



Legal NewsBITE: Food and Drink Quarterly

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Consultation on Amendments to the Food Law Code of Practice (England) – Digital Registration and Food Hygiene Risk Assessment Changes Proposed

The Food Standards Agency (FSA) is [inviting views](#) on the consultation by 27 September 2018. The proposed changes are intended to enable a new digital approach to the process of registration for new businesses; enable the targeting of resources to maximise the impact on non-compliant businesses; and recognise national inspection strategies, to create better alignment between the code and primary authority schemes.

The online registration service will represent a significant shift from the current system of registration with the local authority, and will result in a national “database” of food business establishments. In the consultation, the FSA states that relevant information from the online registration service about food business operators and their activities, will be made available to local authorities and the FSA.

To help target resources, changes to the Food Hygiene Risk Assessment process are also proposed. A business that meets specified criteria will be suitable for a reduction to its collective total risk assessment score, to recognise sustained compliance. It is also proposed that the current additional score for food businesses producing/serving food for more than 20 vulnerable persons (for example, children, the elderly and/or immune-compromised persons) will be directly linked to the assessment of confidence in management at food businesses.

CAP Code Review of HFSS Advertising

Food and drink producers and retailers should continue to monitor the Committee of Advertising Practice Code (CAP Code), which governs the advertising of high fat, salt and sugar (HFSS) products to children. Last year, CAP introduced rules banning the advertising of HFSS products in children’s media and media where children comprise at least 25% of the audience. This includes placing ads within 100 metres of a primary school, for example. CAP intends to restrict the advertising of products that “most contribute to the problem of childhood obesity”. CAP is reviewing the effectiveness of its rules, considering whether its objective can be better achieved with tougher restrictions, which could include a 9 p.m. watershed on all HFSS advertising.

The Advertising Standards Authority (ASA) enforces the CAP Code. Recent ASA decisions have found that ads featuring a non-HFSS product may still fall foul of the CAP Code if the ad generally promotes a brand whose range contains a majority of HFSS products. We have recently published a [blog](#) on these ASA decisions.

Disclosure of Internal Investigation Documents: Court of Appeal Decision on Legal Professional Privilege

A food and drink business must comply with a number of regulations, including in relation to food safety and hygiene, health and safety, trading standards matters, anti-bribery and corruption, and environmental laws. In the event of a potential or alleged breach, an internal investigation will almost certainly be carried out.

Recent case law put into doubt the ability of a business to rely on “legal privilege” to avoid disclosure of documents created during investigations, to third parties in subsequent civil or criminal proceedings, including, for example, the investigation report and notes of interviews with staff (which have the potential to self-incriminate, in particular because the investigation report will usually pinpoint failings with management systems that can amount to breaches of legislation). However, a much-anticipated Court of Appeal decision has restored the previously understood position, making litigation privilege easier to assert, provided that the dominant purpose can be evidenced, if challenged.

The instruction of a lawyer at an early stage is an indicator of the rationale that a prosecution is a real likelihood. Setting up an accident investigation protocol, which involves early dialogue with a lawyer, may help businesses to decide whether exerting legal professional privilege over the internal investigation report would be an appropriate safeguard, in the particular circumstances of the case. We have published an [article](#) on the decision.

Brexit Update: Technical Notes From Government on the Preparation for No Deal

The government has published an initial set of technical notes to explain what a no-deal situation would mean in a number of areas and how to prepare for it. We have issued an [update](#) that summarises those technical notes in relation to retail (including food retail), addressing trading with the EU; customs arrangements; trade remedies; VAT for businesses; and workplace rights.

Our first [Brexit retail report](#), based on research conducted with Retail Economics, concluded that the risk of higher costs from new tariffs is greatest for food and drink, as opposed to other sectors, for a number of reasons. Food and drink operators should, therefore, consider and prepare for the potential impact of a “no deal” on their business at the earliest opportunity.

BRC Global Standards: Food Safety Issue 8

The latest issue of the BRC Global Standard for Food Safety has been published and is available to download at the [BRC Bookshop](#).

In [December](#), we reported on the draft version of the Standard in the context of references to failures of, or attacks on, cybersecurity and ensuring that premises and brands are protected from attack (as well as products). The requirements of the new Standard continue to emphasise management commitment, a Hazard Analysis and Critical Control Point (HACCP)-based food safety programme and supporting a quality management system. BRC notes that this issue further develops food defence and prevention of food fraud, with expansion of the requirement for environmental monitoring of microorganisms in production facilities.

BRC is, of course, only one of a number of audits that food businesses may be required, by their customers, to undergo, and there is growing concern as to the burden of audits on businesses. A recent [Food Safety Survey](#) (see below) reflects this, with many respondents believing the burden of retailer and other third-party hygiene audits has increased over the past year, in terms of their number, time and cost involved.

Pesticides in Food: Recent US Glyphosate Award

Last month, a jury in California awarded US\$289 million to a plaintiff who sued Monsanto, alleging that its weed killers containing glyphosate caused his cancer. Numerous [sector publications](#), [local press](#) and [news websites](#) have covered the case. Some US courts had earlier recognised that the overwhelming majority of agencies have determined glyphosate is not a cancer risk. In the wake of this award, we expect to see more plaintiffs' lawyers targeting products containing glyphosate, even in trace amounts, in the US. Courts may have to decide whether consumers do not expect even those trace amounts to appear in their food, while plaintiffs' lawyers may devote more resources to establish the minimal level of exposure to glyphosate that is capable of causing harm.

Port Health Authorities, on behalf of the FSA, carry out pesticide testing of imported food in the UK. However, food businesses are responsible for ensuring that the food they produce or import is compliant with current local legislation, including maximum residue levels (MRLs), which are set at EU level (under Regulation 396/2005), for various substances, including glyphosate. The debate over safety of glyphosate at particular levels in the US may lead to further scrutiny in the EU.

Food Standards Agency: Annual Report on UK Multi-Annual National Control Plan: Conclusions in Contrast to Food Safety Survey?

The Multi-Annual National Control Plan (MANCP) is required for each member state under EU law, to demonstrate that effective control systems are in place for monitoring and enforcing feed and food law; animal health and animal welfare regulations; and plant health law.

The recent FSA [annual report](#), based on data collected for 2017, shows that the overall level of compliance in all sectors in the UK was satisfactory when assessed against expectations. Despite this, trade press reports on a [recent Food Safety Survey](#) indicate that many believe that food fraud is a growing problem in the UK food and drink supply chain. As we reported in our March issue of [NewsBITE](#), garlic, herbs and spices, rice, shrimps and the organic sector have been flagged as areas of concern that are vulnerable to fraud.

Protected Geographical Indications: Interpretation of Article 16 (a) to (c) of the Regulation (EC) No. 110/2008 ("EU Spirit Drinks Regulation") Concerning Whisky Produced in Germany and Marketed Under the Designation "Glen Buchenbach" – ECJ Judgment of 7 June 2018, Case C-44/17, *Scotch Whisky Association v. Michael Klotz*

The European Court of Justice (ECJ) has delivered its opinion on interpretation of the relevant provisions on protected geographical indications (PGIs). The question at stake was whether a whisky that is marketed under the designation "Glen Buchenbach", produced in Berglen, located in the Buchenbach valley in Swabia, Germany, infringes the registered geographical indication "Scotch Whisky" according to Article 16 (a)-(c) of the EU Spirit Drinks Regulation as an indirect commercial use, an evocation or other false or misleading information.

The ECJ ruled, on the one hand, that an indirect commercial use requires the disputed element ("Glen") to have an identical or phonetically and/or visually similar indication of the registered geographical indication ("Scotch Whisky"). This was not the case in relation to this product. The decisive criterion for an evocation, on the other hand, is whether an average European consumer who is reasonably well informed directly imagines the product whose geographical indication is protected, when confronted with the disputed designation. However, a mere association with the protected geographical indication or geographical area is – in both cases – not sufficient. It lies with the referring court to determine an evocation. In doing so, it must take account of the conceptual proximity, if any, between the designation and the indication, as there is no phonetic and/or visual similarity, as well as any partial incorporation between the disputed designation and the protected geographical indication. In the court's view, including information on the label to show this is a "German product" and "produced in Berglen" does not rule out an evocation or any other false or misleading indication in breach of Article 16 (b) and (c) of the EU Spirit Drinks Regulation. It is, of course, the case that geographical indications and designations for foods, as well as spirit drinks, are protected under EU law (for example, under Regulation (EC) 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs), and it is likely that the ECJ interpretation will also have relevance to those provisions, which are drafted in similar terms.

Firm to Host FDF North West Regional Dinner

We are pleased to be hosting another food and drink sector regional dinner for FDF on 30 October 2018. The dinner will bring together a small group of senior food and drink professionals in the North West to discuss and debate the key issues currently facing the industry. The dinner is by invite-only and places are limited. However, if you would like to attend as our guest, please contact [Nicola Smith](#) to check whether a place is available.

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