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High Court Rules Against Oatly in Trademark Dispute With UK Family Farm

The High Court has dismissed a trademark infringement and passing off case brought by Swedish giant Oatly against UK family farm Glebe Farm Foods, over the latter's "PureOaty" branded drink.

Judge Nicholas Caddick found that the similarity between the product names was "very modest" and only based on descriptive elements (i.e. the "oat" parts in both names referred more to the ingredient than to Oatly's brand). Furthermore, there was no evidence of actual confusion among consumers in relation to the two products. Similarly, in relation to the carton packaging design, the court ruled that any similarities with Oatly's product were only at a very high level (e.g. both products had a depiction of a cup and saucer and used the word "Barista/BARISTA"). However, the court ruled that Glebe Farm's version was unlikely to cause confusion among consumers as regards the trade origin of the relevant products.

With many consumers also criticising Oatly's claim as anticompetitive and praising the High Court ruling, Oatly may also have lost in the court of public opinion.

Allergen Labelling Law Changes in Force From 1 October 2021 – FSA Guides

We have previously reported on the changes to the labelling of foods prepacked for direct sale, to require ingredient and allergen information for the first time. The FSA has issued a number of reminders on social media platforms, such as LinkedIn, promoting its prepacked for direct sale hub, which includes a series of guides designed for different types of business, including bakeries, butchers, fast food and takeaways, mobile sellers, restaurants/cafes/pubs and schools/colleges. The changes, commonly called "Natasha's Law", apply to a relatively narrow section of foods (i.e. those falling within the meaning of foods that are "Prepacked for Direct Sale"), but the proposals are likely to mean a growing demand on suppliers to provide accurate ingredient and allergen information in business-to-business sales, as well. Despite the FSA updates, the press has reported that eight in 10 food business owners are not prepared, with further reports that allergy sufferers are frustrated over failures to prepare.

Greenwashing Guidance – Application to Prepacked Foods and Foodservice

The UK Competition and Markets Authority (CMA) has issued draft guidance on making environmental claims, which will be relevant to businesses in all sectors that want to make "green" claims about their products and avoid the risk of "greenwashing". The EU is also considering legislation on green claims with the same aim of preventing misleading and overly general claims. The CMA has expressed concerns about companies making claims about the eco-friendly nature of products without really being able to demonstrate how they benefit the environment, and products that claim a particular type of environmental benefit, without mentioning that the product may be more harmful overall than comparators or has an overall life cycle impact that is not positive for the environment. This can also lead to companies that really are going the extra mile, and can really substantiate their green claims, not being given the recognition that they deserve.

The CMA guidance has six core principles, and uses many practical examples in the guidance to illustrate claims and techniques that would and would not be acceptable. The six principles are that claims (i) must be truthful and accurate; (ii) must be clear and unambiguous; (iii) must not omit or hide important information; (iv) must only make fair and meaningful comparisons; (v) must consider the full life cycle of the product; and (vi) must be substantiated. The practical examples are particularly useful, and they also illustrate how easy it can be to make unclear or misleading claims – and a number of these examples are directly relevant to food and hospitality scenarios. The guidance spans all commercial communications, so will cover point-of-sale menus and signage for food service businesses, as well as packaging and advertising.

Unusual UK Recall for Unauthorised GMO

In August, a confectioner issued a product recall after an ingredient was found to contain a genetically modified organism (GMO). The trade press reported that the GMO is not authorised for the ingredient in question in the UK, prompting the decision to recall the relevant product range. Recalls for unauthorised GMOs are relatively rare, but any food that is marketed for consumption by humans and animals and contains a GMO must be authorised under the (UK retained) EU Regulation on genetically modified food and feed, with such authorisation being valid for a maximum of 10 years.

Following Brexit, there is now a list of authorised GMOs for Great Britain specifically. Applications for approvals of GMOs in Great Britain are through the Food Standards Agency's (FSA) regulated products application service. The approach to the application process is based on the EU process for authorisation. For GMOs authorised by the European Commission before 1 January 2021, the authorisation will remain valid in Great Britain as part of the Brexit arrangements. The FSA published a research report into international approaches to the regulation of genetically modified and novel foods in August.

First UK Protected Designation of Origin

Since the UK left the EU, there is now a separate and independent UK Geographical Indication (GI) scheme. This quarter, Gower Salt Marsh Lamb received protected status, and is the first food registered under the UK's GI scheme. The meat produced from lambs born and reared on the Gower Peninsula has gained full protection and recognition as a Protected Designation of Origin (PDO). The effect of such recognition is that producers will benefit from protection against imitation.

Cross-border Checks Between the UK and the EU – Delays

There have been a number of announcements on border checks and procedures in recent weeks. At the end of June, the UK and the EU agreed to extend the Northern Ireland Protocol grace period for chilled meat products to 30 September 2021. The agreement was to allow Northern Ireland consumers to buy certain meat products from Great Britain while further discussions continue on a more permanent solution. The extension does not require the rest of the UK to align with any changes in EU agrifood rules during the grace period. The UK government's announcement on the extension indicated, though, that the UK will aim to introduce product-level labelling as soon as practicable, but businesses will be given time and support to put the arrangements in place.

In the meantime, DEFRA also reminded businesses importing products of animal origin into Great Britain from the EU of the new steps that were due to be required from 1 October 2021. However, following the government's recent announcement, the timetable has been pushed back, with new controls and requirements not now taking effect until January 2022 and July 2022, respectively. The amended timetables is as follows:

- From 1 January 2022, importers (or their representative) will be required to pre-notify authorities via IPAFFS that their consignment will be entering Great Britain.
- From 1 July 2022, animal products will need to continue to pre-notify their arrival via IPAFFS. Additionally, these consignments must be accompanied by a certified Export Health Certificate and enter via a point of entry with a Border Control Post (BCP) that has been designated to receive these goods. The consignment will be subject to documentary, ID and physical checks.

DEFRA had previously announced a derogation in place for the first three months of the new arrangement (i.e. from October to December) reducing the required pre-notification time for goods coming from the EU, to no less than four hours prior to arrival (instead of 24), where logistical constraints prevent earlier pre-notification. There is no indication that this same temporary relaxation will now be applied for the first three months from 1 January 2022, so importers should be prepared for a minimum 24 hours' requirement from the new date.

DEFRA is encouraging businesses to register for IPAFFS now if they have not already done so. Registration for IPAFFS can be made online.

National Food Strategy for England – Tax and Investment Proposals

Part two of the National Food Strategy was published in July. Its intention is to set out a vision and plan for a better food system. Headlines reported in the trade press have focused around tax plans for sugar and salt. The report is calling for a levy of £3 per kilo on sugar and £6 per kilo on salt, sold for wholesale use in processed food, restaurants and catering (see below on "It's a Sin"). This is one of 14 recommendations. Others include mandatory reporting for large food companies on food waste and sales of HFSS products, protein, fruit and veg, and other types of food; an "eat and learn" initiative; and extending the eligibility for free school meals. It also proposes a £1 billion investment to create AI and robotic technologies to reduce the reliance on pesticides and fertilisers, and a further £50 million investment for the continued creation of alternative proteins. The aim of the report is to improve overall health and protect the environment. Although many of the proposals appear to have been welcomed, a sugar and salt reformulation tax is likely to prove controversial.

Recognition of Mineral Water – Applications Required for Recognition in Great Britain Before 7 January 2022

You can only market and sell drinks labelled as natural mineral water in Great Britain if you have obtained official recognition for the relevant product. Since the UK left the EU, there is no "automatic recognition" in Great Britain of products that are officially recognised in the EU, although a limited number of natural mineral waters were already recognised in the UK in their own right (the UK has its own list of recognised natural mineral waters). A water that originates from a country outside of the EU, but was recognised in the EU prior to the end of the Brexit transition, was considered to be "an established EU recognised natural mineral water" and, as such, is currently recognised for marketing and sale in the UK, without any requirement for an application/licence.

However, six months' notice was given by the UK on 1 July 2021 to terminate "automatic" recognition on 1 July 2021. Government guidance has been published on how to apply for recognition of natural mineral water inside and outside the UK. Waters must be recognised before 7 January 2022 and, therefore, applications, where required, should be submitted in coming weeks.

In Brief: Latest News on Italian Food Law

Steps Forward in the Implementation Process of EU Directive on Unfair Commercial Practices in the Agro-food Sector

After the EU Commission initiated infringement proceedings against a number of member states – including Italy – for failing to implement EU Directive 2019/633 on unfair commercial practices in the agro-food sector, the Italian government has now approved a draft implementing decree. The draft decree aims to create a unified text replacing the entire existing discipline on unfair commercial practices in the agro-food chain. This would, therefore, be the key regulatory legal source in this sector.

International companies should be aware of the specific deviations from the EU Directive that are likely to be implemented in Italy. In contrast with what is envisaged at an EU level, the draft decree is intended to be applied to all commercial trades involving agricultural and food products, regardless of the turnover thresholds of the contracting parties set out in the EU Directive. In addition, the Italian government – as allowed by the EU Directive – has introduced stricter provisions by including provisions, among other things, as to additional unfair commercial practices and for the regulation of sales under cost price of agro-food products.

The draft decree will now have to be submitted to the parliament's opinion before entering into force.

Mandatory Green Pass to Access Company Canteens

In accordance with Law Decree 105/2021, starting from 6 August 2021, the Italian COVID-19 certification – the so-called "Green Pass" – has become a mandatory requirement for access to a wide range of services/activities, including indoor company canteens.

As a general rule, the Green Pass is issued by the Ministry of Health (i) after the administration of the vaccine, (ii) in case of recovery from COVID-19 in the last six months or (iii) after having been tested negative to a molecular or rapid antigenic COVID-19 test within 48 hours.

Employee objections to the decree have been raised. In order to mitigate potential negative consequences, companies have started to enter into agreements with trade unions in order to implement measures for employees without the Green Pass (e.g. special outdoor areas).

It's a, It's a, It's a, It's a Sin (Tax)!

In July, a government-commissioned independent review – the National Food Strategy – published the second of two reports suggesting a possible future strategy for the UK's food system. The plan set out 14 recommendations, under four broad categories. At the top of the list was a suggestion to "introduce a Sugar and Salt Reformulation Tax" and "use some of the revenue to help get fresh fruit and vegetables to low-income families".

The recommendation is worthy of note because it casts a light on a number of design criteria at the core of tax policy. Generally speaking, tax is used by a government to raise revenue. Usually, the justification for a tax is that the monies collected are needed to build roads, schools and hospitals, pay for social care, defend the population and enforce its laws; tax is part of the consideration citizens pay under the social contract with the state.

Whether a direct tax on income, profits and gains, or an indirect tax on consumption, very broadly (subject to any unexpected impact on behaviour), the more income, profits and gains generated, and the more goods and services consumed, the more revenue can be collected. By contrast, a "sin tax" attempts to do something quite different; its primary purpose is to affect behaviour, not to raise revenue. A "sin tax" is a lever to dissuade certain activities, to penalise the generation of particular types of income, profits and gains and the consumption of particular types of goods and services. It follows, a successful "sin tax" is one that raises ever-smaller amounts of revenue and "nudges" the market away from its (now highly taxed) sinful ways.

The recommended SSRT is a "sin tax". It seeks to affect the behaviour of manufacturers by imposing a punitive "tax" on the excessive use of sugar and salt in their products. Prices of sugary, salty goods will inevitably rise and, so the theory goes, demand and sales will fall. The health and welfare of the population is thereby improved. The SSRT actively, openly encourages [legal, non-abusive] tax avoidance because it hopes manufacturers will seek to reformulate recipes to avoid the tax – that is the whole point!

However, the proposed SSRT is also a (relatively softly) hypothecated tax. That is, recommendation is that (some of) the revenue raised is ring-fenced to be used for a specific reason – to "help get fresh fruit and vegetables to low-income families". However well-intentioned the aim, hypothecation is a problem for a tax – especially one that is, by design, intended to raise ever-smaller amounts. First, falling revenues make it ever more difficult to fund the societal benefits expected, meaning that funds need to be found from other sources. Second, the temptation for government to dip into the supposedly ring-fenced funds for other, perhaps more pressing, needs is likely to be almost irresistible. If a new tax is going to form part of government policy, it should either focus on raising revenues to pay for something the government wants to do, or (more occasionally) to dissuade a particular course of action the government does not want its citizens to do – never both. The new Health and Social Care Levy will, despite its legal ring-fencing provisions, face the same issues in due course.

In addition, there are good arguments to suggest that resorting to tax to solve society's perceived iniquities can never be justified. At best, tax used in this way will be a blunt tool. The setting of rates and thresholds are inevitably political in nature. Witness, for example, the repeated annual freeze on fuel duty (now into its 12th year) caused by the political fear of the impact on business and the economy of a sudden rise in duty rates. Those advocating for a role for taxation policy in meeting the challenge of climate change and helping to steer the nation towards a net-zero future should take note. Other criticisms might include that the incidence (that is the cost burden) of the tax is simply passed on through the supply chain, the new tax results in unexpected, possibly even more detrimental, behaviours, and/or there is no sensible, affordable alternative to the "sin" in question. Regulatory control might be thought to be a sharper, more directly impactful tool to operate on society's problems, while a broader, more generous benefits system, funded by broader, flatter taxes, might enhance the progressivity of the tax system as a whole.

So, as the Pet Shop Boys once almost said, "Everything you've ever done; Everything you ever do; Every place you've ever been; Everywhere you're going to … there is always a tax angle."

Contacts

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

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

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

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

Ian Tully
Partner, Milan
T +39 02 7274 2007
E ian.tully@squirepb.com

Robert O'Hare
Senior Tax Policy Advisor, London
T +44 20 7655 1157
E robert.ohare@squirepb.com