



Legal NewsBITE: Food and Drink Quarterly

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Coronavirus – Supply Chain Force Majeure and Employment Questions

The impact of the coronavirus on supply chains and employment and health and safety in the workplace is coming under increasing focus across the EU and the UK. In the food and drink sector, trade press articles have highlighted [warnings](#) that blockades could halt food production in certain regions and producers themselves have [warned](#) of the potential impact on sales. Please see our published [guidance](#) on employment-related questions for the UK, including health and safety obligations, restrictions on work-related international travel, payment for self-isolation, employees planning holidays in high-risk destinations and other practical tips for employers. We have also published a [blog](#) on whether force majeure clauses can be relied upon and on [contractual penalties](#) that may apply.

We are hosting a [webinar](#) on Legal and Commercial risks for businesses to consider on Wednesday 11 March. Copies of the recording can be obtained by [email](#) on request.

UK Points-Based Immigration System

The UK government has published a policy paper outlining the principles of the UK's points-based immigration system to apply to new applicants from the EU (excluding Ireland) and outside the EU from January 2021, but it will not affect all employers in the same way. Overall, as a sector that is typically heavily reliant on lower-paid and lower-skilled EU workers, food and drink will be one of the sectors worst affected by the proposals and in the short to medium term, if nothing else, the significant cost and administrative burden of sponsorship is likely to be prohibitive for many businesses reliant on EU workers.

We have published a [guide](#) summarising the key points from the policy paper. This includes the proposed reduction in salary threshold for a work visa; reduction of skills threshold; the shortage occupation list to be retained by the Migration Advisory Committee; and the possible introduction of a broader unsponsored route within the points-based system.

There will be no general low-skilled or temporary work route, which will have a significant impact on businesses heavily reliant on EU workers as discussed above, assuming the salary and skills threshold reductions do not go far enough to allow for the sponsorship of the types of worker in short supply. Our guide includes recommendations for those employers reliant on a workforce that is materially comprised of EU workers in preparation for the proposed changes.

Annabel Mace is speaking about post-Brexit UK immigration at the Academy of European Law ERA Annual Conference in Brussels on 27-28 April.

EU Investigation into Anti-Competitive Practices by Mondelez

The European Commission has launched an investigation into suspected anticompetitive practices covering several member states by US consumer goods group Mondelez International. Mondelez, the Illinois-based manufacturers of a variety of food, beverage and confectionery brands (including Oreo, Toblerone, Cadbury and Green & Black's), made the announcement in its [annual report](#) to the US SEC on Friday 7 February 2020.

Various media outlets suggested in November 2019 that European Commission officials had made unannounced inspections, or "dawn raids", at Mondelez premises in Germany, Austria and Belgium. The annual report confirmed that the European Commission has concerns regarding restrictions imposed by Mondelez on cross-border sales of its products within the European Economic Area, which may constitute a breach of EU antitrust rules. The EU antitrust rules prohibit restrictive business practices and the abuse of a dominant position in [Article 101](#) and [Article 102](#) of the Treaty on the Functioning of the European Union, respectively.

This is the latest probe by the European Commission in an attempt to crack down on unfair territorial restraints on trade within the EU in recent years. For instance, in 2019 alone, the European Commission fined (i) NBCUniversal €14.3 million for imposing illegal restrictions on territory, language and customer groups for products featuring the Minions or "Jurassic World"; (ii) Nike €12.5 million for banning traders from selling licensed merchandise to other countries within the EEA; and (iii) Sanrio €6.2 million for engaging in similar practices in respect of merchandising products featuring Hello Kitty characters.

The European Commission also [fined](#) AB InBev, the beer giant, just over €200 million for restricting beer sales from the Netherlands into Belgium in May 2019.

However, the opening of an investigation does not automatically mean that the European Commission has concluded there has been any infringement of the competition rules, nor does it prejudice the outcome of the investigation itself. The duration of the investigation will depend on a number of factors, including the complexity of the case, and the extent to which Mondelez cooperates with the European Commission. There is no legal deadline to complete enquiries into suspected anticompetitive conduct. Other global food and drink businesses should ensure that they are prepared for dawn raid investigations and ensure that they have plans in place to deal with this. We can provide advice on such plans and dawn raid training if desired.

PFAS in Food and Food Packaging – EU Consultation

We reported in our [December edition](#) of *newsBITE* that the Danish government had decided to ban PFAS (per- and polyfluorinated alkyl substances) from paper-based food contact materials as of mid-2020, and that green groups were calling for wider action at the EU level. The European Food Safety Authority (EFSA) has now opened a consultation on PFAS in food, open until 20 April. It invites comments on the draft scientific Opinion (with detailed Annex) of EFSA's Panel on Contaminants in the Food Chain (CONTAM) on the risks to human health related to the presence of PFAS in food. In its Opinion, EFSA assesses the risks linked to human dietary exposure to four main PFAS substances that accumulate in the body. After estimating a "tolerable weekly intake" (TWI) of 8ng/kg bw of PFAS, EFSA concludes that "parts of the European population exceed this TWI, which is of concern". Fish, fruit and eggs are the foods that contribute most to human exposure to PFAS. The European Commission asked EFSA to reassess the risks based on new available scientific data. As part of the consultation process, EFSA will organise a technical meeting on 12 March in Brussels.

Food operators should monitor developments and the implications that this may have on packaging. There have already been calls in the UK to ban PFAS in food packaging, [reported](#) on last year. This is clearly a hot topic. In related news, US actor [Mark Ruffalo visited the European Parliament](#) to present his movie [Dark Waters](#), which dramatises the fight of a lawyer against PFAS pollution. The company Kingfisher and the European water industry association EurEau also recently joined the [call of NGO ChemSec to end](#) the use of PFAS in products and supply chains.

Deadline of 31 March 2021 Set for Cannabidiol (CBD) Products

We reported on the rise of cannabidiol (CBD) in food and drink products in our [September edition](#) of *newsBITE*. CBD is derived from cannabis, but it 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. The Food Standards Agency (FSA) has now [announced](#) a deadline of 31 March 2021, after which, only CBD food products that have submitted a valid novel food application will be allowed to remain on the market. It is worth remembering that the UK will have its own novel food application process following the end of the Brexit transitional period. If an application submitted to the EU is approved before the end of the transition period, it will also be deemed as authorised in the UK. However, after that, as it currently stands, an application will be required to be made for specific UK approval as well.

Consultation on Amended FSA Technical Guidance for Allergen Labelling: Next Steps

Legislation requiring full ingredient labelling for foods that are "prepacked for direct sale" (PPDS) was published in September 2019 and will apply in England, Wales and Northern Ireland from 1 October 2021. Guidance from the FSA has been eagerly awaited, in the expectation that it would provide further clarity as to which products the new requirements will apply to, and how the laws will be applied in practice. A consultation on an amended draft technical guidance for allergen labelling ([Draft Guidance](#)) was launched on 23 January 2020, closing on 6 March. The Draft Guidance does include some examples of what will and will not be considered as PPDS foods, but is largely based around the previous consultation document, which specified:

This applies to foods that have been packed on the same premises from which they are being sold. Foods "prepacked for direct sale" are treated in the same way as non-prepacked foods in EU FIC's labelling provisions. For a product to be considered "prepacked for direct sale", one or more of the following can apply: (1) it is expected that the customer is able to speak with the person who made or packed the product to ask about ingredients; and/or (2) foods that fall under this category could include meat pies made on site and sandwiches made and sold from the premises in which they are made.

Nicola Smith has published an [article](#) detailing the background to this consultation, and some of the examples given in the Draft Guidance, as to what products will be considered as PPDS foods. We recommend that food service and retail businesses review which of their products could fall within the definition of PPDS foods (including drinks) and, for those products, assess what procedures and safeguards will be required to ensure accurate labelling, not only of the 14 specified allergens under the EU FIC, but also all ingredients. The additional responsibilities on such businesses will likely also lead to more information being required from suppliers on ingredients and controls around product substitutions and recipe changes.

Influencer Advertising – Advertising Standards Authority Guide

Collaborating with social media influencers can be a useful marketing strategy for a food and drink business to help build awareness of its products and increase sales. There has been a huge increase in influencer advertising, and that is on all social media platforms. In response to this, the regulators, the Advertising Standards Authority and the Competition and Markets Authority, have issued a joint [guide](#) on advertising laws and rules. The guide is easy to follow, for both brands and influencers, and explains how to use signposts and labels in social media to flag ads. Disclosures are required to ensure that social media posts are not misleading. The regulators want to see ads prominently labelled as #ad or #advert so consumers understand that the posting is sponsored. Affiliate links are also classified as a form of advertising and any content related to those links must comply with the rules. Failure to comply with the rules could be a criminal offence. Watch our [video](#) to find out more.

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