



Legal NewsBITE: Food and Drink Quarterly

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Plant-based burgers: ASA decision banning ads in the UK and a trademark dispute in The Netherlands

The UK's Advertising Standard Authority [has banned](#) Burger King ads in the UK from promoting its new plant-based 'Rebel Whopper' burger. The ASA ruled that the ads gave the misleading impression that the burger was suitable for vegans and vegetarians, when it was not. Read our blog about the decision [here](#).

Staying on topic, Nestlé has been forced to rebrand its newly-launched 'Incredible Burger' following a [Dutch Court decision](#) that the name infringes the EU trademark 'Impossible Burger', owned by US-based Impossible Foods. The Dutch court considered that, given the similarities between the two names and the type of product, there was a likelihood of consumer confusion.

Food Standards Agency (FSA) guidance on reopening and adapting food businesses during COVID-19

For food manufacturers (many of which have, of course, continued to operate throughout the lockdown to supply grocery retailers) [guidance](#) includes adapting food manufacturing operations (including an acknowledgement that it will not always be possible to maintain 2 metre distancing). This guidance is, of course, separate and in addition to the [workplace guidance](#), issued by the government on 12 May, which includes guidelines for factories/ plants and for shops/ branches.

For restaurants and takeaways, the guidance documents include a re-opening [checklist](#), requirements to review food safety management systems and [guidance](#) on food safety for food delivery. Some hospitality businesses will not previously have offered takeaway and delivery as a matter of course and will be introducing these services as an interim measure until they are able to open for consumption on the premises. Therefore, the guidance will be a helpful summary of food safety and hygiene considerations. A number of local authorities are also writing to licence holders and those registered as food business operators to provide advice on requirements and materials such as posters for display on site.

High Court confirms that offering food for sale after expiry of use-by date is an offence

Some retailers and food lawyers have, for many years, sought to argue that prosecutions for the sale of unsafe food, grounded only on the basis of evidence that products are on display for sale past their use-by-date, are misguided, because in fact, such food has often not deteriorated / perished so as to be unsafe. This is particularly the case where the manufacturer may have allowed for a 'margin of error' in the use by date applied to the food.

The High Court has, for now, put that argument to bed, as it has refused an application for judicial review of a [decision](#) of a District Judge, that food offered for sale beyond its use-by date was unsafe (and that expert evidence as to whether the food was, in fact, safe, was therefore inadmissible).

The sale of unsafe food is an offence under the Food Safety and Hygiene (England) Regulations 2013, which provide for the enforcement of EU legislation, including general principles of food safety and food labelling. This legislation provides that where a use-by date is required, the food shall be deemed to be unsafe after that date. This is in contrast to a best before date, which is related to the minimum durability of the product, being the date up to which food retains its expected quality when it comes to flavour and texture, under proper storage and use.

European Commission Report on Front of Pack Nutrition Labelling

The European Commission has published its [report](#) on front-of-pack nutritional labelling. Front-of-pack labelling is, of course, common in the UK, in line with the UK government's recommendation on the use of traffic-light style colour coding as an additional form of expression for nutritional information (for which [guidance](#) is available from the FSA and Department of Health).

The commission report finds that front-of-pack schemes do help consumers make health-conscious choices about the food they read and that the understanding of those labels increase when colour-coding is used. The report concludes that it seems appropriate to introduce a harmonised mandatory scheme across the EU. Of course, by the time legislation is proposed/ effective, it may well be the case that the transition period for the UK leaving the EU has ended and, therefore, the extent to which products produced/ sold in the UK need to comply with any EU scheme will likely depend on whether ongoing regulatory alignment is agreed as part of trade deal negotiations.

To receive updates relating to the legal impact of COVID-19 please sign up to our [Covid-19 Resource Hub](#).

Food Business Concerns around Vulnerable Employees Returning after COVID-19

For food and drink businesses who have asked certain employees to work from home during the lockdown, or have furloughed employees, in our experience there are frequently concerns around whether they should be asking vulnerable employees to come back to the workplace. If you are bringing staff back into the workplace, it would be lawful to ask them to let you know if they fall into a vulnerable or extremely vulnerable category, to the extent they have not already done so. For vulnerable employees (for example those over the age of 70) if it is not possible for them to work from home, employers should take particular care to ensure they comply with the government guidance on social distancing in the workplace, etc.

Depending on the reason for the employee's inclusion in the vulnerable category, some employers may prefer to allow such staff to remain at home even if they cannot work from home. As always, the sensible approach would be for employers to have a conversation with relevant employees about what steps they think are necessary to facilitate a return to work. If a vulnerable employee is keen to return to work regardless, even though fully understanding of the risks, a refusal by the employer to have them back may be discrimination on grounds of age, pregnancy or disability and so must be approached carefully.

Employers should also be aware of their data protection obligations when processing health information, i.e. that any data around the health of identifiable individuals must be retained for the shortest possible time, accessible to the smallest number of people, kept as secure as possible and used only for the purposes of protection of the health of that individual and others who may be affected by it.

Committee of the Regions calls for action on endocrine disruptors and chemicals in food

Endocrine disruptors are found in many everyday products, such as plastic bottles and packaging for food products. In its [resolution](#) on the 2020 Work Programme of the European Commission, the committee of the Regions, an EU advisory body, called for applying "no safe threshold for exposure" to all endocrine disruptors across EU laws and for a ban on bisphenols and phthalates in all food contact materials. In November 2019, the committee had already [called upon](#) the commission to adopt a comprehensive framework on endocrine disruptors, including a detailed timetable to implement appropriate criteria for endocrine disruptors in all relevant EU laws and make progress in reducing exposure to these chemicals, in particular for the most vulnerable groups. Food business operators should review packaging used to assess whether they could be impacted by proposed changes and, if appropriate, explore alternative packaging.

The Impact of the COVID-19 Pandemic on Food Sector Contracts

COVID-19 has, of course, caused a huge impact to the global economy, with many businesses closing and others struggling to keep up with increased demand to keep the nation fed. Amidst an increased need to keep supply chains stable, many businesses have faced issues such as delays in delivery, potentially causing ingredients to deteriorate beyond expiry dates and other contractual frustration issues, for example where ingredients' suppliers cease trading.

As lock-down restrictions begin to ease, many businesses will face further challenges as operations re-open or business begins to resemble something more like "normality". Great care will be needed to ensure that contracts provide all businesses with practical solutions, while properly protecting legitimate business interests. We have created a UK guide, [The Impact of the COVID-19 Pandemic on Contracts Regarding the Manufacture, Distribution and Sale of Goods](#), which addresses some of the key issues that businesses (particularly those involved in the manufacture, distribution and sale of products, including food and drink products) need to consider as they assess their critical needs, vulnerabilities, protections and their ability to mitigate risks, both under existing contracts and as they develop new contractual arrangements. The guide highlights some useful advice on negotiating new contracts and/or varying existing ones and flags some potential longer-term contractual issues and pitfalls to avoid.

CMA Clamps Down on Banning Company Directors Over Competition Law Abuse

The Competition and Markets Authority (**CMA**) has increasingly exercised its powers to seek Competition Disqualification Orders (**CDOs**). The High Court in London is currently determining for the first time a contested claim over CDOs in respect of the disqualification of directors of a [cartelist real-estate agency for colluding to fix commission fees](#).

The [CMA can apply for CDOs if it meets two conditions](#): (i) that the company of which the individual is a director committed a breach of competition rules; and (ii) that the individual's conduct makes him or her unfit to manage or be involved in managing a company. This second condition includes situations where the director **did not know but ought to have known** that the conduct of the company constituted a breach of the competition rules. Although the rules were introduced in 2003, the **first time** the CMA exercised its power to disqualify a director as a result of a breach of competition law was in 2016.

The outcome of the High Court case will be a litmus test for the CMA to disqualify directors on competition law infringement grounds. Company directors in all sectors, including the food and drinks sector, are susceptible to the CMA's increasing enthusiasm to secure CDOs, which is deemed necessary to protect consumer welfare. For the worst breaches of competition law, the CMA has the power to seek the disqualification of an individual by applying to the Court for a CDO or by accepting a legally binding undertaking from a director (a Competition Disqualification Undertaking) from holding company directorships or performing certain roles in relation to a company for up to fifteen years.

Contacts

Hannah Kendrick

Partner, Leeds
T +44 113 284 7620
E hannah.kendrick@squirepb.com

Matthew Lewis

Partner, Leeds
T +44 113 284 7525
E matthew.lewis@squirepb.com

Katie Rogers

Associate, Birmingham
T +44 121 222 3135
E katie.rogers@squirepb.com

Carlton Daniel

Partner, London
T +44 20 7655 1026
E carlton.daniel@squirepb.com

Nicola Smith

Director, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com

Anita Lloyd

Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com

Dickie Chan

Associate, London
T +44 20 7655 1163
E dickie.chan@squirepb.com

Sam Hare

Senior Associate, London
T +44 207 655 1154
E sam.hare@squirepb.com