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CONSUMING ISSUES

CURRENT TOPICS IN THE CONSUMER PRODUCTS INDUSTRY

CMS Cameron McKenna

— The horse meat fiasco – vital checks for all food producers
— Pricing claims that come at a cost
— Disposing of surplus property – what recent case law has taught us in relation to break rights
— Wine may not be promoted as being 'easily digestible'
— Caution on consumer competitions
— Lifting creams and tumbling scooters - substantiating advertising claims in The Netherlands and wider EU impact
— Major changes in the regulation of the food sector in the Czech Republic

Summer 2013

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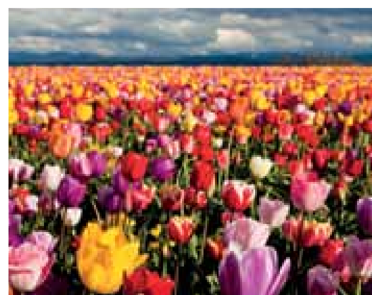

Consuming Issues is prepared by the Consumer Products Group of CMS Cameron McKenna LLP. It should not be treated as a comprehensive review of all developments in this area of law or of the topics it covers. Also, while we aim for it to be as up-to-date as possible, some recent developments may miss our printing deadline.

This newsletter is intended for clients and professional contacts of CMS Cameron McKenna LLP. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice.

The newsletter is intended to simplify and summarise the issues which it covers.

Welcome to the Summer 2013 edition of our Consumer Products update, where we take a look at some of the legal issues affecting the industry

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I am pleased to welcome you to our Summer 2013 Consuming Products update. We capture relevant issues and topics of interest for in-house legal and business personnel alike. In particular, in this issue we cover the following:

The Horse Meat Fiasco – Vital Checks For All Food Producers
We look at the recent issues in relation to the contamination of meat products and the importance of not only checking suppliers have the requisite systems in place but also that such systems are being implemented and the products supplied are tested.

Pricing claims that come at a cost
We have started to see the results of the OFT's enforcement action following its 2010 market study into the advertising of prices. That report highlighted certain pricing practices that were 'more likely to lead to consumer harm' (such as drip pricing and time limited offers) and made clear that advertised prices must be both transparent and upfront. We look further at recent ASA cases in relation to pricing issues.

Disposing of surplus property – what recent case law has taught us in relation to Break Rights
As companies continue to look for ways to save money, downsizing of property portfolios remains high on the agenda. Conversely landlords don't want to suffer another void in this climate and look for ways to retain tenants, often resorting to Court. We have reviewed the trends in relation to break clause cases before the courts and examine the lessons learnt.

Wine may not be promoted as being 'easily digestible'
The Court of Justice of the European Union has sought to clarify the principles for determining whether a statement can be properly considered a health claim in relation to food labelling. We look further at using the claim 'easily digestible' for a wine.

Caution on consumer competitions
Beware - the Court of Justice of the European Union has made a far reaching decision on consumer competitions which has an unwanted impact on promoters in the UK and elsewhere across Europe. We explore the particular requirements in relation to consumer competitions and what promoters should be aware of

Lifting creams and tumbling scooters - substantiating advertising claims in The Netherlands and wider EU impact
We look at the rules concerning misleading and comparative advertising in The Netherlands and the main principles governing what is and what is not permissible.

Major Changes in the Regulation of the Food Sector in the Czech Republic
The Czech Ministry of Agriculture has recently proposed extensive amendments to legislation governing Food Sector regulation. We review how the new legislation will extend existing labelling requirements, especially with regard to nutritional information, allergenic substances and the country of origin.

If you would like to discuss any of the issues in this update please contact the person whose contact details are above the relevant articles or your usual contact at CMS Cameron McKenna.

I hope you find the articles interesting and informative.

The horse meat fiasco – vital checks for all food producers

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If food producers take only one lesson from the latest media furore surrounding contamination of meat products it is the importance of not only checking suppliers have the requisite systems in place but also that such systems are being implemented and the products supplied tested. Also, food suppliers can give themselves a competitive advantage by providing these reassurances to customers.

It is recommended that all food businesses take this as an opportunity to review their due diligence and crisis management programmes. Clearly, in these straightened times, resources for testing and review can be hard to come by and this may need to be considered when contracts are being agreed. However, with some news outlets reporting an initial £300 million wiped off the Tesco share price and with the subject of quality being key to brand reputation, the lack of any checks could well be a false economy.

A number of risk factors might be taken into account when considering prioritising the testing of supplies:

- The location of a supplier; UK, European or Worldwide and any difference in product or manufacturing regulations.
- The size of the supplier and the sort and number of other products potentially supplied from their premises.
- The compliance with and provision of up to date quality certification, evidence of Hazard Analysis Critical Control Points (HACCP) checks and risk assessments and any audits/reviews thereof. Test certificates from accredited, independent third parties will add particular reassurance.
- Product specifications, ingredient listings and claims.
- Insurance terms and conditions of cover.

Advantages of ensuring the highest quality checks are primarily the protection of brand image and market share, limiting liability and possibly insurance premiums, reduction of wastage costs, litigation costs and costs of regulatory compliance, improvement of supplier product quality and improved relationships with trading partners.

Due Diligence is a defence that every company active in the food and drink sector should be able to utilise and already have in operation as part of its quality control and risk management processes. It is designed to balance the protection of the consumer against defective food with the right of traders not to be convicted of an offence they have taken all reasonable care to avoid committing. This defence is available where the person charged proves that they, 'took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control'.

Those who don't have direct control over the food product, such as traders who neither manufactured nor imported the food, can rely on the defence that the commission of the offence (for example, falsely or misleadingly describing or presenting food) was due to an act or default of another person who was not under his control, or to reliance on information supplied by such a person.

Crucially, the burden of proof lies with the accused person or company. The level required is the civil basis of balance of probabilities and not beyond all reasonable doubt. It is important to be aware that the requirement is for the defendant to prove that he took all reasonable precautions AND exercised all due diligence. These are cumulative matters, not alternatives.

What is reasonable depends very much on the facts of each case. What is reasonable for a large multinational is very different from what may be deemed reasonable for a small or medium sized business. Equally this may also depend on the respective specialist knowledge of each party, as well as their resources.

It is therefore important for a company to have a regular review or audit of their systems, to include:

— Suppliers – What questions are being asked to ascertain and, where necessary, actually check or test the source of ingredients of and quality of the products provided? Are these up to date? Are they appropriate (e.g. DNA testing)? Are full traceability documents provided and kept up to date for all products? Are those who carry out checks appropriately experienced and equipped? Are there specific labelling requirements due to the source of supply?

— Manufacturing –Are HACCP checks complied with? Is quality testing regularly carried out and records kept? Are those who carry out checks appropriately experienced and equipped? Are risk assessments carried out and recommendations complied with?

— Packaging & Storage – Are these regularly inspected and checked? Are those who carry out checks appropriately experienced and equipped?

— Carriage – What are the conditions of transportation and carriage? Are these tested? Are quality checks utilized? Are those who carry out checks appropriately experienced and equipped?

— Labelling & Advertising – Is appropriate legal advice being obtained in respect of all new packaging, advertising and product lines, as well as of revisions to old labelling/product reformulation? Are recommendations carried out, for example re supporting data, and all legal regulations complied with? Are legal and technical developments regularly reviewed vis-à-vis current practice?

— Personnel & Out-sourcing – Are staff properly experienced and/or equipped to carry out required checks? Is training kept up to date and properly documented? Are there the resources to request external expertise? If out-sourcing of checks takes place, is it to an appropriately experienced and equipped entity? What checks have been done of their credentials and those of their insurers? Are these checks kept up to date? Are references confirmed?

— 'Post-Marketing Surveillance' / Customer Complaints Department (This is likely to depend on the size of the entity/sensitivity of the product concerned) - Is there a system in place? Is it responsive? This system should, in addition to forwarding more serious claims to insurers, be aware of key issues such as emerging patterns, malicious damage, health risks that appear genuine and these should be forwarded to legal and the technical, QA team for assessment/follow up/monitoring.

The due diligence defence has a fluid identity. Once a company becomes aware of an issue or problem it has a responsibility to deal with it; what the defence may have covered one week may not be covered the next week.

It is important as part of a companies' due diligence process that as well as auditing, reviewing and keeping up to date on their processes, they have in place a crisis management plan in case things go wrong. The crisis management plan should be practiced, very much like a fire drill or other emergency procedure, kept updated and any recommendations promptly implemented. A crisis plan should allow the company to act responsibly, decisively and with transparency. Customer safety should be pivotal to any plan or decision making process and, commercially, this should not only be done but perceived to be done by both the regulatory authorities and the consumer.

'It is important as part of a companies' due diligence process that as well as auditing, reviewing and keeping up to date on their processes, they have in place a crisis management plan in case things go wrong.'

Pricing claims that come at a cost

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In the past 12 months we have started to see the results of the OFT's enforcement action following its 2010 market study into the advertising of prices. That report highlighted certain pricing practices that were 'more likely to lead to consumer harm' (such as drip pricing and time limited offers) and made clear that advertised prices must be both transparent and upfront.

In July 2012, 12 airlines agreed to abandon the industry's infamous drip pricing policy that saw charges for debit card payments added to the headline price just prior to booking. In November 2012, following an OFT investigation, eight supermarkets agreed to adopt a set of OFT principles in relation to special offers and promotions for food and drink. The principles prohibited practices such as artificially increasing prices to make subsequent discounts more attractive.

The ASA has also been busy with pricing issues. In February 2013, the Advertising Codes rules relating to price comparisons were amended to remove the requirement to compare prices against identical or substantially equivalent products only. The new position brings the Advertising Codes into line with EU law and allows advertisers to compare prices of goods and services that meet the same need or are intended for the same purpose. In addition, a further amendment allows VAT exclusive pricing to feature in advertising targeted at both business and consumers as long as the VAT exclusive price is clearly addressed to those who pay no VAT or can recover it. The Committee of Advertising Practice has also seen fit to remind advertisers of two of its positions: firstly, that the claim 'free' should not be used if consumers have to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item, and secondly that, when using qualified promotional pricing such as 'up to 70%' or 'prices from £99', at least 10% of the discounted products must be available at the headline discount/price.

In a ruling in May 2012 against a Virgin Media ad for telecom packages, the ASA held that, because it considered line rental was a non-optional charge when taking a telecoms package from Virgin Media, the cost of line rental must be displayed with sufficient prominence. Virgin Media sought independent review but the outcome remained unchanged. The ASA, however, accepted that the decision had a significant impact on the telecommunications industry and allowed advertisers a three month grace period to amend their advertising accordingly. The ruling demonstrates that following an accepted industry pricing practice may not prevent an adverse ASA ruling.

Numerous ASA complaints were upheld in 2012 in relation to daily deal sites which struggled to demonstrate that the saving claims made in their advertising were achievable. Whilst the ASA appears to recognise that these complaints were largely due to teething problems within a nascent industry, this did not stop the regulator taking a hard-line approach on the matter. It even took the unusual step of referring Groupon to the OFT in December 2011 despite not exhausting its available sanctions. To avoid these issues, advertisers should ensure they hold robust evidence to substantiate any saving claims made.

Advertisers will be aware that, in November 2010, the Department for Business, Innovation & Skills (BIS) issued a revised pricing practices guide to help

advertisers ensure their advertising of prices is compliant. This guide has been endorsed by the OFT and the ASA has stated that advertisers should take into account its provisions. Advertisers seeking to rely on that guidance, however, should take note of an ASA ruling from February 2012 in relation to Comet.

A TV ad for Comet featured savings claims for various products based on the advertiser's previous selling price. Comet argued that the ad was compliant with the BIS guidance as the period for which the higher prices were charged was made known to viewers as required. The ASA, however, did not agree and considered that whilst 14 days was a long enough period to establish a genuine retail price for a washing machine, seven days was not sufficient for previous selling prices for a printer and a TV to also be considered genuine. Considering that the advertised saving claims were upfront, transparent, approved by Clearcast and appeared to adhere to official guidance, Comet seems to have been dealt with harshly.

Nevertheless, the ruling serves as a valuable reminder that advertisers must ensure they keep up to date with the activities of both the OFT and the ASA in relation to pricing, and carefully review any claims relating to pricing before publication/broadcast.

'In February 2013, the Advertising Codes rules relating to price comparisons were amended to remove the requirement to compare prices against identical or substantially equivalent products only. The new position brings the Advertising Codes into line with EU law and allows advertisers to compare prices of goods and services that meet the same need or are intended for the same purpose.'

Disposing of surplus property – what recent case law has taught us in relation to break rights

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As companies continue to look for ways to save money, downsizing of property portfolios remains high on the agenda. Conversely landlords don't want to suffer another void in this climate and look for ways to retain tenants, often resorting to Court. The past 12 months have seen a number of break cases come before the Courts. Below is a summary of the lessons learnt from such recent break cases.

Payment of all sums due up to the break date
Often leases make payment of all sums due up to the break date a condition of the break right. A failure to pay will invalidate the break. A tenant should not assume that a cheque handed over on the last day of the term will be sufficient. To avoid argument, any amounts payable should be made in cleared funds.

If interest is due on late payment under the terms of a lease, a tenant should ensure that there are no amounts due for interest that remain outstanding, whether demanded or not. Any interest owing will invalidate the break.

A full quarter's rent
Often break dates fall between two rent payment dates. If the lease is silent, how much rent does a tenant have to pay? In 2012 two cases looked at this point and both concluded that the full quarter's rent is payable, even if the reservation of rent in the lease says 'yielding and paying therefore during the term … yearly (and proportionately for any part of a year) rent…'. It may be that a lease provides for excess rent to be repaid following the successful termination of the term. This, however, does not relieve from the obligation to pay the full quarter's rent in advance.

Satisfaction of conditions
Often tenants are required to ensure there are no subsisting breaches of leases and that vacant possession is given on the break date to ensure a successful termination. If an agreement is reached with the landlord for a payment in lieu of satisfying the conditions it is important that that payment is made before the break date, otherwise the lease will continue. The Court is likely to hold that time will be of the essence for any payment in settlement of outstanding obligations.

Personal break rights
If a break right is expressed to be personal to the original tenant then subsequent tenants will not be able to take advantage of the option to terminate.

Some of these cases will be subject to appeal this year. However, for the time being this is the current position.

'If you are considering exercising a break right it is important to be aware of the potential pitfalls.'

Wine may not be promoted as being 'easily digestible'

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Food products sold in the European Union which have labelling and advertising claiming health and medical benefits must comply with Regulation No. 1924/2006 on nutrition and health claims made on foods (the Regulation). Nevertheless, despite the European Commission publishing a list of health claims which are permitted for use on food products, some uncertainty remains on the extent to which nutrition and health claims can be properly made.

In *Deutsches Weintor eG v Land Rheinland-Pfalz*, the Court of Justice of the European Union (the CJEU) sought to clarify the principles for determining whether a statement can be considered a health claim. The claim in question related to 'easily digestible' wine which the German producer Deutsches Weintor claimed caused less adverse effects compared to other wines due to the lower acidity levels. The German supervisory authority objected to the use of the phrase 'easily digestible' on the basis that the phrase qualified as a health claim according to the Regulation and that the Regulation prohibited the use of such claims on the labelling and advertising of alcoholic beverages containing an alcoholic content of more than 1.2%.

When interpreting whether a statement is a health claim, the CJEU confirmed that the relationship between food and health must be understood in a broad sense. The Regulation provides no clarification as to whether the relationship between food and health must be direct or indirect and what the intensity or duration of the relationship should be.

In its reasoning, the CJEU suggested that a 'health claim':

- includes not only claims promising health improvements as a result of consuming the food product but also claims which imply that negative or harmful effects on health, which would typically accompany or follow consumption, would be eliminated or reduced. The description 'easily digestible' suggested that the wine was easily absorbed and digested by the consumer due to the lower acidity of the wine and, as a result, the consumer would maintain a state of good health in comparison to when consuming a wine with a higher acidity level; and
- may refer not only to the temporary effects of consuming a precise quantity of food but also the cumulative purported health benefits of repeated or long-term consumption of the product.

In light of its above conclusions, the CJEU ruled that, in the context of the reduced acidity of wine, the phrase 'easily digestible' did qualify as a health claim. As such, Deutsches Weintor was prohibited from using the phrase on the labelling or advertising of wine which has an alcoholic content of more than 1.2%.

This is a landmark decision. As a result of the dangers relating to the consumption of alcoholic beverages, the CJEU attempted to both protect and prioritise the health of consumers whose consumption habits may be directly influenced by such claims. To do so, the CJEU adopted a broad interpretation of the concept of a health claim to prevent the use of unclear or misleading labelling and advertising on food products.

'When interpreting whether a statement is a health claim, the relationship between food and health must be understood in a broad sense.'

Caution on consumer competitions

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The Court of Justice of the European Union (CJEU) has made a far reaching decision on consumer competitions which has an unwanted impact on promoters in the UK and elsewhere across Europe. The Court has indicated that consumers must not be required to bear any cost in finding out if they have won a prize, or in claiming a prize, even the unavoidable cost of a postage stamp or local rate telephone call. The reasoning for this decision derives from the Unfair Commercial Practices Directive 2005/29/EC (the Directive), which is aimed primarily at unscrupulous traders.

Initially, proceedings were brought by the OFT against Purely Creative and other traders in the High Court in December 2009. The OFT sought to restrain the traders from distributing promotions which informed consumers that they could claim one of a number of prizes. In order to find out which prize had been won, consumers called a premium rate telephone number, used a reverse SMS text messaging service, or obtained the information by ordinary post. Prominence was given in advertising to the premium rate method.

Consumers were told the cost per minute for telephone calls and the maximum duration of the call. They were not told that from the charge of £1.50 per minute, the promoter took £1.21. While the prizes were genuinely available, the process of claiming incurred a substantial proportion of the prize value through telephone/text charges and delivery and insurance costs.

The High Court held that the promotions involved unfair practices. On appeal, the Court of Appeal made a reference to the CJEU regarding the interpretation of the Directive concerning business-to-consumer commercial practices which are regarded as unfair in all circumstances:

'Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

— there is no prize or other equivalent benefit, or

— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.'

The traders argued that there could be no unfair practice if consumers were sufficiently informed of the cost of claiming the prize. However, this interpretation was rejected. It is straightforward to see how a false impression is created if in reality there is no prize to be won. However, the CJEU appeared also to say that the very fact that winners are required to pay a cost means that a false impression is created when they are informed that they have won a prize. The CJEU also held that offering a number of options to consumers would not eliminate the unfair character of the practice if any of the options required consumers to bear any cost whatsoever, as 'a prize in respect of which the consumer is obliged to make a payment of whatever kind cannot be regarded as a 'prize''.

The CJEU emphasised the need for clear and sufficient information to be provided to consumers in order to enable them to identify precisely the nature of the prize. By way of example, a prize defined as an 'entrance ticket' for a football match would not cover the costs of transport from the winner's home to the football stadium. However, a prize of 'attendance' at the game would require the trader to bear the travel costs.

The case appears to go much further than curtailing the type of promotions run by Purely Creative. However, there remains some uncertainty as to the extent to which the decision is relevant to genuine and legitimate prize promotions, especially where costs to be incurred by consumers are kept to a minimum.

The case will now return to the Court of Appeal. Until that time, promoters should proceed with caution.

'The Court has indicated that consumers must not be required to bear any cost in finding out if they have won a prize, or in claiming a prize, even the unavoidable cost of a postage stamp or local rate telephone call.'

Lifting creams and tumbling scooters - substantiating advertising claims in The Netherlands and wider EU impact

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When it comes to stimulating sales of a product, advertising is key. Only few products sell themselves. Most products need to be actively brought to the attention of the relevant potential customers and advertising is the appropriate means to that end. Advertisers will often want to refer to test results or expert opinions in support of the advertised product claims. Such references are, however, not always permitted.

In the European Union advertising is bound by strict rules, and the Netherlands is no exception. The rules concerning misleading and comparative advertising have been implemented in the Dutch Civil Code (DCC). In addition, the Dutch Advertising Code (DAC) also sets out what is permitted or not in advertising. This code is a form of self-regulation, in line with the relevant provisions in the DCC, and considered binding to all. The main principle is that advertising may never be misleading but that a certain level of exaggeration is inherent to advertising.

The DAC permits the use of expert opinions or certificates in connection with the promotion of products. Such documents however must be truthful and in accordance with recently accepted scientific views. Also, the DAC stipulates that in advertising intended for the general public any scientific terms, statistics and quotations must be used very cautiously. Prohibited is any use of specialist terminology, descriptions or images obviously aiming to suggest in a pseudo-scientific or misleading manner the existence of any unproven product characteristics.

In the Netherlands, any person may file a complaint against an advertisement with the Dutch Advertising Code Committee (ACC). One complaint was filed against an advertisement stating the following: 'Warning for mobility scooter riders! Many senior citizens are insecure and anxious after having fallen down with their mobility scooter. And with good reason: the most recent figures of the Foundation for Consumers and Safety show that in one year's time 640 mobility scooter riders were hospitalised, in most cases after they had fallen down with their mobility scooter with three or four wheels. Over five years, the number of accidents with mobility scooters has increased by as much as 41%'. The advertisement was placed by a company that sold five-wheel mobility scooters. The ACC found that the advertiser had not used the referenced figures with the necessary caution. The figures were incorrectly represented and did not support the drawn conclusions. The ad was therefore considered misleading.

An advertisement for anti-aging cream also failed the test of both the ACC and the Board of Appeal. The advertiser claimed that the cream had 'a long-lasting lifting effect' and 'transforms the skin completely after four days'. Reference was made to a self-evaluation test, 10 years of research, seven patents and six scientific studies. The Board of Appeal considered that in principle the advertiser may refer to research, patents and studies. However, if it is suggested this results in the products having a demonstrable effect or certain qualities, the advertiser must make it sufficiently plausible that use of the product indeed leads to the specific results claimed in the advertisement. As this was not considered the case, the ad was found unacceptable.

It follows from yet another decision of the ACC that if an advertisement refers to independent test results, the advertiser can no longer argue that the relevant claim is merely a form of customary exaggeration in advertising.

As the aforementioned decisions of the ACC illustrate, claims in advertisements may be substantiated by references to documents and figures to which the average consumer attaches a certain weight, but prudence is called for. Documents and figures must be truthful and may not leave room for confusion. Misleading the public should always be avoided. As the laws and regulations on advertising have been harmonised throughout the EU, the advertising authorities in other Member States may be expected to decide in line with the ACC's findings in similar cases.

'If an advertisement refers to independent test results, the advertiser can no longer argue that the concerned claim is merely a form of customary exaggeration in advertising.'

Major changes in the regulation of the food sector in the Czech Republic

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The Czech Ministry of Agriculture has recently proposed extensive amendments to the Act on Food and Tobacco Products (Food Act), and to the Act on Czech Agricultural and Food Inspection Authority (CAFIA). If approved by the Parliament, the amendments shall come into force by 13 December 2014 and, together with the new EU Regulation on provision of food information to consumers (Regulation), will bring about the biggest changes in the regulation of the food sector in the past 15 years.

The purpose of the new regulation is threefold: to strengthen the protection of consumers' health; to increase consumers' awareness; and to increase the efficacy of supervision in the food sector. The crucial changes to be introduced by the new regulation and amendments are as follows:

The Regulation extends and specifies the existing labelling requirements, especially with regard to nutritional information, allergenic substances and the country of origin.

Nutritional declarations are already mandatory when nutritional statements are written on the packaging of food. However, according to the Regulation, the labels on all processed food and drink products shall provide further information on energy content, fat, saturated fat, carbohydrates, sugars, protein and salt, expressed as amounts per 100g or 100ml.

The provision of allergen information will be required for all the stages of the food chain i.e. food intended for the final consumer, food supplied by mass caterers, and foods supplied to mass caterers. The current labelling requirement for pre-packed foods, whereby they must declare allergenic ingredients, is maintained, but the allergens must now be emphasized within the ingredients list. Allergen information must also now be provided for non pre-packed foods.

The Regulation also stipulates that the country of origin for meat from pork, sheep, goats, and poultry will need to be indicated. Such information is currently compulsory only for beef, honey, olive oil, fresh fruits, and vegetables.

There will also be a new labelling requirement concerning so-called 'imitation foods'. The new requirement is that the labels of such foods must clearly state, in a prominent font size and next to the food's brand, that an ingredient that would normally be expected to be found in the food has been replaced.

The amendment to the Food Act will have the effect of redistributing the supervisory duties among authorities. The Ministry of Agriculture proposed that its subordinate organisations shall perform the official inspection of the entire chain of production and consumption of food, including the inspections in food service providers. This would be a change from the current system, where such supervisory activities are conducted by offices subordinate to the Ministry of Health.

Furthermore, according to the amendment to the Act on CAFIA, the inspection authorities will be able to impose a wider range of sanctions. The inspection authorities shall, for example, be able to prohibit the use of premises of an uncooperative food business operator, suspend the placement of mislabelled or poor quality food products on the market, and order quality checks of such products in certified laboratories.

The amendment to the Food Act will also considerably increase the penalties that may be imposed on food business operators who are in breach of their duties. For example, the existing penalty of up to CZK 1 million for misconduct of an administrative nature is to be increased to CZK 3 million. The penalties for non-compliance with the quality requirements, storage conditions, labelling or other requirements arising from EU legislation will be able to be imposed up to the amount of CZK 10 million.

‘The purpose of the new regulation is threefold: to strengthen the protection of consumers’ health; to increase consumers’ awareness; and to increase the efficacy of supervision in the food sector.’

Interflora stems Marks and Spencer keyword advertising

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The High Court has ruled that Marks and Spencer infringed Interflora's trade mark by purchasing advertising keywords on Google for 'INTERFLORA'. Keywords play a crucial role in internet advertising but this case highlights that there is a fine line between fair, competitive advertising and trade mark infringement.

In May 2008 Google changed its policy for the UK and Ireland so as to allow advertisers to purchase keywords registered as third party trade marks. Following Google's policy change, M&S purchased keywords from Google so that ads for its own flower delivery service were displayed when users searched Google for INTERFLORA and similar terms.

Interflora complained and alleged trade mark infringement as soon as M&S started bidding on 'INTERFLORA' keywords. The case was originally heard in the UK in 2009 but the High Court referred several questions to the CJEU, which were answered in September 2011.

To succeed on a claim for infringement the claimant must show that one of the functions of the trade mark is adversely affected by the alleged infringing activity: Interflora alleged an adverse effect to the origin and investment functions of its trade marks. The CJEU held that the origin function of the mark would be adversely affected if the ad did not enable normally informed and reasonably attentive internet users, or enabled them only with difficulty, to ascertain whether the goods or services referred to by the ad originated from the proprietor of the mark (or an economically connected undertaking) or a third party. The High Court has now concluded that keyword advertising is not inherently objectionable from a trade mark perspective, but considered that M&S had infringed Interflora's marks under Article 5(1) of the Trade Marks Directive. The origin function of the mark was adversely affected for the following reasons:

— A significant proportion of internet users in the UK do not appreciate the difference between natural search results and paid-for advertising via keywords (although a majority are so aware);

— The reasonably well-informed and reasonably observant internet user did not know that M&S's flower delivery service was not part of the Interflora network;

— There was nothing in M&S's advertisements to inform a reader that M&S was not part of the Interflora network;

— The nature of the Interflora network made this difficult to tell, as members trade under their own names, with varying prominence given to the Interflora brand; and

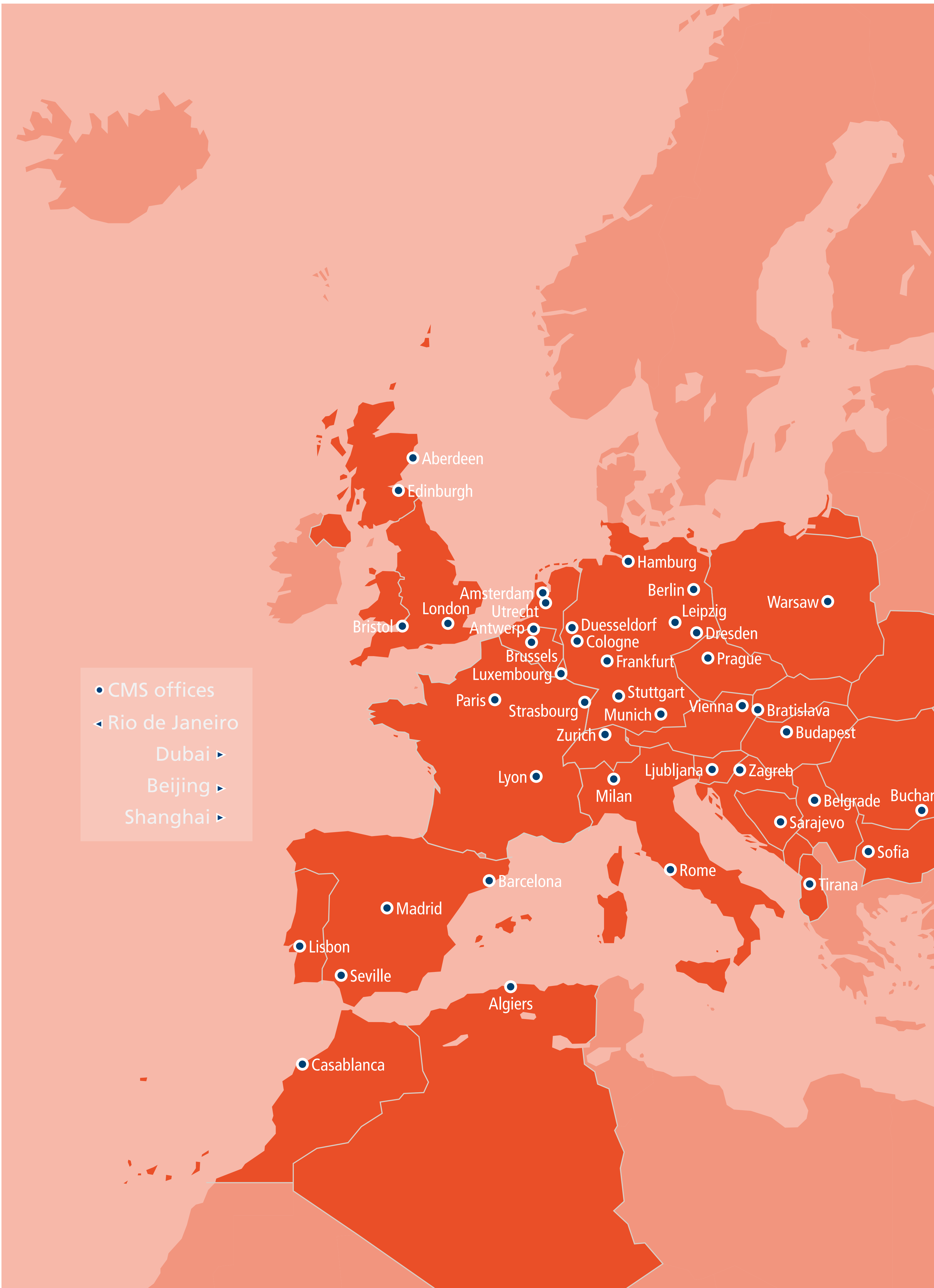
— Interflora had co-branding arrangements with several large retailers, which made a connection with M&S plausible.

Separately, Interflora also argued that use of its mark as a keyword was taking an unfair advantage under Article 5(2) of the Trade Marks Directive. This argument did not succeed, however, as the CJEU took the view that M&S had not taken unfair advantage of the mark "without due cause" and, as such, use of the mark as a keyword, for the purposes of Article 5(2), fell "within the ambit of fair competition".

Keyword advertising plays a crucial role in the online

market place, with Interflora itself having spent over £2.2 million on keyword advertising in 2012, which generated estimated revenues of £29 million. There is no doubt that the individual facts of this case were significant, and it is therefore possible that there might be a different result in other circumstances. It is clear, however, that there is a fine line between acceptable competitive advertising and trade mark infringement.

Advertisers considering purchasing competitors' registered trade marks as keywords should ensure that normally informed and reasonably attentive internet users can determine, without difficulty, whether the goods or services referred to by the ad originated from the proprietor of the trade mark or a third party. Conversely, trade mark proprietors should be alert to the fact that, since 2008, Google has allowed third parties to purchase keywords registered as trade marks and should seek to enforce their rights to protect their brands.



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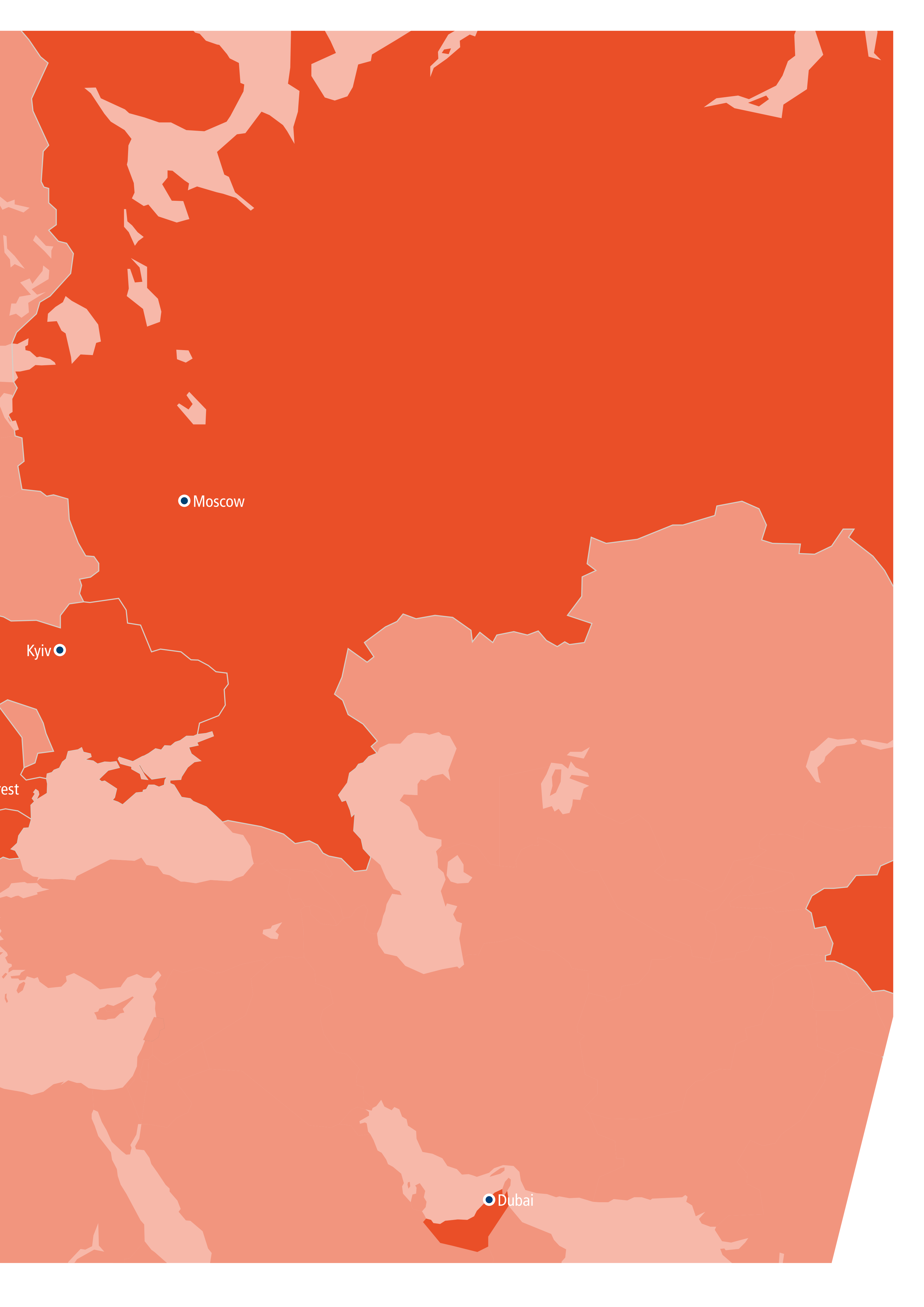
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