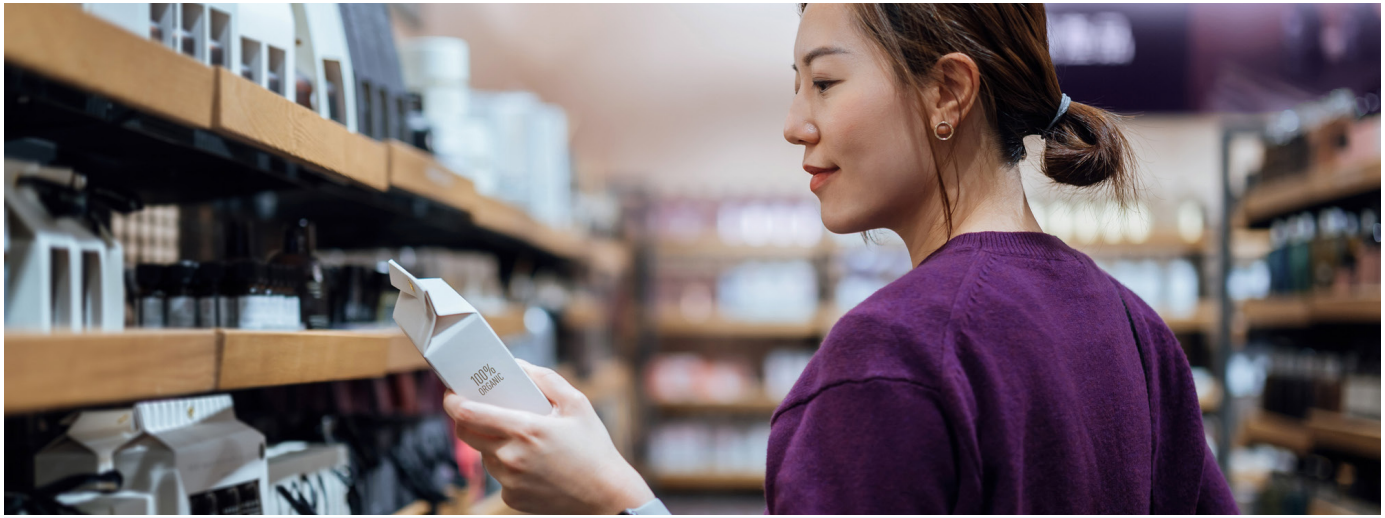
SQUIRE PATTON BOGGS

Legal NewsBITE: Food and Drink Quarterly

March 2024



UK Consultation on "Fairer and Clearer" Labelling

The UK government launched a new consultation on 12 March 2024, announcing in its press release that "the proposals for fairer food labelling will ensure greater transparency around the origin of food and methods of production, helping consumers make decisions that align with their values." The consultation will close on 7 May and seeks views, in particular, on:

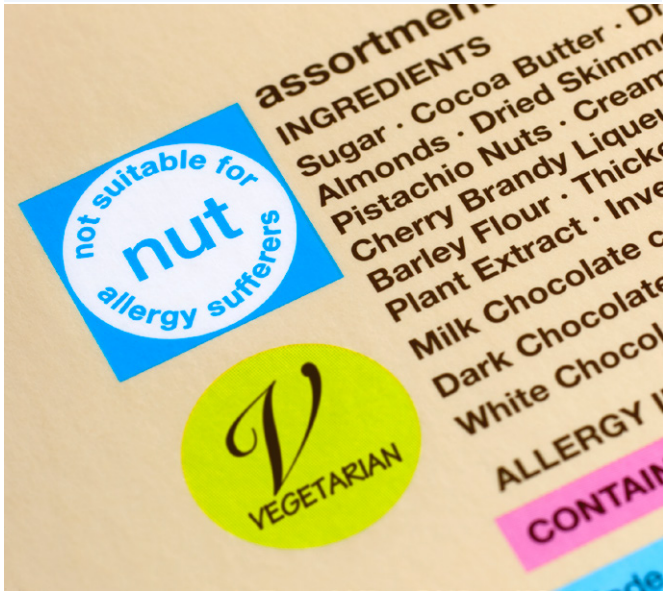
- Interventions to improve consumer understanding of the origin of food and drink products (including how and where origin information is displayed and on which products origin information should be mandatory)
- Proposals to provide clearer information on the production system for rearing of animals (including a proposed mandatory label for certain domestic and imported products of animal origin)

The online survey being used to collate responses summarises the foods for which country of original labelling (COOL) is currently mandatory in the UK. It also summarises the existing regulatory requirements around providing information on how animals are reared, including outlining that there are marketing standards for shell eggs (mandatory) and for unprocessed poultry meat (voluntary) but that there are otherwise no mandatory requirements. It also refers to requirements for mandatory labelling for pork in Germany, and in Switzerland for eggs and rabbit meat.

This is an early stage consultation and, at this stage, the Department for Environment, Food and Rural Affairs (DEFRA) is collating views on some fairly general questions as opposed to detailed legislative proposals, but the consultation is interesting, not least because the implementation of such proposals could represent a divergence between the UK-level and EU-level rules around COOL and other labelling provisions.

UK Coroner Report Into Peanut Allergy Death Published

In January, the coroner's report was issued into the death of 23-year-old James Atkinson in 2020, who had purchased a pizza that contained peanuts via a delivery app. Press reports have indicated that the coroner will "write to the authorities in support of Owen's Law". Owen's Law is the proposal for mandatory written allergy information for "non-prepacked" food. In December, the UK Food Standards Agency (FSA) Board indicated that it intends to write to ministers to communicate its view that written allergen information should be made mandatory in the non-prepacked sector in future (this would impact food service businesses, such as restaurants and takeaways, as well as non-prepacked food sold by retailers).



CMA to Launch a Market Study Into the Infant Formula Market in the UK

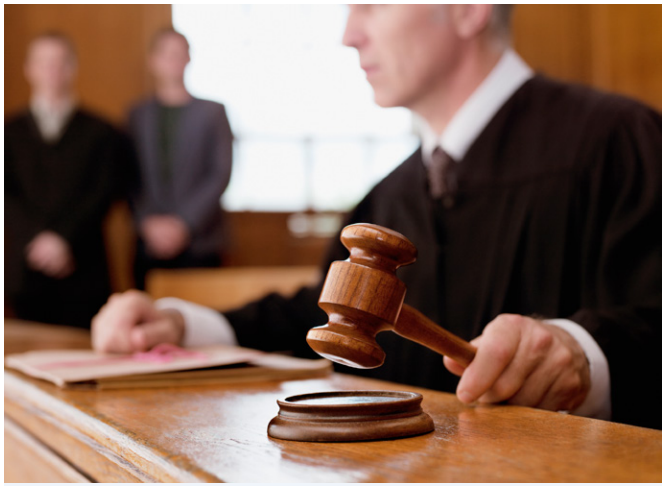
On 20 February 2024, the UK's Competition and Markets Authority (CMA) launched a market study into the supply of infant formula in the UK. This follows the publication of its initial findings and commitment to look into the sector in further detail in November last year, which found that the price of formula had risen by 25% over two years. Two companies – Danone and Nestlé – control the majority of the market, meaning that parents found it difficult to switch as prices increased.

The CMA will use its compulsory information-gathering powers as part of the market study and will not have to rely on voluntary disclosure of information. Any recommendations to the UK government resulting from the study will now also have a formal status.

The CMA is aiming to publish a final report in September 2024, having gathered additional evidence on:

- Consumer behaviour, the drivers of choice, and the information and advice available to consumers to support their decisions
- The role of the regulatory framework and its enforcement in influencing market outcomes
- The supply-side features of the formula market (such as barriers to entry and expansion)

Following the CMA's report last November, formula manufacturer Danone agreed to a 7% price cut to retailers, which has led to a series of price cuts at retailers such as Iceland, Asda, Tesco and Aldi (currently the only UK supermarket to offer own-label infant formula).



German Court Found Filling Quantity to Be Misleading Despite Correct Claim

The Hamburg Regional Court (Case No. 406 HK O 121/22) has banned a pack of margarine after deeming it misleading because its nominal filling quantity was reduced from 500g to 400g in February 2024. The product was considered misleading because an explicit indication of the reduced filling quantity was missing. The fact that the product was labelled correctly as to its contents was not enough to address this. According to the court, the consumer has no reason to check the filling quantity if the pack remains unchanged and it, therefore, deceived without an explicit indication of the reduction

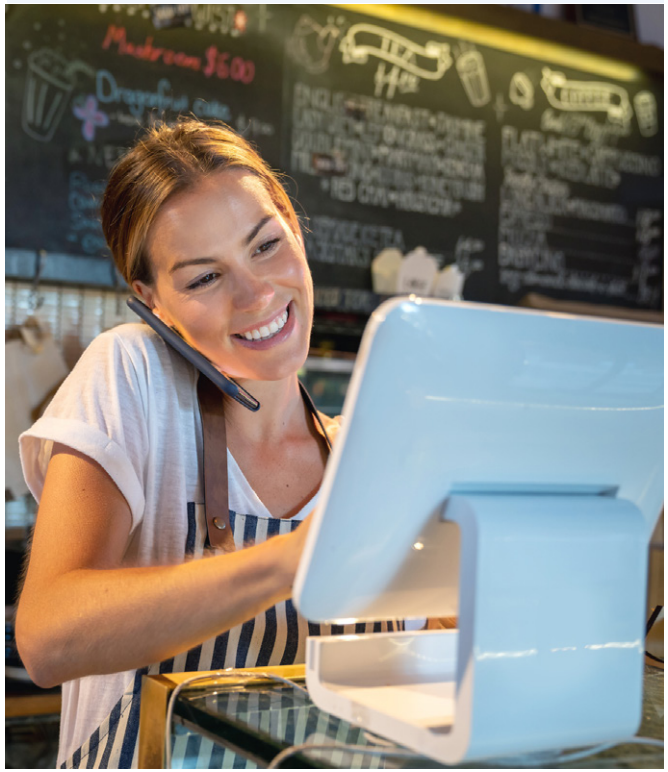
The court mitigated its view by stating that the indication of reduced quantity is only necessary for a limited period. Since margarine is bought in relatively short periods, three months were considered sufficient for consumers to get used to the new filling quantity. However, the notification period will depend on the repurchase frequency.

This strict application of the law could also be applied to other areas and will have to be considered in the future if essential product characteristics are changed.

New Allocation of Tips Laws Expected in the UK From July

The Employment (Allocation of Tips) Act 2023 is expected to come into force on 1 July 2024. It will be supported by a statutory code of practice; consultation closed on 22 February 2024. The act will create a statutory obligation on employers to allocate tips, gratuities and service charges to workers without deductions. This will also apply to agency staff.

Employers will be required to ensure that the total amount of the qualifying tips is allocated "fairly" and the code of practice will detail what amounts to a fair allocation. This will require employers putting in place a tips policy. The act introduces rights for workers to request information about how tips are paid and to bring a claim if their employer has failed to comply with the new obligations.



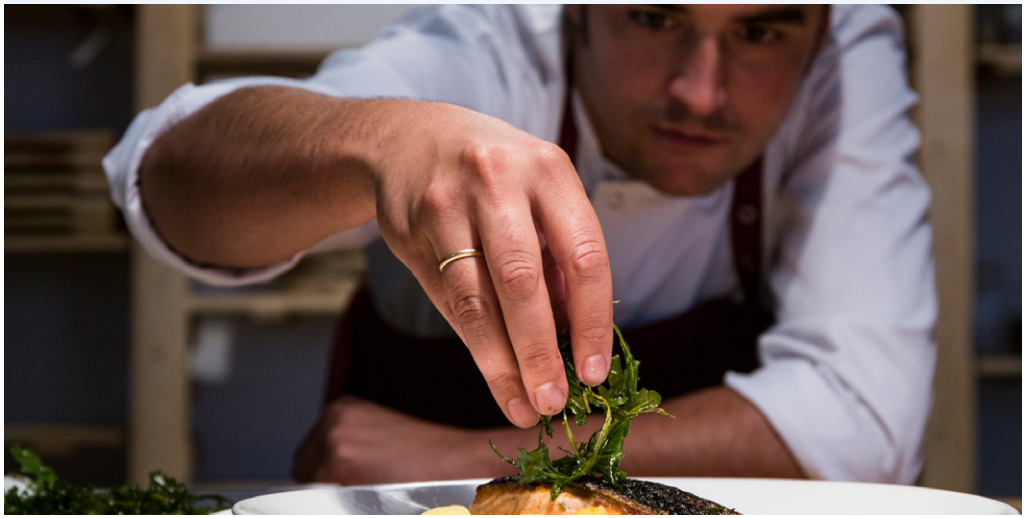
Food Safety Conviction for Michelin-starred Chef in Italy

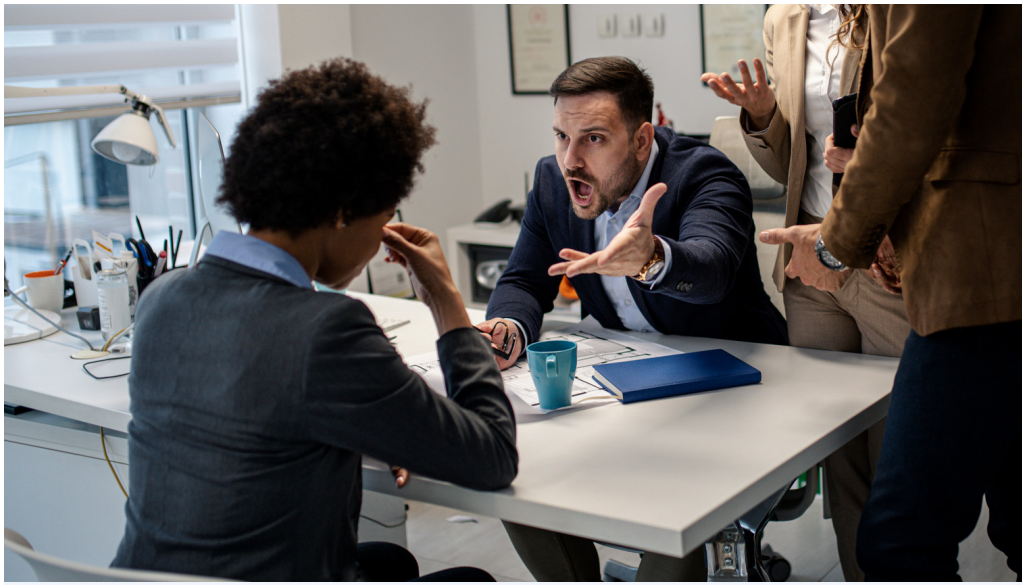
On 8 March 2024, a court in Italy convicted a famous Italian Michelin-starred chef to two months and 20 days' detention, and ordered him to pay damages of €20,000, for serving unsafe food in his restaurant.

The case began in July 2021, when, following a wedding dinner, a formal complaint was filed with the Italian police. This led to an investigation by the local health authority. The health authority reported that the cause of certain of the illnesses was contamination by norovirus, which was contained in clams served raw at the wedding dinner. The case has attracted considerable media attention in Italy.

Although it had emerged during the investigation by the health authorities that the food had already arrived at the restaurant contaminated, the Italian chef, and not the food producer, was convicted of negligent injury and trade in harmful foodstuffs. The sentence was conditionally suspended. The full judgment, including the reasoning, should be published by the Italian court of Verbania within 90 days from the judgment. In any event, it is expected that an appeal will be filed by the Italian chef against the decision.

There are general obligations in relation to food safety under EU legislation, in particular Regulation (EU) 178/2002, which provides that food must not be "placed on the market" if it is unsafe, i.e. is injurious to health or is unfit for human consumption. In determining this, regard must be had to normal conditions of use, not only by the consumer, but also at each stage of production, processing and distribution, as well as to the information provided to the consumer. As a "regulation", this legislation is directly applicable in all EU member states, including Italy, but local laws provide for enforcement and penalties in the event of breach.





New Duty on UK Employers to Prevent Sexual Harassment at Work Comes Into Force in October 2024

The Worker Protection (Amendment of Equality Act 2010) Act 2023, which will come into force on 26 October 2024, amends the Equality Act 2010 in two respects. It will:

(a) Introduce a new duty on employers to take reasonable steps to prevent sexual harassment of their employees, marking a change in the legislation from redress to prevention. The new obligation on employers requires employers to be proactive in tackling sexual harassment.

(b) Give employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached this new duty.

As such, the countdown is now on for employers to ensure that they are ready. We have created a selection of training modules to allow clients to pick and choose what is appropriate for their business. We can either provide these "off the shelf" or tailored to the organisation's requirements, supplemented by short introduction infocasts – our "skills pills".

Our DEI training solutions package is aimed at both local and global businesses operating across the UK. The different parts of the training solutions package are aimed at all levels of audience within your organisation, from HR, recruitment and talent professionals, mid-management, in-house lawyers and general counsel, to board members and other C-suite executives. We have a video explaining the package in more detail.

UK Border Target Operating Model (BTOM) – Common Errors on Import Documentation and Further Controls From 30 April

Following the introduction of the new BTOM, additional import controls were introduced on products coming from the EU and the EFTA on 31 January 2024, including Health Certificates and Common Health Entry Document (CHED) notifications for certain categories of products. DEFRA has issued a summary of common errors in import documentation detected since the changes. These errors include no commercial documentation for low-risk products; the incorrect categorisation of "composite" products (products containing products of animal origin as an ingredient, alongside other ingredients); the absence of a UK address; certain notifications being made via IPAFFS instead of directly to the Border Control Post; and errors with health certificates. These are just some of the examples provided.

To prevent potential hold-ups at the border (which could be particularly problematic for products with a relatively short shelf-life), UK food and drink businesses that import relevant products should communicate with their non-UK suppliers and freight forwarders to ensure awareness of the new requirements. At the same time, they should ensure that all relevant parties are aware of the upcoming changes from 30 April, which will include ensuring products enter through a designated BCP for the relevant commodity type (this will be the start of routine inspections for products from the EU); and, for consignments that contain fish/fishery products for human consumption, the upload of documents to the CHED import notification in IPAFFS.

Further details are available through DEFRA's website, including information on proposed alignment for imports from outside of the EU/EFTA.

Consultation on "Not for EU Labelling" for Agri-food Products Supplied in Great Britain – Opposition Likely

DEFRA announced in February that it was consulting on the introduction of "not for EU" labels on retail products across Great Britain. "Not for EU" labelling will be a requirement in Northern Ireland under the Windsor Framework agreed in relation to the Northern Ireland Protocol post-Brexit (the requirements for such individual product labels is being phased in and all products (except for some specific exemptions, as summarised in government guidance on the Northern Ireland Retail Movement Scheme (NIRMS), which will include shelf-stable composite products) will be required to be individually labelled from 1 July 2025).

There have been press reports indicating that trade bodies are considering legal action to prevent this change. The "description" of the consultation in the DEFRA announcement says that the proposal is "to ensure that no incentive arises for businesses to avoid placing goods on the Northern Ireland market". However, there can be no doubt that this proposal will place an extra burden on those supplying the market in Great Britain – and it is possible that this could deter exporters in other countries from supplying the UK market.

The questions outlined in the consultation indicate that the current proposal is to introduce "not for EU" labelling requirements in Great Britain in two phases, in line with NIRMS, as follows:

- From 1 October 2024, all meat and dairy products will need to be labelled individually
- From 1 July 2025, this will be expanded to all retail goods in scope (although there will be exceptions in line with NIRMS)

However, this would not extend to qualifying goods moving from Northern Ireland to Great Britain because of Unfettered Market Access rules. There is an indication that there will be no box or shelf-level labelling requirements for goods sold in Great Britain (unlike in Northern Ireland). The consultation closed on 15 March 2024.

Sentences of Imprisonment for Poultry Fraud

Two food company employees and a third-party poultry business owner were sentenced for fraud and acquiring criminal property relating to poultry, amounting to a loss of £318,347, according to the CPS report. The crime was identified during an audit, when it was identified that chicken was being delivered to a business that was not a customer. The owner of the poultry firm receiving the chicken was sentenced to over four years' imprisonment. The two employees were both sentenced to two years' imprisonment, plus 250 and 300 hours of unpaid work, respectively, and suspended for two years. The case is a reminder to businesses that they can be defrauded by their own employees and a system of checks can be key in identifying such crime at an early stage.

EU Proposal for a Ban on BPA in Food Contact Materials

On 9 February 2024, the EU Commission presented a draft Commission Regulation on bisphenol A (BPA) and other bisphenols in food contact materials. The draft regulation aims to eliminate BPA from the list of permitted substances for manufacturing plastic food contact materials and articles, while also prohibiting its use in food contact varnishes, coatings, printing inks and adhesives. Bisphenol and its derivatives classified as "carcinogenic", "toxic to reproduction" or "endocrine disrupting" under the CLP regulation will need to be risk assessed and authorised before being allowed for use in the manufacture of food contact materials and articles. Articles covered by the new measures must be accompanied by a written declaration of compliance (DoC) at all stages of marketing. The public consultations on the proposal, which concluded on 8 March, garnered participation from over 200 stakeholders. In the written comments, industry, among other things, asked the EU Commission to clarify rules applicable to retailers regarding DoCs. The EU Commission will now evaluate the received feedback before engaging in consultations with member state experts. The objective is to have the regulation adopted no later than June 2024.

EU Parliament's Stance on the Fight Against Food Waste

On 13 March 2024, the European Parliament adopted its position on proposed revision of the Waste Framework Directive (WFD). As highlighted in the press release from Parliament, under the revised WFD, by 2030 member states will be obliged to reduce the generation of food waste:

- In processing and manufacturing by at least 20%
- Per capita, jointly in retail and other distribution of food, in restaurants and food services and in households, by at least 40%
- This would be in comparison to the amount generated as an annual average between 2020 and 2022.

Member states will have 12 months to transpose the directive into their national laws. The works on the proposal will be continued after the EU Parliament reconvenes after June's elections.

New EU Packaging Rules to be Adopted Soon

European co-legislators are gradually finalising work on the Packaging and Packaging Waste Regulation. A political agreement on the proposal was reached on 4 March and, on 15 March, the EU Ambassadors gave a green light to the Regulation. The Regulation will introduce new requirements regarding packaging, including recyclability, minimisation, and reusability. The proposal will ban the use of single-use plastic packaging for on-site dining in the "Horeca" (hotels, restaurants, catering) sector, as well as single-use plastic packaging for pre-packed fresh fruit and vegetables weighing less than 1.5 kg. The Regulation will also introduce a ban on PFAS in food contact packaging above a certain threshold. The Regulation must be formally approved by both the EU Parliament and the Council before being published in the EU Official Journal and becoming binding law.

UK FSA Board Papers Confirm Proposed Legislation for Precision Breeding

In the Board Papers published ahead of the FSA's March meeting, the FSA confirmed that, following its review of the consultation responses, it is working with the DEFRA on the drafting of regulations, which are expected to be laid in the summer, to set out:

- An authorisation process for precision bred organisms used in food and feed
- A public register for authorised precision bred organisms
- An enforcement regime to ensure compliance

We included details of the consultation, and that proposals diverge from EU requirements, in our December edition of newsBITE.

UK Production Manager Fined for Obstruction of National Food Crime Unit (NFCU)

The FSA issued a press release in February, confirming the manager of Northamptonshire Food Services Limited had been charged and fined by Northampton magistrates court for delaying entry to the premises. The fine imposed was relatively low (although with prosecution costs, the total amount payable was over £12,000), but the report is interesting, as it is a relatively unusual report and flags, first, that the NFCU is actively conducting inspections and, second, that it is seeking to take formal action where necessary, seemingly (from the comments from the head of the FSA) for deterrent effect. As part of the FSA, the NFCU has investigatory powers for alleged breaches of food law. There was a consultation in autumn 2023 proposing enhanced investigatory powers for the NFCU, but these have not yet been implemented.

Does Copyright Protection and Competition Law Apply to AI That Could Be Used in the Food Industry?

The food industry, along with many others, has the potential to use generative AI (such as platforms like ChatGPT) in marketing and content creation. There is also potential for use of AI-powered technology to use data to provide insights to businesses, for example on changing consumer tastes/demand, and to allow personalised meal plans for individuals.

Businesses considering use of AI for these or other purposes should consider whether they will have copyright protection – the position on this may be different in different countries, as case law develops in this area. In October 2023, the Municipal Court in Prague issued a significant ruling concerning the utilisation of AI and intellectual property rights. The plaintiff had sought a determination of ownership for a picture generated by AI, sent via email to the defendant, and requested an order to prevent the defendant from infringing upon its copyright. Subsequently, the generated image was utilised by the defendant on its website without consulting the plaintiff. The complete Municipal Court decision can be accessed here (in Czech).

Initially, the court determined that AI alone cannot be deemed an author according to the Czech Act on Copyright and Related Rights, as an author must be a natural person, which AI inherently is not. Despite the plaintiff's argument that the AI created the image based on its specific instructions, thereby granting it authorship, the plaintiff failed to substantiate this claim with evidence. Consequently, the court dismissed the case due to the failure to meet the burden of proof. However, recognising the significance of this ruling, the court, despite the failure of the plaintiff to meet the burden of proof, asserted that the prompt itself cannot be considered an original work. At best, the prompt could be construed as the "theme of a work" or an "idea of work", neither of which is protected under Czech legislation.

This decision also seems to run contrary to the position under the laws of some other countries. For example, English courts would seem to grant copyright protection to creative works, notwithstanding that they have been generated by AI (although there has been a recent decision by the UK Supreme Court that AI cannot be named as the "inventor" for a patent application). We have also previously commented on the differing position under US law, which seems to follow the Czech model of denying protection to such works.

Businesses wanting to "harness" AI should also consider possible implications of competition law. Regulators are focused on how AI tools can distort competition or harm consumers across any and all industries, warning that even smaller companies may end up with antitrust "issues". Officials have noted that new technologies and market realities – including use of AI, complex algorithms and data at scale – can lead to new forms of express or tacit collusion among competitors. In the US, for example, the Department of Justice recently took the unusual step of intervening in an ongoing civil case involving a property management software company, arguing that use of an AI pricing algorithm by landlords effectively amounted to an unlawful price-fixing conspiracy. Regulators have explicitly cautioned that even smaller companies, which might not otherwise be on the antitrust radar, should ensure that their compliance policies address potential antitrust risks related to their use of AI tools.

If you are considering the use of AI, you can access and sign up to our posts on our *Privacy World* blog.

Campaign to Warn of Risks of Vegan Labelling for Allergy Sufferers

This month, the UK's FSA has started a campaign, directed at those with allergies, warning that precautionary or "may contain" labelling should be checked on foods labelled as "vegan". This is because it is, of course, possible that even those foods that do not contain animal products as an ingredient may have traces of allergens as a result of possible cross-contamination. There is no legal definition of "vegan" food.

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