

To,
The Chief Executive Officer,
Food Safety and Standards Authority of India,
FDA Bhawan, Kotla Road,
New Delhi- 110002

Dear Sir,

SUBJECT: GFI India and Ikigai Law's comment on the Food Safety and Standards Authority of India Draft Notification on Dairy Analogues (F. No. Stds/M&MP/Notification(05)/FSSAI-2019, 21/07/2020)

The Good Food Institute India (GFI India) and Ikigai Law are writing to make this submission in response to the recent Draft Notification on Dairy Analogues (F. No. Stds/M&MP/Notification(05)/FSSAI-2019, 21/07/2020) (Draft Food Safety and Standards Amendment Regulations, 2020 w.r.t. new standards of Dairy Analogue and revision of standards of Ghee and other Milk Fat Products) by the Food Safety and Standards Authority of India (FSSAI).

We thank the FSSAI for providing us an opportunity to submit a response to the FSSAI Dairy Analogue Notification. We are grateful to the FSSAI for coming up with certain requirements including the introduction of 'milk mark' for animal-derived dairy products. These requirements help differentiate between animal-derived dairy products and plant-based dairy products.

Through these comments, we hope to clarify the role labels serve on plant-based dairy products and suggest how the FSSAI might approach labeling convention to continue protecting consumers' health and well-being. The insertion of the sub regulation 2.1.1 relating to the General Standards for Milk and Milk Products, in item 3, "...Provided also that for such products, dairy term or phonetically similar or spell alike terms shall not be used in the nomenclature of the product..." is restrictive to an entire industry that, as a response to consumer demand and investor interest, has been growing rapidly in the last few years. Dairy analogues which in their current definition include plant-based and non-animal based¹ milks, such as soy milk, almond milk, oat milk, and other plant-based dairy products in the yogurt, cheese, and butter categories, have reflected an evolving Indian consumer palate and innovation in the food supply to respond to changing demographics, growing environmental and ethical concerns, and lactose intolerance.

In sections below, we have highlighted factual grounds and legal evidence to allow for fair labelling of plant-based and non animal-derived dairy products.

¹ These proteins may be derived from fungi, algae, and cultivated microorganisms.

I. Statement of Grounds

1. Statement of factual grounds

1.1. Consumers consciously purchase plant-based and non-animal based dairy products knowing their difference from animal-derived dairy products

- 1.1.1. Claims that state that consumers are confused by plant-based milk labels are contradicted by evidence. 84% of respondents in a survey conducted by GFI India and market research firm IPSOS (n=288, comprising both plant-based dairy users and non-users, in Tier 1 and Tier 2 cities, hereinafter referred to as ‘GFI India’s survey’) felt that it was appropriate to use the word ‘milk’ on labels to describe plant-based milk. Additionally, 70% of the total sample of users and non-users had no confusion in the source/origin of plant-based milk, recognising that it came from plant ingredients². This indicates that even with a very nascent plant-based milk industry, a majority of Indian consumers living in locations where these products are marketed already believe that the use of the term ‘milk’ is appropriate in describing these products, and have no confusion regarding their origin. As the Indian plant-based dairy industry grows, this distinction will continue to become even clearer, as similar studies in more mature plant-based foods markets such as the United States show.
- 1.1.2. Plant-based milk users are consciously purchasing these products and pay attention to labelling. GFI India’s survey shows that 94% of plant-based milk users consult labels when shopping for plant-based milks, and 90% of those same plant-based milk users consult labels when shopping for animal-derived milk. This indicates that plant-based milk users are discerning consumers. They also pay particular attention to nutrition facts, protein content and the ingredients list. Most of them are inclined to read the content on the front as well as the back of the pack.³ The FSSAI already requires food labels to bear a full list of ingredients that can instantly dispel most questions in the rare case that a consumer is confused, such as whether there is any wheat in gluten-free bread, or whether there is any cow’s milk in soy milk. Additionally, appropriate disclosures such as a non animal-derived dairy declaration as well as content description⁴ will further allow consumers to make informed purchase decisions. The FSSAI’s proposal to incorporate a logo for animal-derived dairy products can be an additional dimension for differentiation. We consider these requirements, coupled with consumers’ pre-existing and growing awareness of the source of plant-based milks indicated above, to be sufficient to ensure that confusion about the origin of plant-based dairy is not a factor in purchase decisions.

² GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 20-21 of this document

³ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 21-22 of this document

⁴ As provided in the FSSAI Dairy Analogue Notification

1.2. Consumers purchase plant-based and non-animal based dairy products for reasons independent of animal-derived dairy products, and should be able to continue exercising their discretion

- 1.2.1. Several Indian companies have emerged to serve the growing market with innovative plant-based dairy offerings that satisfy the sensory, functional and taste requirements of consumers. Plant-based milk consumers appreciate new trends and varieties as demonstrated in GFI India's survey, with plant-based milk scoring significantly higher than animal-derived milk on these aspects.⁵
- 1.2.2. Often, purchase decisions are based on dietary restrictions such as lactose intolerance and issues concerning milk digestibility. Per a study in the Journal of Gastroenterology and Hepatology, more than 60% of the Indian population suffers from varying degrees of lactose intolerance⁶. GFI India's survey further shows that for users of plant-based milk, lactose intolerance and easy digestibility of plant-based products are among the major drivers for purchase for users.⁷ Plant-based dairy options are thus necessary for the large section of consumers who, because of their dietary requirements, choose to not consume animal-derived milk. An accommodation similar to what has been provided to gluten-free bread, which allows the standardised term 'bread' to be retained to indicate its functionality and at the same time highlights its non-wheat nature, would therefore be useful for lactose intolerant consumers who enjoy plant-based dairy products.

1.3. Sustained retail presence and traditional usage of plant-based dairy products have built consumer recall

- 1.3.1. These products have been on retail shelves for a few years, and have built familiarity with consumers, who recognise its difference in origin while making a purchase. Changing labelling norms will create further confusion for customers who have become accustomed to a nomenclature that includes plant-based qualifiers with appropriate descriptors (milk/cheese/yogurt/butter/dahi). In particular 'soy milk' has been in use by the Indian population for a considerable amount of time⁸.
- 1.3.2. There is a history of usage of dairy terms for plant-based milk products in India, which can be seen in the way they have been adapted to indian regional languages. For instance, coconut milk is called 'tengina haalu' in Kannada, the term 'haalu' is the Kannada word for 'milk'⁹.

⁵ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 22-23 of this document

⁶ Uday C Ghoshal, Marshall and Warren Lecture 2019: A paradigm shift in pathophysiological basis of irritable bowel syndrome and its implication on treatment, *Journal of Gastroenterology and Hepatology*, 10.1111/jgh.15032, 35, 5, (712-721), (2020).

Wiley Online Library

⁷ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 22-23 of this document

⁸ Soymilk was introduced to India in 1933, History of Soymilk and Dairy-like Soymilk Products - Page by William Shurtleff and Akiko Aoyagi; <https://www.soyinfocenter.com/HSS/soymilk2.php>

⁹ Dictionary, Ministry of Human Resource Development (India): <https://sanskrit.bharatavani.in/dictionary-surf/?did=26&letter=&language=English&page=225>

1.3.3. Often, these products serve the same functional end uses as cow's milk, and any other beverage descriptor will not appropriately reflect its intended functional/end use which will affect its customer reach as well.

1.3.4. Respondents from the GFI India survey indicated that a qualifier (such as 'soy' or 'almond') followed by a 'plant-based/dairy-free' declaration along with pictures on the pack are the best differentiators between plant-based and animal-derived milk, which are in agreement with current marketing practices.¹⁰

1.4. The FSSAI has had precedents in using qualifiers and compound names for standardised terms

1.4.1. The FSSAI has historically allowed for standardised terms to be preceded with qualifiers. Qualifiers such as 'gluten-free', 'wheat-free', 'sugar-free', have been in practice for various products and have been successful in differentiating varieties for consumers. Some of these qualifiers are subject to definitions under the law and regulations administered by the FSSAI; others are constrained only by the general requirement that they should not be false or misleading. The FSSAI had defined bread as "BREAD whether sold as white bread or wheat meal bread or fancy or fruity bread or bun or masala bread or milk bread or of any other name, shall mean the product prepared from a mixture of wheat atta, maida, water, salt, yeast or other fermentive medium containing one or more of the following ingredients, namely:- Condensed milk, milk powder (whole or skimmed), whey, curd, gluten, sugar, gur or jaggery, khandsari, honey, liquid glucose, malt products, edible starches and flour, edible groundnut flour, edible soya flour, protein concentrates and isolates, vanaspati, margarine or refined edible oil of suitable type or butter or ghee or their mixture, albumin, lime water, lysine, vitamins, spices and condiments or their extracts, fruit and fruit product (Candied and crystallized or glazed), nuts, nut products and vinegar.¹¹" It later passed standards for gluten-free foods under Sub Regulation 2.14 of Food Safety and Standards (Food Products Standards and Food Additives), Regulations, 2011 and labelling standards under sub-regulation 2.4.5 (50) of Food Safety and Standards (Packaging and Labelling) Regulations, 2011. This allowed food businesses to produce and sell 'gluten-free bread' even though bread had a standard of identity that specified gluten ingredients as a part of its core composition. This presents an additional precedent to reconsider the terms of the dairy analogue notification and pass a fair policy that does not discriminate against an industry that is producing distinct offerings for consumers who choose not to consume animal-derived dairy products on a given occasion.

1.4.2. Additionally, compound names have been used for products in India which have been useful in providing product clarity. Consumers are familiar with seeing plant-based dairy products labeled using the words "milk," "cheese," "yogurt," etc. together with a modifier (e.g., "almond," "soy,"

¹⁰ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 24 of this document

¹¹ Clause 2.4.1.5(2), Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011; https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_08_09_2020-compressed.pdf

“cashew”) indicating what the product is primarily made of. Soy milk and almond milk have been in the market place long enough to create a distinction from cow’s milk. “Butter” has a standard of identity defined by statute — derived exclusively from milk of Cow and/or Buffalo. In spite of this, the FSSAI has attempted to define standards for “peanut butter” and “cocoa butter”- products that do not contain butter derived from these animals. If the FSSAI were to conduct this exercise for individual offerings, it would not be practical and would also be arbitrary. It is reasonable to expect FSSAI’s implicit recognition that consumers have readily understood that these products are not animal-derived butter, to extend to other plant-based dairy products as well. Under such a principle, newer foods should be able to reference standardized foods on their labels as long as producers are not representing their products as a standardized product and it is clear to consumers what the food product is.

1.5. Any alternative terminology is not reflective of the true nature and consumer usage of plant-based dairy products

- 1.5.1. GFI India’s survey showed that consumption behaviour is similar for both plant-based milk and animal-derived milk – they are typically consumed either as a whole, or along with cereals or in tea/coffee.¹² Retaining “milk” and other familiar conventional dairy terminology as standardised terms for plant-based dairy products will allow consumers to understand their core functionality and is in line with the FSSAI’s goal of eradicating consumer confusion, whereas doing otherwise would only compound ambiguity.
- 1.5.2. It would be counterproductive for plant-based milks and similar products to be labeled as, for example, “almond drink” because this terminology would be foreign to consumers and less indicative of what the product is. Similarly, “beverage” is an overbroad, ambiguous term: Regulation 14.1 for Non-alcoholic ("soft") beverages under the FSSAI’s Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 lists waters (14.1.1), fruit and vegetable juices (14.1.2), fruit and vegetable nectars (14.1.3), water-based flavoured drinks (14.1.4), including “sport,” “energy,” or “electrolyte” drinks and articulated drinks, coffee, coffee substitutes, tea, herbal infusions, and other hot cereal and grain beverages, excluding cocoa (14.1.5) as its components. As it stands, current consumer perception and the FSSAI’s inclusions under beverages will not do justice to the nature and end use of plant-based milk products, and will need further consumer education and clarification to introduce it as such.

1.6. The current notification discriminates against the interests of an emerging industry which is producing a distinct product category

¹² GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 24 of this document

- 1.6.1. The Indian dairy alternative market stood at \$20.9 million in 2018 and is projected to grow at a CAGR of 20.7% to reach \$63.9 million by 2024¹³. A change in labelling requirements, and the subsequent shift in consumer demand will negatively impact the entire value chain of these companies, who have created jobs and income streams for cashew and almond farmers, or work with individual suppliers, manufacturers, packagers, etc. At a time when the government is making MSME-friendly policies for an Atmanirbhar Bharat with a message to go ‘vocal for local’, this regulation will be counter productive to the growth of an industry that has the potential to carve its own identity on the global map through the Make in India Scheme, contribute to the Indian economy and talent development, and at the same time serve local demand that will otherwise be fulfilled by imported products. It will also impose additional costs to manufacturers to change labelling, design and packaging, which may not be financially viable for small, homegrown, food business operators.
- 1.6.2. Moreover, the draft notification does not specify alternative labelling guidelines for products that fall under dairy analogues, and such regulatory ambiguity may make it harder for food business operators to test potential names against status quo to check consumer comfort and therefore adequately respond to the notification. It will also add to significant time and effort investment to apply for fresh approvals. The costs accrued by change in packaging and labelling, along with a potential drop in consumer purchases will compound the losses due to the ongoing pandemic and can drive many of these small market players into closure, which would result in the loss of livelihoods and of consumers’ access to products they may prefer.

1.7. Consumers are concerned about environmental impacts due to animal agriculture intensification

- 1.7.1. Sustainability and environmental impact have also become important factors for consumers while making purchase decisions and plant-based dairy producers often leverage this fact in marketing their products as ‘plant-based’. Respondents from the GFI India survey who are users of plant-based milk cite environment friendliness and sustainability, animal welfare, and plant-based origin as some of the key reasons for their purchase of these products.¹⁴
- 1.7.2. The concerns stems from multiple reports that have highlighted the risk of dairy intensification magnifying environmental concerns. An Oxford study finds that while meat, aquaculture, eggs, and dairy use ~83% of the world’s farmland and contribute 56-58% of food’s different emissions, they only provide 37% of our protein and 18% of our calories. It also reveals that impacts of the

¹³ India Dairy Alternative Market By Type (Soy, Almond, Coconut, Others), By Formulation Type, By Distribution Channel (Supermarket/Hypermarket, Grocery/Convenience Store, Online & Others), Competition, Forecast & Opportunities, 2024 (Rep.). (2019, June):

https://www.researchandmarkets.com/reports/4793279/india-dairy-alternative-market-by-type-soy?utm_source=dynamic&utm_medium=BW&utm_code=zt98fc&utm_campaign=1314476 - India Dairy Alternative (Soy, Almond, Coconut, Other) Market Analysis & Forecast, 2014-2024&utm_exec=joca220bwd

¹⁴ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); See Pg 23-24 of this document

lowest-impact animal products exceed average impacts of substitute vegetable proteins across GHG emissions, eutrophication, acidification (excluding nuts), and frequent land use.¹⁵

1.8. The draft notification is not consistent with the FSSAI’s support of plant-based foods through the Eat Right Campaign

- 1.8.1. We appreciate the FSSAI’s efforts under the Eat Right campaign to promote a plant-based diet and its benefits for individual and planetary health. The FSSAI has played a role in promoting the linguistic trend of using the common names of products like soy milk in public statements and documents. Notably, the official messaging from the Authority in its Protein Week series includes soy milk as a good source of protein¹⁶. Such signals from the FSSAI are critical in educating the consumer about the benefits of plant-based dairy products and GFI India can provide research to build this awareness further. We also celebrate the recognition received for the Eat Right Initiative at an international level and GFI India will be happy to partner with the Authority on its vision to ensure “healthy and sustainable diets extends to the entire country¹⁷”, particularly in initiatives pertaining to plant-based protein foods.

2. Statement of legal grounds

The Statement of Objects and Reasons of the Food Safety and Standards Act, 2006 (FSS Act) states that the legislation was enacted to ensure the availability of safe and wholesome food for human consumption¹⁸. Plant-based milk products are high quality products which are a wholesome source of nutrition. Consumers are already familiar with the compound names used by plant-based milk products¹⁹ (such as ‘almond milk’, ‘soy milk’) and are able to differentiate them from animal milk. The proposed FSSAI Dairy Analogue Notification is overbroad and sweeping and unfairly brings plant-based milk within its ambit. This will result in greater consumer harm, stifle a growing plant-based foods industry, and go against the objectives of the FSS Act. The FSSAI’s regulatory framework must give due recognition to plant-based milk products, and allow the existing naming conventions followed by the industry to continue, such as using compound names (like ‘almond milk’), or use of qualifiers like ‘plant-based’ along with dairy terms. The regulations must be clarified to best suit consumer needs and demands. In this section we have listed out the legal grounds on

¹⁵ Poore, J., & Nemecek, T. (2018). Reducing food’s environmental impacts through producers and consumers. *Science*, 360(6392), 987–992: <https://science.sciencemag.org/content/360/6392/987>

¹⁶ FSSAI’s Twitter update; <https://twitter.com/fssaiindia/status/1289905594887860225/photo/1>

¹⁷ Eat Right: A food systems approach to transform India’s food environment, Open Ideo: <https://challenges.openideo.com/challenge/food-system-vision-prize/refinement/better-food-for-better-lives-for-one-sixth-of-the-world-s-population-that-is-1-64-billion-people-in-india-by-2050>

¹⁸ Statement of Objects and Reasons, the Food Safety and Standards Act, 2006: https://www.prsindia.org/sites/default/files/bill_files/bill82_2006123082_Food_Safety_Bill.pdf

¹⁹ GFI India and IPSOS, *Discerning the Plant-based Dairy Consumer in India* (Sep. 2020); discussed in detail in paragraph 1.1 at page 2.

which plant-based milk products must be kept out of the ambit of the FSSAI Dairy Analogue Notification.

2.1. Plant-based milk products are not ‘imitation products’

- 2.1.1. The FSSAI Dairy Analogue Notification defines ‘dairy analogues’ as products that are “*an imitation product that is designed or structured to mimic, or offered as an alternative/replacement to, a milk or milk product or composite milk product*”²⁰.
- 2.1.2. According to the FSS Act, a product is an imitation of another, if “*it is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true character*”²¹.
- 2.1.3. Plant-based milk products are distinct products, which have their own characteristics and are not meant to deceive consumers. Plant-based milk products are produced through the fermentation of nuts and/or cereals including oats, peanuts, soy and almonds and others, which stimulates the activity of bioactive compounds. This leads to the incorporation of valuable and nutritionally significant components which also enhances the quality of the products by enriching the: (i) protein quality, (ii) the bioavailability of minerals and some important elements²². Further, plant-based milk products act as an important source of protein for lactose intolerant population and are a lifestyle choice for the vegan population²³.
- 2.1.4. Consumers are familiar with the names of plant-based milk products, and if they are not allowed to be sold with dairy terms in their names, consumers are likely to get confused about the true nature of such products. Manufacturers of plant-based dairy products label their products in a manner which allows consumers to make informed choices such as through compound naming conventions. Further, manufacturers of plant-based milk products use declarations stating that their products do not contain animal-derived dairy products; they also use qualifiers such as ‘plant-based’, ‘vegan’ etc. These characteristics are incorporated to ensure that consumers are not deceived.
- 2.1.5. Indian courts have held that a food product is not an imitation of the other if it clearly uses appropriate qualifiers in its name and packaging. For instance, the Supreme Court found that the term ‘para saccharin’ was sufficient to signify that the product was not an imitation of saccharin.²⁴ The Himachal Pradesh High Court has held that the product name ‘dairy toffee’ was not an imitation of ‘milk toffee’ as the term ‘dairy’ signified the source or the ingredients of the product. The product

²⁰ Clause 2(1)(i), FSSAI Dairy Analogue Notification

https://www.fssai.gov.in/upload/uploadfiles/files/Draft_Notification_Dairy_Analogue_30_07_2020.pdf

²¹ Section 3(zf)(B)(i), Food Safety and Standards Act, 2006:

<https://fssai.gov.in/cms/food-safety-and-standards-act-2006.php>

²² Akin, Z., and T. Ozcan. 2017. Functional properties of fermented milk produced with plant proteins. LWT- Food Science and Technology 86: 25–30: <https://doi.org/10.1016/j.lwt.2017.07.025>

²³ Anna Aleena Paul, Satish Kumar, Vikas Kumar & Rakesh Sharma (2019): Milk Analog: Plant-based alternatives to conventional milk, production, potential and health concerns, Critical Reviews in Food Science and Nutrition, Taylor and Francis: <https://doi.org/10.1080/10408398.2019.1674243>

²⁴ Bal Kishan Thaper vs Municipal Corporation of Delhi on 9 March, 1979, (1979) 2 SCC 459.

‘dairy toffee’ was made from both milk and butter and the court did not find any basis to hold that there was an intent to deceive or mislead consumers.²⁵

- 2.1.6. The FSSAI Dairy Analogue Notification allows animal-derived dairy products to “exclusively use” a milk mark²⁶. This practice is similar to the use of ‘green dot’ and ‘red dot’ marks which has been in use by the FSSAI to differentiate between vegetarian and non-vegetarian products²⁷. The use of the milk mark by animal-derived dairy products will enable a clear differentiation between plant-based milk products and animal-derived dairy products.
- 2.1.7. Plant-based milk products manufactured in India are compliant with the FSSAI (Packaging and Labelling) Regulations, 2011, and must obtain the necessary licenses, authorizations, and approvals from the FSSAI before selling and marketing their products. Therefore, there is no scope of deceptive, or unlawful practices to be adopted by the plant-based milk industry.

2.2. Unequal treatment of plant-based milk products:

- 2.2.1. The FSSAI Dairy Analogue Notification requires that the names of ‘dairy analogue’ products must not contain “*dairy term or phonetically similar or spell alike terms*”²⁸. It also requires the names of ‘dairy analogue’ products to reflect the “*true nature of the product*”.
- 2.2.2. An absolute ban on the usage of dairy terms with additional qualifiers for plant-based milk products would be discriminatory, as other product categories are allowed to use the term ‘milk’ or ‘butter’ along with qualifiers and/or compound names. For instance, the FSSAI has identified “Coconut Milk (Non-Dairy)”, “Peanut Butter”, “Cocoa Butter”, “Soyabean Curd”, and “lactose free or sucrose free milk substitutes” as separate product categories²⁹, these products do not contain animal-derived milk. These products will continue to use dairy terms post the enforcement of the FSSAI Dairy Analogue Notification.

²⁵ Nutrine Confectionery Co. Ltd. vs State of Himachal Pradesh and Anr., Himachal Pradesh High Court, 1979 CriLJ 219.

²⁶ Clause 2(1)(iii), FSSAI Dairy Analogue Notification:

https://www.fssai.gov.in/upload/uploadfiles/files/Draft_Notification_Dairy_Analogue_30_07_2020.pdf

²⁷ Clause 4, Food Safety and Standards (Packaging and labelling) Regulations, 2011: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiq2Jry8ufrAhVFX30KHRHOApwQFjAAegQIAxAB&url=https%3A%2F%2Farchive.fssai.gov.in%2Fdam%2Fjcr%3A1ee1e147-c683-4c1a-898e-e5dde4133cb6%2FCompendium_Packaging_Labelling_Regulations_22_01_2019.pdf&usg=AOvVaw3pUv2pTeSk_33qg5TjAjYm

²⁸ “Dairy terms” means names, designations, symbols, pictorial or other devices which refer to or are suggestive, directly or indirectly, of milk or milk products, Clause 1(c), Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011: https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_08_09_2020-compressed.pdf

²⁹ Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011: https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_08_09_2020-compressed.pdf

- 2.2.3. If other plant-based milk products are not allowed to use dairy terms along with qualifiers or compound names, this would be in violation of Article 14 of the Constitution of India, 1950 (“**Constitution**”). Article 14 of the Constitution guarantees equality before the law, and equal protection of laws. All persons in similar circumstances shall be treated alike in both privileges and liabilities imposed³⁰. Administrative discretion exercised by the government should not be arbitrary, it should ensure fairness and equality of treatment³¹.
- 2.2.4. If the FSSAI Dairy Analogue Notification is enforced in its present state, a classification will be drawn between some plant-based milk products and the other categories mentioned above³²; the latter will continue to use dairy terms in their names.
- 2.2.5. Article 14 allows the government to create ‘reasonable classification’ between persons, however, such classification should be based on ‘intelligible differentia’³³: there must be a rational nexus between the classification drawn by the government and the object sought to be achieved by it³⁴. For instance, the usage, source, and application of peanut butter is similar to other plant-based butter products (for example almond butter), however, almond butter products will not be allowed to use the term ‘butter’ if the FSSAI Dairy Analogue Notification is enforced.
- 2.2.6. This classification drawn by the FSSAI Dairy Analogue Notification is unfair to the plant-based milk products as the true nature of such products can be demonstrated by the use of compound names and/or qualifiers, as has been allowed by the FSSAI for other products.

2.3. Directive principles provided in the Constitution of India:

- 2.3.1. The Supreme Court of India has held that the directive principles of state policy are fundamental to the governance of the country³⁵, they are the means to an end to recognize novel rights and duties³⁶. Thus, directive principles of state policy must be considered while creating new laws and regulations.
- 2.3.2. As per Article 48, “*the State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines*”. Indian companies and start-ups working in the plant-based milk products industry source their raw material including cashews, almonds, peanuts, etc., from local farmers and agriculture markets. Further, with the rise in demand of plant-based milk products, farmers may be encouraged to grow and harvest the products mentioned above. India may also become an exporter of raw material relating to plant-based milk products as the world demand for such products increases³⁷.
- 2.3.3. As per Article 48A, “*the State shall endeavour to protect and improve the environment*”. There is evidence that plant-based products have a significant positive impact over animal-derived dairy on the

³⁰ John Vallamattom v. Union of India, (2003) 6 SCC 611.

³¹ R.L. Bansal v. Union of India, AIR 1993 SC 978.

³² As mentioned in paragraph 2.2.2. At page 8.

³³ Dharam Dutt v. Union of India, AIR 2004 SC 1295.

³⁴ Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

³⁵ Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 194.

³⁶ Minerva Mills v. Union of India, (1980) 2 SCC 591.

³⁷ Putting the planet on a pandemic diet, Hatch Online, a webinar, Hatch Online:
<https://www.youtube.com/watch?v=gVGLDxCs2xY>

environment³⁸. These products can be produced in smaller areas of land, and once they are produced, they do not incur high storage and refrigeration costs³⁹.

- 2.3.4. The FSSAI must be guided by these directive principles while framing its regulations. The FSSAI Dairy Analogue Notification in its current form disproportionately impacts the plant-based dairy sector and disregards the positive impact of this industry on both agricultural practices and the environment. The regulations must create an enabling regulatory environment for this industry to grow while balancing the needs of consumers.

2.4. Treatment of plant-based milk in other jurisdictions

- 2.4.1. The FSSAI is required by law to consider the prevalent practices and conditions in the country and undertake a review of international practices while framing its regulations⁴⁰. Plant-based milk products have been recognized as a distinct product category in prominent jurisdictions such as the United States of America and the European Union. Further, the use of compound names and qualifiers has become an accepted practice to differentiate plant-based milk products from animal-derived dairy.
- 2.4.2. The European Commission has created a list of products that are allowed to use ‘milk’ and other dairy terms in their names. This is an exception created by the European Commission applicable to the description of products the exact nature of which is known because of “*traditional use*” and/or “*when the designations are clearly used to describe a characteristic quality of the product*”. This list of exceptions includes *inter alia* nut butters, shea butter and coconut milk⁴¹.
- 2.4.3. In the United States of America, regulations under the Federal Food, Drug and Cosmetic Act recognize the use of ‘common or usual’ name of a product for which no standard of identity or definition is developed⁴². Judgments delivered by courts in the United States have allowed the use of compound names for plant-based milk products, and have found that they are not imitation products. The U.S. Food and Drug Administration (FDA), as a part of its Nutrition Innovation Strategy, is looking at modernising standards of identity “in light of marketing trends and the latest nutritional science. The goal is to maintain the basic nature and nutritional integrity of products while allowing

³⁸ Sandefur, H. N., J. A. McCarty, E. C. Boles, and M. D. Matlock. 2017 Peanut products as a protein source: Production, nutrition, and environmental impact. In *Sustainable Protein Sources*, 209–21. USA: Academic Press, Elsevier Inc.:

https://www.researchgate.net/publication/309647181_Peanut_Products_as_a_Protein_Source_Production_Nutrition_and_Environmental_Impact

³⁹ Ibid.

⁴⁰ Section 18, Food Safety and Standards Act, 2006: <https://fssai.gov.in/cms/food-safety-and-standards-act-2006.php>

⁴¹ Commission Decision, listing the products referred to in the second subparagraph of point III (1) of Annex XII to Council Regulation (EC) No 1234/2007, 20 December 2010:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0791&rid=2>

⁴² Regulations on Misbranded Food, 21 U.S. Code § 343. Misbranded food

industry flexibility for innovation to produce more healthful foods.”⁴³ As a starting point, it has invited information from the public to help shape its labelling policies for plant-based dairy products.

- 2.4.4. Almond milk was held not to be an ‘imitation milk’ as the jury was unable to conclude that almond milk was “nutritionally inferior” to milk; the court also recognized almond milk as a distinct product category. It was held that consumers are able to differentiate between animal-derived milk and almond milk⁴⁴. It has been held that the use of the words: ‘soy’, ‘coconut’, ‘almond’; along with the term ‘milk’ are sufficient to differentiate between animal-derived milk products and plant-based milk products. Such compound names enable a reasonable consumer to understand that plant-based milk products do not contain animal-derived milk⁴⁵. In another case, it was held that ‘organic soy milk’ sold with a disclaimer that the product is “lactose and dairy free” was unlikely to deceive a reasonable consumer⁴⁶. Thus, it was held that ‘organic soy milk’ had a separate identity.
- 2.4.5. Miyoko’s Creamery, a U.S.-based company manufacturing plant-based butter, was asked by the California Department of Food and Agriculture to eliminate the terms ‘butter’, ‘lactose-free’, ‘hormone-free’ and ‘cruelty-free’ on its label. Miyoko’s Creamery subsequently filed a lawsuit citing logistical burdens, compliance costs and the erosion of free speech rights under the First Amendment in its response to the directives. Its motion to use ‘butter’ was granted preliminary injunction by the judge, setting an industry-wide precedent for small plant-based dairy producers.⁴⁷ In 2018, Blue Diamond Growers won a lawsuit that permitted the company to continue using the term “almond milk” in their labels recognising that their product was neither an “imitation” nor a “substitute” under the federal definitions of those terms.⁴⁸
- 2.4.6. Imposing a ban on plant-based milk products from using ‘dairy terms’ along with qualifiers, or as compound names, is a deviation from well-established international practice. The FSSAI should recognize plant-based milk products as a distinct product category. They have their own characteristics, and the use of compound names makes them easily differentiable with conventional animal dairy products.

3. Recommendations

⁴³ Center for Food Safety and Applied Nutrition. (2020, April 17). FDA Nutrition Innovation Strategy: <https://www.fda.gov/food/food-labeling-nutrition/fda-nutrition-innovation-strategy>

⁴⁴ Cynthia Cardarelli Painter v. Blue Diamond Growers, United States Court of Appeal – 9th Circuit, case no. 17-55901

⁴⁵ Alex Ang v. Whitewave Foods Company and others. United States District Court of the Northern District of California, Case No. 13-CV-1953 (N.D. Cal. Dec. 10, 2013).

⁴⁶ Gitson v. Trader Joe’s Co., District Court of Northern District of California, Case No. 13-cv-01333-WHO (N.D. Cal. Oct. 4, 2013).

⁴⁷ Watson, E. (2020, August 23). ‘This is a huge victory...’ Judge rules in Miyoko plant-based butter case: <https://www.foodnavigator-usa.com/Article/2020/08/23/Judge-rules-in-Miyoko-plant-based-butter-case-This-is-a-huge-victory>

⁴⁸ Steinberg, J. (2018, December 21). Almond Milk Labeling Not Deceptive, 9th Cir. Says (Corrected): <https://news.bloomberglaw.com/class-action/almond-milk-labeling-not-deceptive-9th-cir-says-corrected>

- 3.1. As stated above, proposed FSSAI Dairy Analogue Notification is overly broad in its scope and unfairly brings plant-based milk within its ambit. Plant-based milk products should be identified as a separate product category. This will enable FSSAI to regulate and set specific standards for plant-based dairy products. Further, this will bring regulatory certainty for Indian companies, and start-ups working in this industry.
- 3.2. This can be done by introducing the following proviso highlighted **bold** within the definition of ‘dairy analogue’: *(ba) Analogue in the dairy context means an imitation product that is designed or structured to mimic, or offered as an alternative/replacement to, a milk or milk product or composite milk product as defined in these regulations by partial or full substitution of selected milk components with other components from non-dairy sources, or prepared by using non-dairy ingredient(s) exclusively or in combination with dairy ingredients.”* **Provided that plant-based products shall not be considered ‘dairy analogues’.**
- 3.3. Plant-based milk products should be allowed to use dairy terms in their names as compound names; or along with appropriate qualifiers. The use of qualifiers or compound names help consumers to identify the true nature of the product. Further, these qualifiers can be conspicuously mentioned on the packaging of the product, in large font, so that such products can be differentiated with other products. Following is an indicative list of names and recommendations that should be approved by the FSSAI:
 - 3.3.1. ‘Plant-based’ + [milk/cheese/butter/or any other dairy term]’
 - 3.3.2. [Source, eg- almond, soy, peanut etc.] + [milk/cheese/butter/or any other dairy term]
 - 3.3.3. The product labels to plant-based milk products can be required to carry the following declaration – “this is not an animal-derived/animal sourced/cow’s dairy product”.
- 3.4. The FSSAI should consider amending the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011⁴⁹ and create a specific product category for plant-based milk products. To do this, the FSSAI should undertake a risk assessment based on the available scientific evidence in an independent, objective and transparent manner; and ensure that there is open and transparent public consultation, as envisaged by the FSS Act⁵⁰.
- 3.5. To help consumers differentiate between plant-based milk products and animal milk products, plant-based milk products should be allowed to use phonetically similar words to dairy terms such as, but not restricted to, ‘mylk’ in place of ‘milk’, ‘cheeze’ in place of ‘cheese’, or ‘yocurd’ in place of ‘yogurt’. Such terms, along with qualifiers, or as compound names should be allowed for plant-based dairy products.

⁴⁹Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011: https://www.fssai.gov.in/upload/uploadfiles/files/Compendium_Food_Additives_Regulations_08_09_2020-compressed.pdf

⁵⁰ Section 18, Food Safety and Standards Act, 2006: <https://fssai.gov.in/cms/food-safety-and-standards-act-2006.php>

- 3.6. The FSSAI should undertake an exercise similar to the U.S. FDA’s initiative⁵¹ under the Nutrition Innovation Strategy to modernise standards of identity, to revisit current standards of identity to reconcile them with growing marketplace and scientific innovation.
- 3.7. We request the FSSAI to expand its framing for labelling standards to accommodate present market realities, consumer discretion and emerging innovation and thus re-evaluate its position on plant-based dairy products. GFI India and Ikigai Law are committed to working with the FSSAI to facilitate this development and provide further assistance, as deemed necessary.

Varun Deshpande
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About the Good Food Institute India

The Good Food Institute India (GFI India) is part of an international network of nonprofits spanning Brazil, Israel, U.S., Europe, and Asia Pacific. Since our establishment in 2017, GFI India has rapidly emerged as the central thought leader and convening body in the space of plant-based, cultivated, and fermentation-based meat, eggs, and dairy that are collectively known as the ‘alternative protein’ or the ‘smart protein’ sector.

GFI India’s team of experts across science and technology, business, and policy works to build the alternative protein sector from the ground up, in order to catalyze a more healthy, sustainable, and just food system. We build pivotal networks, conduct and freely disseminate high-impact research, and provide critical advisory support. GFI India does not accept any revenue or equity from the startup companies, investors, or industry partners with whom GFI India works.

About Ikigai Law

Ikigai Law is an award-winning law firm. We have a market-leading regulatory, policy and commercial-law practice for technology and innovation-led businesses. The firm was awarded Boutique Law Firm of the Year 2019 and 2020 by Asian Law Business, Mid-size Law Firm of the Year 2019 by IDEX Legal and Investments and Startup Law Firm of the Year 2020 by BusinessWorld Legal.

We provide legal and strategic advice to a wide variety of clients, from high impact startups to mature market-leading companies. Our practice spans diverse sectors including food-tech, health-tech, data analytics, digital payments, aerospace and aviation, artificial intelligence, and others. We are often at the forefront of policy and regulatory debates for emerging business models. The firm is privileged to

⁵¹ Discussed in detail in paragraph 2.4.3 on page 11

represent some of the most exciting entrepreneurial and innovative ventures in the country, that include alternative protein products manufacturers, satellite manufacturers, virtual reality hardware and content developers; (r)e-commerce companies; social media platforms, cloud services providers, blockchain and other fin-tech ventures.

Appendix

Executive Summary of GFI India and IPSOS Survey: Discerning The Plant-Based Dairy Category in India



Prepared for: GFI India

Prepared by: Ipsos India Pvt Limited

OVERVIEW

Plant-based milks such as soy milk, almond milk, and oat milk have recently made their way into cafe menus and the Indian consumer's shopping baskets. As of mid-2019, plant-based milk already represented 13% of the total milk market in retail in developed markets such as the United States⁵², and the findings below suggest that we can expect Indian consumers too to further adopt this category into their diets along with animal-derived dairy.

Since 90% of plant-based milk users have also consumed animal-derived dairy milk in the past 12 months, it is clear that in India this category will grow alongside animal-derived dairy consumption and not instead of it. While both plant and animal-derived dairy products are used in teas, coffees and consumed just as is in a glass, plant-based milks have unique propositions of sustainability. Health is an overarching purchase driver for both, but it is further broken down into unique offerings - perceptions of bone health for animal-derived dairy, and digestibility, suitability for allergies and lactose intolerance for plant-based milk - proving both categories to be distinctly desirable. Labelling of plant-based milk as "milk" seems to be the best path to take for companies, since the majority of consumers attest to the suitability of the terminology and also showcase no confusion in the source or origin of plant-based milk.

Nearly 69% of plant-based milk consumers claim that they are most likely to increase their consumption in the future. With specific drivers of purchase, usage patterns and growth potential, plant-based milks are a great opportunity for the packaged milk industry and an exciting area of innovation for both companies and consumers alike.

SURVEY DESIGN AND METHODOLOGY

Objective :

To gauge metrics for awareness, usage patterns, and attitudes towards plant-based dairy products and corresponding terminology

Methodology :

Quantitative Survey done via online panels.

Respondents were screened for eligibility criteria and continued into the main survey. (Single session)

⁵² The Good Food Institute, State of the Industry Report on Plant-based Meat, Eggs, and Dairy (June 2019)
<https://www.gfi.org/non-cms-pages/splash-sites/soi-reports/files/SOI-Report-Plant-Based.pdf>

Sample Design:

Given the ‘niche’ & ‘new’ nature of the category, a purposive and quota-based sampling has been followed to have a sufficient representation of gender, city type and age group.

Target Group:

- 18-65 years old | Men & Women |
- Tier 1 or Tier 2 cities with population over 10L
- Users of plant-based dairy⁵³ (Respondents who have consumed plant based dairy in the past 12 months)
- Non-users of plant-based dairy but users of animal-derived dairy⁵⁴ (Respondents who have consumed animal-derived dairy in the past 12 months, but not used plant-based dairy)

Sample Details :

Total size of the sample (N) : 288

Male : Female - 136:152

Tier 1: Tier 2 - 197:91

Users : Non Users⁵⁵ - 189 : 99

⁵³ Plant based dairy -Dairy derived from plant based sources viz.. Soy milk / Almond milk /Oat milk / Plant-based milk /Vegan milk / Dairy free milk

⁵⁴ Animal derived dairy : Dairy derived from animal sources viz. Cow/Buffalo

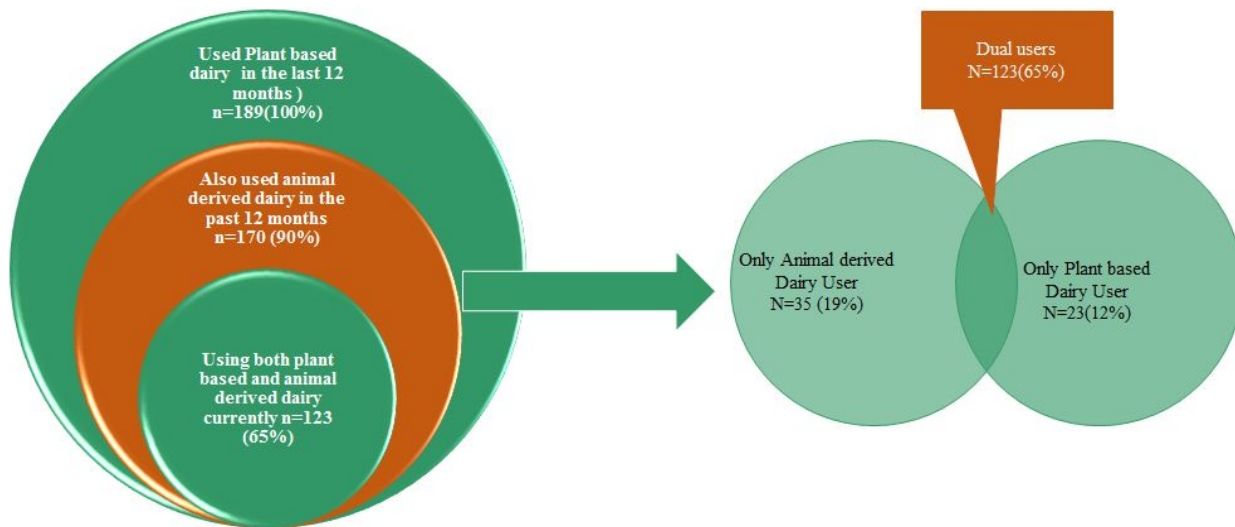
⁵⁵ Users - Respondents who have consumed plant based dairy in the past 12 months.

Non Users :Respondents who have consumed animal derived dairy in the past 12 months, but not used plant based dairy

KEY FINDINGS

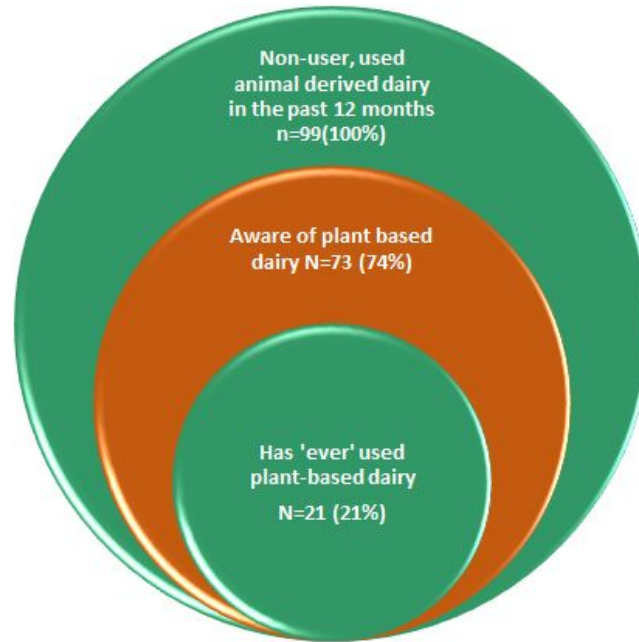
1. Majority of the plant-based milk users also consume animal-derived milk

90% of plant-based milk users have also consumed animal-derived dairy milk in the past 12 months. Of these, around 12% are currently consuming only plant-based milk, 65% are using both plant-based & animal-derived milks, and 19% are consuming only animal-derived dairy. 4% are not consuming any of the categories currently.



2. High awareness of plant-based milk seen even amongst the non users of the category

Around 74% of non-users of plant-based milk (who have consumed animal-derived milk in the past 12 months) are aware of plant-based milk, and a fifth of them have also consumed plant-based milk in the past.



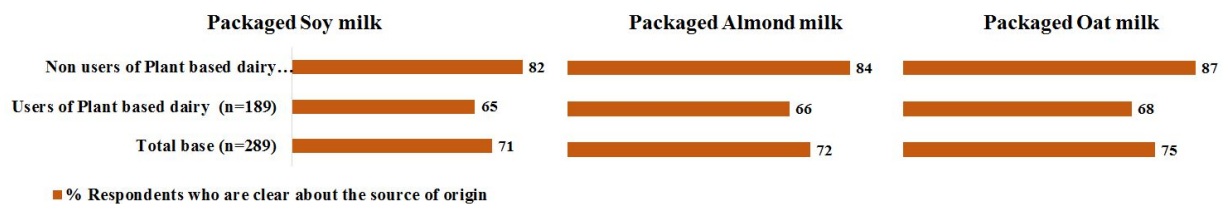
3. 84% respondents agree that "milk" is an appropriate term to use for plant-based milk products

90% of users of plant-based milk think that it is “somewhat to very appropriate” to use the term “milk” for plant-based milk products. The same number for non users of plant-based milk stands at 75%.

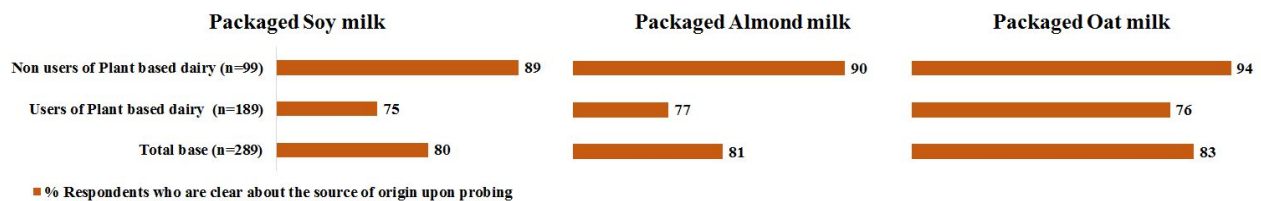


4. 70% of the total respondents had no confusion about the source/origin of plant-based milk. They are aware that it came from plant ingredients

Based on perception, ~65%, 66% & 68% of plant-based milk users do not have any confusion about presence of animal-derived milk for each of the product formats below (Soy, Almond, Oat milks respectively), while over 82%, 84% & 87% of non-users exhibit no confusion at a spontaneous level i.e. initial reactions when asked what the product is comprised of.

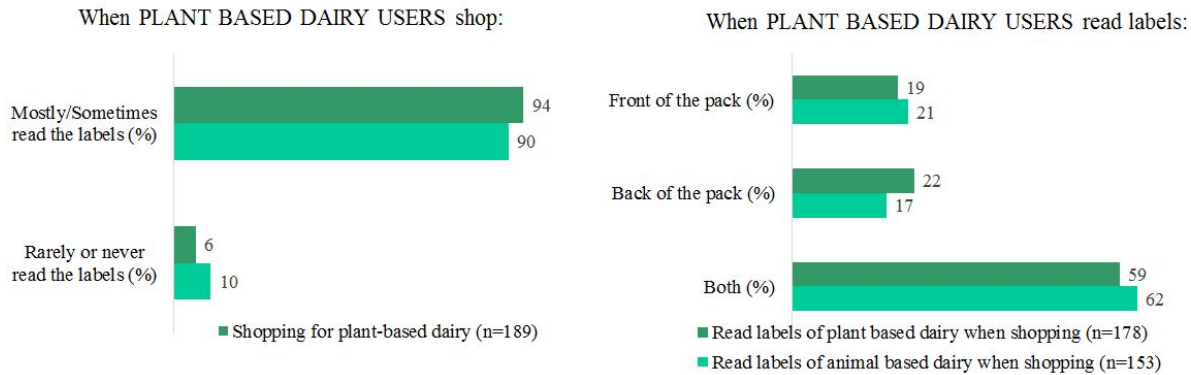


Upon probing, more clarity is achieved: ~75% of users and ~90% of non-users affirm presence of mainly the plant-based ingredient in the respective products. The proportions are similar across the three product formats.

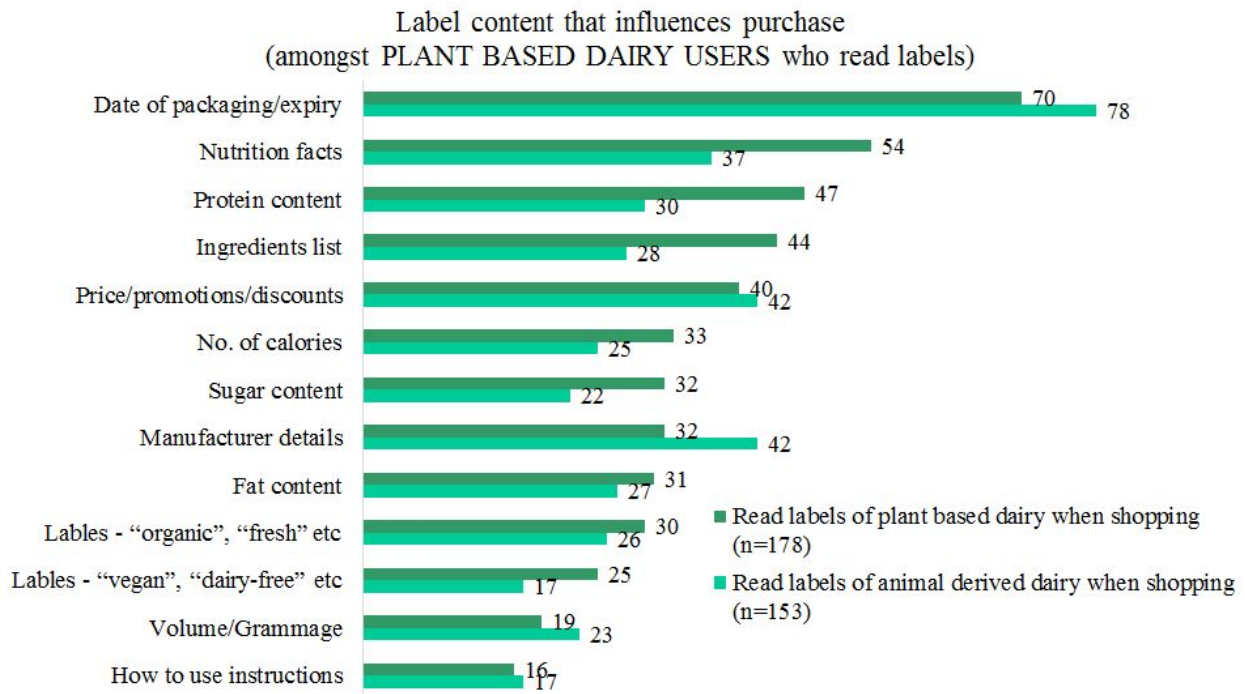


5. Plant-based milk users are consciously purchasing these products, and pay attention to labelling on the packs

Users of plant-based milk tend to pay attention to the labelling on the products when shopping for both plant-based milk and animal-derived milk. Most read the content on the front as well as the back of the pack.



Besides date of packaging/expiry, plant-based milk users pay particular attention to nutrition facts, protein content and the ingredients list of plant-based milk products. These users while shopping for animal-derived dairy pay more attention to details like price/promotions/discounts and manufacturer details along with date of packaging and expiry.



6. While health and wellbeing are the top reasons for purchase of both plant-based and animal-derived milk, plant-based milk is bought for distinct reasons by consumers

For plant-based milks, health and wellbeing can be elaborated as being a “good source of protein”, “pure & unadulterated product”, “easy to digest” and “an alternative for those with lactose intolerance & allergies”.

The same consumers buy animal-derived milk for health as well, but elaborate it differently as “beneficial for bones” primarily.

Sustainability (environment friendly) and avoiding cruelty to animals comes up as a unique purchase driver for plant-based milk, scoring over animal-derived dairy. Animal-derived dairy scores better on ‘versatility’ and ‘price’ over plant-based milks. While animal-derived milk has been a part of upbringing/culture, plant-based milks are considered new/trendy/modern food items sought for distinct reasons.

	Plant based dairy (n=189)	Animal derived dairy (n=170)
<u>Health & Well Being (Net)</u>	97	88
<u>Health Benefits (Subnet)</u>	90	81
It is a good source of protein	56	45
Is beneficial for bone – health (Provides calcium)	45	54
As part of a balanced diet/nutrition	45	45
Has less cholesterol	40	26
Has less sugar	38	24
To monitor or control calories intake	29	16
<u>Pure and Unadulterated (Subnet)</u>	54	41
To avoid harmful effect of artificial hormones found in dairy milk	35	
Has fewer additives/preservatives	28	28
Is unadulterated and pure	22	21
<u>Issue Resolution (Subnet)</u>	54	36
Is easy to digest	43	36
As a milk substitute to manage lactose intolerance or allergic reaction	24	
<u>Sustainability (Net)</u>	63	32
Is environment friendly and sustainable	37	26
To avoid cruelty to animals	30	11
Is completely plant based – no animal source	29	
<u>Taste (Net)</u>	53	57
Is tasty to consume/use	42	47
I consume to indulge myself	22	21
<u>Versatility (Net)</u>	47	59
Suitable for everyone in entire household	33	41
Is Versatile – has many uses	24	34
<u>Price (Net)</u>	39	61
Worth the price – value for money	26	44
Is Affordable	25	45
<u>Others (Net)</u>	64	58
Recommended by a doctor/friend/someone I trust	32	21
Is a new/trendy/modern food item	27	10
Has attractive packaging	23	18
Part of our upbringing, culture, tradition	17	33

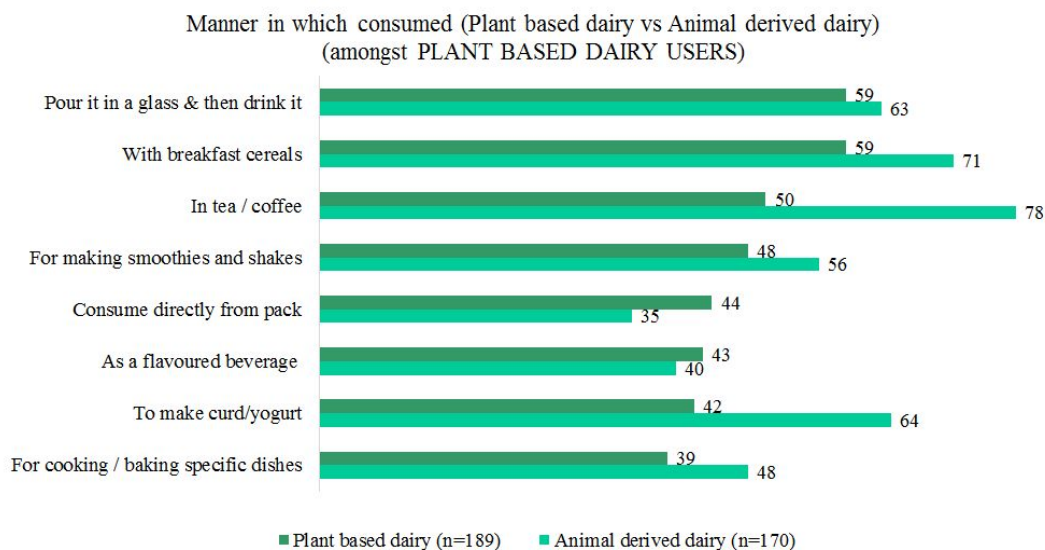
7. Existing terminology of “type of milk mentioned on the pack as - Soy milk, Almond milk, Oat milk etc.” is perceived to be the most efficient differentiator for plant-based milks from animal-derived milk.

“Dairy-Free”, “Plant-Based” labels or “pictures on the pack” are other key elements which would help respondents differentiate from Dairy milk



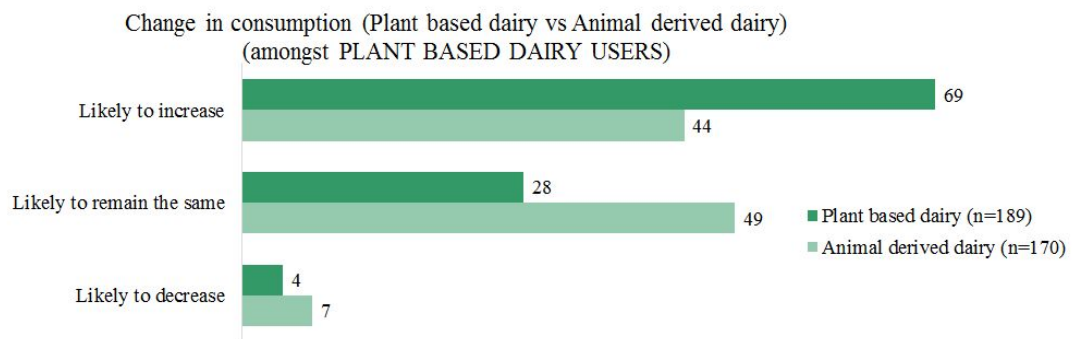
8. Both plant-based milk and animal-derived milk are consumed in similar ways by the users

Top occasions for consumption for both types of milk remain the same - having it whole, with breakfast cereals or in tea/coffee. Animal-derived dairy is used more than plant-based milk in making curd/yogurt/smoothies/shakes and cooking/baking.



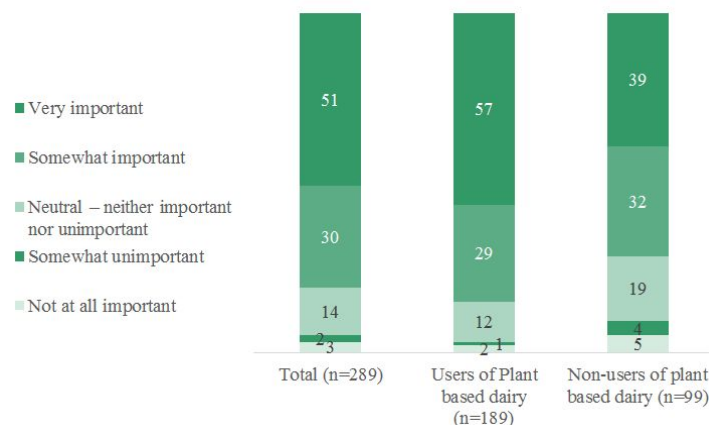
9. Nearly 69% of plant-based milk consumers claim that they are most likely to increase their consumption in the future, as compared to 44% claiming the same for dairy milk

Broadly, plant-based milk users claim they will continue using both animal-derived milk and plant-based milk in the future. The majority of users (69%) claim they will increase their consumption of plant-based milk in the future. At the same time, half the users (49%) are likely to consume a similar amount of animal-derived dairy in the future while 44% users are likely to increase their consumption showing the potential for both categories (plant-based and animal-derived) to co-exist and grow together. The plant-based milks category is seen as a new and exciting opportunity for the packaged milk category with encouraging growth potential.



10. 80% of plant-based milk users confirm that it is important that plant-based milk be placed next to animal based dairy on the retail shelf

~71% of non users also endorse placement next to dairy milk on retail shelves.



PROFILE OF THE RESPONDENTS

