Postponement of "Not for EU" Labelling in Great Britain

In our March edition of newsBITE, we reported on the UK government's consultation on the introduction of mandatory "not for EU" labels on retail products across Great Britain. This consultation sparked fury among many operators, because of the additional costs and complexities associated with the proposal; it also caused confusion amongst importers into the UK, which were unsure what would be required, and by when.

In September, the press reported that a UK government spokesperson had said that the scheme would be postponed and reviewed by the new government; finally, on 30 September 2024, the government's website was updated to confirm that it would not proceed with introduction of such mandatory labelling on 1 October. However, the government does intend to continue to monitor supplies into Northern Ireland, and so has not "shut the door" altogether on this proposal. That said, the postponement is indefinite, i.e. there is no set date for a review to take place by.

This does not affect requirements for "Not for EU" labelling for products moving to Northern Ireland, under the Northern Ireland Retail Movement Scheme (NIRMS). The second phase of NIRMS comes into effect on 1 October 2024 and will require individual labelling at product level for dairy products, but this is only for products that are being moved from Great Britain to Northern Ireland where there is no intention for onward supply to the EU. It will not impact products going from the EU to Northern Ireland.

Advertising of CBD Products Through Social Media

The decision by the UK's Advertising Standards Authority (ASA) regarding social media posts by former footballers in relation to Supreme CBD's products have sparked discussion in the press. Carlton Daniel and Sera Kaplan discussed this in our blog.

The ASA held that under the Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code), the posts were marketing communications and, as such, should have been obviously identifiable. Such marketing communications must make clear their commercial intent if it is not obvious from the context. In addition, the posts made several claims that would be interpreted by consumers as claims to prevent, treat and cure human disease. Under the CAP Code, claims that state or imply that a food could prevent, treat or cure human disease are prohibited. This mirrors the obligations under European Union laws governing food information for consumers around fair information practices.

One of the individuals responded to the ASA to say he had immediately withdrawn the facility for social media posts to be sent on his behalf and would ensure that all future posts would be labelled clearly as marketing material.

This ruling serves as a reminder to CBD brands and advertisers, and food businesses more generally, about the importance of their disclosure obligations (i.e. making ads clear to consumers, which the relevant UK regulators recommend is done using "#ad"). Moreover, this ruling makes it clear that allowing someone else to control an individual's social media account is not a defence to breaches of advertising regulations.

Loss of Trademark for Poultry Products in Europe due to Lack of Use

Following a recent decision of the European Court of Justice (ECJ) in Luxembourg, a quick-service restaurant brand lost the exclusivity on the trademark "Big Mac" over poultry products, due to lack of its use for five consecutive years.

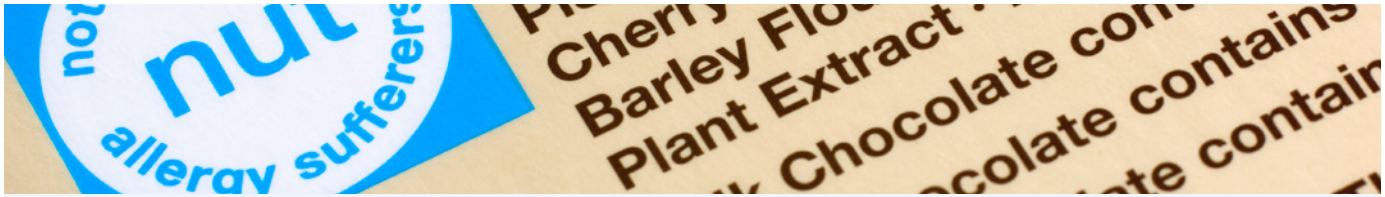
In 2017, Supermac's, an Irish takeaway chain that was already in a legal tussle with the brand for its restaurant name, filed a request before the European Union Intellectual Property Office (EUIPO) to obtain the revocation of the trademark as a restaurant and sandwiches' name.

Following the approval by EUIPO of the request, a recourse was filed before EUIPO's Board of Appeal (Case R543/2019-4), which partially annulled the decision, allowing the restaurant brand to use the trademark for beef and chicken sandwiches. This decision was challenged by Supermac's before the ECJ.

Knowing that it would have been a "David vs Goliath"[1] type battle, given the worldwide diffusion of the restaurant brand, Supermac's challenge this time focused on lack of use of the trademark with reference solely to the poultry products.On the basis of the evidence provided, the ECJ overruled the R543/2019-4 decision,[2] determining that the restaurant chain was not able to prove a genuine trademark's use, neither for the period of five consecutive years, nor for the volume of sales.

1 "*Big Mac v Supermac's: Mc Donald's loses EU trademark fight*", Lisa O'Carroll, The Guardian, 5 June, 2024

2 Case T-58/23; June 5,2024



UK Food Standards Agency (FSA) Board Discusses Precautionary Allergen Labelling (PAL) and Allergen Thresholds

In its September board meeting, the FSA was invited to discuss risks and benefits of thresholds based on reference doses as part of a standardised approach to PAL, i.e. an approach whereby PAL – or "may contain" warnings – is applied to food products where the cross-contamination risks are above a certain level. The board papers note that international guidance is still being developed and is under discussion at a technical level (it will be considered by the Codex Committee on Food Labelling to agree a recommendation for the Codex Alimentarius Commission (CAC) in November 2024, with ministers responsible for setting the UK position). It is clear that alongside the notable benefits, including consistency and certainty when compared to the current position, there remain concerns around testing methodologies, required technical capabilities within some smaller food businesses, and the additional costs of meeting standards associated with thresholds, which might be passed on to consumers.

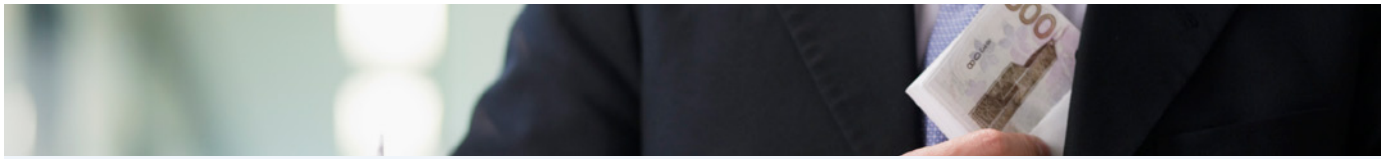
New Mandatory Duty on UK Employers To Prevent Sexual Harassment in the Workplace

A new mandatory duty to take "reasonable steps" to prevent sexual harassment in the workplace will come into force on 26 October 2024.

Although the government has not issued any prescriptive guidance on what employers must do to comply with the new duty, there are some useful points in the Equality and Human Rights Commission's (EHRC) technical guidance and the recent consultation on proposed changes to it to take into account the new duty. Also, see our recently published Relatively Informal Guide, which highlights the importance of carrying out a risk assessment and training staff.

Employers that breach this new duty could face proceedings by the EHRC, as it will have new powers to enforce standalone breaches. Also, if an employee brings a successful complaint of sexual harassment, employers risk an uplift in compensation of up to 25% if the tribunal is satisfied that the employer has breached the new duty. The starting point is to undertake a risk assessment and then training for all staff, so they understand their own obligations to comply.

We are currently working with many of our clients to help them prepare for the new duty. If you would be interested in talking to us about ways in which we might be able to support you and your business with your preparation, please get in touch with Matthew Lewis or your usual contact at the firm.



Significant UK Legal Changes to Corporate Criminal Liability for Economic Crime

The UK government has introduced two fundamental changes to corporate criminal liability for fraud and economic crime. These changes will significantly increase the risk of exposure to criminal liability and prosecution for economic crime and fraud perpetrated by senior managers and associated persons, for large food business operators, or food business operators that are part of large corporate groups (as defined under the legislation).

The "failure to prevent fraud" offence is expected to come into force in the second quarter of 2025. Under these provisions, an organisation can be criminally liable where an associated person commits a specified fraud offence with the intention of benefitting the organisation (or its customers). It will not be necessary to prove that the company's leadership (directors or senior managers) were complicit or knew about the fraud. Other changes, which enable criminal liability to be attributed to the corporate entity where a senior manager has engaged in fraudulent misconduct, are already in force.

Our firm's global Government Investigations & White Collar team regularly advises individuals and corporates on compliance, as well as internal and external investigations relating to financial crime. We are currently helping clients to understand their potential exposure in light of the changes to corporate criminal liability for economic crime, as well as to undertake risk assessments, evaluate their existing compliance framework and implement reasonable fraud prevention procedures. Contact us if you would like a copy of our publication on how to prepare for this legislation coming into force (which also includes a flowchart to help understand if the business is in scope).

A New Era for Consumer Law and Regulation in the UK

The Digital Markets, Competition and Consumers Act (DMCC Act) received royal assent on 24 May 2024. This landmark piece of legislation introduces significant changes in the consumer law and regulation space that will result in increased consumer rights protection, and a strengthened enforcement process that seeks to crack down on unfair commercial practices.

As a result, the regulatory risk in the business-to-consumer space is likely to rise quite significantly. Importantly, the DMCC Act will, for the first time, give the Competition and Markets Authority (the main consumer regulator in the UK) the power to directly enforce consumer law. Other changes include the introduction of new prescriptive requirements relating to subscription contracts, and new offences relating to drip pricing and fake reviews. The DMCC Act will also introduce material updates to the UK competition law regime.

Food labelling is, and will continue to be, governed by a separate regime on "food information", but the new regime will potentially impact on other forms of advertising and marketing practices undertaken by some operators.

For further information, read our full article.

US Olympic & Paralympic Committee Suing US Beverage Company Over Trademark Infringement

The US Olympic & Paralympic Committee (USOPC) serves both the National Olympic Committee and the National Paralympic Committee for the US and is responsible for training and funding the US Olympic, Paralympic, Youth Olympic, Pan American and Parapan American teams.

The USOPC partially relies on licensing its intellectual property, such as trademarks related to the Olympics (e.g. the five interlocking coloured rings), to other brands and companies, which, in turn, help fund the US Olympic teams.

The USOPC recently filed a suit against US beverage company Prime Hydration for alleged trademark infringement and unfair competition, among other alleged violations. According to USOPC's complaint, Prime Hydration used Olympic-related terms and trademarks on beverage product packaging, in-store advertising and social media promotions without USOPC's consent. This litigation is still pending.

For further information, read our full article.

Beer Importer Pays Charity £414,000 Enforcement Undertaking for Packaging Waste Failure

The Environment Agency investigated a beer importer for failing to register as a producer of packaging under the 2004 packaging waste regulations. The beer importer acknowledged its "oversight" and took "immediate and proactive measures" to rectify it as soon as it was aware of its registration and packaging obligations, according to press reports.

Following the investigation, the company contributed £414,000 to Keep Britain Tidy for use in its Great British Spring Clean campaign – a project that will enhance, restore and protect the country's natural environment.

The sum was paid as part of an enforcement undertaking – a voluntary offer made by the beer importer, which creates a legal agreement with the Environment Agency, as an alternative action to prosecution or other monetary penalty. The payment was calculated taking into account the amount saved by the company in not recycling or recovering packaging waste, plus a penalty of 30%. In addition, the company has covered the Environment Agency's costs.

The agreement of this undertaking is a reminder to food businesses that registration as a packaging producer may be required. Where an in-scope business has not registered, proactive steps to address this may help to avoid a criminal prosecution.

UK Advertising Restrictions for Foods High in Fat, Salt or Sugar

The government has published a response to its 2022 consultation on secondary legislation implementing further restrictions on advertising of "less healthy" high fat, salt or sugar (HFSS) products. From 1 October 2025, the regulation will introduce a 9 p.m. watershed for less healthy advertising on TV and video-on-demand programme services, as well as a total ban on all paid-for less healthy food and drink advertising online.

Health and Safety Fine for UK Food Manufacturer – Reminder of Importance of Machine Guards

The UK's Health and Safety Executive issued a press release in August on a £360,000 fine imposed on a food manufacturer after a worker was injured by a machine during a mixing process, on a site where dry seasoning blends and mixes were manufactured. The press release focused on the findings of the investigation relating to an absence of fixed and interlocking guards – a reminder to businesses that this can be an important aspect under regulations governing the provision and use of work equipment, as a control measure for safe working practices.

From Greenwashing to Green-hushing – Impact of German Federal Supreme Court Decision

The advertising world is watching to see if, when and how the EU will continue negotiations on the proposed Green Claims Directive. The latest proposal by the EU Commission provides that specific environmental claims must be preapproved by a national authority or a certified body. It is estimated that such an approval procedure may incur costs for the advertiser of up to €50,000 per claim.

While the outcome of the debate in the new EU Parliament is unclear, the German Federal Supreme Court has handed down a decision that may ban most green claims as of now. In a judgment of 27 June 2024 (BGH I ZR 98/23), the court said that under the existing Unfair Commercial Practices Directive, unspecific general environmental claims – such as "climate neutral" or "environmentally friendly" – are ambiguous and therefore misleading. To make an informed decision, consumers need to have all the information to evaluate any environmental claim, including any limitations. This applies especially if companies buy CO2 certificates to evidence their claim, rather than reducing their own carbon footprint.

While this did not come as a complete surprise, the court also stated that all necessary explanations need to be given whenever and wherever a claim is made, including in advertising and on packaging. A link to a website or a QR-code will no longer do! Previously, the German courts had found that QR-codes are common and sufficient sources of information; however, the Federal Supreme Court found this not to be true.

This dramatically reduces the possibility of specific environmental claim advertising on product packaging in Germany. It is therefore expected that many advertisers will turn away from environmental advertising campaigns in Germany and not share their environmental credits, a practice known as "green hushing." For further information, contact Dr. Christofer Eggers.

Breaking News on EU Deforestation Regulation – Postponement

There have been several important announcements from the European Commission in relation to the EU Deforestation Regulation (which is set to apply to seven commodities, including cattle, cocoa, coffee and palm oil, and will require operators and traders to ensure that relevant products are deforestation free and have been produced in accordance with the national regulations of the respective country of production). The announcements include:

- A proposal to postpone the entry into force of the regulation, by one year, until 30 December 2025. This proposal will need to be approved by the Council and European Parliament
- The publication of a long-awaited guidance document
- The publication of a Communication on a Strategic Framework for International Cooperation Engagement

The press release is available online.

Contacts

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

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

Matthew Lewis
Partner, Leeds
T +44 113 284 7525
E matthew.lewis@squirepb.com

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

Marisol Mork
Partner, Los Angeles
T +1 626 664 1300
E marisol.mork@squirepb.com

Lauryn Durham
Associate, Cleveland, Ohio
T + 1 216 479 8533
E lauryn.durham@squirepb.com

Daniela Sabelli
Partner, Milan
T +39 02 7274 2031
E daniela.sabelli@squirepb.com

Hannah Laming
Partner, London
T +44 207 655 1682
E hannah.laming@squirepb.com

Begonia Filgueira
Director, London
T +44 207 655 1296
E begonia.filgueira@squirepb.com

Thomas Delille
Partner, Brussels
T +33 1 5383 7400
E thomas.delille@squirepb.com

Christofer Eggers
Partner, Frankfurt
T +49 69 1739 2444
E christofer.eggers@squirepb.com