



Legal NewsBITE: Food and Drink Quarterly

June 2019

JAsda Update

The Competition and Markets Authority has issued notice of a proposed order that would prohibit Sainsbury's and Asda from merging for a period of 10 years. It prohibited the merger in April following an in-depth phase 2 review, concluding that prohibiting the merger in its entirety was the only effective remedy and would be a proportionate measure given the substantial lessening of competition expected to arise and its resulting adverse effects – in particular, increased prices in stores, online and at many petrol stations across the UK. It invited comments on the proposed order until 24 June 2019.

National Audit Office (NAO) Report on Ensuring Food Safety and Standards

The NAO [Report](#) was published on 12 June. It concludes that the UK food regulation system is complex, has come under increasing financial pressure and has elements that are outdated. The Report comments on the proposals of the FSA to modernise food regulation, including by introduction of a new national online system of registration, but notes concerns about financial sustainability. The FSA has responded to the [Report](#), welcoming it and noting recommendations in relation to establishing the role of sampling, addressing gaps in outcome-based measures and targets, pressing ahead with mandatory display of food hygiene ratings in England and addressing gaps in enforcement powers available to the Food Crime Unit. For food businesses, the Report and the response from the FSA are further signs that the regulatory regime for food businesses in the UK will likely change over coming months and years, although the speed of change may well depend on how Brexit evolves.

Brand and Advertising Update – HFSS Products

The Advertising Standards Authority (ASA) has published [a report](#) following a compliance sweep of the advertising of products which are high in fat, sugar or salt (HFSS). By using "avatar technology", which mimics the online profiles of children aged between six and 16, the ASA identified [a number of breaches](#) of the rules relating to the advertising of HFSS products to children, and eight brands were contacted by the Committee of Advertising Practice to take immediate steps to prevent the infringing ads appearing again.

Allergen Developments: Ingredient Labelling for Foods Prepacked for Direct Sale

The government have [announced](#) that they will be introducing new laws to require full ingredient labelling of foods which are prepacked for direct sale. Please see our earlier [article](#) on the Consultation, which set out the details of the category of products that this will affect and the background to the proposals.

Waste and Resources Strategy – Impact on Food Sector

Consultations have recently been issued on a number of producer responsibility measures, primarily relating to packaging, which will be important for those involved in the food and drink and packaging supply chain. So far, these have covered proposed changes to producer responsibility for packaging waste to make manufacturers responsible for the full end of life costs and introduce mandatory and consistent labelling regarding recyclability (amongst other measures), a tax on plastic packaging with less than 30% recycled content, a deposit return scheme for drink bottles and cans, making recycling collections more consistent, including separate food waste collections and linking back to the labelling proposals in the packaging waste consultation, and an extension to all retailers and an increase to 10p for the single use plastic bag charges.

This is definitely a fast-moving area of developing law and policy, with significant public pressure being brought to bear upon the government to curb plastic waste and improve recycling rates. The Consultations have followed on from the government's Resource and Waste Strategy for England, published in December 2018. A number of strands within the strategy are of particular relevance for the food and drink sector and there is a whole chapter dedicated to food waste called "Enough is enough: cutting down on food waste". This highlights that an estimated 10 million tonnes of food and drink are wasted post-farm gate annually, worth around £20 billion, and the Strategy sets out plans to reduce this, including proposed consultations on annual reporting of food surplus and waste by "larger food businesses" (the definition/threshold of which will be part of the consultation), and on legal powers to introduce food waste targets and surplus food redistribution obligations for such businesses. This chapter also confirmed government support for the Courtauld 2025 agreement, a voluntary initiative under which businesses have committed to measures aimed at significant reductions in food waste, and announced a £15 million fund for projects to cut food waste, the first tranche of which was opened in January 2019. Some believe, however, that the focus on plastic packaging may be at odds with the objectives in relation to food waste, as much packaging helps with shelf life.

Hot Off The Press: Government Issues Updated Guidance to Food and Drink Businesses on Preparing for Brexit

The [guidance](#) was updated on 24 June 2019 and updates relate to trade between Ireland and Northern Ireland, trade/importing and exporting, including advice on preparing for changes to trade at the UK/EU border, tariffs and employment.

Large Fines for Health and Safety Failures

The last quarter has seen a number of large health and safety fines, including in the food sector. In April 2019, a food processor was fined £1.4 million after a worker suffered crush injuries in 2012, having been struck by a metal stillage. [Reports](#) of the case confirm that the Health and Safety Executive (HSE) commented on the importance of measures to prevent access to dangerous parts of machinery, following the hearing. This followed on from an even bigger fine in the preceding month, after a food manufacturer was fined more than £1.8 million for work at height failures. The HSE [report](#) outlines a failure of the company to provide adequate controls against the risks arising, which caused serious injuries to two workers. Employers and those in control of any work at height activity are required, under Work at Height Regulations, to make sure work is properly planned, supervised and carried out by competent people. The HSE website includes various advice on work at height, including [Frequently Asked Questions](#) and a [Step-by-Step Guide](#).

Significant Rise in Employee Data Subject Access Requests (DSARs) Since May 2018

Since the introduction of the General Data Protection Regulation (GDPR) and the UK Data Protection Act 2018 (DPA) last year, evidence points to a sharp increase in the number of individuals in the UK using data subject access requests (DSARs), a request exercising the right for individuals to obtain a copy of their personal data, to obtain information from their employer or ex-employer. This is affecting companies in a number of sectors and we have seen from our clients in the food sector that this is an increasing concern, with our research indicating that three out of four are reporting an increase in DSARs. In the first five months of 2019, we have supported our clients with nearly as many DSARs as for the whole of 2018. We have seen a particular increase in DSARs being used where an individual is facing a disciplinary or performance management and wants to cause problems for the business or to get advance disclosure prior to raising a claim. The number of complaints to the Information Commissioners Office (ICO) about DSARs has also doubled since 2016. For further guidance and information, please see [our brochure](#) on this issue.

Restrictions on Search Advertising

E-commerce and online distribution remain a priority for competition authorities. A distribution practice currently, and potentially increasingly, under scrutiny is the imposition of restrictions on search advertising. The European Commission fined clothing retailer Guess in December 2018 for a number of “hardcore” anti-competitive practices within its selective distribution system, including banning its retailers from using or bidding on Guess brand names and trademarks as keywords in Google AdWords in the EEA. The Commission concluded that this restricted the “findability”, and, ultimately, the viability, of authorised online retailers within Guess’ selective distribution system in breach of the rules prohibiting anti-competitive agreements (Article 101 TFEU). It is worth noting that, throughout its decision, the Commission, in reaching its findings, makes extensive reference to Guess’s internal strategy papers, a useful reminder that internal company documents will likely be scrutinised in any assessment of anti-competitive conduct. The findings will be equally relevant to other consumer products, including food and drink.

Trade Mark Protection

Food businesses should take care to ensure that they have appropriate trade mark protection in place to protect their brand names. Our trade mark team can carry out a complimentary trade mark audit of clients’ existing UK and EU trade marks portfolios. The audit will allow businesses to see which marks are currently being used and consider whether existing trade mark registrations are sufficient to protect brands across all relevant goods and services. It will also review any registered marks that have not been used in the preceding five years and, where appropriate, recommend that the client does not renew those marks in order to rationalise its trade mark portfolio, saving money and time. Please [contact Kerry Lee](#) for more information.

Food Matters Training: Allergies Awareness in Food Service

Nicola A. Smith is running day-long workshops with a registered nutritionist for Food Matters Training. Details are available on the Food Matters Training [website](#). Nicola has also recorded a podcast on the subject, available through [Table Talk](#).

European Parliament Approves Revision of General Food Law Regulation During First Reading

The [first-reading position](#), which has been adopted, is intended to ensure that the EU’s risk assessment procedure for food safety is more objective, transparent and reliable. The new rules will create a common European Database of commissioned studies, to deter companies applying for authorisation from withholding unfavourable studies. They will allow the European Food Safety Authority (EFSA) to make submitted studies public for scrutiny, which may be used to identify whether other relevant scientific data or studies exist, to ensure objectivity. The European Council and Parliament reached a provisional agreement on the revision in February and the Council is expected to formally adopt it at one of its next meetings. In addition to the revision of the General Food Law Regulation (178/2002), there are related amendments to other sectoral legislation (governing the deliberate release of Genetically Modified (GM) Organisms into the environment, GM food and food, feed additives, smoke flavourings, food contact materials, food additives, plant protection products and novel foods).

Global Supply Chain and Taste of Export: Food and Drink Dinner and Conference

In May, we were pleased to partner with the Food and Drink Federation (FDF) and the Department for International Trade (DIT) for a two-day extravaganza celebrating global food and drink businesses. On day one, Hannah Kendrick and Nicola A. Smith, along with Graham Stuart, Minister for Investment at DIT, and Tim Rycroft and Nicki Hunt of FDF, visited Finlays (tea and coffee merchants) and AKK (speciality vegetable fats manufacturer) in Hull. This was followed by a discussion dinner at the Deep around risks and disruptors when operating in a global supply chain, attended by numerous guests and members of our firm’s Food Sector group. The next morning involved a breakfast seminar aimed at SMEs looking to grow exports, with FDF Chief Operating Officer Tim Rycroft advising on strategies to look for export growth. If you would like to get details of our upcoming sector-led events, please email [Joe Roche](#).

Authors

Anita Lloyd

Director, Birmingham
T +44 121 222 3504
E anita.lloyd@sqirepb.com

Nicola Smith

Director, Birmingham
T +44 121 222 3230
E nicola.smith@sqirepb.com

Nicola Elam

Director, Manchester
T +44 161 830 5072
E nicola.elam@sqirepb.com

Kerry Lee

Partner, Manchester
T +44 161 830 5350
E kerry.lee@sqirepb.com

Carlton T. Daniel

Partner, London
T +44 20 7655 1026
E carlton.daniel@sqirepb.com

Hannah Kendrick

Partner, Leeds
T +44 113 284 7620
E hannah.kendrick@sqirepb.com

Laura A. McLellan

Director, Leeds
T +44 113 284 7048
E laura.mclellan@sqirepb.com