



Legal NewsBITE: Food and Drink Quarterly

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UK Regulators Crack Down on “Greenwashing”

Within seven months of the UK’s Competition and Markets Authority (CMA) announcing its review of “green” environmental claims in the fashion retail sector, it has opened an investigation into claims made by various fashion businesses. This comes less than a year after all businesses were [given notice](#) by the CMA to ensure their environmental claims comply with the law. The investigation will analyse the relevant claims against the CMA’s Green Claims Code (for further insight, see our previous blog post [here](#)) and UK consumer protection law. Notably, the CMA has not yet reached a conclusion as to whether the retailers are in breach of the law. While the fashion sector has been under the CMA’s spotlight, it is important for all consumer-facing businesses to be aware of the current scrutiny of claims relating to environmental credentials, including food businesses. The Advertising Standards Authority (ASA) has taken action against a number of food and drink products in recent times. This, coupled with the CMA’s intention to review “potentially misleading environmental claims in other sectors...”, should be a real driving force for operators to check and ensure that they can substantiate any claims they are making to defend their position, should the CMA come knocking. See our recent [blog](#) post for more information on the crackdown.

Further Delays to Restrictions on TV and Online Advertising of Products High in Fat, Salt or Sugar (HFSS) to October 2025

On 9 December 2022, the UK government announced a further delay to the 9 p.m. watershed restriction on TV and online adverts for HFSS products. As we [previously reported](#), the restrictions include a watershed for advertisements of HFSS foods for television and UK on-demand programmes, and an outright ban on paid-for online advertisements for HFSS products. The Health and Care Act 2022 set out both restrictions, and it received Royal Assent on 28 April 2022. The restrictions were initially due to come into force in January 2023, but this was pushed back to January 2024, and is now expected to be introduced in October 2025. In parallel to the announcement on the delay, the government has launched a [consultation](#) on proposed draft secondary legislation to give effect to the restrictions, and is expected to define the products in scope of the restriction, the food and drink small and medium-sized enterprises (SMEs) for the purposes of the SME exemptions, and the services connected to regulated radio services and relevant radio exemptions. The draft secondary legislation also contains a new proposed exemption for “audio-only” online services, such as podcasts and internet-only radio services. However, the exemption would not cover advertisements on such online services containing moving or still images or legible text. The government hopes that the draft secondary legislation will ensure that the regulations governing the restrictions are clear, unambiguous and can be implemented effectively, and has made it clear that this consultation is only seeking feedback on the draft secondary legislation, and not to revisit the policy decision to introduce these restrictions. The consultation is due to close on 31 March 2023, and the government is expected to produce guidance shortly after. While a further delay may be frustrating for some, it will give businesses time to revisit their proposed advertising strategy and to respond to the proposals in the consultation.

UK Food Standards Agency (FSA) Launches Consultation on Proposed Food Law Code of Practice (England) (Code) in Relation to a New Food Standards Delivery Model

The FSA is currently running a 12-week [consultation](#) on proposed changes to the code to support the introduction of a new Food Standards Delivery Model. These changes include the introduction of a new food standards risk rating scheme that local authorities will use to evaluate the risks posed by a food business, along with a new decision matrix to determine the frequency at which food standards official controls should be delivered in line with the outcome of the risk assessment. The proposed changes are intended to address shortcomings in the current version of the code identified through a local authority survey in 2018. The survey found that food safety officers felt that the code failed to support local authorities in targeting resources at the areas of greatest risk within the food chain. The consultation is expected to close on 9 January 2023, and we will continue to monitor for updates.

Food Supply Chain Comes Into EU’s Antitrust Sights

In a speech given on 27 September 2022, Margrethe Vestager, the EU’s Competition Commissioner, suggested that the European Commission’s “highest priority” was to protect consumers’ purchasing power from the economic turmoil as a result of the Russia/Ukraine conflict and post-pandemic effects, both of which are contributing to rising energy prices and inflation for consumers across Europe.

Food producers, suppliers and retailers may face scrutiny from the Commission as it tries to keep markets competitive amid rising prices that are hurting consumers.

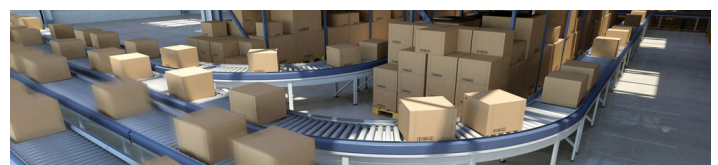
As we [previously reported](#), Mondelez, one of the world’s largest snacks companies, is already the subject of an antitrust investigation relating to the supply of biscuits, chocolate and coffee, and Margrethe Vestager confirmed that her team was looking at other cases.

Vestager said that the “price pressures” were “eroding purchasing power” in “food and other essential goods.” She went on to explain that “whatever the cause, we must act urgently to protect purchasing power by ensuring that markets continue functioning in spite of these challenges. This is the commission’s highest priority right now.”

“We are working on more cases in the food supply chain which will benefit European consumers and help protect purchasing power,” she went on to say.

The Commission is also investigating various supermarket buying alliances.

Vestager also made reference to a probe into food delivery companies as a sign of acting on markets that directly affect consumers, as we reported in our [September newsletter](#).



FSA Publishes Food Safety Charter for Food Delivery Platforms

The FSA has worked with Deliveroo, Uber Eats and Just Eat to develop a food safety [charter](#) that commits those companies to ensuring that businesses selling food through their platforms meet the minimum standard under the [Food Hygiene Rating Scheme](#) and are registered with their local authority. They must also utilise communication channels with businesses and customers to support those with food hypersensitivities and share FSA hygiene and safety information. Businesses that work with these platforms should familiarise themselves with these new requirements, as they could affect their ability to use the platforms in future and, of course, they do have a legal duty to register establishments used for food operations, such as food preparation and cooking, under food safety laws. The provision of information relating to allergens may be particularly complex with a third-party delivery platform model, as information must be communicated through the chain accurately at the point of order and at the point of delivery.

FSA Publishes New Research on the Survival of COVID-19 on Food and Packaging

The FSA commissioned the University of Southampton to conduct the research, following publication of the agency's [risk assessment](#) in 2020. The 2020 risk assessment concluded that it was very unlikely that humans could catch the virus from food. The FSA has now published the University of Southampton's [report](#), which concluded that the survival rate of COVID-19 on food and packaging varied, depending on the foods and food packaging examined. For example, COVID-19 was detected on foods such as cheese and ham for several days, while its presence on foods such as apples and olives dropped quickly. Overall, the report found there was a significant drop in the survival rate of COVID-19 on food and packaging after the first 24 hours. Therefore, the risk has been classified as low, and the current guidance from the FSA remains the same.

ASA Publishes Research on Consumer Understanding of Environmental Claims

On 20 October 2022, ASA published a highly anticipated [research report](#) into consumers' understanding of environmental terms increasingly used in advertising by brands. The report focuses on how the terms "carbon neutral" and "net-zero" are typically understood and makes some key findings relevant to all businesses engaging in environmental claims. The research shows there is "a broad spectrum of consumer engagement on environmental issues, influencing their understanding of, and reaction to, environmental claims". There is little consensus on the meaning of the most used claims, and a possible need for standardised definitions to be policed by an official body. Crucially, many participants in the research generally understood "carbon neutral" as meaning "an absolute reduction in carbon emissions had taken place or would take place", and the reality of offsetting projects could leave consumers feeling misled. The report is not a guidance document, but brands and advisers may find it useful when deciding whether to include an environmental claim in any marketing materials (and whether they have sufficient backing to stand up before a regulator in the likely event of complaints). This is especially pertinent to the food and drink sector, given the growing number of complaints being investigated by ASA against food and drink businesses.



Perspectives on Evolving Regulatory Landscape for US Food and Beverage

We recently ran a [webinar](#) with the Food & Drink Federation on the regulatory backdrop for the food and drink industry in the US. The session was aimed towards food businesses in the EU and the UK that trade in or with the US, focusing on the challenges and changing landscape, including the risks from novel foods and health claims; supply chain risks, highlighted by the recent infant formula shortage; and e-commerce risks, including cybersecurity, the potential for exploding packaging and scrutiny of labels for startups.

Market Volatility and Hedging Risk: Potential Impact on Food Businesses

Ongoing volatility in the global markets has several implications for corporations, including those in the food and drink sector. One of the more pressing implications is risk management: Treasury teams and deal teams should seriously consider their exposure to interest rates, foreign exchange rates and commodity prices, and accordingly, their ongoing hedging needs and hedging strategy.

As we continue to experience the effects of COVID-19, the Russia/Ukraine conflict, inflationary pressures and supply chain disruptions across the globe, as well as a changing political landscape, we continue to see increasing interest rates, fluctuations in exchange rates and rising commodity prices.

What could this ongoing volatility mean? As interest rates continue to rise, there is a possibility that mandatory interest rate hedging on new financing transactions will return and, even if not compulsory, there is an economic need for some element of interest rate hedging, both for existing and new financings. This, of course, will have an impact on cash flows, cash flow ratios, leverage ratios and forecasts, and covenant packages in financing arrangements.

Where an entity does business in multiple currencies or has borrowed (or may borrow) in a single base currency when it uses other currencies in its business, the recent fluctuations in exchange rates (for example, GBP sterling) bring greater uncertainty with respect to the amount of money that will be available to it, as well as the cost of doing business generally.

Having experienced what is probably the largest commodity shock since the 1970s, and as supply chain issues continue, the costs of commodities continue to rise with no certainty as to when prices will moderate. Accordingly, businesses with a need for commodities (whether that be energy, building materials or agricultural products) may experience difficulties in obtaining, or managing the costs of, certain commodities, impacting their ability to carry out their business and/or complete projects. As business costs become more expensive, the overall success of an entity may be jeopardised.

It may be helpful to consider:

- What risks are your businesses exposed to?
- Do you need/want the flexibility to hedge such risks?
- Do your existing financing arrangements with lenders, bondholders and other creditors permit you to enter into derivative transactions (and what types of derivative transactions)?
- Do you need to establish and/or update hedging relationships with dealer counterparties?
- What impact would the entry of new derivative transactions have on cash flows, cash flow ratios, leverage ratios and forecasts and your ability to comply with covenant packages in financing arrangements?

God Save the Queen's Royal Warrant Holders

In a modern world of celebrity and influencer endorsements, there is arguably one endorsement that still trumps others: the Royal Warrant. The prestige that comes with providing goods and services to the sovereign has boosted business for centuries. A warrant is seen as a guarantee that a supplier has the highest standards of service, quality and excellence: the products are quite literally "Fit for a King"; no less. However, following the death of Queen Elizabeth II, questions have been asked as to what happens to the warrants she granted during her lifetime. Upon her death, the 620 Royal Warrants granted by Her Majesty became void immediately. However, warrant holders have a grace period of two years, during which they may continue to use the Royal Arms on their products, packaging, websites, etc. After this time, the insignia must either be removed or, in the event that a new grantor issues a replacement warrant, updated. As it stands, as the reigning monarch, King Charles III is currently the only grantor of a Royal Warrant. It awaits to be seen whether HRH Camilla, the Queen Consort, or HRH Prince William, the new Prince of Wales, will have permission to grant their own Royal Warrants. Food and drink businesses that currently hold Royal Warrants should look for guidance to be issued by the Royal Warrant Holders Association as to whether the insignia will need to be replaced for warrants previously granted by the now-King Charles III, or whether an application for a new warrant will need to be submitted. See our [blog](#) post for more information.

UK Regulators Step Up the Pressure on Influencer Marketing: Principles for Platforms, Brands and Content Creators

Over the past few years, the CMA has been actively taking steps to address consumer protection concerns with sponsorships and endorsements within social media posts that have not been clearly disclosed. [The Influencer Monitoring Report](#), published in March 2021 by the ASA, found that a staggering 65% of the advertisements it monitored in September 2020 were not properly disclosed as "paid for" content. In November 2022, the CMA issued [new guidance](#) on hidden advertisements with the aim of enhancing the transparency of online advertising. The authority makes clear that hidden advertising is both harmful and illegal, and that it will not tolerate non-compliance with the rules. In addition, it produced new guidance for [brands](#), [social media platforms](#) and [content creators](#). The guidance for brands sets out that brands have a level of responsibility for compliance, no matter the type or amount of incentive offered to content creators. To ensure compliance, brands must make it clear to content creators that they must label any posts containing any advertisement of their goods/services in an "obvious way", periodically check social media posts mentioning the brand and take proactive steps to ensure that posts are compliant. See our [blog](#) post for more information.



FSA Warns Consumers That Some Poultry Products on Sale During This Festive Period May Have Been Previously Frozen and Defrosted to Maintain Stock Levels: Another Example of Relaxations to Ease Supply Chain Pressures

The FSA is advising consumers buying turkey, duck, capon or goose products in the run-up to Christmas that these products may have been previously frozen and defrosted before being placed on sale under refrigeration. This change in practice for freezing poultry is expected to be a temporary change from 28 November to 31 December, and follows a number of special derogations and guidance produced by the Department of Environment, Food and Rural Affairs (DEFRA) and the Welsh government for the poultry industry to relieve supply chain pressures presented by the bird flu outbreak. As with the FSA's previous announcements in relation to the temporary relaxation of ingredient labelling requirements for products containing sunflower and numerous other oils, as a result of the Russia/Ukraine conflict that we previously reported on, this is another example of how the UK government is attempting to relieve supply chain pressures and ensure the availability of food to consumers. It is, however, important that food businesses selling poultry products in this way clearly label the products as defrosted and that sufficient information be available in store and on their websites. Failure to do so could be relevant to food safety (for example if a consumer decided to re-freeze the product) and could potentially also amount to labelling being misleading.



Update on Deposit Return Schemes

DEFRA, the Welsh government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland have been consulting since 2019 on a scheme for the three nations (the DRS scheme). The Scottish government is also in the process (albeit at a more progressed stage) of developing a separate scheme (the Scottish DRS scheme).

The Scottish DRS scheme is expected to come into effect in August 2023, with Circularity Scotland (the scheme administrator) and the Scottish Environment Protection Agency (SEPA) due to begin the process to register producers in January 2023. Under the Scottish DRS scheme, producers are obliged to register, and are expected to nominate the scheme administrator to fulfil most of their other obligations under the Scottish DRS scheme. While the scheme administrator will pick up most of the obligations, producers will still be obliged to maintain a record of the number and type of containers made available by that producer to be marketed, offered for sale or sold in Scotland, and to supply any information reasonably requested by that scheme administrator for the purposes of compliance with the Scottish DRS scheme. Producers will also be expected to pay a fee to the scheme administrator (depending upon the number of containers placed on the market) to help fund this service; a registration fee to SEPA (the enforcement agency for the purposes of the Scottish DRS scheme); and a handling fee to the return point operator as determined by the scheme administrator. Although there is no guidance for the Scottish DRS scheme in relation to white label goods or manufacturing under licence specifically, in this instance, it is expected that the "producer" for the purposes of the Scottish DRS scheme will be the brand owner, not the manufacturer. However, where the manufacturer is also producing its own brand products, these would likely fall within the scope of the Scottish DRS scheme; thus, the manufacturer would be itself be obligated under that scheme.

In England, Wales and Northern Ireland, the proposed DRS scheme is still under consideration, and the government has yet to provide its feedback on the consultation. It is expected that the proposed DRS scheme will have a similar aim of making producers accountable, requiring registration and ongoing compliance. The lack of consultation response and legislative proposals for the DRS scheme mean that it is still uncertain how the DRS scheme will interact with the Scottish DRS scheme and those set up in other parts of the country, along with other areas of producer responsibility law, such as the Extended Producer Responsibility legislation due to take effect in across the UK in 2024.

While the UK is only just developing DRS schemes, a number have existed and run successfully for decades. Now, initiatives like the EU Green Deal are incentivising more member states to invest in better, circular systems for dealing with packaging. The Danish, Swedish and German DRS schemes are long-established and widely praised, serving as models in countries such as Latvia and Slovakia, which introduced their own schemes this year. While the regimes have run independently from each other until now, there is some suggestion that there may be a common framework for some elements of DRS schemes in future. In November 2022, the European Commission proposed significant reforms to the Packaging and Packaging Waste Directive, including minimum requirements for DRS schemes across EU member states by 1 January 2029.

"Brexit Freedoms Bill" Introduced to Parliament

If enacted, the [Retained EU Law \(Revocation and Reform\) Bill 2022](#) (also known as the "Brexit Freedoms Bill") will end the supremacy of EU law in the UK by revoking certain EU laws that were retained at the end of the Brexit transitional period (Retained EU Law), by making provision relating to the interpretation of Retained EU Law and by introducing new powers for the modification, restatement, replacement or updating of Retained EU Law. The bill also seeks to introduce a "sunset date" of [31 December 2023](#), by which Retained EU Law will either be repealed or assimilated into UK domestic law. However, the sunset date may be extended to 2026 for some laws, according to a separate government [announcement](#). When announcing the bill, the government stated that "retained EU Law was never intended to sit on the statute book indefinitely." If enacted, the bill will have major implications for UK law, particularly for the food and drink industry, as the majority of important parts of the UK's food safety, composition, hygiene and labelling laws come from Retained EU Law. The bill sets out powers, rather than making specific provisions for what legislation within Retained EU Law will be repealed, retained, amended, etc., and the government has not yet indicated its intentions with regard to any specific laws. It will be interesting to see how this will align with the approach to Northern Ireland, where products still need to comply with EU laws on account of the Northern Ireland Protocol. We will report further once more details emerge and/or if the bill is enacted into law.

Advertising, Media and Brands Global Compliance Series 2022/23

We are hosting a series of virtual events focusing on Advertising, Media and Brands Global Compliance. Our first two events were held earlier this year, and recordings for our sessions on [Managing the Cost of Living Crisis and Recession Proofing Your Business](#) and [Global Data, Technology and Tax](#) are now available online. Our two remaining events will run in January 2023, focusing on Global Anticounterfeiting and Brand Protection Trends and the AMB Hot Topics (Thursday 12 January 2023 at 5 p.m. GMT) and the Rise of ESG and Global Workforce Challenges (Thursday 26 January 2023 at 5 p.m. GMT). Further information and details of how to register for the event can be found [here](#).



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