not use the terms “bred on the shores of Galicia” because the average consumer then expects the mussels to have all the characteristics of the protected Mussels of Galicia, which is not the case.



Misleading names for foodstuffs will prevent the registration as trademarks

22. The European Trademark Directive No. 2015/2436 and EU Trademark Regulation No. 207/2009 stipulate that logos will not be registered as trademarks if they are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service.

The EU Intellectual Property Office gives as an example of this absolute ground for refusal the word TITAN that was applied for as a trademark for portable and relocatable buildings. If those goods were made of titanium, the mark would have to be refused on the basis of descriptiveness. In an attempt to overcome the objection of descriptiveness, the applicant added to his application that none of the aforesaid goods were made from or included titanium. The Board held that such a restriction, if accepted, would have had the effect of rendering the trade mark deceptive from the standpoint of the public, as they would assume that the goods were made from titanium when in reality this is not the case. (Guidelines for examination, Part B, Examination, Section 4, p. 10)

Likewise, the registration of LACTOFREE was refused as a trademark for lactose. As the Guidelines of the EUIPO explain, it is clear that if the good being marketed under the sign LACTOFREE is actually lactose itself, then the mark would be clearly misleading.

23. On 24 April 2017 in Spain, the intellectual property office OEPM refused to register the trademark BOBAL for wines. "Bobal" is the name of a type of grape. Either the wine is made from bobal grapes, in which case the mark is descriptive and should be refused for registration, or the wine is not made from bobal grapes, in which case the mark is deceptive.

On the same day, the OEPM denied the registration of a figurative trademark comprising the drawing of a goat. The trademark had been requested not only for goat's cheese but for cheese in general, including cheese made from other milk. According to the OEPM, the logo was liable to mislead consumers with regard to the origin of the products.

24. Likewise, the Swiss Federal Supreme Court already decided in 1967 that a trademark DIAMALT is misleading for products that might contain malt but in fact, do not (BGE 93 I 573).
The Swiss Institute for Intellectual Property provides in its trademark guidelines that the registration of a trademark CAFÉ for a coffee substitute will be refused (trademark guidelines of the Swiss Institute for Intellectual Property, part 4, clause 5.2).

25. It is thus important for new foodstuffs to have a name that is neither descriptive nor deceptive. Otherwise, the use of that name may not only be prohibited under the applicable food law regulations and the commercial practices legislation, but its registration as a trademark will also be refused. Moreover, from a trademark law perspective, it is not wise to refer to CHICKEN in the name of a vegetarian product.

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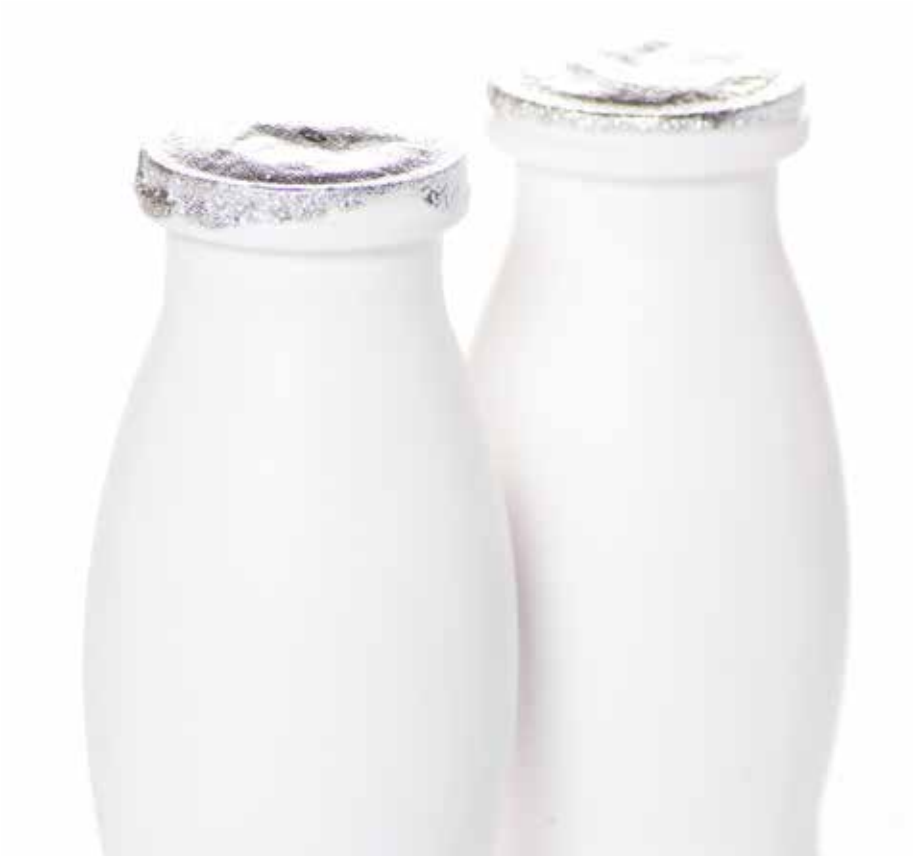
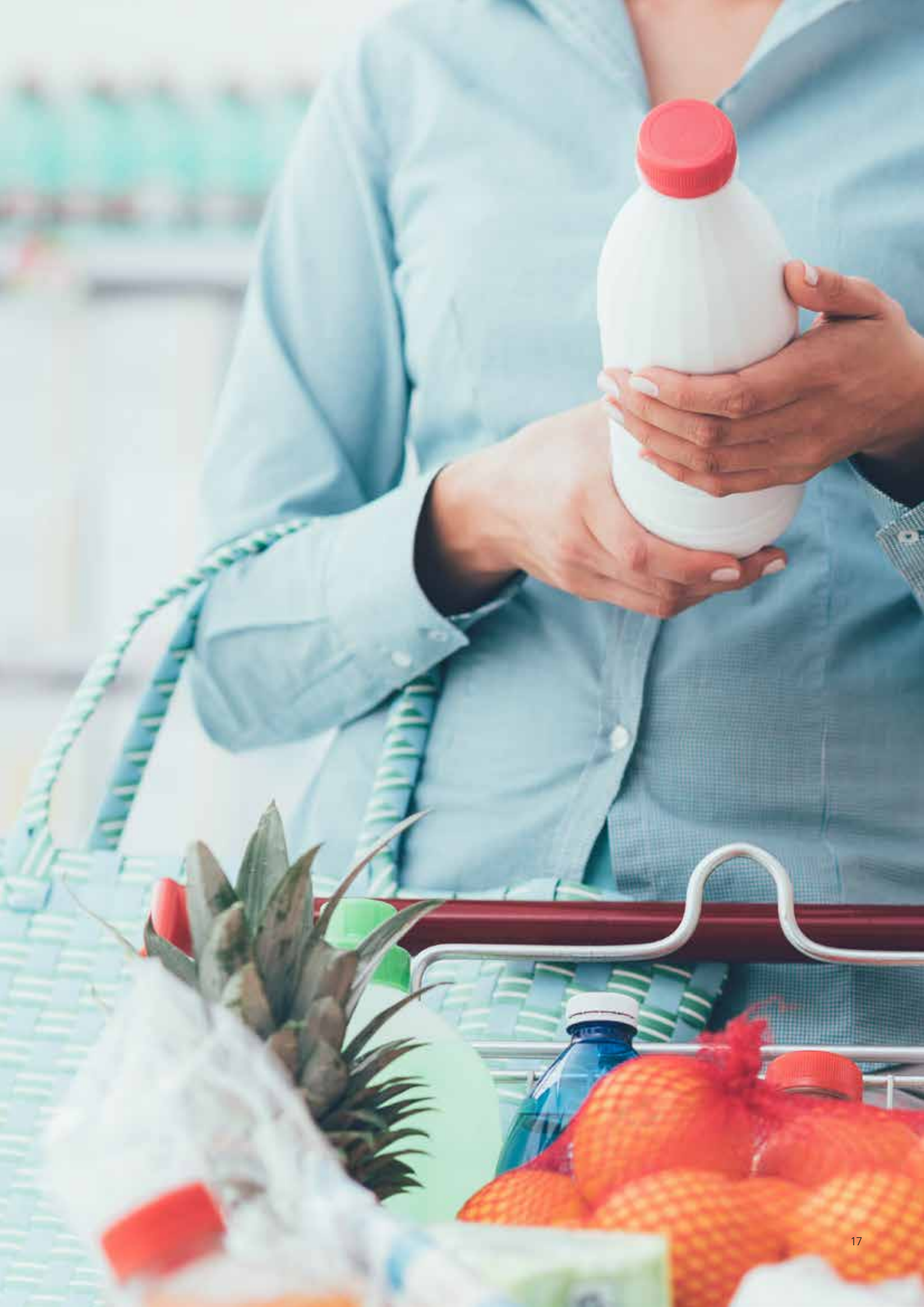
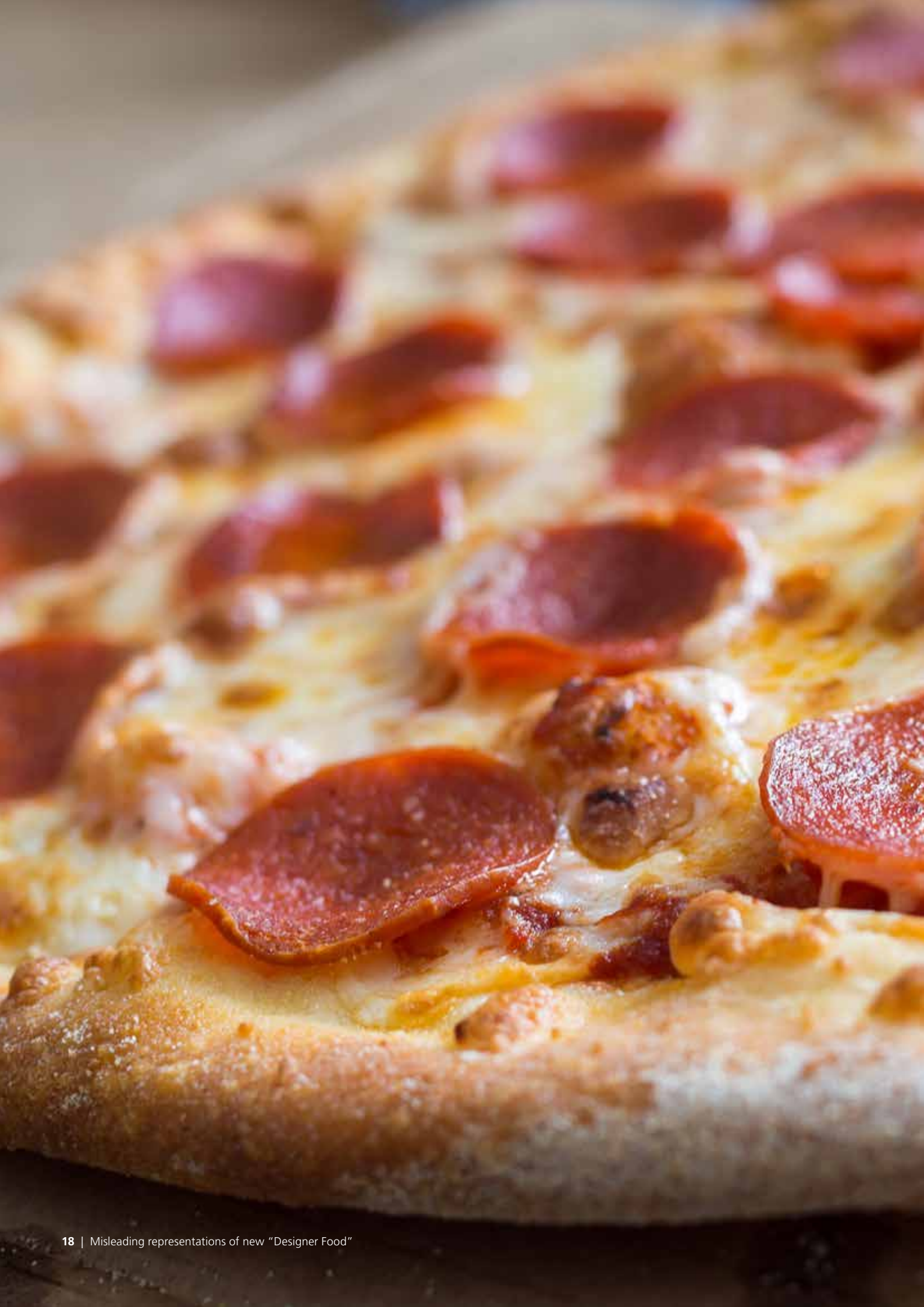
https://www.admin.ch/opc/de/classified-compilation/20143388/index.html







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"Cheese in Chinese" – Labelling requirements for food imported to China

The PRC Product Quality Law and the PRC Food Safety Law provide a general overview of the requirements for the labelling of food products imported to and distributed within China. Additionally, different kinds of food are subject to additional National Standards or special regulations in the relevant fields. For instance, there are special regulations or national standards for pre-packaged foods, health foods, infant formula milk powder, etc.

1. General Requirements

The most important requirement for the labelling of imported foods is that the label must be in the Chinese language. The Chinese label must be submitted to the competent Chinese authority before the foods can be imported into China. Foods without Chinese labelling or with Chinese labelling which does not comply with the local laws and regulations will not be allowed to be imported into China.

According to the relevant Chinese laws and regulations, the labelling of imported foodstuffs (in the Chinese language) must include the name of the product, the country of origin, and the name and address of the domestic agent, as well as the product specifications. The labelling must be true and correct and may not mislead or deceive consumers. The labelling must be clear, obvious and durable and must be easily recognisable and readable.

The name of the product must be consistent with national or industrial standards. In case there are no national and industrial standards available, a common name that is not misleading or confusing to consumers must be used. Words or short phrases can be affixed before or after the name of the product, such as dried, refined, fried, pulverous, grainy, smoked etc., provided that such words will not cause misunderstanding or confusion to the consumers.

2. "Vegetarian Cheese" – A Problem in China?

While in the European Union, the name of vegetarian food is not allowed to contain words such as "cheese", "milk" etc., such words will not be forbidden in China, as long as they are not actually misleading or confusing the consumers. There are few ambiguities in the Chinese language, and products are often named differently, for example in addition to "soy milk" (dounai), Chinese also uses the word "doujiang" (which literally means "bean slurry"). As with many other kinds of Western food, cheese is not a product with a long tradition in China. There are (at least) four different translations for "cheese", which makes it probable that at least one of them can be used in combination with vegetarian products.

3. E-commerce for foodstuffs

For online food sales, special regulations apply. According to the Measures for the Investigation and Punishment of Illegal Acts concerning Online Food Safety issued by the China Food and Drug Administration ("CFDA"), online food producers and traders shall display their food production licence on their website and shall publish the essential information about their products.

In recent years, a popular business model has emerged from e-commerce operators located outside China or in special areas (such as Hong Kong) directly targeting Chinese consumers. The Chinese consumers order products from foreign sellers, and get their products delivered to their home addresses. Food has become an important part of such business models and this is largely because many Chinese consumers believe foreign milk, meat, etc. to be of higher quality than domestic products. It is noteworthy that the import and labelling requirements described above do not apply to such cases of consumer import. It remains to be seen whether the Chinese legislator will leave this loophole open or will tighten the regulation and enforce it subsequently.

Insert 2

A short overview of the consequences of Brexit on Food Labelling Law

Introduction

Brexit is a simple word belying a much more complicated set of facts and aspirations.

Virtually all of UK food law currently comes from the EU. Food labelling regulations in particular offer assurance of food being safe, properly identified and authentic. Despite harmonised rules across Europe, each member state already has a degree of autonomy.

However, Brexit may create an opportunity to do away with the restrictions of what some may consider to be unnecessary "red tape", or maybe even an opportunity to lead international policy and set higher standards.

The opportunities for early divergence through the prism of food labelling

Brexit was brought a step closer when the European Union (Notification of Withdrawal) Bill 2017–2019 passed its second reading in the UK Parliament on 12 September 2017. The key premise of the Bill is to transpose all existing EU Legislation on "Exit day" into UK Legislation: in other words, no immediate change. Nevertheless, new EU Law will no longer apply. UK courts will no longer be bound to have regard to EU decisions. Divergence will begin as soon as the EU or the CJEU start to make decisions to which the UK is no longer a party.

Brexit opportunities for clearer food labelling were hinted at in the 2016 Childhood Obesity plan, which said: *"The UK's decision to leave the European Union will give us greater flexibility to determine what information should be presented on packaged food, and how it should be displayed. We want to build on the success of our current labelling scheme, and review additional opportunities to go further and ensure we are using the most effective ways to communicate information to families."*

The Food Information for Consumers Regulation ("FIC") (1169/2011) offers another potential for divergence. FIC includes the requirement that food labels include details of the food business operator in the EU responsible for labelling. After Brexit, a problem arises where this is a UK entity. UK companies would be well advised to make plans now for listing a different member state post-Brexit. This would be particularly significant for foods with a longer shelf life (2–3 years) as they may still be on the shelf after 29 March 2019, when the UK is to leave the EU. Of course, an extended "implementation period" may well give time for any changes arising from the current REFIT review to be further adopted after 29 March 2019.

FIC also introduced mandatory back of pack nutrition information, but with an option for voluntary front of pack labelling. In this regard the UK is already ahead of the EU, with its own voluntary front of pack traffic light labelling, providing an at-a-glance summary of nutrition information for consumers. By 2010, around 80% of products in the UK contained some form of front of pack label, albeit with different versions of the label and arguably little consistency. In 2013 FSA recommended a consistent traffic light label designed to produce clarity and consistency to present key nutritional information in a user friendly format. Leading UK Consumer groups consider it essential to have a mandatory front of pack traffic light nutrition labelling scheme.

In contrast, Italy is among the countries that consider the UK scheme to be discriminatory – but the calls by MEPs to take legal action against the UK for using its local scheme are now competing with, for example, France trialling its own colour coding scheme.

It seems almost certain that the UK will now retain its traffic light scheme. This is an example of national divergence before Brexit.

The "positive lists"of approved nutrition and health claims, and whether to adopt or change these, are an obvious area in which the UK may consider diverging after Brexit. In May 2017, leading manufacturers and suppliers wrote an open letter to the EC, and the UK Government, calling for the urgent adoption of EU-wide nutrient profiles for nutrition and health claims, to avoid consumers being misled about the health benefits and nutritional attributes of products, and to assist in providing a level playing field for fair competition and innovation. This had been intended by the EU to complement and help the consumer interpret nutrition and health claims but has never been implemented.

Another potential for divergence are regulations around the sustainability of packaging. To date the EU has pushed the UK from a recycling and environmental perspective. The UK may use Brexit as an opportunity to take a divergent policy across and beyond EU member state borders.

Finally, protected geographical indications (PGIs) and protected designations of origin (PDOs), may be examples of potential EU divergence being trumped by consensus. In September, with Brexit negotiations barely underway, the EC issued a position paper reflecting a desire that the UK and EU continue the scheme – inviting the UK to introduce complementary legislation.

Conclusion

It is clear that policies will continue to develop in the UK even if not prompted by the 27 other countries. Even if the UK does decide to diverge from current EU food law the drive for innovation and new markets, together with existing and functioning current markets, suggest that most businesses will continue to want to export to the EU. Subject of course to the detail of any future trade agreement with the EU, the best commercial option is likely to be to continue to produce to EU standards, despite any changes Brexit may eventually introduce.

When Exit day actually arrives, the UK legislative policy may be eerily similar to existing legislation.

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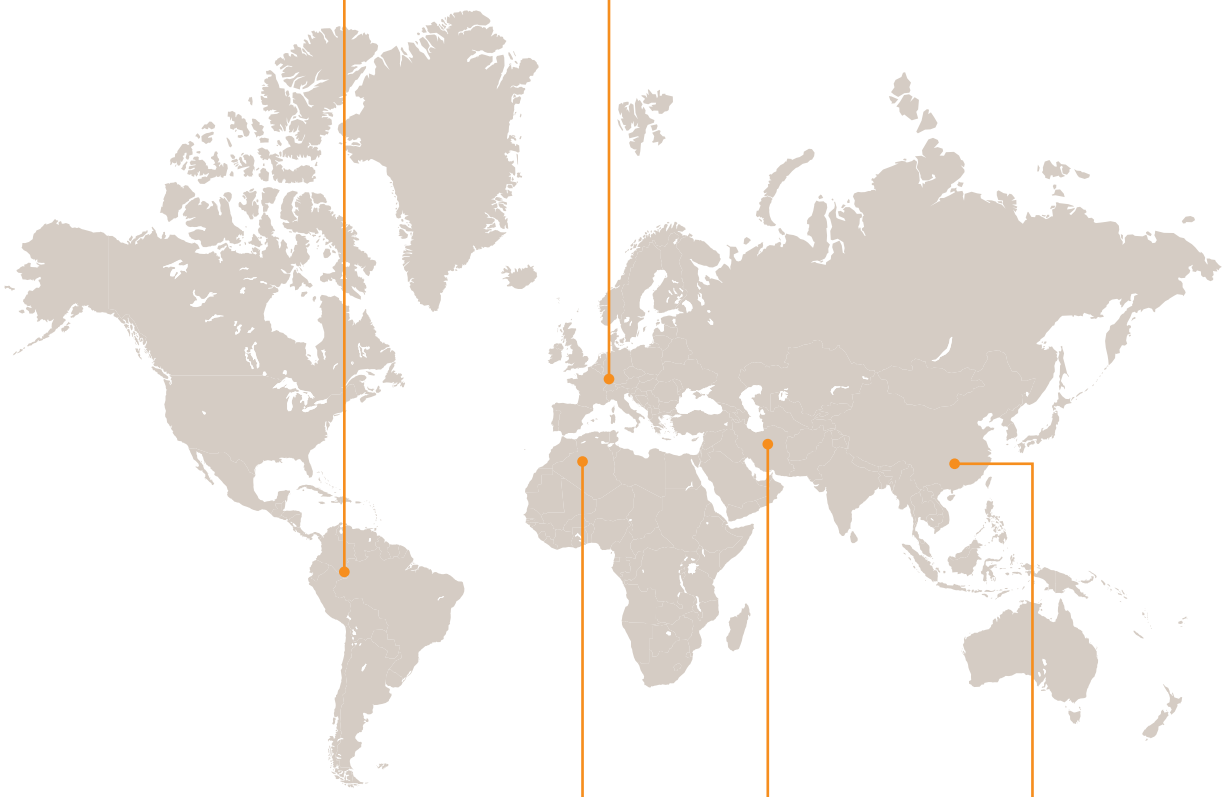

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