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Delay to New Rules in England Restricting Promotion and Advertisement of High Fat, Salt and Sugar (HFSS) Products (But No Delay in Relation to Placement Provisions)

Certain restrictions on HFSS products, due to come into effect on 1 October 2022 as part of the Food (Promotion and Placement) (England) Regulations 2021 (SI 2021/1368), are being delayed by one year. The government has stated that the delay is to allow time to review and monitor their impact on the rising costs of living. Once in effect, the measures will restrict multi-buy deals of HFSS products (for example, by limits on volume price promotions such as “buy one get one free”, and on free in-store refills of non-pre-packaged sugar-sweetened drinks).

In parallel, the government has also delayed new rules on adverts for HFSS products. In June 2021, following consultations in 2019 and 2020, the government announced new advertising rules, which include a 9 p.m. watershed for advertisements of HFSS foods for television and UK on-demand programmes, and an outright ban on paid-for online adverts for HFSS products. The Health and Care Act 2022 legislated both restrictions, and the act received Royal Assent on 28 April 2022. However, these measures have also been delayed by one year and are now expected to come into force in January 2024. The government states that the delays will allow industry to adapt and to account for delays to the Health and Care Bill receiving Royal Assent, while other bodies have criticised the delays due to the impact that they will have on childhood obesity.

The restrictions on where HFSS products may be placed within relevant premises are not, however, being delayed and are still due to come into force on 1 October 2022. The restrictions around placement in stores are likely to be particularly challenging for food and drink manufacturers who have targeted gondola/aisle ends to assist with brand awareness and promotion. It is worth noting that although the restrictions under the regulations do not generally apply to restaurants and the “out of home” sector, they will be caught in respect of soft drink refills, as the guidance makes clear that free refills of drinks in scope are not permitted in such venues. It is also worth noting that the regulations follow a “pattern” seen for other legal requirements recently, in that they only apply to businesses over a certain size, but franchised operations will “count” towards employee numbers for the purposes of the calculation (a similar “test” applied to the regulations introduced for nutrition labelling in the out of home sector, which came into force in April).

[Implementation guidance](#) issued by the government explains how the new rules will work, scope and liability, as well as and offering recommendations and examples of best practice. Failure to comply with the new regulations can be enforced by food authorities (essentially local authority Trading Standards or Environmental Health Officers) in a similar way as failures to comply with food information requirements, i.e. via improvement notice, with a failure to comply with an improvement notice being an offence (with a fixed penalty of £2,500 or prosecution with an unlimited fine). Improvement notices can be appealed to the magistrates’ court. However, the guidance encourages enforcement authorities to take a “pragmatic” approach to enforcement and to focus on supporting compliance rather than penalising non-compliance, including conversations with businesses, as opposed to immediate service of formal notices.

Nevertheless, businesses in the food and drink sector should familiarise themselves with the guidance ahead of the changes in October to prevent risks of enforcement action.



Czech Food and Drink Federation Launches New Database for Reformulation Efforts

Product reformulation, an expensive and time-consuming process, is increasingly recognised as one of the most effective ways of addressing obesity and reducing consumption of fats, sugar and salt. The European Commission (EC) is set on promoting initiatives to stimulate reformulation of processed food across the EU. In the Czech Republic, the latest effort to deliver reformulation in the food and drinks industry is a new online database for consumers, manufacturers, etc. Users will be able to search for food and drinks products with improved ingredients, allowing them to make choices that reduce their intake of calories and salt from sugar and saturated fat in processed food. The aim of the database is to facilitate a shift to a healthier diet, as encouraged by the EC within its broader “[Farm to Fork](#)” strategy.

UK Food Standards Agency (FSA) Adds Fully Refined Corn (Maize) Oil to Previously Issued Advice to Consumers Regarding Sunflower Oil Shortages

Over the last few months, most food and drink businesses will be aware that the supply of sunflower oil has been impacted by the conflict in Ukraine. In recognition of this challenge for the food industry, the FSA published a list of oils that may be used to replace sunflower oil in some products temporarily without this being reflected on labelling. The list was initially [set out](#) in May 2022 as rapeseed oil, fully refined palm oil, fully refined coconut oil and fully refined soyabean oil.

The most recent addition to the list, in June 2022, is refined corn (maize) oil (the FSA issued a [press release](#) and an accompanying [rapid risk assessment report](#), which found that risk of allergic reactions from the substitutes is very low and, in any event, mild). Commenting on the latest addition, Emily Miles, Chief Executive of the FSA, said that refined corn oil is a healthier alternative to some in the initial list, and impressed on businesses the importance of using “healthier, more sustainable oils if substituting”.

Oils other than the five listed above may still be used as alternatives to sunflower oil, but this must be reflected on the labelling, as there is no FSA guidance to inform competent authorities that they should not take action in respect of incorrect labelling for alternative oils. The FSA clarified that the permitted substitutions apply only to products where sunflower oil is an ingredient only (e.g. not a whole bottle of sunflower oil).

These announcements by the FSA, which effectively provide a general “exemption” from legal requirements for accurate food labelling in respect of these products, are unusual, reflecting the significant and serious impact shortages caused by the conflict are having on the supply chain of businesses using sunflower oil products.

Blockchain for Exports – Italy Launches Tech Initiative to Tackle Counterfeiting and Fake Italian-sounding Products

In April 2022, the Italian Trade & Investment Agency (Agenzia ICE) launched an initiative to provide companies exporting Italian food/beverage products with a direct-to-consumer solution allowing them to trace the origin of their goods through the use of blockchain. Consumers will be able to scan a QR code on the label of a product using their mobile telephone to instantly view a dedicated webpage confirming its origin.

This service has been designed to protect “Made in Italy” products from the threats of counterfeiting and the phenomenon of fake Italian-sounding products (i.e. products that are not Italian, but have Italian-sounding names or rely on Italian stereotypes for marketing purposes). It is predicted that the use of blockchain to trace product origin should also add value to authentic Italian products, especially in foreign mature markets.

Companies meeting certain requirements may sign up for the project by submitting an application by 31 July 2022. Agenzia ICE will provide the service and any associated assistance free of charge to the first 300 applicant companies for an initial period of 18 months. After that initial period, companies may decide to continue using the service while bearing the costs themselves. Information on the costs has not yet been made available.

Further information on this initiative and the application process can be found on the website of [Agenzia ICE](#) and in this [information brochure](#).

European Commission Consults on the Revision of Food Waste Rules

The EC launched an [online public consultation](#) on the revision of Waste Framework Directive 2008/98 (WFD). The survey consists of four sets of questions that address policy areas already provided in the call for evidence published earlier this year (see [Sustainability Outlook January 2022](#)): waste reduction and prevention, food waste reduction, separate collection systems, and regulatory and economic incentives. The public consultation is open until 16 August 2022. The EC plans to adopt the proposal of a directive in the second quarter of 2023. Then, it will follow the ordinary legislative procedure. The EC is working to set food waste reduction targets for the first time, and the Commissioner for Health and Food Safety has confirmed that the EC intends to “reduce the environmental footprint of food systems and accelerate the EU’s progress towards our global commitment to halve food waste by 2030”. There is, therefore, likely to be a growing focus on food waste in EU member states over coming months.



European Commission Consults on a Sustainable Food Systems Initiative

The EC has [opened](#) a public consultation on a sustainable food systems framework initiative. This initiative aims to mainstream sustainability in all EU policies related to food and strengthen the EU food system.

The public is asked about policy measures similarly to those provided in the roadmap from September 2021. Those are, for example, establishing sustainability principles and objectives, and setting general minimum standards to be met for foods produced or placed on the EU market that could be linked to environmental and social aspects (including legitimate and proportionate requirements for imported food products). The consultation also asks interested stakeholders about establishing sustainability labels for food products (i.e. information on the nutritional, climate, environmental, animal welfare and social (fair and just remuneration of producers) aspects) and under which form (voluntary/mandatory; for all products/ only EU products). It provides some questions in relation to public procurement of food served in schools and public institutions.

The survey is open until 21 July 2022. The EC plans to adopt the proposal (whose legal form is still unknown) in Q4 2023. Then, it will be sent to the co-legislators (European Parliament and Council) for examination.



End of the Five Star Burnt Lasagne? UK Competition and Markets Authority (CMA) Plans to Tackle Fake Online Reviews

In April 2021, the CMA published proposals to protect consumers from fake online reviews. A new law is proposed to make it “clearly illegal” to pay for the writing or hosting of fake online reviews with new powers for the CMA to fine businesses up to 10% of global turnover (or £300,000 in the case of individual traders) for breaches. It would also become an offence to offer to write or commission fake reviews.

Websites hosting reviews would be expected to take “reasonable steps” to check that those reviews were genuine. No guidance has yet been provided on what such “reasonable steps” might entail (nor indeed what “genuine” might mean, one person’s “burnt” lasagne being another’s “well done and crispy”) and while the proposals have been broadly welcomed by industry and consumer groups, concern has also been expressed that any new law should not place unnecessary additional burdens on businesses, particularly in already challenged sectors such as hospitality.

For further information on this story, please see the [full article](#) recently published on our blog.

UK Advertising Standards Authority (ASA) Publishes Top Tips to Businesses Advertising Free Trials

At the end of May, we [reported](#) that the ASA has recently shared guidance on how to advertise “free trials” responsibly. [In our previous blog](#), we discussed how the CMA has taken an interest in the area of subscription-based contracts, which often contain “auto-renewal clauses”; whereby the agreement will auto-renew unless the consumer cancels. “Free trials” can be an excellent way to appeal to new customers and frequently go hand-in-hand with subscription-based contracts. Often when a “free trial” of a service ends, the customer will automatically enter into a subscription-based contract.

Food and drink businesses should be mindful that there are certain rules that govern advertising a “free trial” and the [ASA has helpfully shared its top tips](#):

1. Do not use the term “free trial” to describe “satisfaction or your money back” offers, or offers for which a non-refundable purchase is required. In order to use the phrase “free trial”, whatever is being offered must be genuinely “free” to the consumer.
2. Make all material information and significant conditions of a free trial clear and upfront, including what a consumer needs to do in order to take up the free trial; whether a paid subscription starts automatically after the trial unless cancelled; how and when to cancel, if arrangements are different from what consumers might reasonably expect; extent of the financial commitment if the subscription is not cancelled during the trial; and any other significant conditions.

Crucially, the ASA clarified that businesses simply stating “T&Cs apply” or “See website for terms” or similar is unlikely to be considered sufficient to make conditions clear to customers.

Crackdown on Gambling Ads Featuring Sports Stars: New UK Advertising Rules

Well-known food and drink brands often sponsor sports clubs and/or competitions/tournaments. Therefore, new rules around gambling advertising may be of particular relevance to such brands. The Committees of Advertising Practice (CAP) have been focusing for some time on protecting children and young persons through their regulation of gambling advertising. Under the current rules, gambling ads are prohibited only if they appeal “particularly” to under-18s, which CAP considers means if an ad is likely to appeal more to under-18s than to adults.

In April 2022, CAP announced a tightening of these rules, which will come into effect on 1 October 2022. CAP had previously launched a consultation in October 2020 considering the need to reduce appeal of gambling ads to under-18s and other vulnerable people. Significantly, the new rules announced by CAP prohibit all gambling ads that “strongly” appeal to under-18s (regardless of whether such ads are more or less likely to appeal to adults than they are to under-18s).

The ASA is responsible for enforcement of the advertising codes. It has stated that it will take a “strict line approach” when applying the “strong” appeal test, considering “both specific pieces of ad content and the general impression given by the ad” CAP has provided [guidance](#) (ASA Guidance) to assist marketers in interpreting the requirements of the new rules.

The ASA Guidance:

- Sets out types of ad content and approaches that are particularly high-risk (including animated content, references to video games and youth-related content like music by artists popular with under-18s)
- States restrictions and limitations that must be adhered to when incorporating such content in gambling ads, notably limiting use/casting in such ads of persons/characters likely to appeal to under-18s

For further discussion of these issues, please refer to our recent [blog post](#).

FSA Plans New UK Food Safety Network to Tackle £9 Billion Food Poisoning Challenge

In June 2022, the FSA and the Biotechnology and Biological Sciences Research Council [announced](#) they had invested £1.6 million into a new “UK Food Safety Network.” This network is intended to serve as an innovation hub for food industry, food and health policymakers and academia, and will be hosted by the Quadram Institute.

The FSA said the new network’s objectives are to:

- Assemble a community of UK food producers, food policymakers and scientific researchers who collectively can take robust actions toward improving food safety
- Identify areas of research need and opportunity that, in the view of food stakeholders and network members, will have meaningful impacts on UK food safety
- Coordinate new collaborative research activities that will promote the application of science towards the food safety challenges identified by our food system community
- Host training promoting skills development, interoperability and relationship-building between our food system community
- Translate the knowledge generated within the network to food safety stakeholders, and to upcycle existing information and technologies relevant to food safety that have not yet been applied more broadly

The UK Food Safety Network has been created in response to the estimated 2.4 million cases of foodborne illnesses per year in the UK, linked often to microbial pathogens carried into food from the environment, livestock or people. The FSA estimates costs from these illnesses at some £9 billion annually. The supply of unsafe food is, of course, also an offence and this focus on “robust actions” may indicate more proactive monitoring and enforcement in connection with microbes such as *Campylobacter* and *Salmonella*.



UK FSA Makes Final Call to Businesses to Submit Evidence for the Cannabidiol (CBD) List

As we have previously reported, in March 2022, the FSA published a [list](#) of CBD products linked to novel food applications, which may stay on the market in England and Wales (subject to further consideration). Products omitted from the list must be removed from the market. The FSA says that it plans to “lock down the CBD list by the end of June”, and made a [final call](#) to businesses to provide evidence by 26 May 2022 that their products were linked to a credible application and were on the market before February 2020. Any products not on the list by the end of June will be prohibited from being sold in England and Wales, and local authorities will be responsible for pursuing companies to remove them from the market voluntarily or face enforcement action. See our [blog post](#) about the CBD product list for more details.

European Food Safety Authority (EFSA) Seeks Comments on Phthalates in Food Contact Materials (FCMs)

EFSA received a mandate to conduct preparatory work for the re-evaluation of phthalates, structurally similar substances and replacement substances that are potentially used as plasticisers in FCMs from the EC (please also see [Sustainability Outlook April 2022](#)). To this end, EFSA [invited](#) national food authorities, research institutions, academia, food business operators and other stakeholders to submit data on migration or occurrence of plasticisers in FCMs. The mandate includes a request to consider migration data in the context of the dietary exposure assessment. EFSA aims to collect results generated in experimental studies on FCMs before their actual use, e.g. tests on migration of plasticisers from FCMs using food/food simulants, or tests on the concentration of plasticisers in FCMs. We will report further when the relevant report is published, including any impact of the conclusions on food business operators.

European Commission Publishes Evaluation of Food Contacts Materials Regulation

The EC has also [published](#) the impact assessment on the evaluation of the Food Contacts Materials (FCM) Regulation 1935/2004, as well as the opinion of the Regulatory Scrutiny Board (i.e. independent advisory body within the EC).

The impact assessment indicates that the FCM Regulation is broadly effective in terms of scope, definitions and traceability rules to achieve the set objectives. With regard to specific rules of plastic FCMs (which are under Regulation 10/2011), they largely ensure the safety of starting substances used in their manufacture, based on a transparent EU risk assessment and authorisation process, but it is technically complex and resource intensive. As the main deficiencies of the legislation, the impact assessment points at the lack of specific rules for FCMs besides plastic, the inability to demonstrate compliance, the unavailability of information in the supply chain, the challenges in enforcement and lack of prioritisation of the most hazardous substances. Also, the current legislation and approaches are largely incompatible with current trends in the switch from materials synthesised from traditional chemistry such as polymers to more novel or natural, sustainable alternatives.

The EC will conduct an open public consultation on the revision of the FCM Regulation 1935/2004 later this year and is [expected](#) to adopt the proposal for a revised regulation in Q3 2023, which may address some of the gaps described above. Then, it will be sent to the co-legislators (European Parliament and Council) for examination.



New German Legislation Requiring Mandatory Supply Chain Due Diligence for Human Rights Violations and Environmental Breaches

From January 2023, large businesses in Germany will be required to exercise due regard for human rights and environmental due diligence in their supply chain. The obligation will apply to companies (irrespective of structure) whose central administration, headquarters or registered offices are in Germany, and who have more than 3,000 employees based in Germany (including secondees to other countries). Foreign companies with a branch office in Germany with over 3,000 employees will also be caught. However, obligations will vary according to the company's ability to exert influence, specifically in relation to their own business area; the actions of contractual partners; and the actions of other (indirect) suppliers. Further guidance on the meaning of "due regard" and the "ability to exert influence" is expected from German authorities in summer 2022.

The core elements of the due diligence obligations under the new law, derived from the National Action Plan for Business and Human Rights (NAP), are establishing a risk management system, designating a responsible person in the organisation, regular risk assessments, policy statements, setting up preventative measures in relations with suppliers and indirect suppliers, remedial action, setting up a complaints procedure, documenting and reporting obligations. In terms of minimising risks, the NAP states that "The measures taken should adequately address the severity of the potential and actual impact on human rights" and that "in some cases, specialised training for certain employees in the company can help, in other cases, training of suppliers is needed. Other problems can be solved by making changes to management processes or supply chains, for example, through reformed procurement procedures or working with suppliers to improve their management of human rights risks." In practice, these may look like due diligence questionnaires requiring companies to confirm certain matters in relation to their business and direct supply chain.

BAFA (German Federal Office for Economic Affairs and Export Control) is expected to have far-reaching powers from 2023 to implement the new law and monitor whether companies are adequately meeting their statutory due diligence requirements. Incentives to comply are significant: companies that do not cooperate will face a €50,000 fine, and intentional or negligent breaches will be met with a fine based on total turnover (up to €800,000 or 2% of annual turnover for companies whose turnovers exceed €400 million). From January 2024, the employee threshold will drop to 1,000 employees for both German and foreign companies, which is expected to quadruple the number of affected companies.

For more information, please see the German Business and Human Rights [website](#).

It should be noted that the German legislation precedes EU proposals for mandatory supply chain due diligence, which will potentially be much broader, as they would apply in all EU member states and would potentially apply, in the first phase, to EU companies with more than 500 employees and a net turnover of over €150 million worldwide; and, in the second phase, to companies with more than 250 employees and a net turnover greater than €40 million worldwide "operating in high impact sectors".

With complex supply chains and ingredients such as agricultural products often originating in developing countries, it is likely that companies in the food and drink sector that are within scope in terms of their size will be affected by these provisions.



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