



EU Approves Deforestation Regulation with Due Diligence Requirements for Various Agri-food Commodities

The EU has approved the Deforestation-Free Regulation, which is intended to ensure that certain products European consumers buy and consume do not contribute to deforestation and forest degradation. The trade press has [reported](#) on the likely impact of this on costs and administrative burdens for food and drink companies.

The new legislation will require supply chain due diligence linked to the production of palm oil, cattle, soy, coffee, cocoa, timber, and rubber and certain derivatives, such as leather, chocolate and paper, which are defined by reference to specific commodity codes in the regulation. It will involve a benchmarking system, which assigns a level of deforestation risk (low, medium or high) based on the location of production. This then determines the level of due diligence required (which can include use of satellite images, supplier visits and digital tracing), as well as determining the frequency of required spot-checks on suppliers. Until a due diligence report is filed, relevant products will not be able to be placed on the EU market.

As well as obligations on “operators” for these products, “traders” that sell on relevant products will have obligations to keep a record of their suppliers for at least five years, even if they are SMEs, although the obligations for larger companies will be broader and will also include obligations for submitting due diligence statements and liability for compliance.

The UK is also seeking to address the impact of deforestation, but within the UK, this will be by way of a schedule to the Environment Act 2021, relating to “forest risk commodities”, although this is not yet in force. The Department for Environment, Food and Rural Affairs has consulted on also including maize, in addition to the commodities included by the EU. Within the UK, however, timber will continue to be governed by the current regime, not under the “forest risk commodity” provisions.



Consultation on Food Hygiene Delivery Model in the UK

In April, the UK's Food Standards Agency (FSA) launched a [consultation](#) on a proposed new Food Hygiene Delivery Model, which includes proposals to base the frequency of inspections on the risk level of the relevant business, as well as provision for "remote" inspections in some circumstances, for example by use of telephone and videoconference discussions, review of documents and review of websites. The consultation closes on 30 June and we will report further on the response to the consultation when this is published.

Delay of UK Volume Price Promotion Restrictions on Foods High in Fat, Salt or Sugar (HFSS)

On 17 June 2023, the Prime Minister's Office [announced](#) that the implementation of the ban on "multi-buy" deals for HFSS foods will be delayed until October 2025.

It is not clear from the announcement whether the planned "transition" period will still apply after that – the more detailed [implementation guidance](#) has not yet been updated to reflect the announcement. It still indicates a date of 1 October 2023 for volume price promotions, with a transition period until October 2024, to allow retailers to sell existing stock that was produced before October 2023 if it includes volume price promotions (such as "x% extra") on its packaging that cannot be removed. Therefore, operators will hope that there will be a similar transition running from October 2025 to October 2026 to allow sell-through of stock.

The implementation guidance had previously been updated (1 June), but the [updates](#) were for clarification only, e.g. to note that location restrictions are now in force, to update the guidance on specialist retailers and to include reference to employee count for zero-hours contracts. There was no change to the proposed "in-force" date at this time.



The UK FSA Calls for Views on "May Contain" Labelling Guidance: "May Contain Nuts" to Be Clearer

Requirements for the provision of allergen labelling and information for ingredients or processing aids intentionally used in the manufacture of a product, and still present in the finished product, are governed by law (under the EU's food information for consumer regulation (EU) 1169/2011, which has been retained in UK law following Brexit under the grandfathering provisions).

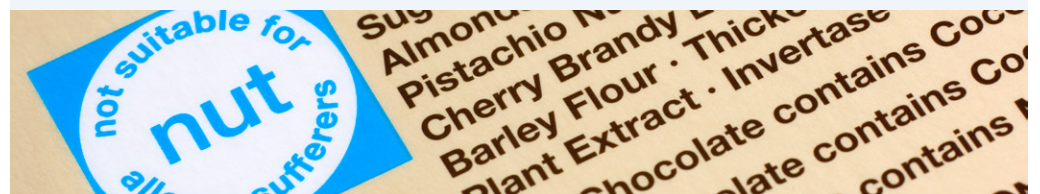
However, "precautionary" or "may contain" allergen labelling is not subject to prescribed legal requirements, as the relevant legislation does not include provisions relating to the possible and unintentional presence in food of substances or products causing allergies or intolerances. Of course, the information on these substances or products is relevant to the safety of the food and is, therefore, in practice, required, despite the fact this is not governed by food information and labelling laws.

To assist operators with ensuring precautionary allergen labelling (PAL) is used accurately and appropriately, sector guidance is available on such labelling and on making "allergen-free" and vegan claims; in addition, the UK's FSA issues Allergen Labelling Technical Guidance. In March, the FSA opened a [consultation](#) on updating this guidance. The consultation closed in May and we expect publication of the updated guidance later this summer. The consultation invited feedback on two main changes:

1. Standards for applying PAL; and
2. Best practice guidance that no gluten containing ingredients (NGCI) statements should not be used – both in terms of their scope and impact.

The proposed standards for applying PAL include requirements for PAL statements only to be used following a thorough risk assessment, and for PAL statements to specify which of the 14 regulated allergens they refer to. The particular example provided relates to the commonly used statement, "May Contain Nuts." Peanuts and tree nuts are separate allergens in the list of 14 regulated allergens and some consumers may be allergic to one but not the other, so if the Technical Guidance is updated in this respect and operators follow the updated guidance, they would instead use PAL that the product "May contain peanuts and tree nuts"; rather than the more generic statement.

The proposed updates will also include a requirement that PAL should not be used in conjunction with a free-from statement for the same allergen. For example: "May contain milk" should not be used in combination with "dairy free".



Marketing of Oral Oils Containing Cannabidiol (CBD) in Germany – Is It Still Possible?

CBD products are increasingly popular in Germany. CBD is a cannabinoid that is not psychoactive or intoxicating, unlike tetrahydrocannabinol (THC).

CBD food is not yet marketable in Germany. Since January 2019, cannabinoids have been mentioned in the EU Novel Food Catalogue. Accordingly, all products containing extracts of *Cannabis sativa* L. and all products derived therefrom containing cannabinoids are considered novel foods, as a history of human consumption in the EU has not been established. This is also the position in the UK, because the EU novel food legislation is an EU regulation, which came into force pre-Brexit, so applies in both markets.

Applications to approve CBD as novel food have been submitted to the European Food and Safety Authority (EFSA). In June 2022, EFSA suspended its assessments until new data on safety is available.

CBD cosmetics may be marketable in Germany, in particular if they are in accordance with the requirements of Regulation (EC) No 1223/2009 on cosmetic products and the requirements of the German Narcotics Act (BtMG). This implies, for instance, that products must contain less than 0.2 % THC. However, whether products containing CBD may be marketed as cosmetic products depends on a precise case-by-case examination of each respective product. Generally, the determination is made on the basis of the subjective and objective purpose of the products. The decisive factor is the impression gained by the relevant public regarding the use of the product. In this respect, several factors are relevant, in particular the presentation and packaging of the product, including instructions for use, its material composition, its distribution and advertisement, etc.

Regarding oral oils containing CBD, these principles seem to no longer be valid. In the most recent decisions of German higher administrative courts, several oral oils have been considered as “lifestyle” products intended for oral consumption that consumers hope will have positive health effects. This assessment seems to be made despite the fact that (skin) care was clearly emphasised, as well as the recommendation for use was to spit out the oils again. Marketing needs close legal supervision and advice on the particular characteristics, and labelling of the product would be well-advised. It may well be that this strict practice is continued, to stop the attempt of many companies to market CBD food as cosmetics or fantasy articles, such as “CBD oils for camels”.

UK Government Announces Changes to Employment Laws “to Reduce Burdens” on Businesses

In May, the first in a series of “regulatory reform announcements” was announced, as part of government efforts to “reduce burdens, push down the cost of living and drive economic growth”. However, although the proposals include some changes to employment law, the changes are relatively minor. Food and drink businesses should be aware, though, that the announcement includes the possibility of rolled-up holiday pay; a single “pot” of annual leave; removal of current obligation for TUPE consultation with employee representatives for businesses with fewer than 50 people and transfers affecting less than 10 employees; and limiting the length of non-competition clauses to three months. Please see our [article](#) on this announcement for further details and insight.

The UK CMA’s Draft Guidance on Competition Law and Sustainability – Comfort for the Food Sector?

On 28 February 2023, the UK government published its draft guidance on the application of competition law to agreements between competitors or potential competitors in relation to Environmental Sustainability Agreements (ESAs). The guidance, on which the CMA is currently consulting, aims to encourage businesses to work together to achieve their sustainability goals without infringing the UK competition rules, reflecting the CMA’s increased focus on environmental sustainability objectives to enable the UK to transition towards a net zero economy. The guidance sets out types of ESAs that are unlikely to infringe Chapter I of the Competition Act 1998, which prohibits anticompetitive agreements, and that might infringe it.

Climate change agreements are considered a subset of ESAs, examples of which include an agreement between manufacturers to phase out a particular production process involving the emission of CO₂, an agreement between delivery companies to switch to using electric vehicles, or an agreement not to provide support such as financing or insurance to fossil fuel producers.

Given the importance of food production in the fight against climate change, the CMA’s draft guidance, coupled with the CMA’s “open-door policy” to discuss whether arrangements comply with the UK competition rules, provides some clarity and comfort to businesses in the food industry sector looking to engage in agreements and collaboration with actual or potential competitors to push for sustainable business practices. That said, businesses must still ensure their sustainability efforts do not, in fact, breach the UK competition rules, or impact food prices or quality.

Further disruption to the planned Scottish deposit return scheme, and announcements about the Welsh scheme

Following months of turmoil and uncertainty around the rollout of the Scottish Deposit Return Scheme (DRS), the scheme administrator was [placed into administration](#) on 20 June 2023. Circularity Scotland Ltd was set up as a not-for-profit to operate the DRS and provide information to stakeholders in the run-up to the scheme beginning. However, following the Scottish government's announcement that the Scottish DRS would be delayed until October 2025 at the earliest, major producer funders [withdrew their support](#). Alternative funding negotiations were unsuccessful, resulting in the appointment of insolvency practitioners.

In a recent [policy statement](#), the Westminster government blocked aspects of the Scottish DRS under the Internal Market Act, which was introduced to regulate the internal market of the UK nations following Brexit. The UK government confirmed that the Scottish DRS could progress but without including glass. This is consistent with current plans for the DRS for England. The decision to grant only a temporary exclusion and to not allow glass in the Scottish DRS' ambit has been heavily criticised by commentators on constitutional and environmental policy grounds. Meanwhile, the Welsh Government has [restated](#) its commitment to including glass in its own national DRS, despite Westminster's stance. However, there have been [recent calls](#) from retailers in the drinks industry for the Welsh scheme to align with the rest of the UK, which fears Wales being the only outlier, which could create confusion and lead to higher industry emissions.



The Subvertising Movement: Protecting Your Food and Drink Brand From “Brandalism”

Heard of the climate activists defacing advertisements, billboards and bus shelters? Brandalism is a recent anti-advertising movement that uses a brand's own assets and marketing channels against the brand itself, through replacing legitimate advertisements with spoofs and parodies (known as “subvertising”).

Food and drink brands need to be prudent in response to these acts and attuned – from a public relations perspective – to the sensitivities involved. Nonetheless, these are often unsafe acts of criminal damage that aim to shock the public and defame the targeted brand. It is important for a brand to be aware of its legal rights in response – from criminal damage and defamation laws, to advertising and IP/asset/real estate protections.

By their nature, these subverted advertisements are deliberately intended to look similar to the original advert, which means there could be an infringement of copyright or trademark law if a brand's name, logo or image is used. From an advertising law perspective, the activists are often in breach of consumer and business protection regulations because the claims they make are often untrue and/or unsubstantiated. Activists will trespass on private land, unlawfully interfere with goods and cause criminal damage to property in the process, all of which can be actionable.



Implementation of the Omnibus Directive (EU) 2019/2161 in the Agri-food Sector in Italy

Legislative Decree No. 26 of 7 March 2023 (Omnibus Decree), implementing the Omnibus Directive in Italy, has introduced new consumer protection rules into the Italian legislative system, providing significant amendments to Legislative Decree 206/2005 (Consumer Code).

In particular, the Omnibus Decree provides for new rules on price reductions and discounts that will come into force as of 1 July 2023. A new Article of the Consumer Code requires commercial operators to show in all price reduction announcements, in addition to the percentage discount, the lowest price applied by the same commercial operator in the 30 days preceding the reduction applied (defined as the “previous price”).

However, as reported by sector press releases, the Italian legislator has attempted to balance the needs for consumer protection with the difficulties in applying the principle of the “previous price” to products of a perishable nature by excluding such products from the application of these obligations.

The Omnibus Decree introduces an express exemption from the application of the mechanism on price reductions and discounts in the case of perishable food and agricultural products. In particular, commercial operators will not be required to disclose the lowest price charged during the 30 days preceding the application of the discount for (i) agricultural products and foodstuffs listed in Annex I to the Treaty on the Functioning of the European Union (which includes various products, such as animals, meat, fish, dairy products, vegetables, fruit, tea and coffee, spices, fats and oils, sugars, cocoa beans and wine) and other products processed for food use from those products and foodstuffs, where by their nature or at the stage of their processing they might become unfit for sale within 30 days of harvesting, production or processing; (ii) meat products that meet certain criteria; (iii) pre-packaged products bearing an expiry date or a minimum shelf-life of not more than 60 days; (iv) products sold in bulk, even if placed in a protective wrapping or refrigerated, which have not undergone any treatment likely to extend their shelf-life for a period of more than 60 days; and (v) all types of milk.

The new provisions introduced by the Omnibus Decree overall aim to increase consumer protection by providing consumers with a reliable parameter for understanding the actual economic advantage of the offer, thereby counteracting unfair practices of inflated prices during sales and special promotions.

UK's FSA Welcomes Border Target Operating Model on Food Imports

The UK government has now published its [draft Border Target Operating Model](#) (BTOM) covering controls on imports of food from the EU, which will start to apply from October 2023. Implementation will be in stages, with the first requirements only for medium-risk animal and plant products and high-risk foods that are not of animal origin. The BTOM will, for the first time, implement remaining controls on goods entering from the EU, and is intended to create a more effective border with an improved regime of sanitary, phytosanitary and security controls on imports into the UK from the EU.

Exactly how the BTOM will affect trade for imports to Great Britain from the EU, and whether it will make trade more difficult (or at least involve increased administrative efforts) will depend largely on the type of product. Products are being categorised according to risk, and it is possible that risk categories for different products may change over time, depending on intelligence as to risk factors. Essentially, though, the draft BTOM proposes three key dates or “milestones”:

- **31 October 2023** – The introduction of health certification on imports of medium-risk animal products, plants, plant products and high-risk food and feed of non-animal origin from the EU.
- **31 January 2024** – The introduction of documentary and risk-based identity and physical checks on medium-risk animal products, plants, plant products and high-risk food and feed of non-animal origin from the EU.
- **31 October 2024** – Safety and security declarations for EU imports will come into force (these are already required for exports and imports to and from non-EU countries and have been in operation for exports to the EU since 1 October 2021). This is separate to the obligation to pre-notify certain types of food and feed products via IPAFFS, but the draft BTOM indicates that the self-serve functionality that will allow a UK importer to complete a safety and security declaration online through the UK Single Trade Window for free will integrate IPAFFS pre-notification.

The FSA has [welcomed](#) the proposals and is inviting stakeholders and interested parties to share feedback on the draft.

Single-use Plastic (SUP) Bans in England and Wales – Status Update

The Welsh ban on various SUP products (EPS/XPS cups, takeaway containers and lids, cutlery, drink-stirrers, straws, plates, balloon sticks, carrier bags, cotton buds and oxo-degradable plastics) became law on 7 June 2023 in the [Environmental Protection \(Single-use Plastic Products\) \(Wales\) Act 2023](#). The majority of the act will come into force on dates yet to be determined, but will make it an offence to supply or offer (including free of charge) certain commonly littered and unnecessary disposable SUP products to a consumer in Wales.

In England, the legislation remains in draft ([Draft Environmental Protection \(Plastic Plates etc. and Polystyrene Containers etc.\) \(England\) Regulations 2023](#)), covering SUP plates, bowls, trays, cutlery and balloon sticks, as well as EPS/XPS food and drink containers, and has this month been going through the Secondary Legislation Scrutiny Committee. We expect a [legislative scrutiny debate](#) to be held on 4 July.



The Emergence of Greenwashing as an Environmental, Social and Governance (ESG) Risk; and new Advertising Standards Agency (ASA) guidance on environmental claims and social responsibility

There have been a number of decisions by the Advertising Standards Agency (ASA) in the UK relating to green claims made in respect of food and drink products, as reported in previous editions of newsBITE. Greenwashing is emerging as an ESG risk, because increasingly aware stakeholders, consumers and regulators are keeping companies in check by calling out and challenging greenwashing when they spot it. For further details, please see our [ESG newsletter](#) from April 2023, where we also address the importance of horizon scanning.

This month, the ASA's Committee of Advertising Practice and Broadcast Committee of Advertising Practice have released [updated guidance](#) on misleading environmental and social responsibility claims in advertising. In an accompanying [press release](#), the ASA said that the new Section 3.1, titled "Claims about initiatives designed to reduce environmental impact," draws on the principles established by recent ASA rulings and the principles from the Competition and Markets Authority's [Making environmental claims on goods and services](#) guidance, to which marketers should have regard when making claims about initiatives designed to reduce environmental impact.

New points to note are that absolute environmental claims require a high level of substantiation. Next, if an advert focuses on a net zero initiative, context should be given about how it fits into the business's wider net zero plan. Finally, there is specific guidance for water companies, noting that the ASA is likely to take account of the EA's environmental performance assessment when assessing whether positive claims that omit any reference to low ratings are likely to mislead.

The Legal Implications of Food Safety Culture: Presentation at the Food and Drink Federation's (FDF) Food Safety Networking Event

We were pleased to sponsor the FDF's recent [Food Safety Networking](#) event, and present on the legal implications of food safety culture.

In the EU, amendments were made to the Food Hygiene Regulation (Regulation (EU) 853/2004) in 2021, to requiring food safety culture to be established and maintained and providing for certain management commitments, as well as introducing requirements in relation to the redistribution of food. As the amendment was made after the regulation was "grandfathered" over into the UK at the end of the Brexit transition period, it does not apply in the UK, meaning that there are divergent minimum requirements between food business establishments in the EU and Great Britain, although, in practice, the new EU requirements are typically followed in the UK anyway, as they reflect updated BRC audit requirements and best practice.

We discussed that in the UK, despite the requirement for "food safety culture" not being embedded in legislation, there are legal implications, including in relation to the risk of non-compliance with legal requirements (more likely where the symptoms of a poor food safety culture mean routine procedural violations of food safety management systems and management placing production or cost above safety); the implications of that on the safety of food produced and associated offences; the potential impact on risk-based inspections, especially in light of the proposed new food hygiene delivery model (as summarised above); the availability of a due diligence defence; the likely impact on the "public interest" test in enforcement decision-making; the potential for director liability; and relevance for sentencing guidelines (including in relation to culpability assessments and mitigating and aggravating factors).

Also speaking at the event were Robin May, Chief Scientist for the FSA; Bertrand Emond, Culture Excellence Lead for Campden BRI; and Zoë Shaw-Mason, Group Quality Manager from Hilton Foods. The event was chaired by Kate Halliwell, Chief Scientific Officer for FDF; and introduced by Alex Turtle, Head of Regulatory Affairs at FDF.

Contacts

Nicola Smith

Partner, Birmingham

T +44 121 222 3230

E nicola.smith@squirepb.com

Hannah Kendrick

Partner, Leeds

T +44 113 284 7620

E hannah.kendrick@squirepb.com

Sam Hare

Senior Associate, London

T +44 20 7655 1154

E sam.hare@squirepb.com

Dr. Christofer Eggers

Partner, Frankfurt

T +49 69 1739 2444

E christofer.eggers@squirepb.com

Rebecca Dücker

Associate, Frankfurt

T +49 69 1739 2422

E rebecca.duecker@squirepb.com

Carlton Daniel

Partner, London

T +44 20 7655 1026

E carlton.daniel@squirepb.com

David Holland

Partner, Leeds

T +44 113 284 7014

E david.holland@squirepb.com

Ian Tully

Partner, Milan

T +39 02 7274 2007

E ian.tully@squirepb.com

Anita Lloyd

Director, London

T +44 121 222 3504

E anita.lloyd@squirepb.com

