

Our Global Food & Beverage Practice actively monitors regulatory, policy and case law developments in the food, beverage and related sectors around the world. We are pleased to present you with an update on such developments in the European Union.

Tax Rules

European Union

The European Commission has launched a public consultation¹ on some of the rules on excise duty on beer, wine and other alcoholic beverages to assess whether they should be amended to fight tax fraud and reduce the sale of counterfeit alcohol. The consultation will determine possible future changes to the current Alcohol Excise Structures Directive². The consultation focuses on problems of classification resulting from the development of new products, the system of measurement for excise on beer (degrees Plato, or alcoholic content), the impact of reduced rates for smaller producers of certain drinks and for alcoholic beverages below a certain strength.

Consumer groups, alcohol producers, retailers and other interested parties are invited to give their views on a broad range of issues, such as the possible benefits of establishing exemptions and common reduced rates by 27 November 2015.

Member States

In the UK, from 1 January 2016, all existing alcohol wholesalers will be required to apply for registration. New wholesalers will need to apply 45 days before they intend to start trading. The key date for alcohol retailers will be 1 April 2017. From that date, it will be an offence to buy alcohol, if you know or have reasonable grounds to suspect that your UK wholesaler is not approved. Penalties for breach will be an unlimited fine and/or imprisonment (up to seven years on indictment or 12 months on summary conviction). The new registration scheme is intended to prevent alcohol duty fraud. More details of the registration process will be available when draft legislation is published.

The Slovak government has decided to reduce the value-added tax (VAT) on a number of food products from the current rate of 20% to 10%, as announced last May by the country's Prime Minister Robert Fico. The reduction should become effective on 1 January 2016.

The Belgian government has announced "Tax Shift"³ measures to simplify the country's complicated tax system. Amongst the measures, an increase on excise duties on alcohol and tobacco was announced. Furthermore, a "health tax" or "grease tax" has been introduced under which "unhealthy" food, such as food or beverages with high sugar content, will become subject to the common VAT rate of 21% and/or specific excise duties.

Labelling

Allergen Labelling

In October, members of the European Parliament voted to approve reforms to EU legislation controlling the production and use of edible caseins, dairy proteins found in mammalian milk and commonly used in meat products for their emulsifying and thickening qualities. The reforms are aimed at tightening control of products containing caseins in order to reduce the potential risk to consumers who are allergic to the protein.⁴

In an update to a 1983 directive on caseins and caseinates (their water soluble form), producers supplying products containing caseins to food manufacturers will be required to include allergen labelling, or at least information on the casein component.

Country of Origin Labelling – Meat

As we reported previously, most of the provisions under the EU Food Information to Consumers Regulation (1169/2011) came into force in December 2014. However, rules on country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry came into force across the EU on 1 April 2015. The rules require the label to indicate the country which the animal was "reared in" and "slaughtered in". If animals were born, raised and slaughtered in the same country, then the label can simply state the "origin" country.

Other Labelling Initiatives

From the end of November 2015, the EC's recommendations in its 2013 guidance on the classification of food extracts with colouring properties must be implemented. "Colourants" and "colouring food" must be clearly distinguished. Synthetic colourants must now be labelled as "colourants". Food and drink companies should check their labelling policies to ensure compliance with these requirements.

1 http://ec.europa.eu/taxation_customs/common/consultations/tax/2015_alcohol_en.htm

2 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31992L0083>

3 <http://www.lexology.com/library/detail.aspx?g=17c164d5-5ee1-47ce-b0b9-e56cf29c3a97>

4 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0340&format=XML&language=EN>

Advertising

The UK Advertising Standards Authority (ASA)⁵ is to launch a public consultation in early 2016 on the introduction of potentially tighter rules governing the non-broadcast advertising, to children, of food and soft drinks high in fat, salt or sugar. "Non-broadcast" includes outdoor, print media, cinema and direct marketing. However, the Prime Minister has ruled out the adoption of a "sugar tax" recommended by government health advisers⁶.

GMO Cultivation Ban

Last March 2015, the EU adopted a new piece of legislation allowing EU member states to restrict or ban the cultivation of crops containing genetically modified organisms (GMOs) on their own territory, even if this is allowed at EU level. In application of this new piece of law, the Member States had until 3 October 2015 deadline to decide on an "opt-out" option. The Commission recently announced that 19 countries⁷ said "no" to Monsanto's GM maize MON 810. It is the only maize currently authorised for cultivation in Europe and is grown in Spain and Portugal. Belgium and the UK asked for the opt-out mechanism to be applied to only part of their territories, while Germany requested a partial opt-out, hoping to pursue more GMO research. The full opt-out requests were made by Austria, Bulgaria, Croatia, Cyprus, Denmark, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Slovenia.

Further to this text, the Commission presented a draft law that would have given individual countries in Europe scope to ban the imports of genetically modified food and animal feed from countries allowing cultivation. On 28 October 2015, the European Parliament overwhelmingly rejected this proposal citing concerns over the potential reintroduction of border checks between Member States in favour of GMO and those against it.

TTIP

Meanwhile, the Transatlantic Trade and Investment Partnership (TTIP) held its 11th round of negotiations which took place in Miami, Florida between the 19 and 23 October 2015⁸. Second offers on tariffs were exchanged by the parties, as well as proposals regarding rules of origin for specific products. During this round, the EU identified a number of non-tariff issues which inhibit the trade of EU agricultural products in the US market, including the prohibition on direct shipping of EU wine to end consumers in the US, discriminatory tax breaks for US small wine and beer producers, a US inspection requirement for table olives and a specific levy imposed on imported dairy products.

The EU is also aiming to include a set of comprehensive rules on wines and spirits which would protect EU and US wine and spirit names, winemaking practices, labelling rules and certification.

Meanwhile, some NGOs are voicing concerns on the impact TTIP could have on public health, for instance, by reducing tariffs on "unhealthy foods". They have been advocating that the Member States should retain the right to regulate the import of food products which have high sugar, salt or fat content, as well as the right to interfere with the end-price for such products via taxation, subsidies or minimum pricing⁹.

Novel Foods

Authorisation and use of novel foods and food ingredients have been unified in the EU by way of adoption of Regulation No 258/97. A new regulation has been in discussion of a number of years at EU level, with the Commission presenting a revised proposal on novel foods back in December 2013. The main changes in the new proposal are: the removal of the former novel food categories; a centralised authorisation process; a shift from applicant-based to generic authorisations; and a simplified procedure for traditional foods from third countries. Most importantly, the new rules would subject novel food to a safety evaluation and authorisation at the EU level. If there were a possibility a new food could affect people's health, then the European Food Safety Authority (EFSA) would have to carry out an assessment.

On Wednesday 28 October 2015, a milestone was achieved toward modernising the system, when MEPs approved the current draft of the new EU Novel Food regulation with minor amendments. The proposal was then approved by the Council of Ministers on 11 November 2015. The Council is expected to formally adopt the new regulation on 16 November before it is published in the Official Journal of the EU. It will enter into force 20 days after its publication and will be applicable two years later¹⁰.

The new rules will make it easier to export to the EU market traditional foods from third, non-Member State countries having a history of safe food use. It will also facilitate the approval procedure to sell novel foods in the EU reduced by switching to an EU-level procedure and providing for generic authorisations. This means that once authorised and added to the EU list, a novel food will be able to be placed on the market by any food business operator.

Waste Management

The Scottish government has announced its intention to introduce a formal food waste reduction target in Scotland, believed to be the first of its kind in Europe. Further details of the strategy will be unveiled later in the year following consultation with stakeholders in order to set an appropriate target which supports both the ambitions of the food and drink industry and the Scottish government's zero waste policy.¹¹ The Review of Waste Policy in England (2011) identified food waste as a priority for action and the government work with Waste and Resources Action Programme (WRAP) and businesses on voluntary agreements to reduce food and packaging, but to date, have stopped short of a formal food waste reduction target.

5 https://www.asa.org.uk/News-resources/Media-Centre/2015/Non-broadcast-advertising-of-food-and-soft-drinks-to-children.aspx#_Vhvg8FYw_IU

6 <http://www.theguardian.com/society/2015/oct/24/sugar-tax-poll-obesity-cameron-oliver>

7 http://ec.europa.eu/food/plant/gmo/new/authorisation/cultivation/geographical_scope_en.htm

8 http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf

9 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153463.pdf

10 <http://www.consilium.europa.eu/en/press/press-releases/2015/11/11-novel-foods-new-rules/>

11 <http://news.scotland.gov.uk/News/Drop-in-Scotland-s-food-waste-welcomed-1e0f.aspx>

In France, the French National Assembly voted unanimously to pass legislation to ban supermarkets from throwing away or destroying unsold food¹². Instead, supermarkets will be forced to donate what they do not sell to charities or to be used as animal feed in an attempt by the French government to crack down on food waste. Supermarkets will be banned from deliberately spoiling unsold food and those stores larger than 400 square metres will have to sign contracts with charities by July 2016 or face penalties.

Plastic Bags

To bring it in line with Wales, Scotland and Northern Ireland, on 5 October, England introduced a minimum 5p charge for plastic bags, with an exemption for smaller shops¹³. A number of the major UK supermarkets have announced that the 5p surcharge will be donated towards charitable or worthwhile causes in England, as is already common practice in Wales. Retailers do not need to charge for paper bags, or re-usable bags. There is also no requirement to charge for bags used for uncooked fish, meat or poultry and other unwrapped food.

France has also notified a ban on single use plastic bags¹⁴ to the European Commission and a period of standstill has begun in order that comments can be given on the draft text.

Prosecution and Enforcement and Food Fraud

The Commission announced that it is taking Spain to the Court of Justice of the EU for failures in its waste management systems in several regions, including the Canary Islands, the Balearic Islands and Andalucía. The Commission alleges that Spain has failed to heed warnings to close, seal and ecologically restore 61 illegal landfills as required by the Waste Framework Directive.¹⁵

In the UK, the Food Standards Agency (FSA) has set up an online database of successful prosecution outcomes¹⁶. The database was set up earlier this year and became available in early November through the FSA website. The database includes a 'live map' and a spreadsheet of all prosecution outcomes reported by local authorities for 2015-2016. The name of the food business operator, the trading name and address of the premises, the provisions/regulations breached, the nature of the offence, sentence imposed and costs awarded are all detailed.

The FSA has also published official statistics for the year 2014/2015 on food law enforcement, compiled from information given to them by local authorities¹⁷. The figures show a continuing trend of increasing compliance levels across the UK. The report indicates that the trend for local authorities to target higher risk establishments has continued and there was a slight reduction in interventions overall – down by 0.8% on 2013-2014 levels.

12 http://www.assemblee-nationale.fr/14/dossiers/lutte_gaspillage_alimentaire.asp

13 <https://www.gov.uk/government/news/plastic-bag-charge-introduced-in-england>

14 <http://www.consultations-publiques.developpement-durable.gouv.fr/consultation-sur-le-decret-relatif-a-la-promotion-a1075.html>

15 http://europa.eu/rapid/press-release_IP-15-5354_en.htm

16 <https://www.food.gov.uk/enforcement/prosecutions>

17 <http://www.food.gov.uk/sites/default/files/laems-annual-report-2014-15.pdf>

As of the date of this client bulletin, news is breaking from Italy that seven olive oil brands are being investigated by Turin prosecutors for selling inferior quality olive oil as extra virgin¹⁸. There have already been lawsuits in the US in relation to alleged olive oil fraud¹⁹. Retailers and food business operators across the EU may want to review their supply chains now to identify whether the brands being investigated are used in their business.

Milk Prices

Jean-Claude Juncker, President of the European Commission, used his State of the European Union²⁰ speech to call for the breakup of small groups of retailers that are able to wield power over food markets. This follows protests by dairy farmers across Europe over plummeting milk prices. Juncker said that both EU and national antitrust authorities should examine the market structure and take steps to break up "some retail oligopolies". This year, the EU's milk quota regime, in place for 31 years, came to an end.

Food Supply Chain

The EC has renewed the mandate of the High Level Forum for a Better Functioning Food Supply²¹ Chain: an expert group to address major challenges and develop policy in the food sector within the EU. The deadline for expressions of interest and applications from representatives of the private sector was the end of September 2015. The Forum is intended to bring together relevant public and private stakeholders to analyse and address challenges in the food sector, including ministerial and private representation from the agro-food industry, non-governmental organisations with expertise in food supply matters and associations for agriculture, food processing, trade and distribution. It will continue to be chaired by Commissioner Bienkowska (Internal Market, Industry, Entrepreneurship and SMEs).

This is perhaps well timed given recent developments in the US: in August 2015, a consumer filed a putative class action against Costco Wholesale Corporation and several of its suppliers, citing violations of the company's disclosure under the California Transparency in Supply Chains Act, and setting off a domino effect of similar class actions targeting global supply chain-dependent companies, including food and drink producers and retailers. Our US colleagues are working with clients to address potential exposures and have reported on the issues to supply chain managers²².

18 <http://www.telegraph.co.uk/news/worldnews/europe/italy/11988947/Italian-companies-investigated-for-passing-off-ordinary-olive-oil-as-extra-virgin.html>

19 <http://fortune.com/2015/06/24/olive-oil-brands-lawsuits/>

20 http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm

21 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ_C_2015.179.01.0003.01.ENG

22 <http://www.squirepattonboggs.com/insights/publications/2015/08/wakeup-call-to-supply-chain-managers-and-compliance-officers-of-companies-doing-business-in-the-us>

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