

## The Netherlands

# Alpro's Dairy Alternatives: What Is Allowed and What Is Not in the Light of ECJ's *TofuTown*?

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## I. Introduction

Alpro is a company that produces and distributes plant-based alternatives for dairy products like milk, yoghurt and cream. Alpro uses dairy names on its packaging and in the description and advertisements of its products, such as 'yoghurt variety' (*yoghurt variatie*) or 'custard' (*vla*). The Dutch Dairy Organization (NZO) is a branch organization for the Dutch dairy industry. Its aim is to protect the interests of the Dutch dairy industry with the purpose to strengthen the economic and social position of Dutch dairy companies. NZO claims that the dairy industry suffers losses as a result of Alpro using these dairy designations for its non-dairy products. Back in 2014 the Court in First Instance ruled partly in favor of the NZO. However, the NZO was not satisfied with this decision and filed an appeal.<sup>1</sup>

The decision in first instance occurred before the ECJ's *TofuTown* ruling.<sup>2</sup> Since the decision of the Dutch Court of Appeal came after *TofuTown*, it took this ECJ ruling into account in its own judgement. The Court stated that the general rule from this ECJ

decision is that dairy designations infringe the EU legislation on designations for milk and milk products<sup>3</sup> when used on packaging or advertisements to designate a non-dairy product, even when the dairy name is complemented with a name indicating the plant origin of the product. The only escape for a producer or distributor of vegetable dairy alternatives is a (limited) list of exceptions.<sup>4</sup> According to the Court this means that Alpro cannot use dairy designations such as "yoghurt" and "cream" (room) in the names or as a designation of its products, either on the packaging or in the distribution or advertising. This does not mean, however, that Alpro cannot use the dairy designations "milk", "yoghurt" or "cream" (room) at all.

The Dutch Court of Appeal discusses four types of Alpro's non-dairy products in this case. The first product is a soy alternative for yoghurt. The statement that it is an alternative to yoghurt is allowed because it cannot be qualified as the use as a name or designation of the product. It only serves as a way to express the fact that the product is a plant alternative for the animal dairy product "yoghurt". The same applies to the use of the term "yoghurt cultures" (*yoghurt culturen*) because it informs the consumer that the soy products contain the same cultures as the animal dairy product "yoghurt". For the same reason Alpro can refer to the "yoghurt section" (*yoghurtschap*) and the "yoghurt category" (*yoghurtcategorie*).

The second product is an alternative for "cooking cream" (*kookroom*). The use of the word "cream" (room) is only illegal when it is used as a name or designation of the product. Again, it is permitted when used as a way to inform the consumer that it is an *alternative* to cream.

The third category of products is "soy drinks" (*soja dranken*). Firstly, the Court points out that Alpro

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1 Gerechtshof Den Bosch, 19 December 2017, zaaknr. 200.165.890\_01, ECLI:NL:GHSHE:2017:5731.

2 European Court of Justice, Seventh Chamber, 14 June 2017, Case No. C-422/16.

3 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1307/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

4 The list of exceptions appears in Commission Decision 2010/791/EU of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007 (OJ 2010 L 336, p. 56).

is allowed to inform consumers that the product can be found in the “milk section” (*melkschap*) at the supermarket since this cannot be qualified as using as a name or designation of the word “milk”. Secondly, Alpro can use the word “dairy” (*zuivel*) on its products since this is not a reserved designation. Consequently, Alpro can use “dairy free alternative to milk” (*zuivelvrij alternatief voor melk*) on its products because dairy is not a reserved designation and milk is not used as a name or designation in this context.

The last category is Alpro’s soy custard (*vla*) desserts. Since Alpro used *custard (vla)* as a name for its products the Court of Appeal followed the court in first instance in finding that this is illegal, because it is used as a name and *custard (vla)* is considered a reserved designation in the Netherlands.

## II. Misleading Consumers

The second part of this ruling looks at the way Alpro presents its products. The Court ruled that it is possible, under certain circumstances, that the presentation or packaging of a soy product misleads consumers into thinking it is a dairy product.

According to the Court, the packaging of Alpro’s dairy free yoghurt alternatives for example is not in itself misleading. The material and shape of the packaging is not typical for just dairy products, nor is the (grass) green color used in the presentation of the product. On the contrary, the green leaves with the word “soya” on the packaging point out the plant origin of the soy product. Furthermore, the color of the product on the image is close enough to the real color of the product. Also, white is not only associated with (animal) dairy products and neither are the words “natural”, “mild”, “soft”, and “creamy”. The term “yoghurt section” (*yoghurtschap*) only refers to the place in the supermarket where the product can be found. The same goes for Alpro’s variety on custard (*vla*).

The advertisement of the yoghurt variety as a whole is misleading, however, according to the Court. It shows the image of a white yoghurt-like product accompanied on the right with: “New in the yoghurt section” (*nieuw in het yoghurtschap*) in a large font. The lack of the name of the product or any other indication of the plant-based nature of the soy product misleads the consumer into thinking it is a dairy product. The words “stay curious enjoy plant power” are not enough to point out the plant origin of the product.

The same applies to Alpro’s soy drinks (see Appendix, image on the left). The packaging in itself is not misleading but the advertisement as a whole is. The soy drink is advertised in the same way as Alpro’s yoghurt variety. The almond variety of the soy drink (see Appendix, image on the right), however, makes it clear that the product is plant-based because the word “almond” and the large image of an almond make it clear that the product is plant-based.

The packaging of the products *Alpro Cuisine and the Airy (Aéré) & Creamy* are not misleading. The fact that Alpro uses a dark blue color for the full-cream version and light blue for the light version are not only typical for dairy products.

Takeaway of the Decision The takeaway of this decision is that producers and distributors of non-dairy alternatives to dairy products can use dairy names on and for their products with a little creativity. The most important note is that it must be clear enough to consumers that the product is a *plant-based alternative* to a dairy product. This not only applies to the packaging but also to the presentation and advertisement of the products. The only question that remains is: How far can you go? Would it be legal to use the name of a dairy product in big font with the explanation that it is a dairy alternative in small font? Probably not, since it would not be clear enough that it is a plant-based alternative. There is, however, a grey area that companies like Alpro will most likely try to stretch as far as possible.

# Appendix



*Alpro Packaging Images*  
*Source: Alpro.*