



## Legal NewsBITE: Food and Drink Quarterly

September 2022

### Another UK Supermarket To Scrap “Best Before” Dates on Almost 300 Lines)

On 30 August, Sainsbury’s [announced](#) that it would be making a number of changes to its packaging labels across a range of fresh produce. Sainsbury’s has already begun removing “best before” dates, with the expectation of removing these permanently from nearly 300 lines. This follows the trends being seen at other supermarkets, such as [Tesco](#) and [Asda](#). In perhaps a slightly more unusual move, Sainsbury’s has also made the decision to remove “use by dates” on all of its own-brand yoghurts, replacing them with best before dates, although that follows on from Morrison’s [announcing](#) earlier this year that it would move to best before dates for milk.

Use by dates are required for foods that are highly perishable from a microbiological perspective and therefore likely, after a short period, to constitute an immediate danger to human health. They are typically used for food that is required to be refrigerated, including dairy products such as yoghurts. However, Sainsbury’s has indicated that testing shows that its yoghurt is safe to eat after its expiry date.

The goal of these changes is to reduce waste and lessen environmental impact. The Waste and Resources Action Programme (WRAP) has published [research](#) showing that approximately 54,000 tonnes of yoghurt is wasted per year, of which 50% is believed to be unopened packs of yoghurt. However, businesses also need to be aware of food safety and labelling obligations. The EU regulation on food information for consumers ((EU) No. 1169/2011) prescribes the use of best before and use by dates on pre-packaged foods, although there are some exceptions that allow the removal of dates of durability for certain products, including fresh fruit and vegetables. However, businesses also need to ensure that foods being sold are safe and fit for human consumption. Any failure to do so would amount to non-compliance with the provisions of the General Food Law Regulation ((EU) No. 178/2002) and the Food Safety Act 1990, and an offence under the Food Safety and Hygiene (England) Regulations 2013. As we have previously [reported](#), fines for breaches of these requirements can be significant (with a supermarket being fined over £7.5 million for selling food beyond its use by date in recent years).

For further detail, please see our [separate article](#).

### Brexit – Further Extension of Transition Periods for Food Labelling until 2024

On 6 September, [regulations](#) were laid before the UK Parliament to amend transitional provisions that relate to various food labelling requirements. The amendments, which only apply in England (but will likely also be applied through separate but similar regulations in the devolved administrations), extend previous transitional arrangements, which were due to expire at the end of September 2022, so that they continue to apply until the end of 2023 (i.e. the new requirements will now operate from 2024). The changes will come into force on 30 September, and will mean that UK food business operator names and addresses will not be required on pre-packed foods for the duration of the extended period (as a result of amendments made to the transitional provisions under the Food Information Regulations 2014); the deadline for UK/EC identification marks in Great Britain, for products of animal origin, will also be extended, along with the deadline for changes to provisions relating to specific products such as eggs, honey, olive oil, fruit and vegetables and certain meats.

### Perspectives on the Evolving Regulatory Landscape for US Food and Beverages

Food businesses based in the EU and the UK that trade in, or with, the US should be aware that the regulatory landscape in the US has different challenges and trends (although often overlapping with those in Europe). Current safety challenges and risks facing the food and drink industry in the US include risks from novel foods and health claims; supply chain risks (highlighted by a recent infant formula shortage); and e-commerce risks, including cybersecurity, the potential for exploding packaging and a scrutiny of labels for startups. Our US colleagues expect, in the coming months, a greater scrutiny of internal audits and recall policies; increased requirements for traceability of high-risk foods; and use of “smart tech” to improve traceability, outbreak response and safety cultures. In future, as with the EU and the UK, sustainability and packaging legislation is likely to evolve, with pressure on companies to reduce their carbon footprint. [Read our full article on the evolving regulatory landscape in the US.](#)



### The Cost of Living Crisis – Responding to Current Workplace Challenges in the UK

The current global economic and political landscape is generating unprecedented challenges for employers, including those in the food and drink sector. Notably, we are seeing employees and trade unions pushing for inflation-beating pay increases to cope with higher prices, and increasingly seeking to reopen closed pay deals. At the same time, the labour market remains tight, with vacancies at historically high levels. Employers are also facing challenges from unions that are threatening industrial action unless pay deals reflect increasing inflation.

Consequently, many businesses are facing the very real prospect of an autumn (and possibly a winter) of industrial discontent if demands are not met. We have seen an upswing in trade union-related queries in the last few months, ranging from handling stalled pay negotiations, to responding to the threat of industrial action if a deal cannot be reached. Companies are also under pressure to give larger-than-usual pay increases, and an increasing number of businesses are contemplating making one-off cost-of-living payments to support their staff. Our Labour & Employment team has [published](#) some useful resources on this topic.

### Welsh Government (WG) Publishes Its Response to Consultation on Banning Single-use Plastics

The response, accompanied by a [summary of responses](#), relates to a ban that was originally planned for the first half of 2021. The consultation, which closed in October 2020, proposed that the banned plastics be the same as those banned under Article 5 of the EU Single-Use Plastics Directive, namely plastic-stemmed cotton buds, cutlery, plates, stirrers, straws, balloon sticks, expanded polystyrene food containers and cups, and oxo-degradable products. In its response, the WG states that a large majority of the 3,581 responses to the consultation were in favour of banning the suggested single-use plastic products. It will, therefore, introduce an Environmental Protection (Single-use Plastic Products) (Wales) Bill into the Senedd Cymru in 2022-23.

### Consultation on Edible Insects and Novel Food Authorisations Published

The UK's Food Standards Agency (FSA) published the [consultation](#), which it says seeks to bring clarity to the British edible insect industry. The FSA has set out plans that will allow edible insects to remain on the market while they go through the process of a novel foods authorisation. The edible insects can only remain on sale if they were marketed in the EU or the UK before 1 January 2018 and were the subject of an application for EU authorisation as a novel food on or before 1 January 2019. Applications must now be made to the FSA (or Food Standards Scotland (FSS) in Scotland) by 31 December 2023, in order for the edible insects to remain on the market while the application is assessed. This is a similar approach to that which was adopted for cannabidiol (CBD), where there were already numerous products on the market before novel foods authorisations were submitted.

### London School of Economics Publishes Its Report on 2022's Global Trends in Climate Change Litigation, Highlighting Increased Actions Against Corporates in Food and Agriculture Sectors

The report's goal is to help readers understand the ways in which the law is being used as a tool to advance a variety of often inconsistent climate-related agendas. It sets out some main messages – first, on a global scale, the cumulative number of climate change-related cases has more than doubled since 2015, bringing the total number of cases to over 2,000. Around one-quarter of these were filed between 2020 and 2022. Second, climate litigation has become an instrument used to enforce or enhance climate commitments made by governments, with 73 “framework” cases challenging governments’ overall responses to climate change. Third, in the last 12 months, further legal cases have been brought against fossil fuel companies, especially outside the US. Although most cases continue to be filed against large fossil fuel companies, they increasingly target the food and agriculture, transport, plastics and finance sectors. Finally, the number of climate litigation cases with strategic ambition (i.e. to bring about a broader societal shift) continues to rise.

Five recent cases specific to the food and drinks industry are set out in a [separate LSE publication](#). In *Envol Vert et al v. Casino*, it was claimed that the defendant, a French supermarket chain, was acting inconsistently with the French duty of vigilance law through its involvement in cattle industry in South America. Next, the pork producer [Danish Crown](#) was challenged over how “climate friendly” its pork is. Finally, three cases were brought against [Oatly](#) for greenwashing.

### Dawn Raids in the Online Food Delivery Sector

On 6 July 2022, the European Commission (Commission) issued a [press release](#) confirming that it had carried out unannounced inspections (dawn raids) at the premises of companies active in the online ordering and delivery of food, groceries and other consumer goods in two member states.

The Commission has concerns that the relevant businesses (and possibly others) may have violated Article 101 of the Treaty on the Functioning of the European Union, which prohibits cartels and restrictive business practices. The Commission officials were accompanied by their counterparts from the German and Spanish competition authorities. The investigation concerns an alleged agreement or concerted practice to share national markets for the online ordering and delivery of food, groceries and other consumer goods in the EU.

Dawn raids are a preliminary step into the tackling of suspected anticompetitive practices. The fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour, nor does it prejudice the outcome of the investigation itself. Having suspended the use of dawn raids since the beginning of lockdowns in early 2020, the Commission and other national competition authorities are starting to use these powers again.





### Global Feedback (Feedback) Legal Action Over Failings of England's Food Strategy

A campaign group for regenerative food production has issued a letter before action for judicial review to government. Feedback contends that government has failed to support the transition to a low-carbon diet with a reduced meat and dairy consumption. The group claims that the government's food strategy (FS), published in June 2022, does not take into account advice on the role of cutting consumption of meat and dairy in achieving net-zero. The group's letter before claim states that the FS "made no mention of, and showed no consideration of, the clear advice on meat and dairy reduction..." Feedback has requested that the FS be rescinded, asked for details of the documents considered by the secretary of state in order to adopt the FS, and contend that the secretary of state is required to explain any decision not to follow the advice given. News of the legal challenge was reported in the [national press](#), and underlines the continuing focus on products of animal origin by environmental pressure groups and activists.

### UK's FSA and FSS Launch an Annual Review of Food Standards

The [report](#) is the first of what will be an annual publication. Its "cautious conclusion" is that food standards in the UK have largely withstood the challenges posed by Brexit, COVID-19 and disruption caused by the Russia/Ukraine conflict. However, it also warns of future challenges and identifies two key concerns. First, the number of food safety inspections has fallen due to pressure on the resources of local authorities. Second, the risk of unsafe food entering the UK market has increased due to the delay in establishing import controls for high-risk food and feed coming from the EU to the UK. Businesses should be mindful of the report's conclusions and note that the concern highlighted regarding inspection rates may suggest that inspection and enforcement activity is likely to increase as authorities seek to address this.

### Food Sector Stress and Distress – De-risking Supply Chains

Supply chain issues have been compounded in the food sector recently as a consequence of the Russia/ Ukraine conflict and the associated sanctions on Russia, which have impacted supplies of raw materials and products (e.g. wheat, fertilisers and oils). They were already under pressure as a result of the ongoing COVID-19 lockdowns in China, delays in shipping, availability of materials, Brexit fallout and rising inflation. Add to that hikes in energy prices, fuel costs and shortages of HGV drivers, and it is understandable that we are seeing significant supply chain stress and disruption. We have published a [guide](#) on de-risking your supply chain, which covers issues including the identification of pinch points, how to stress test your supplier, and managing supply chain stress.

Continuing pressures also mean that early identification of distress within their own businesses (and importantly companies they do business with) can be critical for food and drink manufacturers and suppliers. Signs of distress can range from loss-making divisions, through increasing debtor days, to disputes (and many more besides). Identifying such distress could allow a number of options to be explored, to help mitigate or avoid a distressed scenario, whether it be management of cash flows and balance sheets, dealing with debts, making changes in supply chains or obtaining additional finance. More detail is within our [publication](#) on how to identify distress in your UK business and companies you do business with.

### 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 deadline for submission is 1 November 2022. 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, and will include discussion on any impact of the conclusions on food business operators.

### Proposals to Amend UK Regulations to Permit Addition of Folic Acid to Non-wholemeal flour

A [consultation](#) has been published on a proposal to amend the Bread and Flour Regulations 1998 and Flour Regulations (Northern Ireland) 1998, to include mandatory fortification of non-wholemeal wheat flour with folic acid, to help avoid neural defects in pregnancies. This is already mandatory in a number of other countries.

The regulations "primarily mandate the compulsory fortification of milled white and brown non-wholemeal wheat flour that are manufactured and sold in the UK for public health reasons with added calcium, iron, thiamine and niacin to protect against nutrient deficiencies within the UK population."

The consultation overview highlights that over 99% of British households buy bread, and one-quarter of all groceries in the four largest supermarkets contain flour, so these proposals have the potential to affect many stakeholders. The consultation will close on 23 November 2022, although the UK government had previously announced the proposal, so many in the sector will already have been expecting (and possibly preparing for) reformulation.

### Novel Sugar Seeks Regulatory Approval in Europe

Allulose, a naturally derived rare sugar that was approved for use in the US in 2012, is reported to be going through the novel foods authorisation process necessary to gain regulatory approval in the EU. It is claimed that it has only 10% of the calories of sucralose, and it has the backing of several influential food ingredients companies. It is expected that approval from EFSA could support efforts from industry to achieve a reduction in sugar consumption. Recent studies have been conducted to investigate how allulose might fair in the EU market, both against other sweeteners and against conventional sugar itself. According to [research](#) undertaken by academics and published in *Nutrients*, in which German consumers were invited to rank the most important attributes in a sweetener, a sugar-like taste and perceived "naturalness" of the base sweetener came out as top priorities. The research authors expect allulose to meet a number of these consumer priorities, in particular since it has similar conventional properties to sugar (e.g. texture and a "typical sugar taste") and occurs naturally in fruit. Although this is only in small quantities, the authors state that "Extracting ingredients from sugar beets for sugar production could fulfil the consumers' desire for naturalness." The research also compared the benefits of allulose against conventional sugar, and responses indicated that consumers' priorities were for the product to have no influence on blood glucose level, and for it to be calorie free. The study concludes that allulose is likely to be well received in the EU since it can produce bulk sweetness and appears to meet consumer priorities. Allulose is reportedly also authorised as a food ingredient in Japan, Mexico, Singapore and South Korea.



## Contacts

### Nicola Smith

Partner, Birmingham  
T +44 121 222 3230  
E [nicola.smith@squirepb.com](mailto:nicola.smith@squirepb.com)

### Matthew Lewis

Partner, Leeds  
T +44 113 284 7525  
E [matthew.lewis@squirepb.com](mailto:matthew.lewis@squirepb.com)

### Jenny Tharp

Associate, Cleveland  
T +1 216 479 8537  
E [jennifer.tharp@squirepb.com](mailto:jennifer.tharp@squirepb.com)

### Anita Lloyd

Director, Birmingham  
T +44 121 222 3504  
E [anita.lloyd@squirepb.com](mailto:anita.lloyd@squirepb.com)

### Hannah Kendrick

Partner, Leeds  
T +44 113 284 7620  
E [hannah.kendrick@squirepb.com](mailto:hannah.kendrick@squirepb.com)

### Jon Chesman

Senior Associate, Leeds  
+44 113 284 7190  
[jon.chesman@squirepb.com](mailto:jon.chesman@squirepb.com)

### Sam Hare

Senior Associate, London  
T +44 207 655 1154  
E [sam.hare@squirepb.com](mailto:sam.hare@squirepb.com)

