

Our Global Food & Beverage Industry Practice actively monitors regulatory, policy and case law developments in the food, drink and related sectors around the world. We are pleased to present you with an update on such developments in the European Union.

## Alcohol Strategy

### HMRC Strategy

In an effort to tackle fraud and minimise the burden on alcohol businesses, HMRC has announced further improvements in its alcohol strategy aimed at strengthening the collection of alcohol taxes in the UK. Working with the alcohol trade and various enforcement agencies, the three pronged initiative hopes to: (i) promote compliance, by making it easier to pay the correct taxes; (ii) reduce lost tax revenue, by making it harder to trade in illicit alcohol; and (iii) hand out more stringent penalties for violations.<sup>1</sup> The central plank of the strategy is to place more responsibility on producers, wholesalers and distributors to identify likely fraudulent transactions.

### Alcohol Wholesaler Registration Scheme (AWRS)

AWRS, part of the HMRC's 2010 Alcohol Strategy, launched in the UK in January 2016. The scheme requires existing alcohol wholesalers to apply to HMRC for registration and all existing wholesalers should now be registered. If existing wholesale businesses missed the 31 March deadline, they can still apply, but depending on their circumstances may be charged a penalty. New wholesalers must apply for registration at least 45 days before they intend to start trading. Those businesses will not be permitted to trade until HMRC have assured they are "fit and proper". From 1 April 2017, it will be an offence to buy alcohol from a UK wholesaler who is not approved if you know, or have reasonable grounds to suspect, that they are not an approved person.

The Finance Act 2015 provides that controlled liquor is sold "wholesale"<sup>2</sup> if:

- The seller is carrying on a trade or business and the sale is made in the course of that trade or business; and
- The sale is to a buyer carrying on a trade or business, for sale or supply in the course of that trade or business.

The quantity sold is irrelevant. However, it will not be considered as a "wholesale" sale if it is an incidental sale (i.e. incidental to a retail sale authorised by a premises licence); or a group sale (i.e. between members of the same corporate group).

## Brexit

### Brexit Implications for Food Companies

Credit ratings agency Moody's has warned that the economic costs of Brexit would "outweigh the potential benefits." Restaurants, retailers and food companies could be among the most at risk should the UK renounce its EU membership. Moody's states that the biggest extra cost for retailers and suppliers in the sector would be on their ability to recruit staff on lower wages from other EU countries. The agency also warned that Brexit could bring about significant EU tariffs on food and drink products as well as potential supply chain disputes.<sup>3</sup>

Brexit may also result in the withholding of agricultural subsidies, coupled with higher food prices resulting from the imposition of tariffs.

### Brexit Implications for Scotch Whisky Industry

According to the Scotch Whisky Association (SWA), a UK decision to renounce its EU membership could cost the industry more than £1 billion in lost exports and over 40,000 jobs. The SWA warned that whisky producers could also be saddled with relabelling costs of up to £3,000 for each product line they export.<sup>4</sup>

### Brexit Implications for EU Food Legislations

If the UK vote to leave the EU, the UK will no longer be directly subject to EU regulations which are applicable within member states, for example the EU Regulation on Food Information for Consumers, or the EU General Food Law Regulation, which sets out a framework for food and feed legislation, including the food safety requirement, rules on traceability, recall and withdrawal. However, in practice, it is unlikely that there would be an immediate change, particularly as even over the longer term any "importer" into the EU from the UK would be required to ensure that the imported food or drink meets EU-standards.

<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510235/HMRC\\_Alcohol\\_Strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510235/HMRC_Alcohol_Strategy.pdf)

<sup>2</sup> S.88A(3) Finance Act 2015

<sup>3</sup> [https://www.moody.com/research/Moodys-Uncertainty-is-biggest-near-term-risk-from-a-Brexit-PR\\_346051](https://www.moody.com/research/Moodys-Uncertainty-is-biggest-near-term-risk-from-a-Brexit-PR_346051)

<sup>4</sup> <https://scotchwhisky.com/magazine/latest-news/9226/brexit-would-put-scotch-exports-at-risk/>

## Mandatory Reduction of Acrylamide Levels

At the time of this bulletin, the EU is planning to require food producers to reduce acrylamide level in their products by complying with sector-specific codes of practice. Acrylamide is a naturally occurring carcinogenic contaminant which is created when starchy foods are cooked or processed at high temperature in low moisture conditions. A commission regulation is currently being drafted in Brussels, and is set to take effect some time in 2017.<sup>5</sup>

## Labelling

### Traffic Light Nutrition Label

Italy has asked the Commission to take a stance against the UK's traffic light labelling system. The voluntary nutritional labelling system ranks the sugar, fat, saturated fat and salt content per 100g high (red), medium (amber) or low (green).<sup>6</sup> However, this is not the first time this particular issue has been raised. This labelling system is in fact subject to on-going infringement proceedings opened by the Commission in 2014 after several member states, including Italy, complained it represented a barrier to trade, it failed to provide clear and scientifically based nutritional guidance, and it discriminated against certain products unfairly.

### Origin Labelling

In March this year, another vote from food safety MEPs added further pressure to the Commission to implement mandatory country of origin labelling for meat and dairy products in processed foods.<sup>7</sup> The Commission and industry as a whole have generally opposed new labelling measures on the basis that the high cost associated with implementation would simply be passed on to the consumer. Although the vote was not binding, the motion for a resolution was adopted by a significant majority and will be put to a full European Parliament vote later this year.

The European Parliament adopted a resolution on 12 May calling on the European Commission to draft proposals for the mandatory labelling of certain types of food (such as milk, dairy and meat products) with details about national origin. The resolution was adopted by 422 votes to 159, with 68 members in abstention. This non-binding resolution has reiterated earlier such calls in the face of opposition to mandatory origin labelling by the European Commission and the relevant sectors of the food industry.<sup>8</sup>

## Labelling and Composition Requirements – Young Child Formulae

On March 31 the European Commission published a report on young-child formulae.<sup>9</sup> The report examines the necessity of special provisions for milk-based drinks and similar products intended for young children regarding compositional and labelling requirements.

The report concludes that young-child formulae have no special role and “cannot be considered as a necessity to satisfy the nutritional requirements of young children” when compared against other foods which may be included in their normal diet. The report goes on to state that applying the general EU food law framework is sufficient to adequately regulate the composition and communication on the characteristics of young-child formulae. From 20 July 2016 onwards, young-child formulae currently marketed as “dietetic foods” in some member states will be categorised as “normal foods, fortified in certain nutrients”.

### Nutrition Labelling

EU Regulation (EU) No. 1169/2011 on the provision of food information to consumers (the EU FIC) came largely into force on 13 December 2014. The regulations required food business operators to: (i) make allergen information available for non-pre-packed/loose foods for the first time; (ii) highlight allergens in lists of ingredients for pre-packed foods; (iii) ensure food information is more legible (for example by introducing a minimum font size on labels); and (iv) include mandatory origin labelling in certain circumstances.

The EU FIC will also require a mandatory nutrition declaration for most products from December 2016. The regulation requires nutrient information to be given per 100ml or 100g, although portion information can also be given voluntarily. The nutrients must be given in a particular order specified under the regulation, usually in table form and of a minimum font size. Information on supplementary nutrients (e.g. vitamins and minerals) is voluntary but if given, again must be in a specified order. The percentage of reference intakes for nutritional values may be included, but this is not mandatory (except for vitamins/minerals). Use of the term “recommended daily amount” or “RDA” is not permitted (this is replaced by “reference intake” or “RI”). Alcohol over 1.2% is currently exempt (although there have been calls from MEPs to require drinks producers to include calorie information) along with some other products, including teas, coffees and chewing gum. The requirements in relation to how the nutritional information is shown have applied since December 2014 to any products where nutritional information was given voluntarily.

Voluntary front of pack declarations are permitted but if these are provided, they must be in the correct order and per 100g/100ml.

## Reporting

Companies within the food and drink industry need to review all stages of their business and supply chain to identify risk areas for modern slavery or human trafficking, in line with their obligations under Section 54 of the UK Modern Slavery Act 2015.

<sup>5</sup> <http://www.eurofoodlaw.com/food-safety-and-standards/eu-to-make-acrylamide-reduction-mandatory--1.htm>

<sup>6</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-03-23/HLWS625>

<sup>7</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20160321IPR20300&language=EN&format=XML>

<sup>8</sup> <http://www.europarl.europa.eu/news/en/news-room/20160504IPR25757/MEPs-renew-call-for-mandatory-country-of-origin-labelling-of-meat-and-milk>

<sup>9</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0169>

Although business may be tempted to focus on high risk jurisdictions, in March 2016 came the announcement that agricultural workers in Cambridgeshire were being paid less than £20 per week and subjected to forced labour. This type of activity would be within the scope of a Section 54 review.

## Sugar, Salt and Fat Content

### Advertising

On May 13, the UK Committee on Advertising Practice launched a public consultation seeking to introduce further limits on the advertising of HFSS (high in fat, salt or sugar) products to children. The proposal is to make online advertising subject to the same restrictions as television advertising. The consultation is set to close on 22 July 2016.<sup>10</sup>

### The Sugar Tax

The UK government has announced a tax on sugar-sweetened beverages in its most recent budget speech.<sup>11</sup> The so-called “sugar tax” will come into effect in April 2018 and will operate via a two tier system; one tier for beverages with a sugar content above 5g per 100ml; and the second for drinks with over 8g per 100ml. Based on government projections this will equate to an extra 6p and 8p (per respective tier) per 330ml can, with all revenue from the levy going to support sports in schools.

### Reformulation

The food industry has welcomed an initiative proposed by the Dutch EU presidency to make Europe’s food supply healthier, The Roadmap for Action on Food Production Improvement<sup>12</sup> has already been endorsed by EU member states, food businesses and public health organisations, and aims to reduce salt, saturated fats and added sugar in the European food market. 31 December 2020 has been set as the deadline by which the agreed targets should be met.

## Smarter Rules for Safer Food

The European Commission has adopted the Smarter Rules for Safer Food package, which is aimed at guarding against animal disease and pests in the food chain.<sup>13</sup> The package will affect all those involved in the production, manufacture, supply and regulation of food, feed, live animals and plants, and will replace over 70 existing directives and regulations. This means the new package will have the effect of simplifying and strengthening health and safety standards across the food supply chain from production to final consumption. The package will cover three main topics: (i) official control, or the monitoring and enforcement of new rules; (ii) animal health; and (iii) plant health.

Pending consideration and approval of the European Parliament and the Council, the European Commission expects that a finalised package of new rules will enter into force in 2016.<sup>14</sup>

Once agreed definitively, there will be a transition period where the detailed rules will be developed. This is currently estimated to last up to 3 years, from which point the industry will have a further 2 years to apply the new rules.<sup>15</sup>

## Transatlantic Trade and Investment Partnership (TTIP)

A draft study backed by the European Commission regarding the potential effects of the proposed TTIP deal has highlighted the potential for a price rise of 0.3% on consumer goods upon its implementation, with a likely fall in the prices of unhealthy products high in sugar and alcohol. The model used in developing this study also projected a rise in consumption resultant from a fall in tariffs on these unhealthy products. One likely candidate sector for economic gains upon the implementation of TTIP is the European beverage sector, which makes up 45% of all such exports to the US.<sup>16</sup>

The beef industry is presumed to be most at risk from the elimination or loosening of EU food restrictions. Imports of beef at present are restricted due to a Europe-wide ban on the import of beef hormones and a quota on the import of hormone free-beef. The relaxation of these restrictions is projected to lead to a 30 – 40% fall in revenue for European beef farmers.<sup>17</sup>

One major sticking point yet to be addressed in TTIP negotiations is that of geographical indications (GIs), which opponents of the deal argue are under threat in the trade agreement. Due to the prevalence of products in the US that are routinely marketed under protected GIs in Europe, securing the future of these commercially valuable designations is high on the agenda for many European countries and key industry exporters.<sup>18</sup>

### Waste Management

In the UK, the UK Food Standards Agency (FSA) has pledged its support to cut down food waste through the Waste and Resources Action Programme (WRAP).<sup>19</sup> WRAP unites various organisations with the aim of making the future of food and drink consumption more sustainable. The FSA hope to capitalise on progress already made with WRAP and the Love Food Hate Waste campaign, helping the public reduce food waste and improve efficiencies with food and drink purchases. In addition to this, the campaign has three main areas of focus:

- The reduction of resource intensity by a fifth, saving £20 billion in 10 years.
- Bringing together businesses across the food supply chain to tackle waste, greenhouse gas emissions and water intensity.
- Generally increasing participation in the campaign amongst food retailers, food service companies, trade bodies and local authorities.

<sup>10</sup> [https://www.cap.org.uk/News-reports/Consultations/Open-consultations/~/\\_media/Files/CAP/Consultations/CAP%20Food%20consultation%202016/CAP%20Food%20Consultation.ashx](https://www.cap.org.uk/News-reports/Consultations/Open-consultations/~/_media/Files/CAP/Consultations/CAP%20Food%20consultation%202016/CAP%20Food%20Consultation.ashx)

<sup>11</sup> <https://www.gov.uk/government/publications/budget-2016-documents/budget-2016>

<sup>12</sup> [http://agripress.be/\\_STUDIOEMMA\\_UPLOADS/downloads/roadmap.pdf](http://agripress.be/_STUDIOEMMA_UPLOADS/downloads/roadmap.pdf)

<sup>13</sup> [http://europa.eu/rapid/press-release\\_IP-13-400\\_en.htm](http://europa.eu/rapid/press-release_IP-13-400_en.htm)

<sup>14</sup> [http://europa.eu/rapid/press-release\\_IP-13-400\\_en.htm](http://europa.eu/rapid/press-release_IP-13-400_en.htm)

<sup>15</sup> <https://www.gov.uk/government/publications/smarter-rules-for-safer-food-what-we-are-doing/smarter-rules-for-safer-food>

<sup>16</sup> <http://www.foodnavigator.com/Policy/TTIP-may-mean-higher-prices-and-unhealthy-consumption-EC-backed-report>

<sup>17</sup> <http://www.foodnavigator.com/Policy/TTIP-a-nail-in-the-coffin-for-EU-food-producers>

<sup>18</sup> *Ibid.*

<sup>19</sup> <https://www.food.gov.uk/news-updates/news/2016/14995/food-standards-agency-signs-pledge-to-cut-food-waste>

As we reported previously, although this is a welcome step, it falls short of a formal food waste reduction target recently introduced in Scotland, and the more progressive action taken by the French National Assembly.<sup>20</sup>

Italy is set to introduce similar measures by passing a new law that will cut down on the bureaucracy associated with food retailers donating food to charity. Under existing law retailers were forced to declare their food donations in advance. This will be replaced by a simple monthly form detailing any donations made. It is hoped that the new law will halve the amount of food wastage, and it has already received multi-party support before it goes on to final approval in the Senate later this year.<sup>21</sup>

## Food Fraud

Over 10,000 tonnes and one million litres of fake food and drink have been seized in a joint operation between Europol and Interpol. Dubbed Operation Opson, the move is thought to be the biggest ever global initiative to date, spanning 57 different countries and lasting over 12 months. Several arrests were made and many investigations are still ongoing.

The operation focused on contamination, counterfeiting, substitution and the deliberate mislabelling of food and drinks products that represented a threat to public health and safety. Some of the most serious offences included the discovery of several kilos of monkey meat in Zaventem airport in Belgium, the mislabelling of a shipment of peanuts as pine nuts from Australia, and the discovery of counterfeit chocolate, sweets and soft drinks aimed at children in Hungary, Italy, Lithuania and Romania.<sup>22</sup>

In the UK, the FSA has completed its annual strategic assessment of the prevalence of, and risks presented by, the operation of organised crime groups in the food industry. The assessment has concluded that while the UK maintains a strong position in terms of food authenticity and safety, the chances of the actual detection of food crime are low. The assessment identified a particularly strong deficit in the availability of intelligence pertaining to food related crime, and the Agency is seeking to work to fill these gaps with the relevant actors in the food industry.<sup>23</sup>

## Prosecution and Enforcement

### Alcohol – Minimum Unit Price

The European Court of Justice has ruled against the Scottish government's plans to introduce a minimum unit price for alcohol.<sup>24</sup> The proposed legislation had a twofold objective of reducing the hazardous consumption of alcohol in general, but also more generally, reducing the Scottish population's consumption of alcohol. The Court concluded that the measure would constitute an obstacle to the free movement of goods and recommended the introduction of other tax measures, such as the increase of taxation on alcoholic drinks which would be less restrictive given the fact that traders are free to determine their own selling point. The case will now be referred back to Scotland's civil courts for a final decision.

### Penalties for Food Adulteration and Breach of Food Information and Safety Laws

Recent UK press coverage<sup>25</sup> has reported the imprisonment of an Indian restaurant owner for manslaughter following the death of a customer who suffered an allergic reaction after eating a takeaway which contained peanuts, despite the fact that he made his severe allergy known to staff. The case highlights the serious consequences for customers if allergens are not properly controlled and/or where the allergen information given to customers is not correct. Any court is unlikely to look favourably on a business which puts profit before personal safety and knowingly substitutes ingredients for financial reasons. Financial penalties for breach of food information and food safety laws for manufacturers, restaurateurs and supermarkets are also significant. The potential fine for many food law offences in the UK is an unlimited amount,<sup>26</sup> including selling food not complying with safety requirements; selling food not of the nature, substance or quality demanded; and falsely describing or presenting food.

In February 2016, definitive guidelines published by the Sentencing Council in 2015, came into force. The guidelines included food safety and hygiene offences for the first time (earlier guidelines covered corporate manslaughter and health and safety offences resulting in death only, although fine levels for these offences have also been updated in the new guidelines). All indications to date are that the application of these guidelines by the courts will almost certainly result in significantly higher penalties for organisations convicted of such offences. The guidelines apply to organisations in England and Wales which are sentenced on or after 1 February 2016 (regardless of the date of the offence) and set out starting points and ranges for sentences for various offences. Large organisations (those with a turnover of £50 million or more) could face fines of up to £3 million for food safety and hygiene offences and it will be at the court's discretion to go above these figures if they consider a case to be exceptional.

<sup>20</sup> <http://www.squirepattonboggs.com/~media/files/insights/publications/2015/11/policy-and-legal-developments-eu-food-and-beverage-sector>

<sup>21</sup> <http://www.telegraph.co.uk/news/worldnews/europe/italy/12194549/italy-set-to-pass-new-law-to-fight-food-waste.html>

<sup>22</sup> <https://www.europol.europa.eu/content/largest-ever-seizures-fake-food-and-drink-interpol-europol-operation>

<sup>23</sup> <https://www.food.gov.uk/news-updates/news/2016/15017/the-food-standards-agency-fsa-has-today-published-the-first-assessment-of-food-crime-in-the-uk>

<sup>24</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5dc2cea8827a489b817b81aa20bbd2b0.e34KaxiLc3qMb40Rch0SaxuSbNr0?text=&docid=174504&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=463556>

<sup>25</sup> For example, the Guardian

<sup>26</sup> The previous fine limit of £20,000 was removed in March 2015 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Culpability will be rated low to very high – with very high being “a deliberate breach of or flagrant disregard for the law” and low being “the offender did not fall far short of the appropriate standard”. Consideration must then be made to whether there was a low or serious risk of an adverse effect on the individual. The court is then required to focus on the organisation’s annual turnover or equivalent to reach a starting point for a fine. Offenders which are companies, partnerships or bodies delivering a public or charitable service are expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status.

## Dairy Crisis

The European Commission has announced a set of exceptional measures in an effort to provide further support to the European farmers’ market. The new measures come in response to the “long-lasting and profound [...] global crisis” and will complement the €500 million support package the Commission introduced last year.<sup>27</sup>

This exceptional measure, which specifically focuses on the agricultural sector, has never been used before but is implemented with the intention of correcting severe imbalance in the market. It means that, for a limited time, producer organisations, interbranch organisations and cooperatives in the dairy sector will be able to establish voluntary agreements and determine their own production and supply limits. Other measures include the temporary increase in state aid, finding new export markets, an increase in promotion measures, the development of financial instruments to increase investment, and the possible introduction of an export control scheme.

## Energy Drinks

Latvia is set to follow in the footsteps of Lithuania by banning the sale of energy drinks to anyone under the age of 18. The measure is set to take effect from 1 June 2016, and will bar schools and colleges from selling energy drinks and also require retailers to check the age of anyone wanting to purchase them.<sup>28</sup> There will also be restrictions placed on advertisement for energy drinks as well as a ban on their sponsorship of any sporting events.

Supporters of an EU-wide ban on the sale of energy drinks to under-18s, such as consumer group Foodwatch, have welcomed the move. However, critics have used findings in the European Food Safety Authority’s (EFSA) caffeine risk assessment, published in 2015, to reason that the move will fall short of its overarching aim of improving public health. Comparisons have been drawn between the definition of energy drink in the draft law as a drink containing more than 150mg added caffeine, and EFSA’s report which concluded up to 200mg of caffeine in a single does was in fact safe.

<sup>27</sup> [http://europa.eu/rapid/press-release\\_IP-16-806\\_en.htm](http://europa.eu/rapid/press-release_IP-16-806_en.htm)

<sup>28</sup> <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2013&num=241>

## Alertness Claims

Sugary drinks and energy drinks containing caffeine should not display claims that they help increase alertness or concentration, as this would encourage high consumption of sugar among adolescents, who are the largest group of energy drink consumers, said Health committee Members of the European Parliament in a resolution voted on 15 June 2016.<sup>29</sup>

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