



Food Lawyers Network e.V.

How We Make Things at Home

Artisanal Categories
in Food Law

TEASER

FOOD LAWYERS' NETWORK WORLDWIDE

HOW WE MAKE THINGS AT HOME – ARTISANAL CATEGORIES IN FOOD LAW

The notions of traditional, artisanal, natural,
homemade, farmhouse in food law
across Europe and the world

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THE OBJECTIVE OF THIS PAPER

Consumers around the world often like foods produced and processed the way their grandparents made them – or at least the way they imagine food was made back in the old days. This popularity makes terms like ‘traditional’, ‘artisanal’, ‘farmhouse’, ‘country-style’ or similar powerful marketing tools. The same is the case with terms like ‘natural’, ‘authentic’ and ‘pure’.

It is therefore very tempting to producers to apply these adjectives prolifically to their labelling and advertising in order to draw the consumer’s attention to a food product. At the same time, consumers do not want to be misled about the characteristics of a product and are dismayed at ‘fake news’ around food. To meet these expectations, the law insists that product labels must not be misleading.

In its rules at a more detailed level, however, the law often remains general and therefore vague when it comes to defining what a term like ‘traditional’ or ‘natural’ actually implies in the context of food. In some jurisdictions, guidance is provided by case law, in others by guidelines issued by the government or market surveillance authorities. But because an overall concept is lacking (neither the Codex Alimentarius Commission nor the European Union properly engage with the question of tradition in food) it is the national regulator which has the final say.

The objective of this paper is to present the situation in a number of key jurisdictions in chapters written by experts in the field of food law. Consumers, food business operators (FBOs), authorities and the general public may find it useful to consult this paper to help them understand what ‘tradition’ really means in the vast food sector – which stretches from sales direct from the vegetable patch to multinational food retailing with globally integrated supply chains.

This book is intended to be informational and is not intended to provide legal advice.

AUSTRALIA

JOE LEDERMAN / JOHN THISGAARD

1. The background of Australian food regulatory framework

All food products sold in Australia and New Zealand are regulated under the *Australia New Zealand Food Standards Code* (**Food Standards Code**). Like *Codex Alimentarius*, the Food Standards Code sets out compositional permissions and limits (through the regulation of substances that may be used in food) as well as requirements as to how food products must be labelled.

The Food Standards Code is enforced through the *Food Act* of each Australian State and Territory and New Zealand. Regulatory bodies in each jurisdiction (usually the Department of Health) are responsible for ensuring compliance with the Food Standards Code.

The primary focus of these regulatory bodies and the Food Standards Code is product safety. Many of the labelling requirements in the Food Standards Code relate to the provision of mandatory information. Indeed, with the exception of health and nutrition content claims and requirements for some specified product names and representations (such as “butter”, “meat pie” and “bread”), the Food Standards Code is not particularly prescriptive when it comes to the making of voluntary claims.

However, in addition to the Food Standards Code, the *Australian Consumer Law*¹ contains broad prohibitions on conduct that is misleading or deceptive. Section 18 prohibits any person (including a company) from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive.

1 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

For example, a yogurt, which has been fermented through the natural fermentation process and includes no other ingredients than milk and the culture, can be called 'natural' yogurt.

Flavourings can be called 'natural' if the flavouring part contains exclusively natural flavouring substances.

Fresh, pure, genuine/real etc.

Use of these kind of claims are evaluated case by case.

'Fresh' does not have only one precise definition, but it can mean different things in different foods and different situations. If there are alternatives, which are 'not fresh', then it is justified to claim that a food is fresh. If there are no alternatives, which would not be 'fresh', then the claim should not be used.

'Pure' is problematic, since no food is absolutely pure, but on the other hand all food shall be pure enough so that it does not cause harm or danger to the consumers. Therefore, there is normally no difference in the pureness of different foods and therefore using the claim 'pure' can be considered misleading and an allegation that the other products on the market would be not pure or less pure. For example, all honey shall be pure and therefore 'pure honey' is misleading, since it does not differ from all other honey on the market.

'Genuine' and 'real' are often misleading and should not be used. Particularly when it is question of legal names of foods. For example, 'real cream' is misleading, since all cream is made from only milk and therefore all cream is real. Also, since all fruit juice is made from 100% fruit, the claim 'genuine fruit juice' is misleading.

LITHUANIA

ASTA ŠAMULEVIČIŪTĖ

Generalities

Requirements for food information are to a large extent harmonised at the European Union level. Considering this, Regulation (EU) No 1169/2011⁹¹ is the main regulatory framework for provision of food information when placing food products on the European Union, therefore, on the Lithuanian markets.

Additionally, provision of food information is regulated in Lithuanian Hygiene Standard HN 119:2014 “Labelling of Food Products” approved by Order No. 677 of the Minister of Health of the Republic of Lithuania, dated 24 December 2002 (the ‘**Hygiene Standard**’). The Hygiene Standard foresees requirements for identification of lots, as well as for provision of food information on foods without prepackaging, packed in sales premises at the consumer’s request, or prepacked for direct sale and offered for sale to the final consumer at retailers or mass caterers. The Hygiene Standard should apply without prejudice to Regulation (EU) No 1169/2011, as well as to specific European Union and Lithuanian legal acts laying down requirements for certain food products.

General advertising requirements are provided in the Law of the Republic

91 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, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

food information law in Lithuania, and the (non)misleading character of the usage of the terms in question is determined on a case by case basis.

Traditional, artisan, artisanal, craft, homemade, farmhouse, country-style

(i) Food as national heritage

As mentioned above in this chapter, the Law on National Heritage Products provides the following definitions related to the term ‘traditional’ which are relevant to food considered as national heritage:

- (i) ‘Authentic example of a national heritage product’ means a typical product of ethnic culture traditions, preserved in kind or documented, with a particular way of creation and/or other qualitative characteristics.
- (ii) ‘Product of national heritage’ means a traditional product, a plant, or animal of a traditional variety or breed or their products, nature goods, also a traditional service, a traditional fair of the form, composition and other specific qualitative characteristics historically formed in Lithuania or in a separate ethnographic region, which have been certified in accordance with the statutory procedure.
- (iii) As one can see, a ‘traditional product’ falls within the definition of ‘product of national heritage’, and the former means artisanal wares, foodstuffs, folk instruments and other items of ethnic tangible heritage of non-mass production manufactured from traditional raw materials, handcrafted or manufactured using other old or equivalent new technologies while preserving their unique qualitative characteristics and composition.
- (iv) ‘Traditional craft’ means an individual or collective activity based

on the knowhow and specific skills handed down from generation to generation for the continuous creation and realisation of products of national heritage. Traditional crafts also include production of traditional products, breeding and growing of plants and animals of traditional varieties and breeds, manufacturing of products thereof, collection and processing of nature goods, provision of traditional services.

- (v) 'Traditional craftsman' basically means a natural person engaged in traditional crafts.

For a product to become a product of national heritage, it has to be certified.⁹³ The Minister of Agriculture decides on the certification of a product of national heritage on the basis of a proposal from the expert committee. The expert committee is composed of experts from different fields related to ethnic culture and representatives of relevant competent authorities depending on the products that are presented for certification. Certification of a product is attested by a certificate. Craftsmen who have certified products of national heritage acquire the status of traditional craftsmen.

Products of national heritage, therefore, traditional products, depending on the necessary labour input and the extent of conformity with authentic examples of national heritage products, are grouped into the following two categories:

- (i) Category A: products which perfectly conform with authentic examples of national heritage products and in the production process of which more than half of the handmade process is used.
- (ii) Category B: products which are in close conformity with authentic

93 The List of National Heritage Products is approved by Order No. 3D-562 of the Minister of Agriculture of the Republic of Lithuania, dated 24 October 2008, and is constantly updated.

THE NETHERLANDS

GERT-JAN DE JAGER

Law Generalities

Dutch food law is laid down in the Commodities Act (in Dutch: Warenwet) and several Decrees and Regulations based on this Act. The Dutch legislator has chosen not to set strict rules regarding using descriptions as ‘traditional’, ‘artisan’, ‘homemade’, ‘farmhouse’, ‘natural’, ‘authentic’ and ‘pure’. Instead, the Netherlands since the beginning of the 1960s, have chosen for self-regulation in advertising. The Advertising Code Authority (ACA) is the body dealing with the self-regulating system of advertising. The rules of this Authority are called the Dutch Advertising Code. This Code defines advertising as: ‘any form of public and/or systematic direct or indirect commendation of goods, services and/or ideas by an advertiser or, either wholly or partly, on behalf of him, with or without the help of a third party.’

Food business operators using one of the descriptions mentioned before on the labels of their products are therefore subject to this Code.

The Code is divided into a General Section and a Section of Special Advertising. The General Section contains a body of rules with which all advertising should comply. It stipulates the following

art. 2: *“Advertising must be in accordance with the law, the truth, good taste and decency.”*

art. 7. *“Advertising shall not be dishonest. Advertising is considered to be dishonest if it contravenes with the requirements of professional devotion, and if it substantially disrupts or may disrupt the economic behaviour of the average consumer reached, or targeted, as regards to the product. Misleading and/or aggressive advertising is considered to be (by any means) dishonest.”*

art. 8.1 *“When assessing whether or not an advertisement is misleading, all characteristics and conditions, the factual context, the limitations of the means of communication, and the public for which it is intended are to be taken into consideration.”*

art. 8.2 *“All advertising including incorrect information, or information that is unclear or ambiguous for the average consumer in respect of one or more elements as listed in points a to g hereunder, and which would consequently entice or may entice the average consumer to make a decision on a transaction which he would otherwise not have made, is considered to be misleading:*

a. The existence or the nature of the product;

b. The most important features of the product, such as availability, advantages, risks, design, composition, accessories, service and complaint handling, process and date of production or execution, delivery, suitability for use, quantity, specification, geographic or commercial origin, results to be expected, or the results and essential features of tests and controls performed.

(...)”

Specifically for food and infant nutrition there are separate sections in the Code. The section on food products stipulates:

“Art. 4. Commendation of a food product by referring to a certain quality which does not have a distinctive capacity within the relevant group of products is not allowed if the referral is intended to distinguish the Food Product from other products in the same group in a misleading manner.”

According to the explanation given by the ACA, it is however allowed to refer to a *general* feature. E.g. “Product X is *naturally* fat free”, as this refers to a common feature of all products in the category.

The section on infant nutrition holds no specific rules on using descriptions as mentioned before. Therefore, the general section on food products applies for using these descriptions on infant nutrition.

In essence, the Dutch Advertising Code follows art. 7 of Regulation (EU) No 1169/2011 and gives further guidelines as to how a complaint will be judged.

The case law of the ACA shows that consumers have filed several complaints for using descriptions mentioned before (<https://www.reclamecode.nl/uitspraken/>). In these matters the ACA meticulously examines whether the food business operator can use these descriptions on its product. A product that claims to be artisan, should in fact be artisan.

The ACA may determine a complaint unjustified (rejection/not upheld), or determine the complaint justified (upheld). Upheld means that the ACA judges the advertising message to be contrary to the Dutch Advertising Code. The ACA then makes a 'recommendation' which means that the ACA recommends this way of advertising is discontinued. Furthermore, as the circumstances warrant, the ACA can distribute a decision as an alert which means that the secretariat will ensure the decision is brought to the attention of the public by means of a press release in associated media, to interested individuals or organizations and via placement on www.reclamecode.nl.

The ACA also examines whether advertisers comply with the decision of the ACA in the event of an infringement. If the advertiser pronounces that he will not comply with the ruling or does not respond to the request of the ACA, then this can be published on the ACA website under the heading 'Non-compliant'. In this way, 'non-compliance' by the advertiser is also brought to the attention of third parties, including the government regulators, such as the Dutch Food and Safety Authority (NVWA). According to the ACA 96% of the companies however follow the given verdict.

What descriptions have been regulated by law?

II. EXAMPLES OF USE AND CRITERIA FOR ASSESSEMENT OF CLAIMS

1. Traditional

In Switzerland the term “*traditional*” or “*tradition*” is mostly found on labels for cheese, meat products, like sausages or ham, and bakery goods. For dairy and meat products the term is often linked to a traditional recipe or even used in combination with a protected designation of origin (PDO) or a protected geographical indication (PGI).

Long-established brands and industries also praise their traditional products, proven by the number of years the products have been sold successfully. See for example the advertising for KAMBLY “Bretzeli” (shortcrust pastry biscuits): “*This traditional, delicately crisp Swiss biscuit speciality has been baked according to the same recipe and with the same loving care, day after day, since 1910.*”¹⁴²



The RACCARD Tradition Raclette cheese is the test winner of the consumer show “A Bon Entendeur” in 2018. A Bon Entendeur has tested ten

¹⁴² <https://www.kambly.com/en/695/Fine-biscuits.htm?Assortment=19505> (last accessed 14/2/2019).

Other Terms

Pure

Meat, poultry, eggs – Per USDA regulations, terms such as “all,” “pure,” “100%,” and others may not be used on a label to signify ingredient content, unless the product is prepared solely from one ingredient.²⁶⁸

Other food – By contrast, FDA regulation restricts the use of the term “pure” only in the context of foods purporting to be beverages containing fruit or vegetable juice, which must bear a required percentage juice disclosure on such product’s label or labeling.²⁶⁹ In that context, a beverage containing less than 100 percent juice may not bear the label “100 percent pure.”²⁷⁰

However, it is notable that these 1993 juice regulations²⁷¹ did not stop litigation over juice. In 2010, a consumer unfair business practices claim brought under California state law survived summary judgment – even though the label conformed with FDA’s “100 percent pure” juice regulation.²⁷² The court reasoned that preemption did not apply because labels could still be misleading notwithstanding their compliance with FDA juice regulations.²⁷³ The United States Supreme Court used similar reasoning in *POM Wonderful LLC v. Coca-Cola Company* to rule that Lanham Act claims were likewise not preempted or precluded even where a label com-

268 9 C.F.R. §§ 317.8(b)(34), 381.129(b)(5).

269 21 C.F.R. § 101.30(a).

270 21 C.F.R. § 101.30(l).

271 Food Labeling; Declaration of Ingredients; Common or Usual Name For Nonstandardized Foods; Diluted Juice Beverages, 58 Fed. Reg. 2897, 2903–04 (Jan. 6, 1993).

272 *Zupnik v. Tropicana Prod., Inc.*, No. CV 09-6130 DSF RZX, 2010 WL 6090604, at *2 (C.D. Cal. Feb. 1, 2010). *But see Bell v. Campbell Soup Co.*, 65 F. Supp. 3d 1328, 1332 (N.D. Fla. 2014) (granting motion to dismiss on preemption grounds for product labeled 100% juice).

273 *Id.*

2017, but FDA has yet to issue new regulations.³¹⁶ FDA has indicated that manufacturers that meet the current definition of healthy can continue to use the definition until new regulations are promulgated,³¹⁷ and has issued guidance FDA will not enforce the term against foods that are “(1) not low in total fat, but have a fat profile makeup of predominantly mono and polyunsaturated fats; or (2) contain at least ten percent of the Daily Value (DV) per reference amount customarily consumed (RACC) of potassium or vitamin D.”³¹⁸ As a result, U.S. attorneys typically advise clients to remove the word healthy from their products unless they meet the current definition of healthy or the two exceptions under the current FDA guidance on healthy.

CONCLUSION

In the United States, terms such as “natural,” “traditional,” “artisanal,” “homemade,” “farmhouse,” and “country-style” are largely undefined by law or regulation. As a result, food companies are well advised to consider both regulatory requirements and the risk of consumer and/or competitor challenge when developing their product claims, labeling and marketing strategy.

316 See U.S. Food & Drug Admin., Use of the Term “Healthy” in the Labeling of Human Food Products; Public Meeting; Request for Comments, FDA-2016-D-2335-0843 (Feb. 16, 2017), <https://www.regulations.gov/document?D=FDA-2016-D-2335-0843>.

317 U.S. Food & Drug Admin., “Healthy” on Food Labeling (last updated Oct. 22, 2018), <https://www.fda.gov/food/food-labeling-nutrition/use-term-healthy-food-labeling>.

318 See FDA Guidance: “Healthy,” *supra* note 303, at 3.

CONTACT DETAILS OF FLN-MEMBERS

FLN

www.food-lawyers.net

Australia

FOODLEGAL

www.foodlegal.com.au

Melbourne

Joe Lederman

joe@foodlegal.com.au

Austria

AustriaLegal

www.austrialegal.at

Salzburg

Bernd Roßkothen

office@austrialegal.at

Albania

BOZO ASSOCIATES

www.bozolaw.al

Tirana

Artan Bozo

artan@bozolaw.al

Belgium

DALDEWOLF

www.daldewolf.com

Brussels

Aude Mahy

ama@daldewolf.com

bxl-law

www.bxl-law.com

Brussels

Jens Karsten

karsten@bxl-law.com

Canada

Gowling WLG

www.gowlingwlg.com

Ottawa

Lewis Retik

lewis.retik@gowlingwlg.com

Czech Republic

Štros & Kusák
www.stroskusak.cz
Prague

David Štros
dstros@stroskusak.cz

Denmark

BECH-BRUUN
www.bechbruun.com
Copenhagen

Christian Vinding Thomsen
cvt@bechbruun.com

Martin Dræbye Gantzhorn
mdg@bechbruun.com

France

PRODUCT LAW FIRM
www.product-lawfirm.com
Paris

Gilles Boin
boin@product-lawfirm.com

Julie Legay
legay@product-lawfirm.com

Finland

PERTTA ATTORNEYS Ltd
www.pertta.fi/en
Helsinki

Kukka Tommila
kukka.tommila@pertta.fi

Germany

KWG RECHTSANWÄLTE
www.kwg.eu
Gummersbach

Markus Grube
markus.grube@kwg.eu

Greece

CHALDOUPIS & PARTNERS
www.chaldoupis.com
Athens

Charis Chaldoupis
chaldoupis@chaldoupis.com

Hungary

KÖLCSEY-RIEDEN & PARTNERS
www.colaw.hu
Budapest

Roland Kölcsey-Rieden
r.kolcsey-rieden@colaw.hu

India

PLR-CHAMBERS
New Delhi

Harsh Gursahani
harsh.gursahani@plrchambers.com

Ireland

RAYMOND O'ROURKE

Raymond O'Rourke
raymond.orourke7@gmail.com

Italy

MONDINI RUSCONI
Law Firm
www.mondinirusconi.it
Milan – Rome

Giorgio Rusconi
giorgio.rusconi@mondinirusconi.it

Omar Cesana
omar.cesana@mondinirusconi.it

Lithuania

TGS BALTIC
www.tgsbaltic.com

Asta Šamulevičiūtė
asta.samuleviciute@tgsbaltic.com

The Netherlands

KNEPPELHOUT&KORTHALS
www.kneppelhout.nl
Rotterdam

Gert-Jan de Jager
gjm.de.jager@kneppelhout.nl

PLOUM
www.ploum.nl
Rotterdam

Marijn van Tuijl
m.vantuijl@ploum.nl

Norway

KVALE
www.kvale.no
Oslo

Marie Vaale-Hallberg
mvh@kvale.no

Poland

BOREK LEGAL
<https://boreklegal.com>
Gdańsk

Paweł Borek
p.borek@boreklegal.com

Portugal

José Miguel Ascensão
Lisbon

José Miguel Ascensão
jma@oliveiraascensao.pt

Russia

ALRUD
www.alrud.com
Moscow

Maxim Alekseyev
malekseyev@alrud.com

Timur Akhundov
takhundov@alrud.com

Slovakia

Štros & Kusák
www.stroskusak.cz
Prague

David Štros
dstros@stroskusak.cz

Spain

BANARES VILELLA
Barcelona

Silvia Bañares Vilella
sb@icab.es

Sweden

SETTERWALLS

www.setterwalls.se

Malmö

Per Lidmann

per.lidman@setterwalls.se

GULLIKSSON

www.gulliksson.se

Malmö

Magnus Friberg

magnus.friberg@gulliksson.se

Switzerland

FOOD-LEX

www.foodlex.ch

Berne

Karola Krell Zbinden

karola.krell@foodlex.ch

RENTSCH&PARTNER

www.rentschpartner.ch

Zurich

Matthias Städeli

staedeli@rentschpartner.ch

United Kingdom

DWF LLP

www.dfw.co.uk

London

Hilary Ross

hilary.ross@dwf.co.uk

DWF LLP

www.dfw.co.uk

London

Dominic Watkins

Dominic.Watkins@dwf.law

BURGES SALMON LLP

www.burges-salmon.com

Bristol

Sian Edmunds

sian.edmunds@burges-salmon.com

United States

KLEINFELD, KAPLAN & BECKER
www.kkblaw.com
Washington, D.C.

Suzan Onel
sonel@kkblaw.com

FAEGRE BAKER DANIELS
www.faegrebd.com
Minneapolis

Sarah Brew
Sarah.Brew@FaegreBD.com



When is a food 'traditional', 'artisanal', 'farmhouse' or 'country-style'?
What is 'natural', 'authentic' and 'pure'? Find the answer between
these book covers.

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