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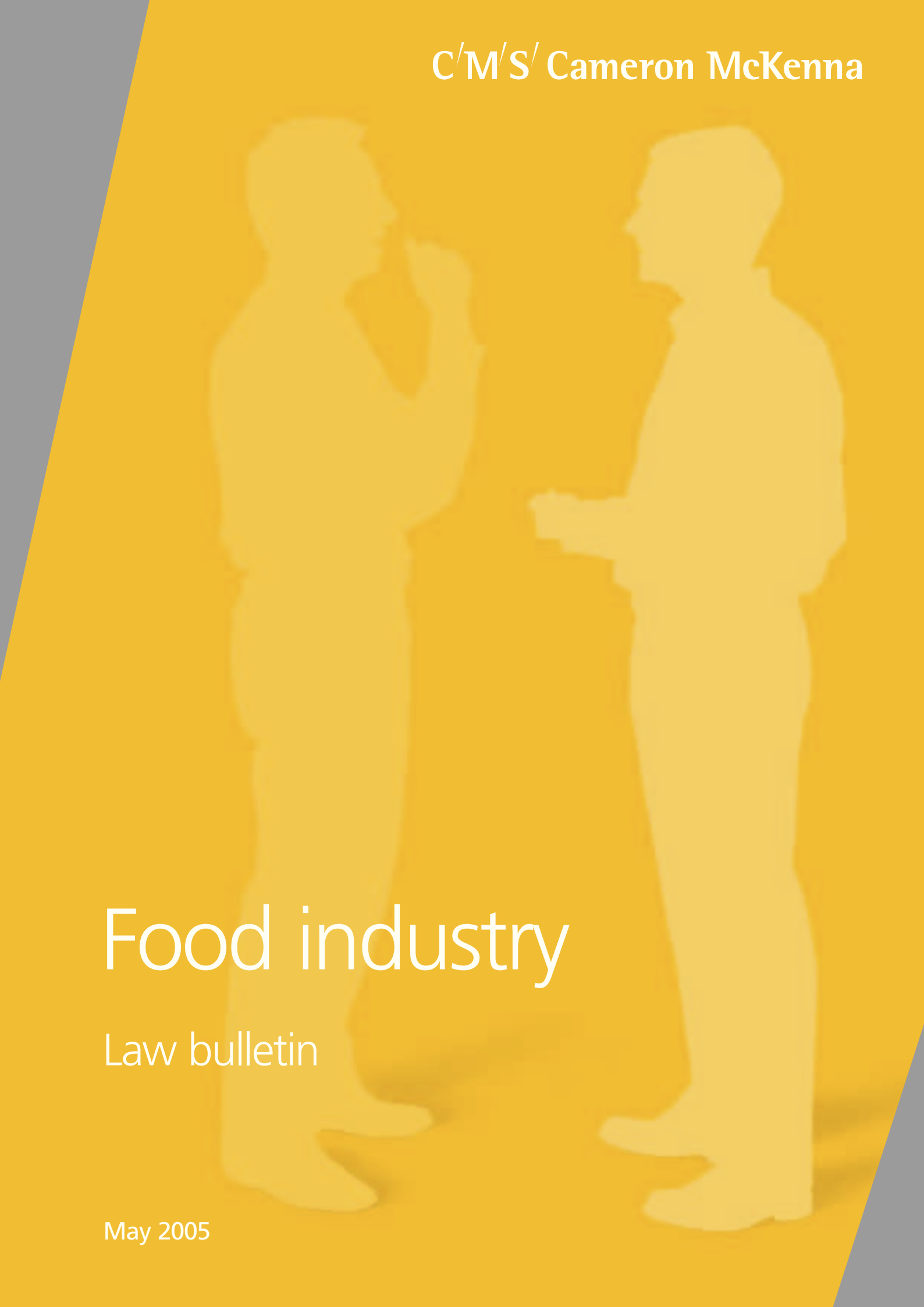

Food industry

Law bulletin

May 2005

Contents

Editorial

Louise Wallace

Jessica Burt

Obesity

Obesity and in particular the growing number of clinically obese children has resulted in increasingly emotive language and warnings of an obesity "epidemic" sounding across the globe. The key question for debate is who should bear responsibility - the state, the food industry, or indeed, the individual?

White Paper

In November 2004 the British government unveiled the much anticipated White Paper: "Choosing Health: making healthier choices easier" (CM6374.) This proposed a range of voluntary measures from restricted advertising to a "signposting" system for shoppers to help them distinguish between "good" and "bad" food, healthier ranges of food and alternatives to a voluntary levy on industry to help support health campaigns. It has prompted cries of 'nanny-statism' from some, although others felt they did not go far enough. The Delivery White Papers have now been published, but is the whole thing just pie in the sky?

Obesity & Trans-Fat Litigation

In the US the question of who takes responsibility for food consumption is being disputed in the courts in the ongoing *Pelmans v McDonalds* case. The Trans-Fat litigation has also taken its first scalp with McDonalds agreeing to settle the case. Both lawsuits raised important issues relating to food labelling and advertising.

Labelling & Advertising

Labelling, advertising and the question as to whether or not certain foods should contain warnings are dominating the debate on obesity within the food industry. This is reflected in the UK by the analysis of food in order to check the veracity of the claims being made in packaging and advertising.

In Europe the issue of labelling and advertising also dominates. The European Health Commissioner has demanded a restriction on advertising of certain foods to children within the year. Also, the health and nutritional claims regulation proposal has been adopted and was due to come into force this year, although it now looks more likely to be 2006.

> *Obesity – who should take the blame – the state, the food industry, or indeed, the individual?*

Sudan 1 recall issues

The Sudan 1 recall has been used by consumer groups and the media to make broad criticisms of the processed food industry. It also illustrates the extreme response which results from any perceived safety issue with food. This bulletin provides guidance on how you can protect your product.

The amount of contamination by the banned Sudan 1 was so slight as to represent no real risk to public health. The presence of the dye was in fact only a technical breach of the food safety legislation. Questions that may be added to these triggered by this recall are: Did the instigation of a recall provide any real additional health protection to

consumers as opposed to its withdrawal from supply? If not what was the basis of the recommendation to recall? How can the reasoning behind recall decisions made by public authorities be made more transparent?

The FSA is currently consulting on its decision making process and further comment on this may be accessed via our Law-Now service.

Competition update – the OFT's supermarkets report

The OFT has now published its further findings on how supermarkets are complying with the Supermarkets Code of Practice (the Code). The OFT's report found that generally supermarkets are complying with the Code. The report stemmed from an OFT review of the Code in February 2004 which found a widespread belief among suppliers that the Code was not working effectively but there was no hard evidence to support this belief. Currently the OFT is inviting comments on the report's findings and on the wider role of supermarkets to be submitted by 31 May 2005 and is considering whether there are sufficient grounds to make a market investigation reference to the Competition Commission.

Employment update

Discrimination on the grounds of sexual orientation and religion is now unlawful. In October 2004, new disability rules on access to premises and employment came into force. There are also new statutory minimum disciplinary and grievance procedures that employers (and employees) must follow.

New legislation and cases

"…the OFT's report found that generally supermarkets are complying with the code of practice…"

The General Food Regulations 2004 mark the new era of Regulation 178/2002 reaching full implementation.

Plus there are a number of important court cases on food labelling and marketing reviewed plus Advertising Standards Authority (ASA) decisions.

The Government White Paper "Choosing Health: Making Healthy Choices Easier" (CM6374) published in November 2004 dealt with a number of health and corporate social responsibility issues. However, for food companies the main issues concerned proposals for labelling, advertising and anti-obesity, anti binge-drinking measures.

Jessica Burt

UK White Paper – Choosing Health – impact on food

> *If by early 2007 these voluntary measures have failed, the government has stated it will take action…*

Apart from a further push until the end of the UK Presidency of the EU in 2005 to simplify nutrition labelling and make it mandatory on packaged foods, all the aims proposed were voluntary measures. Nevertheless, there was a definite warning in the White Paper with the statement that, if by early 2007, these voluntary measures had failed to produce change in the nature and balance of food promotion, the government would take action using existing powers or new legislation to implement a framework for regulating the promotion of food to children.

The voluntary measures proposed by the White Paper include:

"Signposting"

- Signposting was a coding system for food, with criteria set by the government, the Food Standards Agency ("FSA") and industry.

Product development

- The development of healthier foods,

Labelling information

- Developing nutrition labelling and associated messages,

Promotion and pricing

- Strategies to promote healthier eating, and

Customer information and advice

- Including healthy eating and the promotion of sensible drinking messages to combat alcohol misuse.

These are health conscious times and a careful consideration of the placing and promotion of all foods and consumer products must be taken.

As part of increasing opportunities for healthy choices further proposals included increasing the availability of healthier food and reversing the trend towards larger portion sizes. The proposed targets the development of guidance on portion sizes implementation strategies will be published in a further White Paper sometime in 2005 (see next section). Additionally, in the field of "signposting" there are proposals to restrict the promotion of foods, in particular to children.

The UK White Paper proposal for the "signposting" of foods, providing a code based on the nutritional content of foods, is seen by some as the provision of useful information to consumers. However, the Code is viewed by others as giving a misleading and subjective nutritional view of a specific food as opposed to the promotion of a healthy diet as a whole, in view of the fact that no food should be deemed dangerous in isolation.

This remains a voluntary proposal and we have not, as yet, reached the stage of placing warnings on high fat or calorific foods, or instructions as to how they may be ingested safely. There is a definite shift in emphasis towards the provision of social good by industry, and the threat of regulation is helping to achieve this. These are health conscious times and a careful consideration of the placing and promotion of all foods and consumer products must be taken.

Advertising and perceived "unhealthy" food

Reports from the Food Standards Agency (FSA) and Office of Communications (OFCOM) were examined in relation to food advertising to children. The FSA's view was that action to address the imbalance in TV advertising of food to children was justified but it was the combined effect of television advertising and other forms of promotion and marketing that resulted in a significantly greater effect than television alone. The OFCOM report concluded that television advertising had a modest direct effect on children's food consumption. However, the significance of television advertising was small when compared to other factors linked to childhood obesity such as lack of exercise, family eating habits inside and outside the home, parents, demographics, school policy, public understanding of nutrition, food labelling and other forms of food promotion.

The White Paper concluded that to have maximum effect, action needed to be comprehensive and taken in relation to all forms of food advertising and promotion, including; television advertising, sponsoring and brand sharing, point of sale advertising and labels, wrappers and packaging. Possible options of restriction were provided as:

- When, where and how frequently certain advertisements and promotions appear;
- The use of cartoon characters, role models, celebrities and glamorisation of foods that children should only eat seldom or in moderation as part of a balanced diet; and
- The inclusion of clear nutritional information e.g. the signposting system, and/or balanced messages in advertisements to counteract the influence of high fat, salt and sugar food advertisements.

These options would be dependent upon the nutrient profiling scheme that would be developed between the Department of Health and the FSA. Once again, the level of restriction will depend upon where the food falls in the nutrient profiling to be provided by the FSA.

The White Paper proposes strengthening existing voluntary codes in non-broadcast areas including the setting up of a new food and drink advertising and promotion forum to review, supplement, strengthen and bring together existing provisions; and contributing funding to the development of new health initiatives, including positive health campaigns.

Conclusion

Industry has expected the proposals contained in this White Paper for some time now. The general requirements for voluntary action to be taken in relation to

labelling and promotion of foods has indeed already been implemented to a large extent by industry. The main difficulty will come in relation to any "signposting" strategy that is developed. It may be argued that if the aims of better education and clearer information are the objectives then the provision of "signposting" may be seen as too much of a blunt instrument for use across a broad populous with different nutritional needs and that this may result in, in effect, less choice for consumers. "Signposting" would put the emphasis on individual foods as opposed to food as part of a balanced diet and its' adoption as a standard should be carefully monitored.

"Signposting" would put the emphasis on individual foods as opposed to food as part of a balanced diet and its adoption as a standard should be carefully monitored.

1 In 2002 McDonald's France placed an advert in Femme Actuelle magazine which actively discouraged parents from feeding their children regular hamburgers. The advert stated: "Our children belong to the fast-food generation; forbidding them from eating this type of food would not be constructive at all. However there is no reason to eat excessive amounts of junk food, nor to go more than once a week to McDonald's. A child's meal should thus be selected according to his weight and physical activity. If a child is rather active, there is no problem, the calories from this happy meal will be burned off quickly. On the other hand, if a child is rather sedentary and overweight, it will be better to offer him a hamburger rather than chicken nuggets, orange juice or mineral water and of course a yoghurt…"

2 So far proposals in the UK White Paper on Health in relation to labelling and promotion of foods will be voluntary. However, it is clearly stated that this will be monitored and if, by early 2007, these measures have failed to produced a change in the nature and balance of the promotion, the government threatens to take action through existing powers or new legislation to implement a clearly defined framework for regulating the promotion of food to children.

The three white papers contain a lot of jargon. There is a great emphasis on "joining up action", "building partnership and inviting engagement", "planning and performance assessment" and "resourcing."

Delivery plans for the white paper "Choosing Health" published

It is in particular in relation to the food industry and in "tackling obesity" that the objectives and their implementation are most problematic.

The Department of Health (DoH) has launched three publications outlining a delivery plan for its Public Health White Paper commitments.

Delivering Choosing Health
http://www.dh.gov.uk/assetRoot/04/10/57/13/04105713.pdf

Choosing A Better Diet - A Food and Health Action Plan
http://www.dh.gov.uk/assetRoot/04/10/57/09/04105709.pdf

Choosing Activity - A Physical Activity Action Plan
http://www.dh.gov.uk/assetRoot/04/10/57/10/04105710.pdf

The proposals are mainly reliant on voluntary action and a "partnership" approach between government and industry. The voluntary route allows for a certain amount of flexibility and speed but also opens the way for inconsistency of implementation and potentially a greater confusion for the public resulting from this.

It is in particular in relation to the food industry and in "tackling obesity" that the objectives and their implementation are most problematic.

Signposting

By mid 2005 it is stated that the government aims to have introduced a system that could be used as a standard basis for signposting food. The "5 a day" logo, a very simple positive labelling logo has been compared to the introduction of a system of categorising all foods on the basis of the provision of a healthy diet. Whilst it may be established that the provision of "5 a day" fruit and/or vegetables can only be positive, the sign posting criteria assesses each food as part of a healthy diet (of which each individual has separate

different requirements). It is assessed that once the nutritional criteria of each food is established the government goal is, by early 2006, to provide a clear straightforward coding system "that busy people can understand at a glance, to find out which foods can make a positive contribution to a healthy diet, and which are recommended to be eaten only in moderation or sparingly". Further, for this to be "in common use" at that time. Additionally, the nutritional criteria to be used should identify which foods can be promoted to children.

This is despite the fact the recent European Food Information Council (EUFIC) study into food labelling and consumers' understanding of them (http//www.eufic.org/gb/heal/heal12.htm) found that the nutritional system "is not about qualifying into good or bad products, it is about helping to integrate any product into a good diet". (See below for further information on this.) Also, as long as consumers lacked a basic understanding of nutritional terms and requirements, any label information will be lost on them. There was therefore an immediate need for better nutrition in education and improve nutrition knowledge.

It is impossible to see how there could be a clear, straightforward coding system in common use where requirements as to nutrition labelling in a basic form differ across Europe. Different food producers from different member states and even between different industries will adopt different labelling practices. Equally, there is likely to be a difference between different sorts of products (ie those unpackaged and those from caterers, those from different countries and different uptake levels within the UK itself). Rather than creating clarity it is likely the government will provide further cost on industry without any corresponding impact on public health.

It is likely that the nutritional criteria which will be established by the Food Standards Agency (FSA) will be key to how food products are promoted in the future. It is therefore vital that the basis upon which the FSA decide this criteria for each food be very carefully considered and not necessarily in a "one size fits all" context.

The government is setting out its own criteria as to what is or is not a healthy diet. By adding its endorsement to a particular "healthy" (or otherwise) diet, unless this is clearly established with nutritional education and further detail as outlined by the EUFIC, they are opening the way for potential "obesity" style actions against them from consumers who have followed their recommendations and suffered ill effects.

New Food and Drink Advertising promotion forum

The new Food and Drink Advertising promotion forum has been set-up to "review, supplement, strengthen and bring together existing provisions". It is, again, uncertain on what basis any strengthening of existing voluntary codes will be undertaken.

Summary

There is no indication within the delivery papers of any of the concerns and drawbacks raised during the consultation period.

Whilst certain "healthy" foods may be positively marketed as such, the complex set of nutritional requirements for individuals cannot be boiled down to an easy to read coding system "that busy people can understand at a glance". Negative or restrictive labelling of certain foods by necessity feeds into a "warning labelling" mentality which is out of place in the food market.

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> *"Negative or restrictive labelling of certain foods by necessity feeds into a "warning labelling" mentality which is out of place in the food market."*

If there is not effective self-regulation there is therefore a real threat of legislation…

European position on advertising perceived "unhealthy" food

The EU's newly inaugurated commissioner for health and consumer protection, Markos Kyprianou, has been reported as stating that the food industry was the fastest, and most effective, route to reducing the obesity problem. "The signs from the industry are very encouraging, very positive. But if this doesn't produce satisfactory results, we will proceed to legislation," Markos Kyprianou informed the Financial Times in January 2005.

15 March 2005 saw the official launch of the 'EU Platform for Action on Diet, Physical Activity and Health'. Plus it is expected the food industry will agree new self-regulatory standards. Commissioner Kyprianou hopes these will produce commitments by the end of this year, or early 2006, and that these will have practical benefits. However, it is not clear what these 'practical benefits' must be as Markos Kyprianou has set no tangible targets, but it is clear that restricting advertising of certain food to children is high on the Commision's agenda.

The document setting out the EU Platform on Diet, Physical Activity and Health recognised that there are many causes of obesity and no simple solutions.

Examples of existing initiatives to tackle obesity in the EU – advertising, promotion and marketing

Examples of voluntary initiatives already planned or implemented across Europe are as follows:

European Food and Drink Industry

- Members of the European Food and Drink Industry (CIAA) agree to conform to a code of general principles for product advertising, and specific principles on advertising to children.

World Federation of Advertisers

- The World Federation of Advertisers rolled out 17 road-shows across Europe, focusing on the obesity problem, and promoting the European Advertising Standards Alliance best practice guidelines for food advertising.

"Media Smart"

- "Media Smart" is a UK project funded by the advertising industry aimed at improving media literacy among 6-11 year olds. It supplies educational materials to schools, aimed at encouraging children to think critically about advertising. It will shortly be introduced to 8 other European countries: Belgium, Germany, Netherlands, Czech Republic, Ireland, France, Finland, Poland and Slovenia.

European Community of Consumer Co-operatives (Euro-Coop)

- Since 2000, consumer cooperatives in the UK have adopted a voluntary ban on the advertising of high fat, high salt or high sugar foods during children's viewing hours. The same policy has been adopted for press advertising. Across Europe, consumer cooperatives promote magazines, recipes and web-based materials on healthy eating for consumers and provide education materials for schools.

European Vending Association

- The European Vending Association has developed best practice guidance for vending in schools, which promotes choice in the branding, contents, and location of machines.

For further information please see: http://europa.eu.int/comm/dgs/health_consumer/dyna/consumervoice/create_cv.cfm?cv_id=59

The main proposals in relation to alcohol and advertising have in fact already been instigated by way of OFCOM, which has the statutory responsibility for the regulation of broadcast advertising, and has published its code amendments, aimed at significantly strengthening the rules in many areas, particularly to protect the under-18s.

White paper and alcohol

> *"The UK government has already introduced an "alcohol harm reduction strategy for England" which already included a social responsibility charter for drinks producers…"*

Alcohol and advertising

The new rules were published on 1st November 2004 and came into force on 1st January 2005 and apply to all advertising campaigns conceived after that date. (There is a grace period allowed until 30th September 2005 for advertisers who have committed themselves to campaigns which may not comply with the revised rules). The requirements of the revised rules are that:

- Advertisements for alcoholic drinks on television must not be likely to appeal strongly to people under 18, in particular by reflecting or being associated with youth culture;
- Advertisements must not link alcohol with sexual activity or success or imply that alcohol can enhance attractiveness;
- Television advertising for alcoholic drinks must not show, imply, or refer to daring, toughness, aggression or unruly, irresponsible or anti-social behaviour; and
- Alcoholic drinks must be handled and served responsibly in television advertising.

Alcohol and voluntary social responsibility

The UK government has already introduced an "alcohol harm reduction strategy for England" which already included a social responsibility charter for drinks producers which proposed:

- New measures to ensure advertising does not promote or condone irresponsible or excessive drinking;
- Putting the "sensible drinking" message clearly on bottles alongside information about unit contents;
- Drinks companies pledging not to manufacture irresponsibly;

> *…the concern to implement effective self-regulation before actual legislation is imposed is a very real one…*

- A move to packaging products and safer materials;
- The industry contributing to a new fund to finance innovative schemes to address alcohol misuse at national and local levels.

As well as a new "code of good conduct" scheme for retailers, pubs and clubs, this code is run locally by partnership of the industry, police and licensing panels and led by the local authority, dealing with such issues as underage drinking, alcohol related health problems and alcohol related crime and disorder in town centres as well as the need to provide targeted education information for local schools about the dangers of alcohol misuse.

The White Paper further refers to a Voluntary Social Responsibility Scheme for alcohol producers and retailers to protect young people by:

- Placing information for the public on alcohol containers and in alcohol retailer outlets;
- Including remainders about responsible drinking on alcohol advertisements; and
- Checking identification and refusing to sell alcohol to people who are under 18.

Conclusion

The Voluntary Social Responsibility Scheme, with reference to reminders about responsible drinking on alcohol advertisements, whilst not prescriptive heralds the beginning of some sort of warning label on alcohol products. No European country has passed health warning label legislation for alcohol beverage containers but it would appear that some alcohol industries are already pre-empting future legislation. (In any event, this issue had already been raised via the "Alcohol Harm Reduction Strategy for England" earlier this year.)

Nevertheless, the concern to implement effective self-regulation before actual legislation is imposed is acute, especially in light of the proposed smoking legislation due to insufficient progress voluntarily. This is a clear example of where industry fails to act decisively, regulation being imposed upon it. At least, in relation to corporate social responsibility issues, healthy eating and alcohol there is still room for voluntary compliance.

The White Paper, although duplicating previous proposals in some areas and reviewing established aims and objectives, does mark a definite shift in government policy away from the laissez faire and towards the perceived social good. Whether or not its objectives are followed through with any conviction will be seen in the coming months.

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BCAP: Broadcast Advertising of Alcohol

Already there are general prohibitions in both TV and Radio advertising rules that advertisements must not suggest that alcohol has therapeutic qualities.

BCAP is consulting to combine the rules for TV and Radio and also further restrict any nutritional claims for alcohol and prevent it from being advertised "in the context of health or fitness". The consultation on health and dietary claims ends 6 June 2005.

Obesity now affects more people worldwide than malnutrition. The prevalence of obesity (defined as body max index (BMI) greater than 30Kg/m2) is now estimated as one in four men and one in five women. The number of obese children has doubled over the past 20 years. One in ten six year olds and one in six fifteen year olds are now obese.

Mark Tyler

Obesity

On 27 May 2004 the health select committee published its report into obesity. The report found that the proportion of the population that is obese had grown by almost 400% in the last 25 years. On present trends, obesity will soon surpass smoking as the greatest cause of premature loss of life. The report warned the £3.5bn cost of obesity could threaten the end of a publicly funded health service and there is a danger of increased levels of diabetes, cancer and heart diseases if obesity rises.

> *"On present trends, obesity will soon surpass smoking as the greatest cause of premature loss of life."*

Pelmans v McDonalds – obesity litigation in US

There has been widely reported obesity litigation in the US. The most notable of which was *Pelmans v McDonalds*, which was successfully struck out in 2003. However, McDonald's is again facing the threat of obesity-related litigation after a US Appeal court ruled in January 2005 that part of the dismissed lawsuit pertaining to deceptive advertising could be reinstated.

Plaintiffs in *Pelmans v McDonalds* alleged that McDonald's food was inherently dangerous and addictive and caused obesity and diabetes among a group of teenagers. The action also alleged that the outlets misled people into thinking that its products were nutritious.

At the first strike out application U.S. District Judge Robert Sweet held:

"as long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera - for instance by the masking of information necessary to make the choice, such is the knowledge that eating McDonalds with a certain frequency would irrefragably cause harm - that manufacturers should be held accountable."[3]

However, the Judge also considered that if, as the claimants argued, McDonald's food:

"'was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to

3 Judgment of Judge Robert W Sweet, January 2003 in allowing the defendant's application to strike out the action.

> *The issue of obesity in the UK has become predominantly one of protecting brand reputation…*

its characteristics'. If true, consumers who eat at McDonalds have not been given a free choice, and thus liability may attach."

Therefore, although the Judge dismissed the lawsuit because he said it failed to link the children's alleged health problems directly to McDonald's products, there was the opportunity for the claimants to argue that McDonald's products had been so altered that their unhealthy attributes were now outside the understanding of the average reasonable consumer.

A federal appeals court has now ruled that some of these questions might be answered with information that is appropriately the subject of discovery. This therefore allows the claims to survive procedurally at least in the short term. Matters of further disclosure may be pre-empted by the requirement that plaintiffs provide more detailed allegations as to what they ate and what information they relied upon in ordering their meals.

Conclusion

Pelman has been the most widely reported obesity lawsuit in the US but is unlikely to be the last. Especially in light of the studies[4] researching the effect of convenience foods in causing a change in brain structure, usually associated with drug addiction. The claim of "addictiveness" of fast food is a new element to counter the "obviousness" argument in the US class action litigation along the lines of those against the tobacco industry.

The obesity claims in the US have many parallels with the US tobacco litigation. Many of the issues that arose in tobacco (allegations of fraudulent deception and corporate cover-up, issues as to knowledge / defence of volenti non fit injuria, issues of addiction etc) are also relevant in the US in relation to obesity claims. Although there has been tobacco litigation in the UK, it has not followed the same course as that in America, mainly due to limitation points, adjudication by a judge as opposed to a jury and so the examination of issues such as a precise causal connection and practical issues such as the "loser pays" indemnity costs rule.

Manufacturers do have a general obligation to warn consumers in respect of product risks. However, in the absence of specific regulatory objections, this obligation exists only where the manufacturer can reasonably anticipate that health hazards will arise during the normal expected use of a product. Nevertheless, sensible defensive steps aimed at limiting possible exposure to litigation will also have positive impact on a company's reputation for corporate and social responsibility and a possible impact on insurance premiums.

In the UK whilst there has been no high profile litigation there has been increased consumer pressure and awareness. The issue of obesity in the UK has become predominantly one of protecting brand reputation in seeking to limit any future legislation in this area through self-regulation.

Many companies have already taken action to improve the nutritional content of food products because of consumer concerns and many fast food restaurants have now introduced a range of healthy dishes.

The importance of brand reputation certainly should not be underestimated. Other US litigation concerning trans-fats has been filed with the sole aim of raising consumer awareness against the products which are the subject of the litigation.

4 The New Scientist 1 February 2003 pages 27-29

McDonald's Corp. will pay $8.5 million to settle a lawsuit accusing the fast-food giant of failing to inform consumers of delays in a plan to reduce fat in the cooking oil used for its french fries and other foods.

Tim Hardy

Reputational risk – trans-fat litigation

BanTransFats.com, a non-profit advocacy group, sued McDonald's in California state court in 2003, alleging the company did not effectively disclose to the public that it had not switched to a healthier cooking oil. McDonald's has agreed to donate $7 million to the American Heart Association and spend another $1.5 million to inform the public of its trans fat plans.

> *"The aim of the litigation…was to increase publicity…"*

The settlement is the result of litigation from a San Francisco-area activist Stephen L. Joseph who has been seeking to raise public awareness of the health dangers from the trans fatty acids (TFAs) in hydrogenated or partially hydrogenated oils. Trans fats, which occur naturally in small amounts in dairy products and meat, are also formed artificially when manufacturers hydrogenate fat or oil, primarily to extend the shelf life of their products. It has been claimed that ongoing research suggests trans fats raise LDL cholesterol levels, causing the arteries to become more rigid and clogged. An increase in LDL cholesterol levels can lead to heart disease.

McDonald's announced in September 2002 that it was voluntarily changing to a cooking oil with less trans fat and that the change would be completed by February 2003. However, McDonald's encountered operational issues and the oil was not changed. Plaintiffs claimed in the lawsuits that McDonald's did not take sufficient steps to inform the public that it had not changed the oil.

Mr Joseph's organisation BanTransFats.com first gained publicity for his cause by suing Kraft Foods two years ago to highlight the trans fat content of Oreo cookies. The company has since moved to remove trans fats from its snack foods. Oreo cookies were targeted as Kraft had not at that time indicated they would be taking any steps to reduce trans fat content whereas other manufacturers had. It now looks like Mr Joseph, whose aim is to publicise the dangers of trans fats, is turning on the food restaurant business.

The aim of the litigation, as was the case against Oreo cookies, was to increase publicity and inform consumers about trans fats in McDonald's oil. The aim of the settlement is stated to be to focus media and consumer attention on the issue of partially hydrogenated cooking oils in many restaurants, not just McDonald's.

The US Food and Drug Administration ("FDA") has now introduced the requirement for trans-fat labelling that will come into force on 1 January 2006. Europe has yet to

Consumer organisations are pressing for transparency and food makers are feeling market pressure to reduce TFAs.

introduce a similar rule, but consumer organisations are pressing for such transparency and food makers are feeling market pressure to reduce TFAs from their products. The UK Co-op supermarket chain has this year announced its aim to list the amount of trans-fats in its own-brand food products.

Conclusion

Law suit or publicity stunt? The level of media attention given to the above US actions highlight concerns over the relationship between the general level of consumer knowledge in relation to the specific properties of a product and the respective labelling obligations on the manufacturer for that product. There is clearly a risk in relation to brand reputation where products' "healthy" qualities are marketed, or excessive consumption encouraged, where the products have corresponding high levels of another ingredient that should not be consumed to excess.

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The ordinary consumer is fully aware that excessive consumption of alcohol or sugar products can lead to a number of health problems. Nevertheless, whilst food manufacturers are not strictly required to maximise the health benefit of their products, there is clearly a risk in relation to brand reputation where they seek to market products' "healthy" qualities or encourage excessive consumption where the products has corresponding high levels of another ingredient which should not be consumed to excess.[5]

Jessica Burt

Health and nutritional claims

Health and nutritional claims regulation

The making of positive health claims will shortly be governed by regulation. There is already the prohibition against medicinal claims.[6] but there has been a grey area in which the general healthy attributes of certain foods may be promoted.

The proposed European Regulation on nutrition and health claims is projected to come into force at some time in 2005 (although this is now more likely to be 2006). Under the proposal, no food product would be prohibited but claims on food products will have to be in compliance with the regulation, with conditions for the use of nutrition and health claims, prohibition of certain claims and scientific evaluation of the use of claims in relation to the nutritional profile of food.

Criticisms of the Regulation include the amount of bureaucracy involved will be disproportionate. For example, it will be necessary for applicants to submit copies of the

5 The risk of litigation would also be a possibility especially if there is a specific ingredient which may be shown to cause a specific ailment if order to provide the causal connection between the excessive consumption and the injury, also as we have seen even failed lawsuits may have an enormous effect in terms of time, cost and reputation.

6 In October 2004 Asda was fined GBP5,000 for claiming mangos had anti-cancer properties, the label read: "Mangoes are a great source of vitamin C and beta carotene which are good for healthy eyes and skin. Their antioxidant properties help to fight cancer. Try adding mango to smoothies, fruit salad or breakfast cereal." Swindon Borough Council decided to prosecute as this breached the Food Labelling Regulations 1996 which strictly prohibited any claim that a food ".has the property of preventing, treating or curing a human disease or any reference to such a property." (Schedule 6 Part I section 2)

> *If any claim can be scientifically substantiated, then it is argued that it is not in the consumer's best interests to prevent it from being communicated.*

wording of proposed health claims in the languages of all member states even if they intend to market the product in only one or two countries. There are also concerns about the likely length and cost of the approval process and the restrictive process stifling innovation.

There is also opposition to restrictions on implied health claims and the prohibition against endorsements from health professionals and charities. If any claim can be scientifically substantiated, then it is argued that it is not in the consumer's best interests to prevent it from being communicated.

As a result of these criticisms and others, the speedy implementation of this regulation is being resisted. It must be hoped that amendments will be accepted that secure a sensible balance between protecting consumers and allowing substantiated and beneficial claims to be made.

Nutritional labelling

Where no nutritional claim is made nutritional labelling is voluntary. The consumer magazine Which? has investigated the accuracy or otherwise of this nutritional labelling of products.

Which? reported early in 2005 to have looked at 570 nutrients listed on 70 different products and found only seven per cent of nutrients matched exactly with what the label said. 17 per cent fell outside the agreed margin of error.

Lacors, the body which advises trading standards officers about enforcing food laws, guidelines allow for the content of main nutrients to be 20 per cent either side of the labelled value, though this rises to 30 per cent for lesser nutrients making up between two and five per cent of a food.

Manufacturers are permitted to use average figures to give consumers a good indication of what the 'typical' nutrient content is for each product and although there is no specific law about how accurate the information on food labels should be, any significant inaccuracy may be prosecuted under the Trade Descriptions Act 1968 as being 'misleading' to consumers.

It is particularly important for reputational reasons and to avoid any prosecution or provide a defence of due diligence under the Trade Descriptions Act to ensure that where health or nutritional claims are made about a certain ingredient that this is substantiated in the finished product and there are checks within the system to monitor the accuracy of this.

Consumer's understanding of labelling

The FSA started consultations on an appropriate food labelling system in November 2004.

The FSA has reported that consumers felt that any signposting system should be independent from the food industry, with many naming the Agency as the appropriate recognisable body. Of the five concepts tested, two had significantly more promise than the others.

These were:

- A 'simple traffic light' system (option A) – where foods are labelled with a single green, amber or red traffic light on the basis of their overall contribution to a balanced diet
- A 'key nutrients' system (option D) – which rates each nutrient, for example as high (red), medium (amber) or low (green)

The FSA research also took some initial views on the application of signposting to catering establishments, with the intention of informing more research at a later date. It was stated by the FSA that consumers' views on signposting in catering outlets varied significantly depending on the context, the type of outlet and how often they were likely to eat there. It was stated that a system operating in catering would need to take account of the diversity of the catering sector and for this reason, consumers felt that the same system could not be applied across both the retail and catering sectors. This therefore indicates the potential for two different systems already.

The FSA's formal 12-week consultation on its research to develop a scheme to

categorise foods based on the nutrients they contain ended on 25 February 2005. The outcome of the nutrient profiles research could help underpin some of the signposting options. The FSA has stated that people would like simple labelling signposts to help them make informed and healthier food choices.

However, the onus should be on simplicity and uniformity and this does not fit in with the different nutritional requirements for different members of the population nor for the vast number of different nutrients that are contained in particular foods.

EUFIC Report

The European Food Information Council (EUFIC) undertook a study into food labelling and consumer understanding of them. The full report may be accessed at http://www.eufic.org/gb/heal/heal12.htm

The study, involving French, German, Italian and UK consumers, found that there was an understanding of both the benefits of nutrition and 'healthy and balanced eating' but that the terminology used on the labels was not really understood. Consumers from all four countries disliked the small print used on nutritional labels for being "too technical".

In response, EUFIC advised companies to make more of an effort to explain the complex terminology to consumers through the use of readable, clear, attractive and well-structured labelling. The EUFIC condemned the low fat and light labels used on food packaging for being "restrictive" and "negative" and urged food manufacturers to keep such labels simple, despite proving increasingly popular among both consumers and manufacturers.

But contrary to governmental labelling proposals, such as the incorporation of a nutritional traffic light labelling system onto UK food packaging, EUFIC believes that the nutrition system "is not about qualifying into good or bad products, it is about helping to integrate any product into a good diet".

EUFIC concludes there are many things in the current labelling terminology that can be improved. However, as long as consumers lack a basic understanding of nutritional terms and requirements, the label information will be lost on them. There is an immediate need therefore for better nutrition education and improved nutrition knowledge. This is the big challenge for government, educators, health professionals and all operators in the food chain.

Conclusion

The aim of further voluntary labelling by way of signposting of foods, would in itself appear praiseworthy. However, this seems to be bypassing the very essence of achieving a balanced diet and that is educating consumers as to what a healthy diet would consist of.

Consumers already know that certain foods contain more energy than others, and that excessive consumption can cause weight gain. The agreed nutritional and health claims regulation, when implemented, will harmonise the making of positive health claims in relation to products across Europe. Reports were also provided in January 2005 that the European commission was intending to consult on proposals for EU-wide labelling norms. If EU rules were aligned to international standards, industry would have more flexibility in marketing their products anywhere in the world without needing to re-label them.

Any voluntary proposals implementing the making of explicit claims or labelling for foods by way of signposting or any other device will therefore fly in the face of efforts of harmonisation, be unenforceable, and unfair due to inconsistencies between markets, inconsistent by reason of different approaches that will be taken by different manufacturers, and thereby unintelligible to consumers.

"Signposting will "fly in the face of efforts of harmonisation" of labelling claims…"

For any labelling concerns, please contact:

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Mark Tyler

The Food Standards Agency (FSA) recall of products potentially containing the illegal red food dye, Sudan 1 has risk management implications for all food producers and retailers, and not only those of the hundreds of food products affected.

Legal implications of Sudan 1 recall

Background

Sudan dyes are not found naturally in food and the EU does not allow them to be used in food. The FSA alert that was circulated on 18 February 2005 stated "Sudan 1 could contribute to an increased risk of cancer and it is not possible to identify a safe level or to quantify the risk. However, at the levels present in these food products the risk is likely to be very small."

"…the recall of over 400 products is one of the largest ever carried out."

In June 2003 the European Commission moved to stop the import into the EU of hot chilli products containing "Sudan red 1". Following this decision Member States had to ensure that imports of crushed or ground hot chilli were tested to ensure that Sudan red 1 was not present. Random checks were also to be carried out on products already on the market.

These emergency measures were extended by the Commission in January 2004 to include that curry powder could only be imported into the EU if accompanied by an analytical report which showed it did not contain any Sudan dyes.

Current Situation

Premier Foods who distributed the affected Worcester Sauce reportedly received the chilli powder ingredient that was the source of the contamination before July 2003, when regulations first required that food be tested for the substance. Because the product is used as an ingredient in a number of branded and retailer own-label products, as well as being sold as branded bottles of Worcester Sauce, the recall of over 400 products is one of the largest ever carried out.

Legal implications and lessons to be learned

Due diligence

There is always a question whether to apply a retrospective review where new product safety legislation comes into force. When it can affect a back-log of stock or there are ingredients with a lengthy shelf life "due diligence" would entail a need to re-test products or ingredients.

A commercial decision will need to be taken to assess whether or not a suppliers' assurance of compliance will be sufficient. Case law in the area is inconsistent. It is recommended though that some level of additional quality checks and testing should be carried out.

Traceability

The requirements for traceability between businesses operatives came into force on 1 January 2005. The European food framework regulation EC/178/2002 laid down in January 2002, (http://europa.eu.int/eurlex/pri/en/oj/dat/2002/l_031/l_03120020201en00010024.pdf) sets out the requirements for traceability under Articles 19 of the regulation. (Further guidance on these requirements is now available on the website of DG Health and Consumer Protection (see below re Traceability of food products: new EU guidelines to facilitate implementation).)

The basic requirements of a food traceability system are the ability to identify products/ingredients and processes at any point in the supply chain and the recording of this identity information. In practice, traceability systems are record keeping procedures that show the path of a particular product or ingredient from a supplier into a business, through all the intermediate steps which process and combine ingredients into new products, and through the supply chain to consumers.

Documents should be kept up to date and document retention policies reviewed. This is particularly the case where there are long-life products involved.

Recall and customer help

A recall system and customer complaints must be in order to rapidly remove products and deal with any complaints/queries.

Whilst food companies had been under the legal duty to ensure that all food in their chain of supply was safe, the new rules under Article 19 of regulation 178/2002 now formally provides three levels of duty:

- Where a food business has reason to believe a food they have imported, produced, processed, manufactured or distributed is not in compliance with the food safety requirements that company must (where the food has left their immediate control) immediately initiate procedures to withdraw the food in question from the market and notify the local authorities.
  Where the product may have reached the consumer, consumers must be effectively and accurately informed of the reason for the withdrawal. If necessary products must be recalled when other measures are not sufficient to achieve a high level of health protection. i.e. Recall is only required where other measures are insufficient to achieve a high level of health protection.
- Retailers and distributors are obliged to participate in the withdrawal and the dissemination of information.
- There is additionally a further higher obligation on any food business operators, if they have reason to believe that a food on the market may be injurious to human health, there is a blanket requirement, whether or not they are connected with the food itself, to immediately notify the competent authorities.

All food business operators must collaborate with the competent authorities on action taken to avoid or reduce risks posed by a food which they supply or have supplied.

Brand reputation

The Rapid Alert System for Food & Feed and the Hazard Alerts provided by the Food Standards' Agency are blunt

"All food business operators must collaborate with the competent authorities on action taken to avoid or reduce risks posed by a food which they supply or have supplied."

There is therefore likely to be considerable litigation based on supply contracts, interpretation of terms and conditions, and relevant exclusions of liability for the standard conditions as to quality and fitness for purpose of goods.

instruments and can impact on the reputation of a manufacturer or retailer and/or their market share. There is little evidence of material risk to public health but the alarm caused to consumers is evident. A rapid response from industry to any agency enquiries and the provision of robust risk-based evidence may serve to better inform these announcements.

Media relations

Spokespersons should be primed with relevant information in any withdrawal or recall scenario. Inaccurate and misleading reporting should also be corrected swiftly. The various codes, voluntary and statutory, provide mechanisms and opportunities to secure corrections and apologies without the need for recourse to, often unattractive, legal challenges for defamation.

Media and defamation concerns on this or any other issue should be addressed to:

Tim Hardy on +44 (0)20 7367 2533 or tim.hardy@cmck.com

Insurance and contract terms

Assumptions may be made that losses will ultimately be insured and this is problematic. The extent of any insurance is likely to be limited as compared to the overall nature of the loss. This is because recall policies generally provide only quite restricted cover and are not a standard feature of product liability insurance policies.

Insurance concerns on this or any other issue should be addressed to:

Anthony Hobkinson on +44 (0)20 7367 2892 or anthony.hobkinson@cmck.com

Much of the loss in the current Sudan 1 recall may, in effect, be borne by industry itself. There is therefore likely to be considerable litigation based on supply contracts, interpretation of terms and conditions, and relevant exclusions of liability for the standard conditions as to quality and fitness for purpose of goods.

Disposal of products contaminated with Sudan 1 dye

Environmental concerns on this or any other issue should be addressed to:

Paul Sheridan on +44 (0)20 7367 2186 or paul.sheridan@cmck.com

Foodstuffs containing Sudan 1 – 5 are not to be classified as hazardous waste. Therefore, such wastes may go to permitted facilities authorised to accept non-hazardous waste of this type, including landfill. If products contain meat, fish and other foodstuffs of animal origin they will be classed as Category 3 material under the Animal By-Products Regulations 2003. Although the disposal of animal by-products to landfill is not a permitted under EU Regulation 1774/2002, the UK has obtained a temporary derogation for former foodstuffs until 31 December 2005. This derogation does not apply to raw meat and raw fish, so the disposal of such products containing them will require an alternative to landfill. Possible disposal routes for raw meat and raw fish products include approved incineration or rendering plants, use as raw materials in an approved pet food plants, or in approved composting or biogas plants. Whichever disposal route is chosen, there will be cost implications for retailers having to dispose of foods contaminated with Sudan dye.

For any product liability concerns, please contact:

Mark Tyler on + 44 (0) 20 7367 2568 or mark.tyler@cmck.com, or

Jessica Burt +44 (0) 20 7367 3589 or jessica.burt@cmck.com.

Guidance has been provided by the Standing Committee on the Food Chain and Animal Health on General Food Law (Regulation 178/2002) in order to assist with its harmonised implementation in all Member States.

Chris Hodges

Traceability guidance

Traceability of food products: new EU guidelines to facilitate implementation

The specific requirements covered in the guidance document include the traceability of food products, withdrawal of dangerous food products from the market, operator responsibilities and requirements applicable to imports and exports.

The guidance document is currently available on the website of DG Health and Consumer Protection at: http://europa.eu.int/comm/food/food/foodlaw/guidance/guidance_rev_7_en.pdf

Continuous traceability along the food chain

The new mandatory traceability requirement applies to all food, animal feed, food producing animals and all types of food chain operators from the farming sector to processing, transport, storage, distribution and retail to the consumer. The guidance document lays down detailed implementing rules for operators.

Information on the name, address of producer, nature of products and date of transaction must be systematically registered within each operator's traceability system. This information must be kept for a period of 5 years and on request, it must immediately be made available to the competent authorities.

An operational framework for product withdrawal

Common criteria triggering the withdrawal or recall of a dangerous product from the market are defined. Situations where operators are required to inform competent authorities of this withdrawal are specified.

Common criteria triggering the withdrawal or recall of a dangerous product from the market are defined. Situations where operators are required to inform competent authorities of this withdrawal are specified.

All food and feed business operators are responsible for the safety of the food that they produce and put on the market.

Implementation of business operator responsibility

All food and feed business operators are responsible for the safety of the food that they produce and put on the market. The guidance document clarifies that operators are responsible for the activities under their control.

Requirements applicable to imports and exports

The extent to which traceability requirements apply to imported and exported food and feed products is clarified. The guidance document addresses concerns raised by third countries trading with the EU.

For any product liability, traceability or recall concerns, please contact:

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Towards the end of March 2005 the OFT published its further findings on how supermarkets are complying with the Supermarkets Code of Practice (the Code). The OFT's report found that generally supermarkets are complying with the Code but it found that the Code is not being used to resolve disputes and that without evidence of disputes regarding the Code it is difficult to assess the Code's effectiveness.

Caroline Hobson

Supermarkets code compliance audit – OFT findings

> *The OFT is committed to preparing an annual report on how the Code is working.*

Background

The Code was introduced following the Competition Commission's report into supermarkets in 2000, which found that there was significant dissatisfaction with the power supermarkets had over their suppliers. The Code was one of the recommendations in the Competition Commission's report. It applies to supermarkets having a share of at least 8% of grocery purchases for resale from their stores. ASDA, Sainsbury's and Tesco are bound to follow it. Morrisons has agreed to be bound by the Code following its acquisition of Safeway.

The OFT is committed to preparing an annual report on how the Code is working. The OFT's first report, published in February 2004, found a widespread belief among suppliers that the Code was not working effectively but no hard evidence to support this belief. This led to the OFT commissioning a compliance audit of the Code to be undertaken by a third party in order to examine in more depth the level of compliance on the part of supermarkets. The recently published report presents the findings of this compliance audit.

Findings of the compliance audit

The audit involved the examination of a sample of 500 grocery supplier relationships with those supermarkets subject to the Code. The audit found that the supermarkets have mostly complied with the Code. Some limited breaches of the Code were detected but

…the OFT is still clearly concerned at the behaviour of the supermarkets…

the nature and extent of these breaches did not suggest that non-compliance is widespread.

However, the OFT is still clearly concerned at the behaviour of the supermarkets, and in particular is concerned that the commercial importance of the supermarket relationship to many suppliers is preventing many suppliers from coming forward and making complaints under the Code. The report states "Whatever the audit's finding on compliance, concerns may legitimately remain about the Code's effectiveness in addressing the adverse effects identified in the CC's 2000 report….there is a widespread feeling among suppliers that the concept of 'reasonableness' used in many of the Code's terms, favours the supermarkets by virtue of the suppliers' dependence on them, and may thus deter suppliers from complaining because they consider there is a limited prospect of it being interpreted in their favour. Together with the reluctance to jeopardise important trading relationships, this may partly explain the absence of complaints."

Whilst the OFT encouraged suppliers to overcome their fear of complaining about the supermarkets' conduct, the OFT has invited further comments as to whether the audit portrays an authentic picture of the dealings between suppliers and supermarkets. It has also asked for further evidence on whether the practices prohibited by the Code continue and whether there are other practices which operate and which adversely affect competition.

The OFT welcomed proposals for a voluntary Buyers' Charter ensuring that supplier-supermarket relations are conducted on a clear and predictable basis but did not go as far as proposing to amend the Code. It stated that amending the Code "would be unlikely to tackle its perceived ineffectiveness and would have legal and practical difficulties" because "the Code has to apply to a vast range of commercial dealings and making it more rigid and prescriptive may stop mutually beneficial arrangements between suppliers and supermarkets" which could harm competition and thereby consumers. The OFT also doubted whether amending the Code would address the root causes of the fear of complaining, namely the inequality of bargaining power between suppliers and the supermarkets.

What next?

This report is clearly not the end of the story. Apart from inviting further evidence and comments on the report, the OFT has also invited comments on the wider role of supermarkets and the operation of the market for the supply of groceries. The OFT states that it is now considering whether there are sufficient grounds to make a market investigation reference to the Competition Commission: "It has been suggested that a wide range of competition issues in the grocery market – those issues identified in the CC's 2000 report which are addressed by the Code, issues identified at the time but not addressed by the Code and any others which may have arisen since – could and should be addressed by means of a market investigation reference to the CC…".

In addition the OFT has invited comments on the practical effects of the recent structural developments in the grocery sector on competition between grocery retailers and between suppliers, the impact of the supermarkets' acquisition of convenience stores as well as below-cost selling and price flexing.

The OFT has requested all comments and evidence by 31 May 2005 and will publish its response later this year.

This report and the recent referral by the OFT of the acquisition by Somerfield of 114 stores from Morrisons indicates that the UK grocery sector still remains a focus for the UK competition authorities.

For more information on the Code or to discuss its implications for your business, please contact:

David Marks on + 44 (0) 20 7367 2136 or david.marks@cmck.com,

Susan Hankey on +44 (0) 20 7367 2960 or susan.hankey@cmck.com or

Caroline Hobson +44 (0) 20 7367 2056 or caroline.hobson@cmck.com.

Discrimination on the grounds of sexual orientation and religion is now unlawful. In October 2004, new disability rules on access to premises and employment came into force. There are also new statutory minimum disciplinary and grievance procedures that employers (and employees) must follow.

Simon Jeffreys

Employment aspect

An employment update for the food industry

Employment concerns on this or any other issue should be addressed to:

Simon Jeffreys on +44 (0)20 7367 3421 or
simon.jeffreys@cmck.com or

Anthony Fincham on +44 (0)20 7367 2783 or
anthony.fincham@cmck.com

> *…advertising for "young and dynamic" employees is likely to get you into legal trouble.*

Age discrimination

It will be unlawful to discriminate against job applicants and employees on grounds of age. Some sectors of the industry target particular age groups as customers, and targeting matching age groups as employees is likely to fall foul of the new law. For example, advertising for "young and dynamic" employees is likely to get you into legal trouble. These laws are due to come into force in 2006 and a draft law for consultation is expected in summer 2005. At the same time, we are still awaiting the results of the child employment law review launched in 2003.

Religious discrimination

For an industry where shift patterns and holidays are normally strictly enforced, employers are now having to consider adjusting shift patterns and holidays to accommodate religious practices. The impact of the new regulations is wide-ranging and will cause headaches for the food and leisure industry. Take for example, a Muslim who applies to work behind a bar – would it be reasonable to refuse him the job because religious Muslims do not drink alcohol and you do not therefore think he would have the right degree of enthusiasm for the job? Or consider the case of a Humanist, Sikh or Secularist applying for a job as a waiter or food processor but who is reluctant to serve or handle certain foods – would an employer be expected to redistribute the work or could the job

Whilst alterations to accommodate disabled customers may be provided would it be reasonable to refuse applications from disabled persons for certain jobs?

application be refused? Employers in the food industry in particular are being forced to consider a wide range of issues such as these.

Disability Discrimination

The new rules on access that came into force in October 2004 received a high profile in the media. In addition, the issue of discrimination in employment continues to be a serious one. Whilst alterations to accommodate disabled customers may be provided would it be reasonable to refuse applications from disabled persons for certain jobs? The proposal by the government to remove the need for mental illnesses to be clinically well-recognised to qualify as a disability under the DDA will also have significant impact: the stressful nature of a customer-facing job could lead to more easily-proved claims and also, one fears, more spurious claims.

Working time

The Working Time Regulations protect the health and safety of employees. Also, in September 2004, the European Commission issued a proposal to update key aspects relating to working time. One of those proposals is to restrict the opt-out from the 48-hour working week. In a world where opening hours and demand are likely to increase, further restrictions on working time are going to create practical problems for employers in the food and leisure industry and a tricky balance will need to be achieved.

Part-time and fixed-term employees

The food and leisure industry has always relied heavily on temporary and seasonal staff, treasuring the flexibility that such arrangements bring. The advent in 2000 and 2002 of regulations governing the treatment of part-time and fixed-term employees had a significant impact in this area. Part-time and fixed-term employees have significant rights and can expect to be treated in the same way as their full-time and permanent counterparts, unless the difference in treatment can be objectively justified by the employer.

Agency workers

The importance of temporary agency workers to trades like the food processing and restaurant trade is clear. So far this group of workers has largely been excluded from regulation. However, a directive from Europe is on the horizon. We are expecting an agency workers directive that will seek to protect the interests of the agency worker in the same way that the regulations on fixed-term employees and part-time employees have. At the same time, our domestic courts seem increasingly ready to rule the end user owes full employment rights to the worker. This will have a big impact on the leisure industry, reducing flexibility and increasing cost.

Illegal employment

This is an issue for a lot of industries, but particularly the food industry (which typically attracts employees from overseas who are often willing to accept low pay). Raids by the Immigration Service are becoming increasingly common and fines of up to £5,000 can be incurred. Where gangmasters are involved, employers could be caught up in money-laundering. Illegal employment is a real issue for many employers, especially where staff turnover is high.

General Food Law Regulation 178/2002, lays down the general principles and requirements of food law, establishes the European Food Safety Authority and lays down procedures in matters of food safety. It came into force on 21 February 2002, although certain key provisions apply only from 1 January 2005.

Jessica Burt

Main new legislation

General Food Law Regulation 178/2002

Although as a Regulation it is directly applicable in Member States, there was a need to introduce new enforcement powers and penalties in relation to the new obligations on food and feed businesses in Articles 14 – 20 of Regulation 178/2002, to apply from 1 January 2005 by way of the Food Safety Act 1990 (Amendment) Regulations 1990.

The European Commission has issued guidelines designed to help businesses and national authorities to implement the new requirements in EU food law that entered into force on 1 January 2005. http://europa.eu.int/comm/food/food/foodlaw/guidance/guidance_rev_7_en.pdf

> *"The European Commission has issued guidelines designed to help businesses and national authorities to implement the new requirements in EU food law…"*

General Food Regulations 2004

The main purpose of these Regulations is to provide new enforcement powers in respect of new obligations to apply from 1 January 2005 under Regulation 178/2002. These are Articles 14 (Food Safety Requirements which replace Section 8 of the Food Safety Act), 16 (Presentation not to mislead consumers), 18 (traceability), and 19 (Responsibilities for food: food business operators).

The implications of regulations 18 and 19 are additionally reviewed above under legal implications of the Sudan 1 recall.

Regulation 14 on Food Safety is broader than that of Section 8 FSA in that it applies to all properties of food that may be injurious to health and would therefore cover for example jelly cup sweets intended for consumption by young children where there is a risk of choking. A recent example of this in March 2005 was Cereal Partners UK recall of three batches of its Nestle Honey Nut Cheerios after it discovered hard lumps of honey and sugar that could cause a choking hazard or be difficult to eat. The FSA issued a Food Alert for Information.

"The new rules remove the so-called '25% rule'…"

Guidance is published by the FSA at http://www.food.gov.uk/multimedia/pdfs/generalfoodsafetyguide2.pdf

Food Labelling (Amendment) (England) (No 2) Regulations 2004

The new rules require foods containing ingredients on the list in Schedule AA1 or their derivatives to make a clear reference to the Schedule AA1 name whenever they are used in pre-packed foods, including alcoholic drinks.

Ingredients listed in the Schedule are: cereals containing gluten: wheat, rye, barley, oats, spelt, kamut and their hybridised strains, Crustaceans, eggs, fish, peanuts, soybeans, milk, nuts: Almond (Amygdalus communis L.), Hazelnut (Corylus avellana), Walnut (Juglans regia), Cashew (Anacardium occidentale), Pecan nut (Carya illinoiesis (Wangenh) K Koch), Brazil nut (Bertholletia excelsa), Pistachio nut (Pistacia vera), Macadamia nut and Queensland nut (Macadamia ternifolia), celery, mustard, sesame seeds and sulphur dioxide and sulphites at concentrations of more than 10 mg/kg or 10 mg/litre expressed as SO_2.

There are exemptions for foods sold loose, food that is pre-packed for direct sale and certain fancy confectionery products. However, these rules do apply to small packages and certain reusable glass bottles.

The new rules remove the so-called '25% rule', under which individual components of a compound ingredient making up less than 25% of the finished product do not have to be listed.

In order to take account of technical constraints in the manufacture of foodstuffs, the new rules allow the following derogations for ingredients used at less than 2% of the finished product:

- Where the composition of the compound ingredient is defined in EU law (e.g. jam and chocolate), the ingredients need not be listed.
- Where the compound ingredient is a food for which an ingredient list is not required, the ingredients need not be listed.
- A mixture of herbs and spices need not be listed individually.·
- Ingredients will not have to be listed in descending order of weight
- The presence of similar or mutually substitutable ingredients could be indicated by use of "contains....and/or..." in certain circumstances.

These derogations do not override the allergen labelling requirements.

The new rules add a further category of substances that do not have to be named if used in the same way as processing aids (section 8).

Guidance is available at: http://www.food.gov.uk/multimedia/pdfs/labelamendguid2004.pdf

Animal Welfare Regulation 1/2005-03-10

Regulation 1/2005 on the protection of animals during transport and related operation amends directive 64/432/EEC and 93/119/EC and regulation (EC) 1255/97.

The Regulation applies that a transport of live vertebrate animals carried out within the community, including the specific checks to be carried out by officials on consignments entering or leaving the customs territory of the community. The new rules aim to ensure that animals will not be transported in a way likely to cause injury or undue suffering to them. The Regulation applies not only to transporters but also to other categories of operators such as farmers, traders, assembly centres and slaughter houses. It aims to improve the following aspects: conditions applicable to transporters making long journeys; the length of the journey and the space available for the animals; training of personnel; assembly centres must ensure that community legislation on the protection of animals during transport is known and respected by their employees and visitors; and rules on the transport of horses.

The EU regulation applies from January 2007; with the competent certification for drivers in attendance taking effect from January 2008.

In October of 2004, the European Commission published draft commitments to be finalised with The Coca-Cola Company concerning a number of its commercial practices in relation to the sale of carbonated soft drinks.

Overview of recent food cases

Important competition law guidance for food and drink companies

The draft commitments would apply to sales of specified products in any European territory where The Coca-Cola Company was found to have a market share in excess of 40% and more than twice the share of the nearest competitor.

The commitments are wide-ranging and apply to the take-home (supermarkets and other retail outlets) and on-premise (catering) sales channels for carbonated soft drinks. In particular, the ruling gives guidance on the European Commission's likely approach to suppliers who hold a dominant position in their relevant market and who engage in the following practices:

- exclusivity arrangements with customers including any obligations which require customers to discontinue or reduce commercial relationships with other suppliers;
- customer minimum percentage requirements;
- target or growth rebates;
- tying arrangements making the supply of one product conditional on the purchase of another;
- combined payments or percentage-based payments when a customer commits to an assortment or range of products and to stocking commitments for those products;
- requirements which control space in free-of-charge coolers where the customer has no other cooler capacity.

The European Commission also clarifies its approach to a range of other issues as further commitments concern shelf space arrangements, financing agreements, sponsorship and public and private tender agreements and technical equipment placement.

This case is only the second time that the European Commission has used its new commitments procedure. The commitments, which will become binding on The Coca-Cola Company, prevent the European Commission from undertaking any further proceedings against the company on these issues.

> *"…the ruling gives guidance on the European Commission's likely approach to suppliers who hold a dominant position in their relevant market…"*

> *…a reasonable consumer faced with such products would expect to read the label as a whole…*

Formal consultation on the commitments took place in December 2004. The final version of the commitments should therefore be published and become legally binding very shortly.

The case provides useful guidance for all food and drink manufacturers holding a dominant position on the application to their distribution practices of Article 82 of the EC Treaty. Article 82 prohibits the abuse of a dominant position. Further and more detailed guidance should become available during 2006 as the European Commission is currently preparing detailed guidelines on the scope and application of Article 82 EC. These guidelines will cover dominance and some of the major abuses such as predation, bundling, refusals to deal and loyalty rebates. Draft guidelines for public consultation are due to be published by the end of 2005.

For further information please contact:

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Important High Court consideration of Trade Descriptions Act and Food Labelling.

Lewin v Purity Soft Drinks [2004] EWHC 3119

The case concerned the labelling of bottles of cranberry and blackcurrant fruit juice. On each bottle there was a picture of the fruit in question under the words "Blackberry (or Cranberry) Juice", each with the word "burst" underneath. To the left of this representation was specified typical values per 100 ml, and under that some words which included "a refreshing fruit based drink". There was also a list of ingredients that included the particular fruit, followed by the relevant percentage. A purchaser looking at the centre of the label would have to rotate the bottle somewhat in order to read the ingredient list.

Prosecution

It was alleged the descriptions applied to the fruit juice were false in that they indicated that the drinks were 100% when, in fact, the fruit juice content was less than 100%.

It was further alleged that the trade descriptions, if not false, were misleading.

Magistrates Court

The Magistrates found that "burst" signified that the drinks in question were not necessarily 100% fruit juice.

They further ruled that they and consumers were entitled to consider the label as a whole.

It was held that, even if "Blackberry (Cranberry) Juice" were the relevant trade descriptions, these would not be false because a reasonable consumer faced with such products would expect to read the label as a whole, including the ingredient list, and would be familiar with the idea that the ingredient list was likely to appear on the label.

It was found that the description of "Blackberry or Cranberry Juice" was not misleading in that the reasonable consumer would interpret the use of "juice" in a way which was not misleading. Finally, the Justices stated that they were entitled to take notice of the commonsense fact that the relevant fruits were by nature bitter and would not be palatable in a non diluted form.

The Magistrates held that, the notion of a disclaimer, in this case the ingredient list, did not apply as the ingredients list was a statutory requirement under the fruit juices regulations (reg 4).

High Court

The prosecution appellants argued that "burst" was meaningless and therefore could not have a qualifying effect.

It was further argued that the fact the fruit content was placed elsewhere on the label, was again, not a matter which the Justices should have recognised.

The High Court found that the Justices were correct to have regard to the word "burst" but that they should not have found it to be a qualification. It was

established that "drink" would be enough to indicate that the drink was not pure juice. But that the assumption by the Justices that "burst" could be read in the same way as "drink" could not be sustained. There was no evidence before them that the public would read "burst" in this way.

The issue as to whether or not the fruit content as stated in the ingredient list could be taken into account was considered.

The High Court ruled that the Justices were indeed entitled to consider the label as a whole. They were entitled to regard the entirety of the evidence, and by having regard to what, in their experience, a reasonable consumer might be expected to do, that is to say, read the label as a whole.

The appellants had argued that the ingredient list was a disclaimer and as such would not be sufficient as it was not as bold precise and compelling as the trade description which it sought to disclaim. (*Authority Norman v Bennett* [1974] 1WLR 1229).

The High Court agreed with the Magistrates that the ingredient list could not be regarded as a disclaimer. This was because it was specifically required by the Fruit Nectars Regulations 1977, and because it "filled out" the description rather than disclaimed it.

Reasonable consumer test

In respect of the allegation that, if not false, the trade description was misleading, the prosecution appellants argued that the Magistrates had been wrong to ask whether a reasonable consumer *could* have understood the label in a manner which was accurate. It was stated that the correct question was whether such a consumer *could* have read the trade description in such a way that it would have been to him either false or misleading.

The High Court held the test to apply was not that of conceivability, but whether it was likely that there would be a particular reading of a trade description in a way which rendered it misleading. The High Court found that the correct test had been applied. The Magistrates had, in effect, asked whether a reasonable consumer would be misled, and the answer they gave to that question was one which was reasonably opened to them.

The final point raised by the appellants was that the Justices had been wrong to take judicial notice of the fact the fruit in question was known by the public to be bitter in an undiluted form. It had, however, been agreed before the hearing in front of the Justices that blackcurrant and cranberry were both bitter fruits. Given this, the High Court felt that no objection could be taken to the Justices proceeding on that basis; they were held equally entitled to conclude that consumers would know this.

The appeal was therefore dismissed.

Conclusions

This case sets out important legal principles as to the status of ingredients lists, what may be considered as part of any trade description and the test that is to be applied. In summary, this may be set out as:

- The use of "meaningless" descriptive words should be used with care and if they are used to replace a word which has a commonly understood and judicially interpreted meaning.
- A label may be considered as a whole, and may not be separated into a watertight compartments in relation to any trade descriptions made within it.
- Where an ingredients list is a statutory requirement it may not be regarded as a disclaimer. Further, it may be argued that an ingredient list "fills out" the trade description of a product rather than acts to disclaim it. The usual considerations that the disclaimer be at least as "bold, precise and compelling" (*Norman v Bennett 1974*) as the trade description which it sought to disclaim does not therefore apply.
- The test for whether a trade description is false or misleading was whether a reasonable consumer was likely to be misled. It is not whether or not a reasonable consumer could have understood the label in a manner

"The test for whether a trade description is false or misleading was whether a reasonable consumer was likely to be misled."

> *…the absence of [nutritional] need cannot, by itself, justify a total prohibition.*

which was accurate or in such a way that it would have been either false or misleading. The test is not one of conceivability, but one of likelihood.

- Finally that which is common knowledge to the Magistrates they are equally entitled to conclude that the reasonable consumer would know.

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European court tells Netherlands to open up on fortified foods (December 2004)

The Netherlands has been told that it must allow the marketing of foods with added vitamins and minerals without requiring manufacturers to prove that there is a 'nutritional' need for such products.

Under Dutch national food law, foods fortified with vitamin A or D, folic acid, selenium, copper or zinc, may not be marketed unless they do not pose a risk to public health and also meet an actual nutritional need.

But in a case brought by the European Commission, the European Court of Justice ruled that this second requirement, when used alone, obstructed the free trade of products in the European Union.

The case concerned Kellogg's breakfast cereals fortified with vitamin D and folic acid and a range of fortified with folic acid made by Inkosport Nederland. Both companies marketed their products elsewhere in the EU but had been prevented from selling the goods in the Netherlands.

The court ruled:

"Although the criterion of nutritional need of the population of a Member State can play a role in its detailed assessment of the risk which the addition of nutrients to foodstuffs may pose for public health, the absence of such a need cannot, by itself, justify a total prohibition, [on the basis of free trade in Europe]".

The European Commission had proposed a harmonized law on the fortification of foods in November 2003 but this did not progress due to disagreement on issues, including nutritional profiles.

Protected designation of origin WTO v EU

The World Trade Organisation ("WTO") reached a verdict on 21 December 2004 against the European Union in a trade complaint by the US and Australia against European Union Rules protecting regional and traditional food names, such as "Parma" ham. The WTO dispute panel stated that the EU system was incompatible with trade rules because the system did not allow the registration of non-European products.

The dispute panel found that the EU could not block producers of Idaho potatoes or Florida oranges from protecting their food names in Europe simply because the US had not itself adopted a system for the protection of such "geographical indications". The EU's protected list of foods will have to be opened up to non-European products.

The panel also agreed that Europe could not, consistent with WTO rules, deny US trademark owners their rights. The panel emphasised that any exceptions to trademark rights for the use of registered geographical indications were narrow, and limited to the actual geographical indication name as registered.

"Feta" Cheese – disputed PDO

A northern English cheese producer has brought an action against the European Commission over the right to use the label "feta" on its cheese products in the ECJ.

Background

In 2002 the European Commission (EC)

ruled that Greek feta cheese should be afforded the same type of identity protection (protected designation of origin or PDO) as products such as French Champagne and Italian Parma ham. Consequently, this ruling meant that the label "feta" must only be used on products that originate from certain regions of Greece, which have also adhered to strict EC production specifications.

Dispute

Shepherd's Purse Cheeses, a Yorkshire-based manufacturer of blue cheeses and the sole remaining feta cheese producer in England, lodged an appeal with the European Court of Justice, claiming that the production of feta cheese, contrary to Greek claims, was not specific to a certain geographical region and that it has in fact been producing Yorkshire feta for a number of years.

The UK has declined to provide official legal representation. However, legal representatives for the Danish and German governments (two of Europe's largest feta cheese manufacturers) are supporting the application.

Comment

Dairy associations reportedly voiced concerns reported that a favourable ruling for the Greeks could encourage a number of similar retaliatory PDO applications from other nations. If French Brie, for instance, was successfully awarded a PDO, European dairy producers could end up paying millions for the subsequent rebranding and reformulation of their products.

Food Supplement Directive – EU court challenge

The European Food Supplement Directive 2002/46/EC ("FSD") is due to come into force on 1st August 2005. The FSD will make it illegal to supply any products containing ingredients not on its "positive list" of 140 permitted substances. An estimated 5,000 supplements will be affected. In order for any further ingredients to be added to the list in the Food Supplements Directive (FSD), they must be assessed for safety through submission of a dossier and have received a positive opinion from the European Food Safety Authority ("EFSA").

The UK's supplement industry had its case against the FSD heard by the European Court of Justice (ECJ) on 25 January 2005 and a judgement is expected on the verdict to be given on 5 April 2005.

The parallel cases brought by industry trade bodies the National Association of Health Stores and Health Food Manufacturers' Association, as well as the health campaign group Alliance for Natural Health (ANH). The groups argue that the EU FSD, passed in 2002 and set to enter into force in August 2005, will see around 270 nutrients currently included in supplements removed from the market and significant damage to UK trade. The supplement industry is arguing for the EU to allow each member state the right to continue the sale of products it considers safe.

"The supplement industry is arguing for the EU to allow each member state the right to continue the sale of products it considers safe."

The Advocat General of the ECJ gave an advisory opinion in April 2005 that the directive, as it stands, is "invalid". The current proposals lacked clear rules for the European Commission to follow when deciding whether or not to include an ingredient on the positive list. The Advocate General however upheld the concept of EU legislation on health supplements, saying only that the proposals needed to be reworked.

The full ECJ judgment is expected in July 2005.

US Cereals law suit over "low sugar" claims

An American woman has filed a lawsuit in March 2005 against food companies including Kraft Foods, General Mills and Kellogg alleging that "low sugar" breakfast cereals are misleading.

The suit claims that these cereals are misleading because they aren't any healthier than cereals with regular levels of sugar.

The allegation reported is that the low-sugar cereals falsely represent that they

"Europe could not, consistent with WTO rules, deny US trademark owners their rights."

"Lawyers for the claimant are reported to be relying on the fact that customers rely on the "one-line ad" as opposed to the nutritional labels and that these included an ambiguity which should not have been there."

offer a nutritional advantage over defendants' full-sugar breakfast cereal products, when in fact, the removed sugar is replaced by other carbohydrates, thus offering no significant nutritional advantage.

The complaint, which seeks class-action status, lists the reduced-sugar versions of Post's Fruity Pebbles from Kraft, General Mills' Cocoa Puffs and Trix, and Kellogg's Frosted Flakes.

An article published recently by the Associated Press said that nutrition scientists at five universities had suggested that "low sugar" cereals had no significant advantages over their regular counterparts.

The scientists found that while the cereals have less sugar, the calories, carbohydrates, fat, fibre and other nutrients were virtually the same as full sugar cereals because the removed sugar had been replaced with refined sugar to preserve the cereal's crunch.

It is unclear whether or not any specific health claims were made for the reduced sugar cereals and reports confirm that nutritional information provided complied with government regulations.

Lawyers for the claimant are reported to be relying on the fact that customers rely on the "one-line ad" as opposed to the nutritional labels and that these included an ambiguity which should not have been there.

The lawsuit, filed in the San Diego County Superior Court, seeks to force the companies to surrender profits from low-sugar cereals and to stop them from marketing the products as nutritionally superior. The suit seeks class-action status on behalf of all California consumers who bought the new cereals believing they were healthier.

Summary

This case is a further illustration of the approach taken by claimant lawyers in the US, namely alleging that labelling and product information is misleading, in particular where there may be construed an implication of a health claim. This approach is being seen also in the UK but via the Advertising Standards Authority (see below.)

Due Diligence Defence

Kilhey Court Hotels Ltd v Wigan MBC – Queen's Bench Division – Forbes J – 04.11.04

The appellant hotel (K) appealed against conviction of ten food offences. K had sought to rely upon the defence of due diligence pursuant to the Food Safety Act 1990 s.21(1). It had pointed to the default of two of its employees, but during the course of the trial the judge raised the possibility that K's head of health and safety was also responsible, but K did not apply for him to be included as part of the due diligence defence. The judge held that the two employees and the head of health and safety were responsible, but as the latter had not been included in the defence K could not rely on it.

It was held a due diligence defence under s.21(1) could not be relied upon or established where responsibility for a default or omission lay with a person not included in the defence case. However, the Administrative Court had power to remedy the defect of a failure to serve a notice under s.21(5) by allowing an application to include a defaulting party in order to establish a defence of due diligence.

In this case it was clear that K would not have been convicted but for the technical omission to include its head of health and safety in the due diligence defence. Justice would not be served by upholding convictions where a defence would have been made out but for a technical slip. Moreover, had an application been made to the trial judge it would have been allowed. Appeal allowed.

Not only must straightforward health claims be considered but also where health claims may be implied in the context of the advertisement.

Susan Barty

Advertising Standards Authority decisions

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Frosties – implication product was healthy due to football reference

The Advertising Standards Authority (ASA) acted on a complaint that the claim "…eat right…", in a Frosties commercial that depicted children playing football, misleadingly implied the product was healthy. The ASA upheld the complaint, because despite evidence supplied by Kellogg's, the ASA considered that Frosties had a high sugar content. (October 2004)

Organic "health" claims

The Advertising Standards Authority has upheld two complaints against the country's organic industry body and dismissed one.

The two complaints upheld against the Soil Association for describing organic as "healthy" and "more humane to animals".

The ASA found evidence submitted did not show organically produced food conveyed noticeable health benefits over and above the same food when conventionally produced or that a diet of organic food could guarantee no harmful effects.

The ASA found the claim "more humane to animals" implied the organic system was more humane to animals than industrial farming techniques. Because the advertisers had

> "…evidence submitted did not show organically produced food conveyed noticeable health benefits over and above the same food when conventionally produced…"

The ASA considered [McVities] had not shown their products were healthier than other similar snack products…

not sent comparative studies showing indicators of animal welfare, such as mortality rates, lameness or disease levels, that proved animals kept and disposed of under their organic standards were treated more humanely, the ASA considered that the advertisers had not substantiated this claim.

However, the claim "a more environmentally friendly approach" was allowed. Evidence from DEFRA showed that, when comparing conventional and organic farming systems for ecosystem, soil quality, water quality, air quality and resource use, organic farming generally scored better in terms of biodiversity, soil quality, nitrate and pesticide pollution, ammonia, methane and carbon dioxide emissions, energy efficiency, nutrient balance and controlled waste. It noted there was insufficient evidence to assess the effect of organic farming methods in phosphorus loss, survival of human pathogens and nitrous oxide emissions. Although most organic food was imported, because the leaflet solicited donations in the UK to help promote the production of food in the UK by organic farming methods, the transportation cost of imported organic food outside the UK was not relevant to the context of the claim. (March 2005)
http://www.asa.org.uk/asa/adjudications/Adjudication+Details.htm?adjudication_id=39414

McVitie's – implication cereal bars and cakes were healthy snacks

The Advertising Standards Authority upheld the complaint that advertisements misleadingly implied the cereal bars and cakes were healthy snacks. The ASA considered the text "so, whenever you feel like it, feel free", "the healthier choice", "using healthier ingredients" and "you can have yours and eat it any time you like", together with the low fat claim on the products implied the products were healthy snacks. Because the advertisers' products had lower fat content than other snacks, but comparable sugar contents, the ASA considered that they had not shown that the products were healthier than other similar snack products. The ASA considered that the advertisements were misleading and asked the advertiser not to repeat the approach (2 March 2005).

Penta UK – complains of misleading claims

The advertisers asserted that Penta was a new form of water that was restructured. They submitted research papers that they believed showed scientific evidence of restructuring and several works in preparation that they believed showed increased performance and recovery levels after exercise with Penta when compared with ordinary water. As Penta could hydrate more efficiently than tap water, it was claimed better for health, however, no medicinal claims had been made.

Complaints concerned that advertising misleadingly implied the product had health benefits over and above those of ordinary water and the claims "restructured" and "it might be just H2o, but it is no ordinary water" were misleading because they believed that water could not be restructured.

The Advertising Standards Authority considered that readers would be likely to interpret that claims made in the original leaflet and the revised leaflet to mean the molecular structure of water had been altered in the advertised product for improved hydration physical performance. On expert advice the ASA understood that scientific evidence submitted did not prove that Penta had health benefits over and above those of ordinary water or had been restructured to form a stable smaller cluster. The ASA concluded that the information submitted was not sufficient to prove Penta water had health benefits over and above those of ordinary water or was structured differently from ordinary water. The ASA told the advertisers not to repeat claims that implied the product was chemically unique, had been restructured or molecularly redesigned, or hydrated cells and improved physical performance better than tap water.

Green King Plc – strict requirement for responsible alcohol advertising

The British Association for Shooting Conservation Ltd, The Gun Trade Association Ltd, The Union Pub Company, The Metropolitan Black Police Association and members of the public objected to press advertisements for beer that included a photograph of a double barrelled shotgun that was positioned between two stores and was pointing at the reader.

Advertisers stated their theme for the campaign was "uncompromisingly from the country" and stated research carried out before the campaign was launched and that the target consumers recognised the humour of the campaign and feedback was positive. The situation portrayed was fictional and exaggerated and the gun merely dramatised the uncompromising element. They had selected media to match the brand's target audience as closely as possible to avoid causing offence.

Although the Advertising Standards Authority acknowledged that the tone of the advertisement was humorous and was unlikely to be seen as condoning or provoking anti social behaviour they nevertheless found that the advertisement showed a shotgun being used in an irresponsible way. The photograph of the double barrelled shotgun, pointing at the reader, could be seen as threatening and was likely to cause a serious or widespread offence. This did not appear to take into account the targeted media approach that had been taken. It also did not seem to take into account the context within which the advertisement was used. This illustrates the stricter approach the ASA are taking towards alcohol advertisements (February 2005).

Co-operative Group – Trans Fats claims

This complaint concerns campaigners against trans fats in foods who objected to an advertisement on a plastic carrier bag that stated "Our packaging tells you the whole truth" with further text "We go further so you don't have to". The complainants challenged the claim because they believed the information given on the advertisers food packaging about transfats content was the legal minimum only.

This in fact was not the case and that food labelling regulations stated that Trans Fatty Acids (TFA) could only be listed in a nutritional labelling if a claim had been made about TFAs on the product packaging. The FSA do not recommend that TFAs were labelled but merely recommended consumers avoid TFAs and saturated fat. Because the advertisers listed all relevant nutritional information on their packaging and TFA content could be listed in a nutritional labelling only if the claim has been made about TFAs on the product packaging, the authority conceded that the claim was acceptable.

This goes to show that complaints can be made even where companies are seeking to go beyond the legal requirement. There was no legal requirement to state the content of TFAs in the nutritional panel on packaging because they were counted as part of the overall fat content (February 2005).

Foxes Biscuits – differentiation between low fat and sugar content

Foxes Biscuits advertised as a low fat biscuit according to the FSA requirement as less than 3% fat. A comparison of other competitor's products fat and calorie content was provided.

The Advertising Standards Authority held that the advertisement was not misleading by omission by not referring to the sugar content of the biscuits as the advert emphasised the low fat element but also provided the calorie content of each.

No health claim was made about the biscuit or implied but rather the advertisement targeted consumers seeking products for low fat diet only. No general health claims for the biscuits were made. The ASA found that readers would not infer from the content of the advertisement

> *"It also did not seem to take into account the context within which the advertisement was used. This illustrates the stricter approach the ASA are taking towards alcohol advertisements…"*

> *Even though the product was called a mini chicken fillet burger, we do not think this was sufficient to alert consumers to the fact the product was smaller than appeared in the advertisement.*

that the biscuits were low in sugar. The ASA concluded that the advertisement did not imply the biscuits were healthier than they were (December 2004).

KFC – Advert for "mini" burgers was misleading as to size

A KFC commercial has been held to be "misleading" about the size of a chicken burger and in breach of CAP (broadcast) TV Advertising Standards Code Rule S.1. (10 March 2005).

The Advertising Standards Authority (ASA) upheld five complaints about the fast-food television advert, which showed the burger to be bigger than in real-life. This was despite comment from the BACC (Broadcast Advertising Clearance Centre) that it did not consider the advertisement to be materially misleading because the product was clearly described as 'mini'!

In the advert for the mini chicken fillet burger, a group of people stood at a railway station enjoying the food while one man asked if he could "have a bite". A close-up shot of the burger in a woman's hands prompted viewers to complain that the real thing was much smaller than that seen on screen.

They held that the bun in the advert was significantly thicker than those found around their burgers and there was "more filling and the lettuce was a different type".

KFC said the burgers on screen had been cooked in a KFC store that day and were within the "standard range of dimensions for the burger".

The company argued that the burger was called a mini fillet burger - indicating it was smaller than a normal burger - and, at 99p, was clearly cheaper for reasons of size.

The woman in the advert may also have had small hands, it said, because all actors in the advert were holding the same-sized burger.

The ASA ruled that hand size was not material although it could have contributed to a misleading impression.

Banning the advert, the watchdog added: "Advertisers are permitted to present their products in a favourable light but not in a way likely to mislead viewers. Even though the product was called a mini chicken fillet burger, we do not think this was sufficient to alert consumers to the fact the product was smaller than appeared in the advertisement. We believed the visuals were likely to mislead viewers over the actual size."

The CMS Cameron McKenna Food and liability bulletin is prepared by the Consumer Products group of CMS Cameron McKenna. The bulletin summarises recent legal and regulatory developments that we believe would be of interest to our clients. It should not be treated as a comprehensive review of all developments in this area of law nor 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.

For further information on any of the topics covered in this bulletin, please contact your client partner or alternatively Jessica Burt on +44 (0)20 7367 3589 or email jessica.burt@cmck.com.

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