



Legal NewsBITE: Food and Drink Quarterly

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French Competition Authority Issues Statement of Objections for Alleged Collusion on BPA in Packaging

In October, the French Competition Authority (FCA) issued a Statement of Objections (SO) (which is effectively a “charge sheet” against suspected cartel participants) to more than 100 companies/ trade associations for alleged collusion as regards the use of Bisphenol A in food packaging (principally food cans/tins). BPA is a persistent organic pollutant commonly used in internal lacquers for tins and cans to protect the can from the product. In 2015, the French government decided to ban BPA from the French market.

The allegation is that the relevant companies colluded in not informing their respective customers as to the presence of this banned chemical pre-2015. The investigation seems to target both suppliers and purchasers of such packaging. The [press release](#) notes that the Authority will not make any other comment on the identity of the companies or associations of companies concerned or on the practices concerned; however, we understand that, for example, food producers and packaging trade associations were named.

The FCA’s jurisdiction does not extend outside France, but it is not clear whether the underlying conduct may do. In any event, were the FCA to decide that there was an infringement, this could form the basis of “follow-on” claims for damages by companies/individuals who have suffered loss as a result.

German Coalition Announces Measures to Accelerate Shift to “Sustainable Agriculture and Food Systems”

Christofer Eggert has been quoted in an [article](#) on the measures appearing in Food Navigator, reporting that food will become more expensive in Germany as a result. The plans include expanding organic farming beyond current targets; reducing the use of pesticides (taking glyphosate off the market by the end of 2023 and cutting the use of herbicides); and creating a new food label for meat, indicating how livestock was treated before and during slaughter (a welfare label) from 2022. It is likely there will be more pressure to promote the ecological sector and animal welfare will be particularly important. Compliance in the food supply chain will also become more important.



Implementation Guidance on Calorie Labelling in the Out of Home Sector

In September, the UK government issued [guidance](#) in preparation for new [regulations](#) coming into force on 6 April 2022, which introduce a duty to display calorie information for non-prepacked food, at the point where the consumer chooses the food. The guidance summarises the requirements, including in relation to calorie content, portion size and a statement of daily calorie needs. It also includes an annex with graphical examples, such as notices on a counter and on menus.

There are some exceptions under the legislation, including exemptions for some types of food and drink (such as alcohol over 1.2% alcohol by volume, loaves of bread and some single-ingredient foods, such as meat and cheese) and exemptions for some settings (such as workplace canteens, hospitals, care homes and educational establishments, unless the catering in those settings is provided by a contract caterer). However, most businesses offering catering/ food and drink to customers who will be consuming food and drink purchased outside of the home, will be affected by the new requirements. The guidance seems unlikely to cover every scenario; and the determination of portion size to meet requirements may pose particular challenges for some businesses.

European Commission Fines Conserve Italia for Participating in Canned Vegetables Cartel

On 19 November 2021, the Commission [announced](#) that it had fined Conserve Italia Soc. coop. Agricola and its subsidiary Conserves France SA (together, “Conserve Italia”) a total of €20 million for breaching Article 101 of the Treaty of the Functioning of the European Union (TFEU) by participating in a 13-year cartel for the supply of certain types of canned vegetables to retailers and/or food service companies throughout the European Economic Area (EEA). The main features of the cartel included (i) price fixing, (ii) agreements on market shares and volume quotas, (iii) allocation of customers and markets, (iv) the exchange of commercially sensitive information, and (v) coordination of replies to tenders.

In September 2019, the Commission had taken a decision under the settlement procedure finding that Coroos, Groupe CECAB and Bonduelle had breached Article 101 of the TFEU by their involvement in three cartel agreements (with total fines of over €31 million imposed). The Commission’s investigation into Conserve Italia proceeded under the standard procedure, as Conserve Italia decided not to settle the case.

The Commission has concluded that Conserve Italia participated in two of the three cartel agreements (an agreement covering private label sales of canned vegetables such as green beans, peas, peas and carrots mix and vegetable macédoine to retailers in the EEA, and an agreement covering private label sales of canned sweetcorn to retailers in the EEA). The Commission found that Conserve Italia did not participate in an agreement covering both own brands and private label sales (sold under retailers’ brands) of canned vegetables to retailers and to the food service industry specifically in France.

Environment Agency (EA) Launches Project to Tackle Greenwashing in UK Food and Drink Sectors

The EA's project is looking to standardise metrics for environmental performance in the food and drink sector. This is aimed at avoiding and preventing "greenwashing" (where environmental claims are vague or unsubstantiated) and make it simpler to understand the environmental performance of food and drink companies and their products. Key areas of focus are greenhouse gas reduction and resource efficiency. The EA is working with various other bodies on the project, including standard setting bodies, other environmental regulators and Waste and Resources Action Programme (WRAP). The EA has identified that one of the big challenges for food businesses trying to mitigate climate change, is how to effectively and efficiently communicate their environmental performance. There are many different metrics in use which makes it time consuming to compile data from different systems. It is also hard to compare performance between companies using different metrics.

First Sanction From UK ASA for Greenwashing

The UK Advertising Standards Authority (ASA) sanctioned an alternative milk brand, for its use of the claim "Good for the planet" in ads featured on the sides of buses. The regulator held that the brand had breached the ASA's CAP Code because the ad was misleading, lacked qualification and was also unclear. The ASA's formal adjudication found there was limited context to the green claim and it was, therefore, open to interpretation. The [advertising watchdog said](#) it was not clear whether the claim meant that the soy and almond-based products pictured in the ad had a net positive effect.

The ruling represents the first time ASA has ruled on its beefed-up "greenwashing" provisions. Greenwashing is the use of misleading/unsubstantiated green claims, which has been under increased focus since the publication of the Competition and Market Authority's Green Claims Code as discussed further in our blog [here](#). We, therefore, expect further scrutiny of advertisements containing environmental claims going forward.

Updated Guidance and Draft Regulations for UK Plastic Packaging Tax

HMRC issued updated guidance on 4 November called "check if you need to register for plastic packaging tax", which helps businesses to "Work out [which packaging is subject to Plastic Packaging Tax](#)"; "[Decide if you need to register for the tax](#)"; "Check [when you must register for the tax](#)"; "Find out [how to register](#)"; "Read how to [claim a credit or defer paying Plastic Packaging Tax](#)"; and "[Find out how you will complete your return](#)". The guidance is being frequently updated and supplemented, with additional text on more information about recycled plastic and invoicing added mid-month in November.

In addition, a further consultation on draft regulations (The Plastic Packaging Tax (General) Regulations 2022) closed on 1 December. The draft regulations address: the determination of recycled content; further regulations to be issued regarding evidence of recycled content; what is meant by "substantial modification" (which is important when determining the point at which the tax applies to a packaging component); export credits; registration; and measurement/weighting requirements.

The tax is likely to have a significant impact on the food and drink sector. Retailers and manufacturers that cannot source packaging with 30% recycled content will need to look at mitigating costs. Where possible, they will need to consider taking further weight out of plastic packaging, although this might impact on packaging functionality, which can be relevant to safety and shelf life.

Food Standards Agency (FSA) Response to Report on Food Safety and Standards: Increased Sampling Surveillance

A [response](#) from the FSA to a National Audit Office report on food safety and standards, comments that the FSA is seeking ministerial support and legislation to introduce a mandatory display of hygiene ratings in food businesses in England. The FSA also states that it has informed government officials and ministers that further enforcement powers are required for the National Food Crime Unit. Of particular interest in the response are comments from the FSA that it has developed a sampling strategy on the back of the National Audit Office report; has increased its sampling surveillance activities for retail and for imports; and is undertaking further surveillance sampling programmes in 2021 to 2022.

Sentencing Guidelines Consultation – Possible Impact on Food Safety Sentencing in Relation to Compensation

The Sentencing Council in the UK has opened a consultation on various amendments to the Sentencing Guidelines. These include proposals in relation to compensation and confiscations, which will be relevant to numerous sentencing guidelines. The existing [Sentencing Guideline](#) covering food safety offences provides that where an offence has resulted in loss or damage, when sentencing organisations, the court must consider whether to make a compensation order. Offences relating to food safety failings, may, of course, result in personal injury and, therefore, this could be relevant to such offences. Similar wording is included for the sentencing of individuals and organisations for health and safety and sentencing for corporate manslaughter.

It is proposed to add the following wording: "where the offence has resulted in personal injury, loss or damage the, court must give reasons if it decides not to order compensation." The Sentencing Council states: "The additional wording is not expected to affect the number of compensation orders made or the amounts awarded, however, if it did, it would be a result of courts carrying out a statutory duty rather than as a result of the change to guidelines."



Dealing With Defamation on Social Media

With social media, reputations of food businesses can be damaged or destroyed by a competitor, disgruntled/vexatious customers, employees, influencers (including celebrities) and brand ambassadors, in a matter of seconds. At the end of November, a landmark [privacy case](#) began in the UK, considering whether someone under criminal investigation has a reasonable expectation of privacy up to the point they are charged; and we are advising on a growing number of defamation claims.

A defamation claim may arise whenever there is: (i) a publication of words/images (to a wide enough number of third parties) that, (ii) refer to a claimant, and (iii) convey a meaning capable of causing serious harm to the claimant's reputation and which cannot be proved to be true or excused by any other legal defence. The risk of defamatory material being published increases in the food and drink sector whenever there is an alleged product liability/safety issue, where customer expectations are not met, or as a result of competitive marketing.

Effective management of defamation claims from the outset can often result in successful, cost-effective and swift resolutions, which can avoid the need for court proceedings. If defamatory material is published/threatened to be published, some of the key actions to consider are:

- Identifying the perpetrator
- Gathering evidence to demonstrate how the publication is damaging reputation and causing financial loss
- Sending a Letter Before Action in accordance with the Defamation Pre-Action Protocol – to prevent the initial publication or demand the removal of defamatory material, together with requests not to repeat the defamation, compensation as required and the publication of an apology
- Sending "Take down" notices to any third-party publishers (such as the providers of social media platforms)
- Implementing a PR strategy
- Reviewing internal policies, procedures and contracts
- Considering if there are any alternatives to defamation claims that can be relied upon – for example, breach of confidence, malicious falsehood, breach of privacy or negligent misstatement

It is possible that a food business could also be accused of publishing defamatory material, in the course of competitive advertising. We will cover this in our next edition of newsBITE.

UK FSA View on the Year Ahead

This quarter, the FSA has also published [details of a speech](#) given by its Chief Executive, including comments around local authority hygiene inspections getting "back on track" following the COVID-19 pandemic, with the FSA requesting a focus on higher risk premises. The Chief Executive commented that there are reports of hygiene standards having fallen over the pandemic in the "eating out" sector. We may, therefore, see a renewed focus on hygiene inspections in the UK over the coming months.

The speech also gave some insights into the FSA's views on potential risks (and, therefore, areas where we may see future regulation and/or enforcement activity) and opportunities. Opportunities include less carbon use in food production, improvements in traceability using genomics, and digital innovation for consumer risk. However, this is balanced by some concern that cell-cultured meat is energy-intensive to produce and the long-term health effects of consuming heavily processed food is unknown.



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