



# Legal NewsBITE: Food and Drink Quarterly

June 2021

## COVID-19: Employee Holidays FAQs

Despite the moveable feast that is the Green, Amber and Red list of holiday destinations in the UK, we are seeing more and more people booking holidays and heading off for what will be seen as a well-deserved break. Some in the food manufacturing sector will have been working throughout the lockdown periods, whereas those in hospitality may have been on furlough but, either way, most want a holiday and this raises a range of questions and concerns for employers. Can you stop them going to a country where they will need to self-isolate on return (because that will impact production)? Are employees entitled to pay if they need to self-quarantine? Can you require employees to take holiday in order to deal with the carry-over from 2020 so that you can manage shifts/rotas? What if they all want to go at the same time? All these and more are answered [here](#).

## Food Sector UK Transaction Highlights

The trade press has [reported](#) this quarter that UK food M&A activity has recovered to its highest levels since 2017. So far this year, our transactions have included advising Elaghmore on the £25 million acquisition of Orchard House Foods (prepared fruit, fresh fruit drinks and desserts supplier) from Hain Celestial; and advising WM Morrison Plc on the acquisition of Falfish (Holdings) Limited by International Seafoods Limited, a member of the WM Morrison Supermarkets group.

It will be interesting to see how the Atlantic trade deal recently announced will impact on deal activity for the remainder of 2021.

## Focus on UK Trade

Views differ on whether the economic impact of Brexit can be judged at this point, but the food and drink sector has certainly seen some challenges, both in trade with the EU and in the wider trade agenda.

**EU exports drop but East Asia exports grow** – The [Food and Drink Federation \(FDF\)](#) reported that UK food and drink exports to the EU almost halved in the first three months of the year, compared with the same period in 2020. The FDF figures show EU sales dropped by 47%. In Q1 2021, sales to Ireland were down by more than two thirds, while sales to Germany, Spain and Italy declined by more than half since Q1 2020. In contrast, the FDF reported that there has also been a return to strong growth in exports to East Asia, where there is high demand for quality UK food and drink. In Q1 2021, exports to China (+28.2%), Hong Kong (+3.7%), Japan (+6.2%) and South Korea (+18.5%) were all above the levels seen in Q1 2020.

**UK-Australia Free Trade Agreement negotiations** – The UK and Australia have agreed the “[agreement in principle](#)” for a free trade agreement. The deal paves way for the UK to join a wider Asia Pacific free-trade agreement – [the Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#). The UK-Australia FTA has come under criticism from parts of the food and drink sector across the UK as Australia will be able to send a certain amount of agricultural goods per year to the UK without any payment of tariffs. Beef, sheep meat, sugar, dairy (cheese and non-cheese) and rice will have certain duty-free transitional quotas attached.



## New EU Export Health Certificates (EHCs) for Composite Products

Changes to EU rules on 21 April 2021 mean that new EHCs have been introduced for composite products of animal origin, which are not shelf-stable. For composite products that are exempt, including shelf-stable composite products containing dairy, egg and/or fish (where the dairy or egg meet heat treatment requirements), a private attestation is required by the importer, in place of the EHC.

The big difference in the rules is that the percentage of animal product in the composite product is no longer the determining factor as to whether or not an EHC is required. Therefore, products with relatively small amounts of animal product content may need an EHC for the first time. This is catching many exporters unaware, as they are unfamiliar with EHC processes and, indeed, many Official Veterinarians (who are required to sign off the Certificate) are not familiar with the new forms, which include a requirement for the establishment approval number of the approved EU establishment for exporting.

The requirement for the new EHCs applies for relevant products for supplies anywhere within the EU (and Northern Ireland) – but not all shipments are stopped/inspected in the same way in practice, which means that some consignments without the new EHCs are getting through and others are not.

For those composite products with a higher animal product content that have previously needed an EHC, the old form of EHC is currently still being accepted – and will be until August 2021, but after that, exporters of those products will also need to use the new form of EHC.

Exporters should, therefore, review their product range to check whether they are exporting a “composite product” within the meaning of the relevant definitions; and if so, what they need to do to export that particular type of product (including consideration of whether it contains meat, whether it is exempt from checks, whether it contains processed egg/dairy/fish, whether it contains honey/gelatine/snails, and whether or not it is “shelf-stable”). Shelf-stable products are products that do not need to be transported or stored under controlled temperatures. If you are still not sure of the requirements, the Animal and Plant Health Agency may be able to assist, or it may be necessary to contact the Border Control Post in the country of import to understand what their requirements will be.

## New Dual Quality Rules for the Czech Republic

The Czech Republic has passed a new strict law prohibiting the sale of food and drinks in the local market with the same brand but substantially different specification compared to other EU markets (for example, Nutella with less chocolate or Fanta with less fruit juice, compared to the same product sold in Germany).

The law was hastily passed in the run up to the general elections in October. There is very little guidance as to what constitutes a breach but there is a high penalty of up to €2 million for non-compliance. The law went into effect on 12 May 2021 with no transition period.

The change was implemented under the New Deal for Consumers Directive 2019/2161. We reported on Germany's draft regulations under this Directive in our [December edition](#) of newsBITE.

## High Fines for Food Safety and Health and Safety Offences in the Sector

The last few weeks have seen two significant fines imposed on UK food companies. Perhaps most widely reported, a retailer was fined £7.56 million for selling food past its use-by date, by Birmingham magistrates' court. The fine followed a guilty plea in respect of 22 charges under the Food Safety and Hygiene (England) Regulations 2013. The offences related to a number of items that were on sale past the marked use-by date at three stores. An earlier application for judicial review of the decision of the District Judge that expert evidence as to whether the food was, in fact, safe, was inadmissible, was refused by the High Court, so the case had been ongoing for some time. See [here](#) for our more detailed article on this case. The case perhaps puts to bed the long-running argument that food past its use-by date is not necessarily unsafe, but it may also lead to pressure on producers to ensure that use-by dates and best before dates are used appropriately and with a proper assessment of whether a product is highly perishable and likely after a short period to constitute an immediate danger to public health (and, if so, what the appropriate date might be).

A distributor of fresh and frozen food has also been fined almost £800,000 in relation to a worker accident, where the worker was trapped by a mixing machine. The [HSE found](#) an inadequate fault reporting system contributed to the accident and that preventative maintenance and good communication between shop floor and maintenance could have prevented the accident.

Both of these fines are a stark reminder that the Sentencing Guidelines for food safety and hygiene offences (such guidelines also governing health and safety and corporate manslaughter) can result in a very significant fine, particularly for organisations that will be classified as large. The fine imposed by Birmingham magistrates court for use-by-dates is the largest reported fine imposed for food safety offences and is significantly higher than typical health and safety prosecution fines, even where there is a fatal accident involved, notwithstanding that no individual was harmed on these facts. It suggests we may see similar fines on other facts for large organisations in the future.

## CBD Novel Food Applications Final List – Due June 2021

The FSA issued its provisional [list](#) of CBD products in England and Wales that are able to remain on the market because an application for safety assessment has been submitted to the FSA. CBD is now classified as a novel food and novel foods are, of course, required to be authorised before they are put on the market. However, in the case of CBD, until a decision on their authorisation has been made, the products can remain on sale. The list is subject to change, and a final list was expected in June 2021, although the current list available online was last updated on 26 April (indicating 43 validated applications had been made). Any products submitted will be undergoing a risk assessment to evaluate their suitability for sale on the market. Companies that have not submitted their CBD products for assessment are expected to remove those products from sale, with enforcement in the hands of local authorities.

## Queen's Speech 2021: Calorie Labelling to Be Mandatory for Large Hospitality Businesses From 2022

Following the announcement in the Queen's Speech, draft legislation has been published requiring hospitality businesses that employ 250 or more employees in England to list [certain calorie information](#) on non-prepacked foods and soft drinks. Among other things, businesses will need to list the energy content in "kcal" and the size of the portion to which the energy content relates, next to the price. In certain circumstances, a statement should also be included to show that adults need around 2,000 calories a day. This is the latest step in the government's [obesity strategy](#) and, in addition to Natasha's Law, which will apply from 1 October 2021 for foods that are "prepacked for direct sale," perhaps shows a continuing trend towards a greater focus on food information products that are not "pre-packed".



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