A Franco-Italian ploy to protect the carnivore consumer

*By David Nagode*

‘An “emulsified high fat offal tube” on account of it not containing enough meat’ were the words of the Rt. Hon. James Hacker in the 1980s British sitcom *Yes, Minister* to describe a sausage, when complaining about EU regulations on food labelling. These days, one might replace ‘enough’ with ‘any’. Giving the situation a modern twist, the French and Italian Governments have introduced legislation on banning names of meat products from a number of products, which are in fact plant-based meat substitutes. And all of this in the name of consumer protection and cultural heritage. The compatibility of the infamous French Decree No. 2022-947 with EU law currently rests with the Court of Justice of the European Union (CJEU or ‘the Court’), who has been referred questions regarding the French restrictions on the use of designations traditionally designating foodstuffs of animal origin for the description, marketing, or promotion of foods based on vegetable proteins produced and marketed in France. Just a few weeks ago, the Italian Government pulled out of the Technical Regulation Information System (TRIS) procedure, thereby depriving the European Commission of commenting on similar proposals coming from Rome, regarding, *inter alia*, a ban on the use of national treasures like mortadella or salami from meat-substitute products.
The French perspective

In October 2022, a French legislation came into force, which prohibits the use of meat-related terms to describe (and market) plant-based products, serving as meat substitutes. The scope of Decree No. 2022-947 of 29 June 2022 (‘the French Decree’), issued by the French Ministry for Agriculture, applies to all foodstuffs, manufactured in France, which contain vegetable proteins. In essence, the French legislator was aware that technical regulations, which could potentially place additional burdens on importers from other Member States according to the dual burden doctrine (Barnard, p. 87). C-261/81 Walter Rau clearly established that, back in the 1980s, the Belgian requirements to sell margarine in cube-shaped packages put considerable pressure on importers, who did not sell margarine in cubes. Similarly, the new French rules on meat-related terms would likely clash with the EU rules on free movement of goods, if applied to imported goods, unless they were justified under Article 36 TFEU or the rule-of-reason mandatory requirements. However, the French Decree is carefully constructed and includes, in Article 5, an exclusionary clause, whereby products ‘lawfully manufactured or marketed in another Member State’ are not subject to the Decree. With this, the French legislator has strategically managed to evade the minefield created by the Cassis de Dijon case law. If the measures of the French Decree are permissible according to Articles 34 and 36 TFEU, the question arises of whether the area of market regulation has already been harmonised or not.

This brings us to C-438/23 Protéines France, which is a case currently pending before the CJEU referred by the French Conseil d’État on the interpretation of Article 7 of Regulation (EU) No 1169/2011 on food information to consumers (‘the FIC Regulation’). The Conseil d’État’s first referred question is whether the terminology of butchery, charcuterie and fish sectors is harmonised at Union level. According to Article 38 of the FIC Regulation, Member States are allowed to adopt national measures in areas not harmonised by the Regulation with the only restriction of not impeding or restricting the free movement of goods. Put in simpler terms: if the Regulation does not harmonise the labelling of meat and meat-substitute products, the French measures are in conformity with EU law. The
second question refers to Article 17 of the Regulation and is linked to the first question by the consumer protection aspect. In principle, the content of Article 17 and Annex VI include specifics regarding the labelling of meat products, so as not to confuse the consumer about the content of the meat product (and possible other substances, such as hydrolysed proteins of a different animal origin). Looking at Annex VI, there is no mention of meat-substitute products being either subject to, let alone harmonised in this Regulation. This would seem to support the statements of the French government during the domestic proceedings, that there is no specific harmonisation, paving the way to grant the consumer additional protection when it comes to products, based on whose name the average consumer expects certain components.

In 2017, the CJEU had come to a similar conclusion in C-422/16 TofuTown regarding the labelling of dairy products. An association registered to protect fair competition according to German law (VSW) sued a manufacturer of plant-based products because it was selling "plant-based cheese", "veggie cheese" and "soyatoo tofu butter". In a rather technical and blunt manner, the Court managed to determine the very definitions of ‘milk’ and ‘milk product,’ and simultaneously precluded any plant-based products from bearing the term ‘milk’ as well as ‘whey’, ‘cream’, ‘butter’, ‘buttermilk’, since milk is essentially an animal product. In other words: if the product is not made from milk, it cannot be designated with any of the above-mentioned terms. Any substitution, even a partial one, of the basic component – being milk – automatically precludes the use of ‘milk’ terminology on the label (paras. 26 and 27).

Although the TofuTown judgment focuses on the dairy sector, it does contain certain parallels to the present meat sector dilemma. Namely, it aims to protect consumers and to maintain conditions for allowing competition (para. 43) – if names such as ‘salami’, ‘escalope’, or ‘cordon bleu’ are used as ‘customary names’ (Article 17(1) of the FIC Regulation), then any meat-substitute products with a same name would likely be precluded from using such names.
Consumer protection à la française

In a press release, Marc Fesneau, the French Minister for Agriculture and Food Sovereignty, explained the objective of the French Decree as follows:

‘This new draft decree reflects our desire to put an end to misleading claims as provided for by law, by using meat product names for foods that do not contain them. It is an issue of transparency and fairness that meets a legitimate expectation of consumers and producers. To maintain trust with consumers, labelling and its intelligibility are essential. This is the objective of this decree and of the whole of government policy in this area.’

The C-422/16 TofuTown judgment, although initially brought forward by a German court, provides a valuable basis to the French measures when it comes to meat labelling. In the above-mentioned case, the Court held that removing the restrictions on labelling, i.e., the marketing of dairy-free products with dairy labels would ‘not enable products with the particular characteristics related to the natural composition of animal milk to be identified with certainty, which would be contrary to the protection of consumers because of the likelihood of confusion’ (para. 44). According to the Court, this would also mean a deteriorating economic climate for milk production, and the marketing and quality of milk and milk products.

Returning to the questions posed by the Conseil d’État in the currently pending C-438/23 Protéines France – is meat and meat-substitute labelling harmonised within the scope of Articles 7, 17, and 38(1) and Annex VI of Regulation 1169/2011? – the EU’s prerogative will have to be revisited in accordance with the proportionality principle in the area of consumer protection (Article 169 TFEU) and regulating the internal market (Article 114 TFEU). Regulation 1169/2011 should be the authoritative legal text to achieve this: recital 9 expresses a desire to serve the interests of the internal market as well as simplifying the law and introducing certainty, clarity, and comprehensiveness of food labelling for consumers. The Regulation includes a certain amount of flexibility to changing consumer awareness and perception whilst still protecting the internal market.
The CJEU will accordingly have to balance a (perhaps less normative) definition of a modern consumer (Schebesta and Purnhagen, p. 13) and the integration of the internal market. A less normative approach to defining a consumer would require an actual analysis of the circumstances and interests, instead of relying on extensive lists of ingredients such as in C-195/14 Teekanne. There, the Court held that ‘the list of ingredients, even though correct and comprehensive, may in some situations not be capable of correcting sufficiently the consumer’s erroneous or misleading impression concerning the characteristics of a foodstuff that stems from the other items comprising its labelling’ (para. 40). The internal market aspect refers to a uniform interpretation of an ‘average consumer’. The Teekanne judgment, however, gives the final say to the national courts (para. 35), which could cause fragmentation across the EU. This could directly affect the integrity of the internal market by eroding consumer confidence (Schüller, p. 127).

Though the public discourse has moved to debate the environmental (dis)advantages of meat substitutes, the relevance of the French demand for meat products and French consumer behaviour will likely also play a decisive role in the upcoming judgment. The FIC Regulation leaves a sufficiently open-minded approach to food information rules (recital 50 et seq.), which makes a strong argument against the French Government’s case, especially in terms of environmental protection and reducing greenhouse gas emissions, which account to 57% of all food production emissions. Ultimately, the Protéines France case should be construed as an issue of consumer protection alone and have little bearing on environmental protection aspects.

In accordance with the ‘permit but inform’ line of thought (C-120/78 Cassis de Dijon, C-407/85 3 Glocken paras. 16-22), the primary assumption is, that the French Decree seeks to do precisely that – it does not seek to ban the sale of meat-substitute products as such, but rather seeks to inform the consumer sufficiently of the content and composition of alternatives to meat products. It is also worth considering that the current potentially unregulated practice in the EU fails to adequately inform the average consumer regarding meat and meat-substitute products. If this is the case, then the CJEU would certainly be inclined to support the argument of better informing the consumer. C-465/98 Darbo and
**C-51/94 Commission v Germany** suggest only a complete list of ingredients could satisfy the requirements of informing the ‘reasonably well-informed and reasonably observant and circumspect’ consumer (**C-210/96 Gut Springheide** para. 31). The judgment in **C-195/14 Teekanne** makes it bluntly clear that a complete list of ingredients ‘does not in itself exclude the possibility that the labelling of those goods and methods used for it may be such as to mislead the purchaser’ (para. 38). Transferring the **Teekanne** logic to the French case, in other words: the producers who use meat-related labels to market their meat-substitute products may not be exculpated of unfair commercial practices just by listing a complete list of ingredients. This is a point that requires to be taken *cum grano salis*. It certainly walks a thin line in terms of unfair competition rules on misleading commercial practices. National legal orders might include provisions similar to the **German §3a UWG** (‘the Law against Unfair Competition’), which was the legal basis for **TofuTown**.

**Dov’è l’Italia – Rome’s proposed legislation pulled back from Brussels**

Following the French example, the Italian government decided to embark on a similar path, with a key addition: the **Italian legislative proposal covers both a ban on the production and marketing of meat from cell structures (cultivated meat) as well as the marketing plant-based meat-substitute products**. The Italian **draft legislation** was presented in early 2023 and has most recently been retracted by the Italian government from the TRIS procedure with the European Commission. According to **Directive (EU) 2015/1535**, Member States have to notify the European Commission before implementing measures, which may distort the functioning of the internal market. The Italian proposal would have taken effect within the national territory only (similarly to the French Decree), according to **Article 2 and 3** of the draft proposal.

Article 2 of the Italian proposal could arguably be at odds with the internal market rules, since cultivated meat products could lawfully be marketed in other Member States through an approval from the European Food Safety Authority (see **C-192/01 Commission v Denmark**, para. 48).

Article 3 prohibiting the designation of plant-based products as meat may, if ever adopted, however, prove to be entirely lawful, since it follows the French example. The reasoning
behind the Italian law was to protect the socio-economic, historical, and environmental importance of the national livestock heritage, while simultaneously protecting human health and the interests of Italian consumers. The ban would have gone along similar lines of the French justification of consumer protection, though the historical-heritage argument might be novel.

Since the entire proposal has been withdrawn from the notification procedure, there is no reason to go into detail on the cultivated meat prohibition here, except to point out that the ‘precautionary principle’ (see e.g. C-174/82 Sandoz, para. 15) would stand on very shaky grounds. Firstly, Italy would have to show scientific evidence demonstrating the alleged harmful effects of cultivated meat, and secondly, the Italian ban may prove to be a breach of the free movement rules. The Court held in Commission v Denmark that precautionary measures may be taken, before human health is endangered. However, ‘the systematic prohibition […] does not enable Community law to be observed in regard to the identification and assessment of a real risk to public health’ (para. 56) and to scrutinise the risks of a real threat to public health.

**Will the carnivore agenda prevail?**

Awaiting the Court’s judgment on the recent French case filed this summer, Italy’s participation in Luxembourg proceedings, and the potential adoption of a similar proposal hinge on domestic politics in Italy. Assuming that the reasoning from C-422/16 TofuTown and C-195/14 Teekanne prevail, there should be a clear affirmative answer to the Conseil d’État that the national legislator is free to regulate the requirements for labelling of plant-based products, in order to guarantee the protection of the average consumer. This would without a doubt have considerable repercussions in the developing meat-substitute industry. However, by ensuring clear labelling, this approach would also preserve the distinct identity of meat products, contributing to the safeguarding of tradition and transparency. That way consumers will be able to clearly distinguish between meat and meat-substitute products. This transparency fosters fair competition by preventing confusion among consumers, aligning with the idea of a level playing field where all products are clearly and accurately presented to consumers.