



## Legal NewsBITE: Food and Drink Quarterly

December 2020

### Government Announces Grace Period of Three Months for Checks on Foods Travelling From Great Britain to Northern Ireland

This month, the UK government [announced](#) an update to the withdrawal agreement to “protect Northern Ireland supermarket supplies”. Concerns had been raised as to potential delays, caused by the implication of Northern Ireland remaining in the single market when Great Britain has left. For products of animal origin in particular, this would require a proportion of goods to be physically inspected when arriving in Northern Ireland and export health certificates and other paperwork to be checked at border control posts.

Other changes that will be required for many products after the end of transition include labelling of the name and address of the food business operator (which EU laws require should be the name and address of the operator under whose name or business name the product is marketed, or if that operator is outside of the EU, the importer into the EU market). For importers into the UK, a UK name and address will be required, although the UK government has [confirmed](#) a grace period of 21 months for such changes to be made (with compliance required by 30 September 2022). To date, there has been no similar grace period announcement in the EU.

### Shelf-life Guidance for Chilled Beef, Lamb and Pork Updated

The Food Standards Agency (FSA) has [announced](#) a change to its guidance for vacuum-packed and modified atmosphere-packed products, to allow operators to determine the safe shelf-life for these products in line with their existing food safety management systems. The previous best-practice guidance was a set 10-day shelf-life. The [consultation document](#) that preceded this announcement indicated that the FSA received representations from the meat industry that no other EU member state applies, and no other country was known to apply, a 10-day shelf life.

Food business operators in the UK and the EU are, of course, obliged not to place unsafe food on the market, and to determine whether a food is unsafe, authorities will consider (among other things) the information provided to the consumer on the label, so there are safeguards in place against operators that do not provide an appropriate indication of shelf-life.



### Business Interruption Insurance – Supreme Court to Rule on Policy Coverage for COVID-19 Lockdown

Business interruption insurance policies have been a matter of huge debate since the COVID-19 lockdown started in March 2020. The Financial Conduct Authority (FCA) launched a test case earlier in the year in the High Court to determine whether insurers with a representative sample of “non-damage” policy wording would have to pay out claims to businesses that were forced to close during the lockdown.

Where the policy coverage is linked to the event of a notifiable disease within a specified radius of the policyholder’s premises, the High Court mostly found in favour of policyholders. Where the policy wording relates to prevention of access because of public authority restrictions, coverage was found to be more limited.

Both sides appealed to the Supreme Court, which heard the parties’ appeals over four days in November 2020. The Supreme Court has undertaken to provide its judgment as quickly as possible, but it has been unable to say whether the judgment will be handed down before Christmas. The decision is likely to impact hundreds of types of policies, 60 insurers and 370,000 policyholders.

Hospitality businesses in the food sector have, of course, been one of the most affected by enforced closures. One of the grounds of appeal from the FCA is whether business interruption policy wording requiring “prevention of access” or “inability to use” are satisfied by partial closure. For example, if a restaurant cannot serve customers on its premises, but can continue to offer a delivery or takeaway service, can a claim be made? Watch this space and follow our [blog](#) for more updates.

### Germany Issues Draft Implementation Measures on the EU “New Deal for Consumers” Directive and Dual Quality Rules

EU Directive 2019/2161 requires EU member states to implement national laws to prevent:

“any marketing of a good, in one member state, as being identical to a good marketed in other member states, while that good has significantly different compositions or characteristics, unless justified by legitimate and objective factors”.

This requirement will relate to food and drink products, as well as other consumer goods. Previously, the European Parliament issued a [briefing](#) outlining concerns that lower quality foods were being marketed in some countries as the same, and the commission issued [guidelines](#) on the issue later that year. Member states have until November 2021 to adapt and publish measures to comply with the directive, and until May 2022 to actually comply.

The directive envisages that competent authorities should consider whether differentiation is easily identifiable by consumers; an operator’s right to adapt goods for different geographical markets for legitimate reasons, such as national law, availability or seasonality of raw materials, or voluntary strategies to improve access to healthy and nutritious food; and the right to offer products in different pack sizes in different geographical markets. Germany recently issued its draft to implement these rules into German law, mirroring the provisions in the directive.

## The Rise of “Dark Kitchens” and Virtual-only Restaurants

The move to online retail and food delivery services has been amplified by lockdowns and closures through the 2020 pandemic. The UK trade press has [reported](#) on the trend and the growing number of “dark kitchens” that have opened to service delivery orders by restaurant brands, often through known delivery service partners. There have also been reports in the US of online-only restaurant launches, with no option to dine in. An example was the June launch of brand “It’s Just Wings” [reported](#) in the trade press.

There will, of course, be challenges in such diversification, including monitoring and ensuring compliance with minimum wage and immigration laws; maintaining food hygiene and temperature control through the delivery process; and ensuring that mandatory food information, including in relation to allergens, is provided to the consumer accurately. Where age-restricted products, such as alcohol, form part of the offer, checking that sales are not made to underage persons will also need to be considered, as will licensing laws.

## Consultation on Banning HFSS Advertisements

In November 2020, the UK government launched a consultation on banning online advertisements for products high in fat, sugar and salt (HFSS). This forms part of its wider strategy to tackle obesity and follows a previous consultation, which led to the government confirming its intention to introduce a 9 p.m. watershed for HFSS ads on TV.

Curiously, the government considers that TV advertising strategy is influenced by the time of day ads are shown. Whereas, for online content, commonly targeted to individual users, the government’s view is that time does not affect ad content (or who views it). This assumes children are equally active online as adults, ignoring the likelihood that parents will impose screen time limitations. The government seems concerned at the practical challenges of an online watershed, instead advocating for the arguably easier route of a complete ban.

The consultation is open for submissions until 22 December. HFSS manufacturers, advertisers, agencies, distributors, retailers and other stakeholders should seize the opportunity to influence this rather draconian direction of travel. We have specialist public policy and advertising lawyers who are able to assist.

## A Bit of This and a Bit of VAT

We love this time of year. Who wouldn’t? The magic, the wonder, the food! Helping ourselves to a bit of this, and indulging in a bit of VAT.

However, when the Christmas dinner table conversation inevitably turns as dry as Aunt Delia’s turkey, can we recommend a round of our favourite festive parlour pastime, “VAT’s my VAT rate”?

Players take it in turns to guess the applicable VAT rate applying to a randomly nominated item of cold/burned/undercooked fare. “But,” they will cry, “the supply of food (including drink) is just zero-rated!” “Ah, yes,” you retort, “but do not forget Excepted items [standard-rated] and Overriding items [zero-rated overrides to the Excepted items].” They will soon discover it is not as easy as drawing the distinction between the humble Jaffa Cake [zero-rated – it is a cake, obvs.] and the pretentious chocolate-covered Hobnob [standard-rated].

Take, for example, the staple of any worthy Boxing Day picnic: the Subway sub-sandwich. A sandwich is made of bread, they will reasonably reason. Bread is zero-rated; ergo, the sub is zero-rated. Wrong! Subway sandwiches are not made with bread – well, not for VAT purposes anyway – according to the [Irish Supreme Court](#).

In effect, there is so much sugar in the dough (an amount equal to approximately 10% of the flour), the DNA of a Subway sub is closer to a chocolate orange [standard-rated confectionary (not cake or fruit)] than a freshly baked Julekake.

So, when Uncle Matthew wearily turns to you (over Zoom), while diving again for the smorgasbord of sweetbreads, and wisely proclaims, again, “man cannot live on bread alone,” you will know exactly what to say.

If VAT be the food of love, tax on!

## New UK Geographical Indication Logos

The government has [announced](#) new logos to indicate protected geographical and traditional British foods.

Registered producers of British food, drink and agricultural GI products that are required to use the logos will have until 1 January 2024 to change packaging to display the new UK GI logos. All existing UK products registered under the EU GI schemes before 1 January 2021 will remain protected under the UK GI schemes (further [guidance](#) is available from the government).

## Competition Law Update

Businesses in the food and drink sector should be aware that the CMA has rounded off 2020 with the publication of several consultations and new guidance documents, covering a number of areas of its enforcement activities, largely reflecting the “major challenge” in 2021 of undertaking its new responsibilities at the end of the EU Exit Transition Period. In particular, it expects a “significant increase” in its caseload for merger control and competition law enforcement, as the revised post-EU Exit competition regime will have a potentially significant impact on businesses, including those involved in cross-border M&A transactions, or with cross-border supply chains/distribution agreements. It has published for consultation its draft Annual Plan, which sets out its priorities for 2021/22; guidance on the functions of the CMA after the end of the Transition Period, which provides information on its merger, antitrust (including cartels) and consumer functions at the end of the Transition Period; consultation on updates to the Merger Assessment Guidelines, setting out its substantive approach to analysing mergers; updates to its mergers procedural guidelines, in preparation for the end of the Transition Period and reflecting a series of changes in UK merger control over recent years; and, finally, revised Competition Act 1998 procedures guidance, which covers the way in which it conducts investigations into anticompetitive agreements and abuse of dominance.

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