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Reaping the Rewards of Your Recipe: What *Shanks v. Unilever* Means for Employee Inventors in the Food Industry

Obtaining a patent for a recipe is possible, but by no means easy. Employers in the food and drink industry whose staff have concocted recipes that are both novel and inventive may be able to obtain patent protection for the invention. However, for employees devising such recipes during the course of employment, a recent decision of the UK Supreme Court has made it slightly easier for them to be compensated for their patentable creations.

The decision in *Shanks v. Unilever* has clarified that employee inventors are entitled to a "fair share" of the benefit that the employer has received from employee inventions, if the invention/patent has been of "outstanding benefit" to the employer. Whilst the bar to demonstrating the "outstanding benefit" of a patent remains high, culinary inventors may be encouraged to pursue compensation claims where they can show that their recipe has led to significant monetary benefit.

Food businesses should (i) require employees to disclose all inventions immediately; (ii) keep careful records identifying employee inventors; and (iii) consider a scheme to adequately compensate employee inventors, rather than risk litigation where an employee seeks to enforce their right to compensation.

Sale of Matthew Walker by 2 Sisters Food Group

In late October, a team led by partner Hannah Kendrick advised 2 Sisters Food Group on the sale of Matthew Walker to Rowse Honey Limited, part of the Valeo Food Group. The Matthew Walker Christmas pudding manufacturing business is one the main manufacturers and suppliers of Christmas puddings to UK supermarkets.

Protected Designations of Origin and Geographical Indications: Balsamic Vinegar Does Not Have to Come From Modena

Our Frankfurt office successfully represented Balema GmbH in proceedings before the European Court of Justice (ECJ). The decision is now available in English, and in its judgment, the ECJ ruled that the term "Balsamico" is not protected as a designation of origin and geographical indication. The key question of the legal dispute that began in 2015 was whether the protection afforded by the registration of the entire name "Aceto Balsamico di Modena" also extended to the use of individual non-geographical components of that name, namely the terms "Aceto", "Balsamico" and "Aceto Balsamico", and whether the exception under the relevant EU regulation on quality schemes for agricultural products and foodstuffs applied, specifically whether the term "Balsamico" could be considered a generic term (and, therefore, a breach had not been committed).

This case also attracted international interest from the governments of Germany, Greece and France, which all held the view that the terms "Aceto", "Aceto Balsamico" and "Balsamico" are generic terms or non-geographical names, and only "Aceto Balsamico di Modena" as a whole should be protected, a view also agreed with in July by the Advocate General. Partner Dr. Christofer Eggers commented on the ECJ's ruling: "I am very happy that the ECJ has agreed with our view and that we have been able to achieve ultimate success for our client after years of legal proceedings. In addition, we are happy that this ruling finally ensures that Balsamico can legally come from Germany."

Green Groups Call for EU Action on PFAS in Paper-based Food Contact Materials

The Danish government has recently made a decision to ban PFAS (per- and polyfluorinated alkyl substances) from paper-based food contact materials as of mid-2020, leading to environmental groups demanding wider action at EU level. Most of the population would be contaminated by such chemicals, especially through water, the European Environmental Bureau (EEB) stated, based on data from the World Health Organisation. In October, ChemTrust said it was "extremely concerned" about PFAS, also known as the "forever chemicals", since they would be the "most persistent synthetic chemicals to date" due to their persistence and mobility in the environment. According to the ChemTrust, a global ban of the substances should be considered, and EU restrictions for all PFAS substances are urgent. At the EU level, only the PFOA substance, part of the PFAS family and widely used in the production of non-stick coatings, has been identified as a substance of very high concern (SVHC) and included on the REACH Candidate List. In use since the 1940s, PFAS are found in a wide array of consumer and industrial products. Scientists across Europe are currently developing the biomonitoring programme HMB4EU, with the aim to provide EU regulators with an overview of levels of human contamination from 18 of the most concerning chemical groups, including flame retardants, pesticides, plasticisers and the PFAS family. The results are expected to be released in 2020.

Food Labelling – Preparations for Brexit

Director Nicola Smith presented a webinar to members and contacts of the Food and Drink Federation (FDF) in October on the impact of Brexit on food labelling. On withdrawal or full exit (depending on whether there is a "deal"), all producers will need to ensure that the name and address of the food business operator on labels of products exported to the EU is actually in the EU. Likewise, those who import into the UK market for sale in the UK will need to ensure that the address of the UK importer appears on the label. Other changes that may be required, depending on the current product label, include origin marking (where marked as "EU" or "non-EU"), health and identification marks (for products of animal origin), use of the EU organic logo, use of the EU emblem and protected geographical indications. UK government guidance is available, which summarises the relevant changes required.

Under the Brexit deal recently agreed in principle with the EU, there will be a transition period, during which operators will have the opportunity to make the required changes. However, it is still possible that the UK could leave without a deal if this withdrawal agreement is not approved by 31 January. If no deal is agreed, on the face of it, changes will be required immediately on exit; although, in practice, the UK previously indicated that it would take a practical approach to enforcement and effectively allow a "grace period" for changes (the same "grace period" may not, however, apply in the EU). Although there may be a reluctance to spend significant amounts on no-deal preparations amidst continuing uncertainty on when (or possibly even if) the UK exits, and on what terms, food and drink producers should at least map (i) the effect that exit will have on the labelling of their own products; (ii) the changes that will be required; (iii) the timescales that they will need to implement any changes through their supply chain; and (iv) whether interim solutions (such as over-stickers) can be introduced quickly in the event of short-notice (or immediate) changes being required.

Food Provenance: Is Blockchain the Answer?

"Everywhere we go! People always ask us. Who we are? Where we come from?" This may be a favourite song of many children around the world, however now more than ever, global consumers are applying the very same mentality to the provenance of the food they consume. Associate Josh Headley has published an article explaining what blockchain is, where it can help food and drink manufacturers (and retailers), and the blockchain service solutions available. He concludes that the use of blockchain can have tangible benefits to businesses, including the ability to monitor food and react immediately to safety concerns by quickly identifying, intercepting and removing bad produce from the supply chain, with the potential to save both producers and suppliers millions in terms of both direct costs and reputational damage.

From a legal perspective, blockchain can help a business establish "due diligence" in the event of legal proceedings involving the nature of the product (such as whether it contains only the meat that is declared) or legal actions stemming from other provenance issues. We are already seeing blockchain being utilised to record businesses' intellectual property rights, providing a solution for verifying intellectual property rights from trade marks and designs to patents, tracking ownership and record transfers. However, the potential implications on contractual relationships between parties, where responsibilities will lie in terms of the data in the blockchain (and the privacy of that data) and potential liability for information on the blockchain, remains to be seen.

European Commission Investigates French Retailer Purchasing Alliance

On 4 November 2019, the European Commission (EC) announced that it has launched a formal cartel investigation into two French retail groups, Casino Guichard-Perrachon (Casino) and Les Mousquetaires (Intermarché), for allegedly coordinating their retail sales activities (location of stores and retail pricing), in the context of a joint purchasing arrangement. The EC suspects that Casino's and Intermarché's joint purchasing venture, Intermarché Casino Achats (INCAA), may have breached EU competition rules.

In February 2017, EC officials conducted dawn raids (unannounced inspections) against several companies, including Casino and Intermarché in relation to INCAA, suspecting anticompetitive information exchanges concerning rebates for hygiene and cleaning products. A second set of dawn raids specifically targeting Casino and Intermarché were conducted in May 2019. Both companies have filed appeals before the EU General Court against the 2017 dawn raids, which are pending. On the same day in May, the Belgian Competition Authority raided Carrefour and Provera, a joint purchasing venture of grocery retailers Cora, Match and Louis Delhaize.

These investigations arise in the context of increasing scrutiny from EU and national competition authorities into the practices of joint purchasing ventures between competitors in the grocery retail sector. The EC's guidelines on horizontal cooperation agreements (Guidelines) state that alliances such as joint purchasing can have benefits in terms of lower prices and better quality products/services for consumers thanks to the bargaining power created for large suppliers, but all collaborations with competitors must be legitimate and undertaken in full compliance with competition law.

On a related note, the EC is currently consulting on the functioning of two of the current Horizontal Block Exemption Regulations (R&D and Specialisation) and the accompanying Guidelines, which cover agreements between competitors, all of which expire in 2022.The block exemption regulations exempt from the prohibition on anti-competitive agreements those R&D and specialisation agreements that meet the block exemption criteria. The review will affect a wide range of commercial agreements including joint purchasing, standardisation and data pooling. The public consultation was launched on 6 November 2019. The deadline for stakeholders to complete the questionnaire is 12 February 2020 (midnight Brussels time).

Single-use Plastic Straw and Stirrer Ban – Including Drink Products With Attached Straw

The Department for Environment, Food and Rural Affairs (Defra) has published draft regulations to ban selected single-use plastics. The ban will apply to distribution and sales of plastic drinking straws and plastic-stemmed cotton buds (with some exceptions), and plastic drink stirrers. The bans will apply in England from 6 April 2020, except for a ban on supplying a drink product with an attached plastic straw, which will apply from 3 July 2021. However, there is an exemption for plastic straws supplied in catering establishments (such as restaurants, pubs or canteens), provided the straws are not visible/accessible to customers and are only supplied on request.

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