



# Legal NewsBITE: Food and Drink Quarterly

March 2019

## Food Sector Deals and Trends

We acted on the recent acquisition of Thomas Fudge's by Burton's Biscuit Co. The acquisition has been [reported](#) in the trade press, which includes comments from Burton's chief executive, Nick Field, that the acquisition represents a continued commitment and investment by Burton's to extend capability and bring new and exciting products to market in both the sweet and savoury premium segments. Thomas Fudge's includes its own retailer brand and Marmite products baked under licence.

There have been fears that Brexit will result in a slowdown of M&A activity in 2019, but there are trends that continue. The premium market still seems strong. As well as the Burton's deal, there are recent [reports](#) that Cargill has agreed to acquire gourmet chocolate producer Smet. Interest in plant-based foods also continues, featuring in *Food Drink & Franchise's* "[Top 10 food and beverage trends to watch out for in 2019](#)", along with cannabis-infused food and beverages, which are a growing trend in Canada and North America, and for which *Forbes* [predicts](#) an "explosion" of M&A activity in 2019 (although there are regulatory hurdles to overcome in Europe).

## Labelling Changes Required After UK Exit From EU

In the run up to (the currently scheduled) exit day, many food businesses have already considered how, if at all, food labels will need to change when the UK leaves the EU. If you are a UK-based food business that exports to the EU, you will almost certainly need to consider the name and address on the label and any stated "origin" information. Depending on your product, health marks and the EU organic logo could also be high on your priorities.

EU laws require that where food is produced/imported, the name and address on the label must be the "importer" into the EU. This requirement means that the default position in the EU after exit date if there is "no deal" will be that the name and address of the UK manufacturer/supplier cannot be provided. This may have other implications in relation to agreements with EU distributors, because as an "importer" into the EU, the distributor will assume additional responsibilities under the legislation.

The government has produced [guidance](#) on health marks on meat, fish and dairy if there is no deal. The current form of health marks would need to change and the Food Standards Agency (FSA) has now published an [update](#) on what the new marks will need to show. There are different marks depending on whether you are exporting to an EU, or a non-EU, country. The issue with organic products is that UK bodies will no longer be able to certify as organic status in the event of a no deal and UK organic operators will not be able to use the EU organic logo. The Soil Association has published a summary of the implications on its [website](#).

If you want advice on labelling obligations, please contact [Nicola Smith](#).

## The Brexit Pallet Problem

The "pallet problem" arises from the requirements under EU law for wood packaging and dunnage (loose wood used to protect products and packaging) from non-EU countries. The relevant directive obliges member states to require that such packaging is either heat treated or fumigated in line with the procedures in the relevant [International Guide for Phytosanitary Measures](#) (ISPM15); officially marked with the ISPM15 stamp consisting of three codes (country, producer and measure applied) and the IPPC logo; and debarked (although this does not apply to wood that is 6mm thick or less, processed wood like plywood or veneer or cardboard). The rules will also apply to packing boxes, crates and drums, as well as pallets. There are concerns that there are insufficient supplies of such packing materials in the UK to meet these requirements. The national press is [reporting](#) on this potential no-deal crisis.

## Increases in Pension Contributions – It Is No April Fools!

Employers' minimum automatic enrolment pension contributions will increase from 2% to 3% of "qualifying earnings" from 6 April 2019. Food businesses should ensure that the correct processes are in place to enable a smooth transition to the higher contribution rates.

The Pensions Regulator (TPR) is tasked with enforcing automatic enrolment compliance, and one of the nine businesses fined by TPR between October and December 2018 was in the food and drink sector (incurring penalties of £5,000). There are two key steps that you will need to take before April: First, ensure that your payroll is aware of and ready to implement the increase in contribution rates; second, notify staff of the increase in contribution rates.

There has been much discussion in previous years around whether staff should be consulted about the increase (as opposed to just notified). Our view is that where the employer is currently paying the statutory minimum and is simply increasing contribution rates in order to ensure compliance with the automatic enrolment regime, consultation is not necessary.

TPR is fairly relaxed about any lack of consultation in this regard. Note that TPR is not quite so relaxed when it comes to other elements of compliance. Since 2014 (when TPR issued no penalty notices), the value of penalty notices has jumped. During the year ended 31 March 2018, TPR issued fixed penalty notices totalling £11.5 million and escalating penalty notices totalling £30.5 million (fixed penalty notices start at £400 and can include an escalating penalty accruing at a daily rate of between £50 and £10,000).

If you are in any doubt about your automatic enrolment duties, please contact [Matthew Giles](#).

## Consultation on Allergen Labelling Launched – Proposals in Relation to Foods Prepacked for Direct Sale and Other Potential Changes on the Horizon

Following our report last quarter, a [consultation](#) has now been launched that proposes a number of options for food that is prepacked for direct sale. Currently, where foods are packed on the same premises from which they are being sold, staff is permitted to provide information on allergenic ingredients verbally.

However, the consultation notes that it can be difficult for customers to distinguish between food that is packed on and off the premises. The consultation asks whether people would prefer the promotion of best practice (i.e. a non-regulatory framework); a requirement for obligatory “ask the staff” labels on food packaging; the labelling of foods packed on the premises with the name of the food and a list of any of the 14 allergens specified by the EU Food Information Council; and/or labelling with the name of the food and full ingredient list, with allergens emphasised on the packaging.

The first option can be implemented relatively quickly, but it does not have “teeth”. However, all of the other regulatory options will involve a cost to businesses and an added burden to inspection regimes.

The government is also asking whether it ought to review other types of food, so further changes may also be on the horizon, namely food packed on the sales premises at the consumer’s request; food not packed (such as loose items or restaurant meals); and non-prepacked food ordered via distance selling. Therefore, businesses with delicatessen counters, cafes and takeaways should take note.

In addition, the consultation says that the FSA has been working with local authorities in Yorkshire on a pilot scheme to improve notification of incidents between businesses, local authorities and the NHS. It suggests that a requirement on businesses to report “near misses” (non-fatal anaphylactic shocks) could trigger a priority inspection to ensure that non-compliances are identified and solved.

The consultation closes on 29 March 2019. Once the responses have been collated, any changes may need to be implemented quickly.

## Food Company Fined More Than £270,000 by Health and Safety Executive for Thumb and Finger Injuries

The Health and Safety Executive (HSE) [press release](#) reports that there were two separate incidents. In the first, the company allegedly failed to ensure that measures were in place to mitigate the consequences of a worker becoming trapped in a shackle. In the second, it failed to ensure safe isolation procedures were followed. The company pleaded guilty to breaching the Provision and Use of Works Equipment Regulations 1998 and was fined £200,000 for the first incident. For the second incident, it pleaded guilty to breaching the Health and Safety at Work Act 1974 and was fined £74,000. Costs of more than £8,000 in total were also awarded. Under the Sentencing Guidelines that apply to health and safety offences, the court will consider the turnover of the company, culpability and risk when setting fines. It will also take mitigating factors into account. Approaches to risk management by companies and senior managers are, therefore, of continuing importance, particularly given the general increase in fines for such offences over recent months. The HSE publishes guidance on the main health and safety hazards in the food industry, a [Recipe for Safety](#), which can be a useful reference point when considering priorities and action plans for management of safety risks.

## German Food Day Conference

Our Frankfurt team members [Christofer Eggers](#) and [Christian Boehler](#) are attending the “[German Food Day](#)” in March, along with our Berlin-based senior associate Nora Thies. The team has a strong focus on the food and beverage sector, and the German Food Day is the main event for the food law community in Germany and the EU. If any of our *Legal newsBITE* readers will be in attendance, please [contact us](#) and we can put you in touch with one of the team to meet on the day.

## Brussels Roundtable on Single-use Plastics

In January 2018, the European Commission (EC) announced its new EU Plastics Strategy and put forward a proposal for a Single-use Plastics Directive (the SUP Directive) in May 2018, which has since been intensively discussed. In December 2018, the European Parliament (EP) and Council reached a provisional agreement on the directive. Our colleagues in Brussels hosted a roundtable meeting at the end of January, with representatives from the EU institutions, as well as industry leaders from food and packaging companies. If you would like a copy of our summary of the views and conclusions from the meeting, please [contact us](#).

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