



## Legal NewsBITE: Food and Drink Quarterly

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### Substitution of Sunflower Oil With Rapeseed Oil Due to Ukraine Conflict

The UK's Food Standards Agency (FSA) and Food Standards Scotland (FSS) have issued a [warning](#) to UK consumers that oil is being replaced in many products due to the Ukraine conflict impacting product availability. The [rapid risk assessment](#) it has also published indicates that allergic reactions to rapeseed oil are very rare and – if they do occur – are mild, although there are some uncertainties around variations in protein content, the amount of allergenic rapeseed protein that needs to be consumed in order to elicit an allergic reaction and whether the lack of confirmed clinical data on allergic reactions to refined rapeseed oil or rapeseed more generally in the UK could be due to under-reporting. Operators may wish to consider whether it is possible to add a supplementary label to products to warn of rapeseed oil content, although the FSA and FSS announcement appears to accept that, in some cases, it will be necessary to substitute the ingredient before being able to make a change on the label.

### EU Proposes Supply Chain Due Diligence Legislation

The European Commission (EC) has [published](#) the proposal for an EU Sustainable Corporate Due Diligence Directive, to bring forward obligations for companies to carry out due diligence across their supply chain and incorporate sustainability and human rights considerations within their business strategies, decisions and oversight. There are three categories of companies that would be subject to the rules, based on the turnover and employee numbers of those companies, including companies based outside of the EU. The proposal will be of particular interest to many food and drink companies, because "agriculture" is one of the "high risk" sectors identified in the proposal, where "smaller" companies will also be caught. We have published an [article](#) with further information on the proposal.

Supply chains are, of course, coming under ever-increasing focus in the sector, not least because supply chain disruptions in the last two years, due to COVID-19 and other world events, has led to many companies adjusting their operations and their business, looking for commercial solutions from alternative suppliers and ingredients. However, at the same time, regulators worldwide are increasing their demands that manufacturers and retailers know and understand all aspects of their supply chains as they relate to Environmental, Social, and Governance (ESG) goals. Maintaining confidentiality around findings, communications, information, and reports generated in connection with supply chain ESG investigations can be challenging (as our [report](#) on US legal privilege in this context shows).

### Dealing With Defamation on Social Media Continued – What to Do When You Are Accused of Defamation

As highlighted in the [last edition](#) of NewsBITE, it is possible that a food and drink business could be accused of publishing defamatory material, in the course of competitive advertising. This can easily occur in the context of competitive advertising (among other things). When faced with such a situation, the business should:

- Check the facts in order to determine whether the business did say what was alleged and whether it is defamatory
- Consider whether there is a defence – i.e. truth, honest opinion, public interest, privilege
- If there is no or a weak defence – consider a pragmatic resolution, such as an apology, swift removal/correction of the offending material, payment of compensation and/or legal costs and expenses, etc.
- Consider the exposure – i.e. what is the extent of the risk posed by the claim so the business can determine the ideal resolution strategy
- Consider whether a third party may be more culpable, especially if the business knowingly or unknowingly repeated/published someone else's defamatory material

Defamation and reputation management can be a complex area of law. Contact [Mariyam Harunah](#) for further advice and assistance if you need to pursue or defend a defamation claim, or deal with reputation management-related issues.

### UK Calorie Labelling for Food and Drink in Restaurants, Takeaways, Deli Counters and Other "Out of Home" Settings from 6 April 2022

With only a few days to go before the UK's new Calorie Labelling (Out of Home Sector) (England) Regulations 2021 come into force, there are a number of areas where operators trying to understand and comply with the Regulations are facing challenges around interpretation and application in practice. These include uncertainties around calculations of employee numbers, definitions of exempt food, application of the requirements to drinks, portion size indications, calculations of energy value, and the application to products that are "prepacked for direct sale". The Regulations include obligations for businesses of a certain size (250 or more employees) to provide calorie labelling for "non-prepacked foods" in England, which are sold in a form suitable for "immediate consumption". They will likely lead to food service and retail businesses demanding more nutrition information from suppliers and may prompt shifts towards lower calorie alternatives. Please see our [blog](#) for further details.



### Misleading Influencer Advertising of Food and Drink Products

Food and drink influencers commonly share recipes and cooking tips on social media and can feature branded products as part of their content. In January, the UK's Advertising Standards Agency (ASA) [announced](#) a new campaign on Instagram to publicise influencers on social media who are breaching advertising rules, despite "repeated warnings and help and guidance on sticking to the rules." The ASA has been paying close attention to influencers' ad disclosures for some time now; it published its influencer monitoring report in March last year and found that only 35% of UK ads masquerading as genuine social media posts were clearly labelled and identifiable as sponsored content/paid for ads. The ASA has subsequently created a "name and shame" [webpage](#) listing non-compliant influencers. Those listed have repeatedly failed to clearly disclose ads on their social media posts and have failed to provide or uphold assurances that they would become compliant. Named influencers remain on the webpage for three months and are subject to enhanced monitoring spot-checks.

Food and drink producers intending to partner their brand with an influencer to raise brand awareness and profile and increase engagement should be aware of the increased scrutiny and may wish to review influencer contracts, policies and advertising practices in the UK, EU and US with urgency. Failure to comply is potentially serious, resulting not just in brand damage and banned ads, but criminal prosecution and fines. For more information, please see our [blog](#) on this topic.



### Bulgaria Publishes Implementation of Dual Quality Directive

Bulgaria is the latest country to implement the New Deal for Consumers Directive 2019/2161, which requires EU member states to prohibit the sale of food and drinks in the local market with the same brand but substantially different specification compared to other EU markets, by amending and supplementing its Consumer Protection Act. We have previously reported on implementation in the [Czech Republic](#) and in [Germany](#).

The directive envisages that competent authorities in member states 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. The Bulgarian implementation mirrors these provisions in the directive.

### Importation of Animal Products to Great Britain From July 2022

The UK's Department for Environment, Food and Rural Affairs (DEFRA) has published a number of new guidance documents in preparation for the requirements for Export Health Certificates (EHCs) and use of Border Control Posts for products of animal origin. These include [Model EHCs](#) and details of [BCPs](#) in the UK. DEFRA's newsletter for animal product imports notes that it will be running a series of webinars to help operators prepare for the July changes. In addition to EHCs and BCPs, pre-notification time limits will also change from 1 July 2022 (there is currently a four-hour requirement, which has been in place since 1 January, for all products of animal origin and animal by-products, as summarised on DEFRA's [website](#)).

### UK FSA Consultation on Precautionary Allergen Labelling

At the end of 2021, the FSA launched the consultation on the use of precautionary allergen or "may contain" labels on foods with responses due by 14 March. Precautionary allergen labelling (PAL) is commonly used by food and drink manufacturers, because labelling is relevant to the "safety" of food, both generally, and for those with particular health sensitivities, but the use of such labelling is not prescribed by food labelling. The consultation follows the coming into force, in October 2021, of a new requirement to label ingredients and allergens on foods that are prepacked for direct sale ("Natasha's Law") but that legislation did not govern PAL.

[Technical guidance](#) from the FSA on Food Allergen Labelling and Information Requirements reminds businesses of [best practice guidance](#) from Food Drink Europe; and cautions that use of PAL when there is not a real risk could be considered to be misleading food information, contrary to the requirements of Article 36 of the EU Food Information for Consumers Regulation (EU) 1169/2011. However, the Consultation sought views on different approaches to PAL for prepacked foods and information for non-prepacked foods, to ensure that information is communicated more clearly and consistently, in an understandable and meaningful way, to consumers, both in form and content, and is based on proportionate and standardised processes for assessing, managing and communicating the risk of allergen cross-contamination. We will report further when responses to the consultation are published.



## Proposed New Regime for Recycled Plastic Food Contact Material and Articles

In December 2021, the EU Executive [presented](#) a draft Commission regulation on recycled plastic materials and articles intended to come into contact with foods, repealing the existing 2008 EU regulation on recycled plastic food contact materials (FCMs). It also organised two webinars ([general points, for recyclers](#)) to explain the draft new regime. Since then, the European Commission has presented revised drafts to the national experts in its Standing Committee on Plants, Animals, Food and Feed, [most recently on 18 March](#). The new regime is expected to fundamentally change parts of the regulatory approach from pre- to post-market approval, and to introduce new definitions as well as requirements for the placing on the market of recycled plastic FCMs and articles, and for the development and operation of recycling technologies and processes to produce such plastic.

Two technologies will be deemed suitable from the start of the new regime. First, mechanical recycling of PET, whose input is post-consumer waste containing a maximum of 5% materials and articles not used in contact with food. This technology requires the authorisation of individual recycling processes. Second, recycling from product loops that are in a closed and controlled chain, which applies to all polymers manufactured as primary materials in compliance with Regulation 10/2011 on plastic FCMs (which governs, in particular, virgin plastic FCM). Mixed waste or waste collected from consumers are excluded as input to these loops. This technology requires a recycling scheme, which organises use and collection to control contamination, but no authorisation. Pending applications for authorisation based on other recycling technologies will be deemed terminated. However, applications under the existing regime for PET may receive an authorisation. If such an application is submitted up to nine months after the entry into force of the new regulation, the plastic FCM may remain on the market until the authorisation decision. Food business operators may use recycled plastics and articles legally placed on the market to pack food and place it on the market until the exhaustion of stocks.

For so-called novel technologies, i.e. recycling technologies on whose suitability the Commission has not yet decided, the new regime proposes an elaborate notification procedure and reporting requirements to be fulfilled by the developer, an assessment of the technology by the European Food Safety Authority (EFSA), and, eventually, a decision on its suitability by the Commission. The notification must include detailed information concerning, among others, extensive reasoning, scientific evidence and studies demonstrating that the novel technology can manufacture recycled plastic materials and articles that meet the general requirements for FCM and also ensures their microbiological safety. The data used to determine the decontamination efficiency must be obtained either by the operation of a pilot installation, or originate from commercial production. Where needed to fully establish the safety of the plastic materials and articles, it must be complemented by tests. The latest draft foresees that competent (national) authorities must verify within five months from the notification whether the requirements have been met.

The Commission is expected to put the draft regulation to a vote soon. If approved by the Committee, the Council and European Parliament will scrutinise it for three months. After that, the Commission plans to adopt its regulation during this summer.

## Scientific Opinions on Approval of Recycled Plastics as Food Contact Materials and FSA Call for Evidence on Recycled Plastic

The European Food Safety Authority (EFSA) has published a number of scientific opinions this quarter relating to food contact use of recycled plastics, including safety assessments of various processes using “Vacurema Prime” and “Starlinger iV +” technology. In each case, the EFSA panel concluded that the recycled PET obtained from the relevant process is not a safety concern, when used in line with specified purposes. The opinions can be accessed via EFSA’s webpage on [plastics and plastics recycling](#). A safety opinion relating to a safety assessment of bleached cellulose pulp for food contact use was also published, but in that case, the EFSA panel could not reach a conclusion on the basis of the information provided, due to a substantial fraction of unidentified components.

FCMs made either entirely or partially from recycled plastics must only be obtained from processes that have been assessed for safety by EFSA and authorised by the European Commission, in line with requirements under the EU’s current regulation on plastic FCMs (Regulation (EC) 282/2008). The Commission has recently proposed to change this regime later this year, repealing and replacing the current EU regulation (please see above).

The EU’s regulation on plastic food contact materials is “retained law” in the UK following Brexit. However, new applications for authorisation of a FCM use in the UK must be submitted to the FSA’s regulated products application service. In March 2022, the UK’s FSA launched a [“call for evidence”](#) on the use of recycled plastic, originating from ocean-bound/cycle schemes and similar environmental collection in FCMs. It closes in September 2022.

The opinions, proposed changes for the EU and call for evidence in the UK represent a growing focus on the potential use of recycled materials for food packaging and other food contact uses.



## EU Commission Critical of Italian Implementation of the SUP Directive

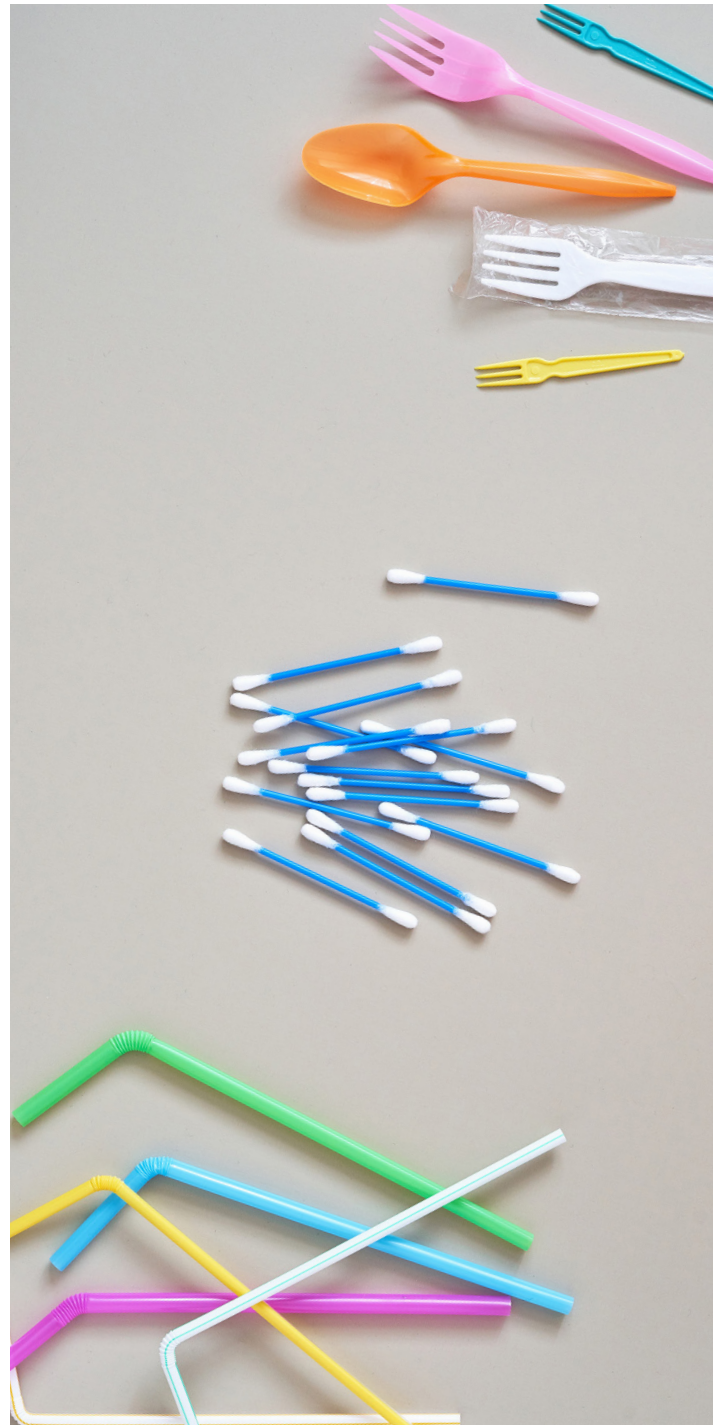
On 14 January 2022, the new Italian rules on single-use plastics in Legislative Decree 196/2021 (Decree) came into force, implementing Directive (EU) 904/2019 on the reduction of the impact of certain plastic products on the environment, commonly known as the Single-Use Plastics Directive (SUP Directive). The application methods defined in the Decree differ from the structure of the SUP Directive and from the EU Commission guidelines published on 7 June 2021 in a number of significant respects. The main divergences relate to the fact that the Decree:

- Explicitly excludes from the definition of plastics “materials such as paints, inks, adhesives, and plastic coatings, weighing less than 10% of the total weight of the product”, although no provisions in the SUP Directive allow for such an exemption
- Provides that several plastic products, including cutlery, cotton bud sticks, plates, straws and wrappers (which were already available on the Italian market by 14 January 2022), may continue to be available “until stocks are exhausted”, even if the ban of the SUP Directive should have been already in force since July 2021
- Sets forth a list of exceptions from the EU ban on certain biodegradable and compostable products, provided that they contain a certain percentage of renewable raw material (at least 40% for the period up to January 2024 and at least 60% from January 2024)

According to press reports, the EU Commission, following advance notification by the Italian government of the draft Decree, had delivered a detailed opinion objecting on the grounds that the Italian legislation deviated from the principal objective of the Directive, i.e. achieving the circular life cycle for plastics. In particular, press reports stated that the EU Commission:

- Criticised the flexible definition of plastics provided for in the draft Decree, which went against the approach promoted by the EU
- Specified that the definition of plastics also covers bio-based and biodegradable plastics regardless of whether they are derived from biomass or are intended to biodegrade over time
- Requested Italy not to apply the Decree before March 23, 2022

In light of these warnings from Brussels, there is a risk that the EU Commission may start an infringement procedure against Italy, which could lead to the EU Courts declaring that the definition of plastics contained in the Decree is not compliant with EU law. Companies manufacturing and selling products in Italy – including those operating in the food and beverage sector – should watch this space.



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