



Legal NewsBITE: Food and Drink Quarterly

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Let Them Eat Cake (If We Coordinate) – Will UK Government Waive Competition Rules in Response to Food/Drink Shortages?

The possibility of a no-deal Brexit, and therefore the potential for food and drink supplies to be disrupted, has led to calls for the government to provide “cast-iron guarantees” that businesses in the food supply chain will be permitted to work together to discuss and tackle shortages, in order to decide where to prioritise shipments, in a way that may otherwise give rise to questions of compliance with competition law.

The Competition Act 1998 (The Act) prohibits anti-competitive agreements, in particular, agreements between competitors that fix prices, allocate customers/markets, rig bids and share competitively sensitive information. Companies found to have breached competition law can be fined by the Competition and Markets Authority (CMA) up to 10% of group global turnover, the agreements are void and unenforceable, and individuals involved can also face penalties, including prison and fines, and director disqualification.

The Food and Drink Federation has called on the CMA to issue a “letter of comfort” to the industry that coordination necessary to ensure maintenance of supply and distribution of food and drink, in the event of a no-deal, would be considered legal. However, the CMA no longer has the power to grant individual exemptions to the prohibition on anti-competitive agreements, and businesses must self-assess whether their agreements fall within the prohibition and, if so, whether they meet the exemption criteria (essentially, that the benefits of the agreement outweigh the anti-competitive effects and will not eliminate competition in the market). Under existing guidelines and practice, generally “hardcore” infringements, such as market allocation between competitors, will not qualify for exemption. Indeed Andrew Tyrie, the Chairman of the CMA (and former Chairman of the Treasury Select Committee from 2010 – 2017), confirmed that: “This is a matter for government as the secretary of state can exempt certain agreements from competition law in the public interest. The CMA stands ready to advise government as necessary in its preparations for a no-deal exit.”

Under the Act, the government can pass a statutory instrument, in the form of an Order, relaxing the prohibition if there “are exceptional and compelling reasons of public policy”.

The government has used this power four times before, most recently in 2012, when panic buying of petrol led to fuel shortages. In response, the SoS issued The Competition Act 1998 (Public Policy Exclusion) Order 2012, which permitted communication between fuel companies to allocate supplies. This involved the development of a voluntary protocol between industry associations and companies in the UK downstream oil sector, the purpose of which was to improve the distribution of oil fuels during a disruption, in particular, to enable the sharing of accurate information between industry parties relating to any disruption of operations, availability of fuel stocks and fuel tanker movements, and to enable joint planning and coordinated supply action between the parties by sharing and redeploying assets.

Such a statutory instrument can be implemented quickly and with limited, if any, parliamentary scrutiny.

As yet the government has given no public indication that such an Order is in the pipeline, or that it is minded to temporarily suspend the application of competition law in this way. Indeed, in the current political climate, a public announcement that food and drink supplies are likely to need “managing” in a way that requires legislation is arguably tantamount to confirming that food shortages are to be expected and thus to lead to immediate panic buying in a way that would potentially compound the issue this is designed to control. Furthermore, it is not immediately obvious that the major retailers and suppliers would have the appetite to coordinate supplies in any way that could conceivably help their competitors.

New Legislation on Allergen Information Published

New legislation implementing the announcement of the government to introduce full ingredient labelling for foods which are “prepacked for direct sale” was put before Parliament on 5 September and will become law on 1 October 2021, as reported by DEFRA. Foods which are “prepacked for direct sale” are those which are prepared and packed on the same premises from which they are sold, so this will be a relatively narrow category of foods (guidance is due to be published by the Food Standards Agency (FSA) on what this will cover on 1 October 2019). However, it is possible that there may be changes to the way allergen information is provided for other types of “non-prepacked” foods in the future, as the consultation on the new law also sought views on foods packed at the customer’s request (for example, at a delicatessen counter), non-prepacked foods ordered via distance-selling (such as pizza takeaway) and meals served without packaging (for example, meals served in a restaurant). For suppliers to food service businesses which will be affected by the changes, this is likely to mean a greater demand by customers for full ingredient information and controls around substitutions, recipe changes and new products.

Changes to Immigration Rules

The UK government has announced changes to the Immigration Rules. Notably, this includes a welcome update to the UK shortage occupation list. Use this [link](#) to download a summary of the key changes of most direct relevance to employers, sponsors and recruiters in the food sector and elsewhere. In addition to these changes, there has been another important and very recent government proposal relating to Tier 4 international students for the 2020/2021 intake – bringing back the post-study work visa. Our commentary on that change can also be found in the same link.

Philadelphia Ad Banned in UK Following New Rule Against Harmful Gender Stereotypes

As we reported earlier this year, the Advertising Standards Authority (ASA) has now updated its BCAP and CAP Codes to ban the depiction of harmful gender stereotypes in advertising. Mondelez is one of the first companies to fall foul of the new rules. The ASA has banned the company’s ad for Philadelphia, which featured fathers being distracted by the cheese spread long enough for their babies to end up on a conveyor belt of Philadelphia snacks, resulting in an embarrassed dad saying “let’s not tell mum”. The ad received numerous complaints, triggering the ASA’s investigation under the new rules. Mondelez told ASA that it was in a “no-win situation”, having deliberately chosen two dads to avoid perpetuating the stereotypical image of women handling childcare. However, the ASA banned the ad on the basis that it reinforced the stereotype that men are ineffective care-givers. Critics condemned ASA’s decision, stating that the watchdog went too far. Phil Smith, Director-General of the advertisers’ body ISBA, said the ASA in this and similar cases recently were “concerning, both in terms of the precedent they set and the likely impact they will have on advertisers.” The ASA will review its new rules in mid-2020 to assess whether they are effective in helping to combat harmful advertising. In the meantime, if you are an advertiser or agency and want to know whether the new rules may affect a campaign, please contact our lawyers Carlton Daniel or Katie Rogers for practical guidance and advice.

Brexit Readiness and Retailer Contracts

We are speaking this month at FDF's Brexit Essentials Session on the importance of "no-deal preparations". In addition to workforce and immigration issues, we are addressing preparations relevant to retail contracts for food and drink producers and the importance of planning and being ready for no deal, further delay or increased friction at key dates, the first being 31 October 2019 (i.e. the scheduled exit date for the UK), but also with a view on a possible extension to the end of January 2020, the outcome of a potential general election and the potential for no-deal arising as a result of failing to agree a new free trade agreement with the EU by the end of any transition period at 31 December 2020 (potentially extendable to 31 December 2022). It is likely that there will be conflicting priorities due to the differing perspectives of manufacturers, distributors, retailers and hospitality, and a focus on supply, logistics and warehousing contracts will be sensible, not least as Brexit is likely to happen at the beginning of the peak Christmas trading period for many. Contracts will need to deal with the changes, including the potential for tariff increases on exports and imports from/to the EU and a reduction on imports from the rest of the world, the procedures and cost which will be involved in customs compliance, the possibility of border delays and longer delivery timescales (leading to pressure on "just in time" arrangements, in particular), the resulting impact on competitiveness, staff shortages, travel disruption and regulatory changes. Data sharing considerations may also be important.

However, the most important issues will arise out of the potential tariffs and customs frictions, even with a deal, and the potential loss of access to many existing EU free trade agreements. As such, reviewing existing contracts, including supply chain mapping and understanding the potential impacts of Brexit and your commercial objectives; understanding how those contracts will be interpreted by the courts, possible interpretation issues (such as conflicts between incoterms and contracts) and the workings of contractual rights and remedies (or not); and the possibilities of including a Brexit clause, are all preparatory steps that food and drink businesses should take as soon as possible.

Cannabidiol (CBD) in Food and Drink Products

CBD is derived from cannabis, but does not have a psychoactive effect and, in its pure form, would not be classified as a controlled drug. There have been numerous CBD supplement products on the global market for several months. A number of producers have now also started to incorporate CBD as an ingredient in other food and drink products, particularly in the US, including chocolate bars, tea, sweets and canned drinks. However, the legal landscape is complex in the EU and UK. If there is a trace of a controlled cannabinoid, such as Tetrahydrocannabinol (THC), the product would be unlawful as a controlled drug and, even if there is not, producers should be aware that the FSA [announced](#) earlier this year that they accepted the EU clarification that CBD extracts are considered novel foods. There are also no approved health or nutrition claims for CBD.

Sector Deals – A Round-up of Recent M&A Activity

We acted on the recent acquisition of Paterson Arran by Burton's Biscuit Co. The acquisition marks Burton's second major acquisition this year following its earlier acquisition of Thomas Fudge's and it has been [reported](#) in the trade press, with comments from Burton's chief executive, Nick Field, that the acquisition will compliment Burton's current portfolio with more top quality products and generate excitement in biscuits and the other categories in which it now has a presence.

In other developments, interest in plant-based foods is continuing to grow, with KFC [partnering](#) with Beyond Meat to test plant-based chicken nuggets and boneless wings at an Atlanta KFC restaurant and with investors including Formula One racing driver, Lewis Hamilton, [investing](#) in Neat Burger, which has plans to create a global plant-based burger chain, with two initial sites in Covent Garden and Kings Cross in London, before expanding into the US and wider European markets in the future.

In a deal worth £4.6 billion, property investment firm CK Asset Holdings, founded by Li Ka-shing and run by his son, Hong Kong billionaire Victor Li, has taken advantage of the weak pound to [acquire](#) Greene King, the UK's largest listed pub and brewery company; in comments reported in the *Financial Times*, Li's investment group was undaunted by the economic prospects for the UK following its impending departure from the European Union, saying it was taking a long-term view of British consumer spending.

Notwithstanding the [announcement](#) by the CMA in July that Sainsbury's and Asda will be blocked from acquiring an interest in each other for a period of 10 years until 9 July 2029, the drive to reduce reliance on plastic food packaging materials received a recent boost from Sainsbury's, with it announcing its plan to reduce the amount of plastic packaging used at its supermarkets by fifty per cent in the next six years. The supermarket says it is the first major retailer to make such a commitment and it aims to accomplish this target by switching the current packaging materials used by its branded food products to alternative materials, using lighter-weight plastics and offering refillable packaging to customers.

Delivery Vehicles – Focus on Bridge Strikes

Food businesses operating heavy goods vehicles for the purpose of deliveries (or otherwise) should note that there is a focus on bridge strikes by Traffic Commissioners currently, following concerns being raised by Network Rail as to the frequency of bridge strikes nationally and the financial and potential safety implications, including due to train cancellations and delays. Commissioners are keen to ensure that companies are taking responsibility for route planning for drivers, including the avoidance of hazards, such as low bridges, as well as matters such as appropriate training and maintenance of vehicles. Any bridge strikes by goods vehicles could result in a hearing before the Commissioner, possibly leading to a public inquiry. Therefore, transport managers should be reminded of the importance of training/driver briefings on height checks, signage awareness and other relevant safeguards and critically review what is provided to drivers for route planning purposes. Prompt and thorough investigation and appropriate follow-up would also be sensible in the event of any bridge collision.

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