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Kernel

The Scotland Food and Drink Bulletin

Autumn 2019

Kernel

Welcome to the latest issue of Kernel, our Scotland food and drink bulletin. In Kernel, we examine current legal issues affecting the Scottish food and drink industry and provide bite-size articles on key developments.

In this issue, we consider the following:

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— Tackling food waste: Future measures set to force change by FBOs

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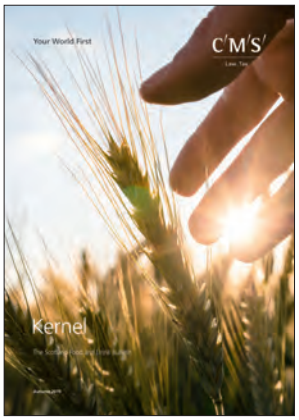
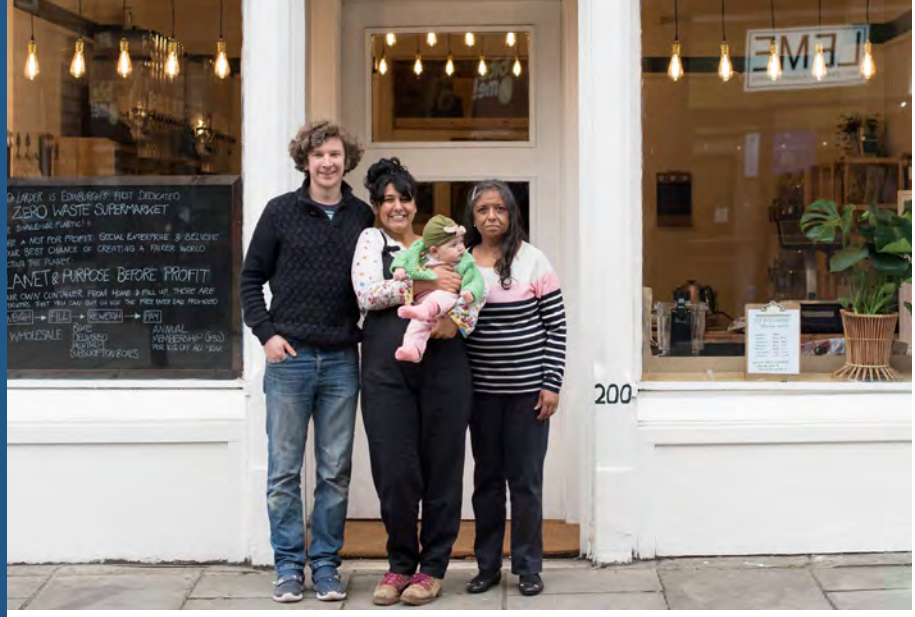
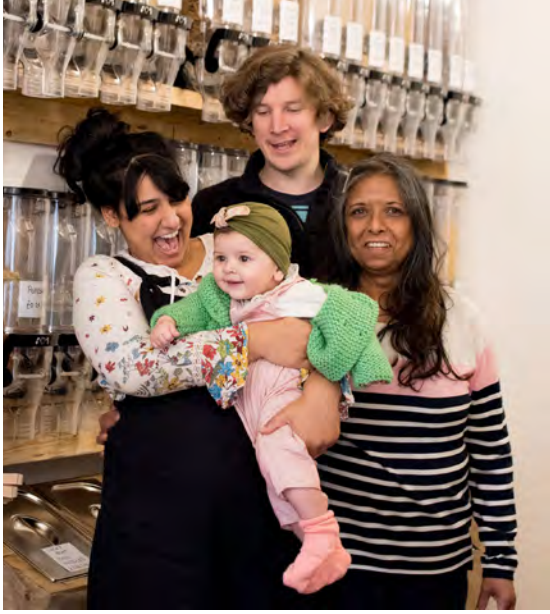
If you would like to discuss any of the articles in this edition of Kernel or wish to provide any feedback, please contact Alison McCartney at **alison.mccartney@cms-cmno.com**







Spotlight on… The Eco Larder: Waste not, want not

In a new feature, CMS Kernel profiles a Scottish business, playing its part in the reduction of plastic use. Please meet The Eco Larder, Edinburgh's first zero waste supermarket.

Two years ago, a young couple who were running a small yoga studio business in Edinburgh and about to enter the world of parenthood asked themselves a question: 'What can we do to make the world a better place for our child?'

After watching David Attenborough's Blue Planet series, which highlighted the ever-growing level of plastic pollution within the earth's oceans, Stephanie and Matt Foulds decided they should take direct action. A year later in November 2018, and just months after the birth of their daughter Jasmina, they opened The Eco Larder, Edinburgh's first zero waste supermarket.

Operating as a not-for-profit social enterprise, the business is committed to providing consumers with a plastic-free and reduced carbon shopping experience. It offers a wide range of items including bread, milk, dried goods, fruit and vegetables, cereals and ecologically-produced toiletries and cleaning products.

Stephanie and Matt have established a close relationship with sustainability-focused suppliers who are committed to producing and transporting their products using a minimal carbon footprint. The shop's milk supply, for example, comes from a local farmer who delivers it in a 50 litre churn which goes directly into a specially designed vending machine. Customers then dispense their milk into a glass bottle which they reuse when they require a refill, eliminating the use of plastic containers which can end up in landfill.

In fact, The Eco Larder offers a wide selection of different sized glass bottles and jars, reusable containers and bags to be used when purchasing produce and other items, providing shoppers with a unique experience. "Our customers are super enthusiastic," says Stephanie. "We see couples and families really working together and thinking while doing their shopping, working out effective and sustainable means of packaging and carrying the items they're buying."

"When people come in for the first time they often act like children in a sweet shop," she says. "They love what we are doing, the way we display and sell our products and how clean we keep it. While the shop has an earthy, rustic look, we are very strict about hygiene."

Images Stephanie and Matt Foulds, pictured together with baby Jasmina, and Stephanie's mum, Ingrid

Along with the Foulds' initial inspiration, opening The Eco Larder also required finance, some of which came through the support of the Edinburgh community. In July 2018, Stephanie and Matt launched a crowd-funding drive to help get the business off the ground. "It felt like a crazy idea at the time," says Stephanie. "When we embarked on the crowd-funding campaign, I was heavily pregnant - 11 days overdue - and going a bit crazy at home so we decided to write the plan."

The campaign raised £23,000 in eight weeks, providing enough capital to transform their idea into reality. Some of the funding came via the clientele of their yoga studio, a business which they continue to operate within a separate room inside the shop. "All the 'Yogees', as well as their friends and families, really got behind the concept," says Stephanie. "That, along with social media profile and wider press coverage, help spread the message and bring in that early and much-needed financial support."

An ideal premises on the city's Morrison Street, just up from Haymarket train station, was identified and soon a major refurbishment of the site was underway. "The place had been derelict for four years – it was a total tip requiring a huge amount of work," recalls Stephanie.

Once again, local community spirit would play a significant role in turning the dream of The Eco Larder into reality. "Through the crowd-funding process we had created such a strong community. We put out a message saying we needed all the help we could get to turn the site around as quickly as possible because we were required to put down a deposit and would soon be paying rent."

The response was amazing, according to Stephanie. "We got over a hundred volunteers helping us with everything from painting to sanding and so many other jobs that needed doing so we could open for business."

The community support that helped get The Eco Larder off the ground still exists to this day, partly due to the fact that its owners see it as being far more than just a food shop. The business operates as a social enterprise, where the profits are ploughed into supporting environmental and sustainability initiatives including The Ocean Clean-up, a non-profit organisation which is developing advanced technologies to rid the world's oceans of plastic.

Education is another key focus. The Foulds, along with their small army of supporters, have also developed a programme of waste reduction workshops, where participants are taught practical means of reducing domestic waste. This includes sessions on using beeswax food wraps in place of plastic-based options and showing people how to make more organic forms of household items such as shampoo and tooth paste. They also run an ongoing series of monthly clean-ups of Cramond Beach in Edinburgh and they organised a city centre flyer clean up in August during the height of the Edinburgh Fringe.

As Stephanie explains: "The Eco Larder is a circular economy within itself with social and environmental goals. As a collective, we believe we are better placed to do something about what I believe is a climate catastrophe. It felt ethically wrong that we could simply profiteer off such a disaster, so we run this as a business which is there to benefit the community it serves."

Given its broader aims, The Eco Larder has also received some government agency support. It was given funding from First Port, an agency which helps social enterprises, to employ a store manager for a year. Stephanie and Matt have also taken on another part-time colleague who is developing the shop's digital and online offering. It's a lean but committed team for a seven-days-a-week operation.

Although broadly supportive of new initiatives aimed at tackling waste and reducing plastics, Stephanie believes governments need to go much further. "Along with cutting plastics out of the supply chain, I'd like to see more investment on pooling existing resources, such as straws and bottles, so we don't need to produce nearly as much new stock," she says. "If we are going to get serious about reducing waste and significantly changing consumer behaviour, we need to address this through the tax system and incentivise consumers to make eco-friendly lifestyle products more affordable."

As they near the end of their first year of trading, the Foulds have much to be proud of in getting The Eco Larder off the ground and continuing to promote sustainability across the wider community in Edinburgh and beyond. Along with the focus on building the shop's existing clientele, they are now developing their wholesale business, supplying smaller independent shops. It's a logical extension of their core aim of reducing waste and packaging within retailing.

Among their longer term aspirations, Stephanie and Matt want to expand The Eco Larder brand to other locations around Scotland. They are certainly keen to do all they can to help other consumers reduce plastics and household waste. With the support of their growing community behind them, they are building an inspirational and successful social enterprise that has real potential to grow and thrive, in tandem with their young daughter, in the years ahead.

Tackling food waste: future measures set to force change by FBOs

There is growing pressure on food business operators ("**FBOs**") to reduce food waste and to be more accountable for the food waste they produce. Nearly 130 FBOs have signed up to the "Step up to the Plate" pledge (the "**Pledge**")[1] following its launch in May, making commitments to measure and reduce food waste. This is the first phase of the Government's plan to minimise food waste and part of its revised waste strategy, "Our Waste, Our Resources: A Strategy for England" (the "**Strategy**")[2].

Meanwhile, the Scottish Government's Food Waste Reduction Action Plan ("**Action Plan**"), arguably goes further than the Strategy – aiming to reduce food waste in Scotland by 33% (from 2013 levels) by 2025, preventing nearly 300,000 tonnes of food waste each year. Change is therefore afoot in the UK, but some FBOs have queried its pace and have called for increased transparency within the food industry in respect of the publication of food waste data.

Drivers for change and current commitments

Leaving aside the financial and social issues associated with food waste, the significance of its related environmental impacts is widely recognised and is considered to need redress. The Strategy reports that the carbon footprint of food and drink consumed in the UK is estimated to be equivalent to one fifth of all UK emissions[3]. Further, methane released by the breakdown of food waste sent to landfill is considered to have a potentially more damaging impact on the environment than carbon. As such, the Government has committed to meet the United Nations' Sustainable Development Goal 12.3 – which is by 2030 to halve per capita global food waste at the retail and consumer levels and reduce food losses along the production and supply chains[4].

This commitment has been reaffirmed in both the Strategy and the Pledge. In addition, the Government will continue to support voluntary initiatives such as the Courtauld Commitment, which aims to reduce per capita UK food waste by 20% by 2025. Together, these commitments are envisaged to promote the Government's wider ambitions to eliminate avoidable waste by 2050 and to work towards eliminating sending food waste to landfill by 2030.

Mandatory food waste reduction targets and annual reporting

However, the Government admits that its "determination to cut food waste has not been matched by progress" and therefore a new approach is needed. In view of this, the Strategy states that it will consult this year on:

1. the introduction of regulations to make annual reporting of food surplus and waste mandatory for larger food businesses[5] ; and
2. seeking powers for setting mandatory food waste prevention targets for "appropriate" food businesses and the introduction of surplus food redistribution obligations (subject to progress made by businesses to targets for food waste prevention).

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[1] Step Up to the Plate Pledge

[2] Our Waste, Our Resources: A Strategy for England

[3] Ibid 1, page 99 (WRAP and WWF (2011) The water and carbon footprint of household food and drink in the UK)

[4] United Nations' Sustainable Development Goals

Exactly when these consultations will be published is currently not known and the Department for Environment, Food and Rural Affairs ("**DEFRA**") was unable to provide projected timings when contacted. Interestingly, when announcing the launch of the Pledge, DEFRA suggested a different approach to its earlier proposition to introduce mandatory food waste prevention targets, stating that it will consult on legal powers to introduce mandatory targets for food waste prevention "should progress be insufficient". The Government's Food Waste Champion, Ben Elliot, echoed this approach at a conference in July, stating that government could legislate on surplus food reporting if progress was not seen in the next two to three years. This may mean that the consultations will be delayed until industry progress can be adequately assessed. If introduced, it remains to be seen how the proposed food waste prevention targets will be measured and whether different targets will be set depending on the size of the FBO. It is also not clear whether there will be any repercussions for businesses who fail to meet the targets, or for any non-compliance with reporting obligations (e.g. prosecution, financial penalties and/or the "naming and shaming" of underperformers). However, without any such enforcement measures, substantive progress may falter.

In the meantime, FBOs are being encouraged to start annually reporting their food waste transparently, on a voluntary basis, using the online tool Atlas[6] prior to mandatory reporting obligations being introduced. Nearly 100 FBOs have committed to the Food Waste Reduction Roadmap[7] launched by WRAP and IDG in 2018, agreeing to publish details of their food waste. Signatories to the Pledge are also encouraged to embrace a Food Conversation week of action in November 2019 to highlight the changes that can be made[8]. For some, however, the pace of change is not sufficient and have criticised the Pledge as being a missed opportunity to move quickly towards transparency for the publication of food waste data.

[5] The scope of the proposal is not yet clear, as the Government has not provided a definition of a "larger food business". This is expected to form part of the consultation.

[6] The Food Waste Atlas

[7] Food Waste Reduction Roadmap

[8] https://www.gov.uk/government/news/slashing-food-waste-major-players-urged-to-step-up-to-the-plate

Scotland – Food Waste Reduction Action Plan

Prior to the Pledge, the Scottish Government launched the Action Plan in April which aims to: reduce unnecessary demand for food; improve how Scotland produces, stores and cooks food so that less is wasted; increase food recycling rates; and make better use of food waste as an organic resource. Arguably, the Action Plan goes further than the Strategy and is more advanced – providing greater detail on how it intends to deliver on each of the proposals to meet this target. The forthcoming ban on the landfilling of biodegradable municipal waste in Scotland from January 2021, has no doubt helped to focus minds and drive the Action Plan forward.

The Action Plan sets out four key focus areas for delivery:

1. **Improved monitoring and infrastructure:** consulting, by the end of 2019, on a mandatory national food waste reduction target and the mandatory reporting of Scotland's food surplus and waste by FBOs; and developing the infrastructure to support the reporting of food waste.
2. **Sector leadership**: working with industry and stakeholders to build skills and competence in the management of food waste; share expertise; and provide support and advice on reducing waste throughout the supply chain.
3. **Public engagement and communications**: providing a sustained programme of communications designed to raise public awareness and understanding of the food waste problem.
4. **Supporting delivery of a new approach to food waste**: implementing a Food Waste Hub that connects businesses with the funding, support and innovations needed to reduce food waste; identifying the skills needed to develop new ways of reducing food waste and optimising the use of bio-resources; and promoting research and innovation in emerging bio-technologies and other solutions that will tackle food waste.

Comment

Much of the publicity surrounding the Strategy has focussed upon its proposals to expand the existing producer responsibility regimes and, in particular, the proposed reform of the packaging waste regime. These measures will, no doubt, have significant implications for FBOs. However, the proposals to reduce food waste are also likely to impact FBOs considerably, particularly if non-compliance with the mandatory food waste reduction targets will attract enforcement, and if the data provided by FBOs is to be made publicly available. Indeed, consumer and investor pressure to address this issue may, in fact, drive the pace of change faster than the Government's current plans.

FBOs should start looking at their supply chain and processes now to ensure that they are able to adapt their procedures, compile the relevant data and try to reduce food surplus and waste pending the potential introduction of mandatory targets and annual reporting obligations. Many FBOs are, of course, well advanced in this process and have already adopted WRAP's Food Waste Reduction Roadmap, with some going further and already publishing their food waste figures.

The Ellen Macarthur Foundation's recent report, "AI and the Circular Economy", suggests that food waste reduction can be realised by introducing the use of AI at each stage of the supply process (for example, by using image recognition to determine when fruit is ready to pick; matching food supply and demand more effectively; and enhancing the valorisation of food by-products). Arguably, the new measures could therefore be viewed as an opportunity for FBOs to embrace new processes and innovations, including "intelligent packaging", which may benefit their businesses in the long term.

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[9] Law Now – Packaging, Plastics and Waste: Significant Proposals Announced

[10] Ellen Macarthur Foundation, AI and the Circular Economy

Brand protection: More than a just a trade mark

Beyond trade marks, protecting intellectual property "**IP**" is not necessarily the first thing that comes to mind when one has developed a new food or beverage product. Why is this the case, especially when so many other industries have readily adopted and employed IP protection to their commercial advantage? This article looks at some of the common misconceptions surrounding intellectual property protection and opportunities food and drink manufacturers should be aware of.

There are three common misconceptions regarding IP and brand protection.

1. Trade mark protection equals brand protection. Beyond logos, food and drink brands ooze all sorts of creative assets featuring colour palettes, shapes, graphics, designs and packaging. Manufacturers should seek to protect all aspects of its brand identity. Some tips on this are set out below.

2. Food and drink manufacturing is not a patentable industry. New food and drink products are the result of complex and technical processes. By failing to register patents and design rights, innovations of Scottish laboratories and factories are vulnerable to exploitation by competitors.

3. IP protection is only for big corporates. We are seeing more and more food and drink start-ups in the Scottish market with extremely innovative products. Whatever the size of your business, securing IP protection in developmental stages can help attract and protect investment and distinguish your products from competitors.

So, what practical steps can you take to strengthen your brand's IP protection?

A great product is much more than just a trade mark. **Design rights** can protect the overall look and feel of a product. A design right arises automatically upon creation of a product, but will only cover the functional shape and configuration. A registered design, however, will protect a product's overall aesthetic. A whisky distiller may develop an unusual bottle with intricate carvings or an unorthodox shape, giving the product a unique feel. Yet, if the design remains unregistered the distiller would need to prove that an infringing copycat had its product in mind. If the design is registered, the distiller only needs to demonstrate the infringing product creates the same impression on the user, even if it was created independently and without copying – a much lower hurdle!

The owner of a **patent** can take action against anyone using their invention without permission. Patents present a great opportunity to capture the value of innovative processes in food and drink. It is untrue that recipes are not patentable. In fact, 15 different patents for Quorn products have been registered protecting Quorn's unique composition and health benefits. Processes offering improved shelf life, flavouring and packaging also may be worthy of patent protection. Applying for a patent keeps your competitors on their toes and "patent pending" may help increase the marketability of your products.

Lastly, **trade secrets** can be used to safeguard food and drink IP – it's widely known that Irn Bru is Scotland's most closely guarded recipe. Although this is a powerful form of protection (and also carries marketing potential), a brand must be able to demonstrate that it has taken reasonable steps to protect the secret, such as implementing technical measures to prevent leaks and ensuring adequate confidentiality agreements are in place with relevant parties.

Ensuring that your brand and products have sufficient IP protection requires a lot more than registering a trade mark. A full suite of safeguards are available for the savvy manufacturer, and should be utilised in order to confidently take products to market and lessen the risk of copying. In the highly competitive food and drink market, adequate IP protection is crucial.

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Brexit could chip away at protected food names

The recent news that Ayrshire New Potatoes (or "Ayrshire Earlies") have been granted Protected Geographical Indication ("**PGI**") status has been warmly received by a number of industry stakeholders. However, depending on the how and when the UK leaves the EU, the status of PGIs in the EU following Brexit remains materially uncertain. The benefits of PGIs are clear and careful consideration needs to be given to ensure there is no dilution of this protection following Brexit.

What is a PGI?

The PGI scheme covers regional and traditional foods whose authenticity and origin can be guaranteed and will only be granted where the EU decides that the product has a reputation, characteristics or qualities that are a result of the area it's associated with. The effect of securing PGI status is that another producer of a similar product can't call it by the same name unless it is (a) produced in the geographical area and (b) produced by using the approved methods, both of which have been agreed with the EU during the application process. In addition to the Ayrshire Early, there are 14 other Scottish food and drink products (including Scotch Whisky, Stornaway Black Pudding, Scotch Beef and the Arbroath Smokie) which have been granted PGI status by the EU.

Benefit of PGIs to the Food and Drink Industry

According to Scottish Development International figures, the food and drink industry is worth around £14 billion each year to the Scottish economy and accounts for one in five manufacturing jobs. It is believed Scotland has almost 19,000 food and drink businesses, which employ over 115,000 people. There are also ambitious targets to grow these figures to £30 billion by 2030.

Given the importance of this sector to the Scottish economy, the assurance of quality and provenance provided by the PGI scheme for Scottish products should not be underestimated and any steps to protect the identity and brand of Scottish food and drink products are to be welcomed.

PGI and other forms of relevant IP

The PGI status is essentially another form of intellectual property that requires to be protected. Whilst perhaps less well-renowned than more "traditional" forms of IP which may protect food and drink products such as trade marks (for a brand name), copyright (for a logo), designs (for the shape of a product or its packaging) or patents (for any inventive step used in the manufacturing process) the PGI offers yet another layer of protection to stop imitators from seeking to ride on the coattails of well-known brands/products. Additional protection may be available to food and drink brands who can seek the protection of slightly different forms of trade marks such as collective marks (which can only be used by a specific group of enterprises, e.g. members of an association) or certification marks (which are used to demonstrate compliance with defined standards, but are not confined to any membership body or organisation).

PGIs being misused

The protection of PGI status goods is provided by EU regulations. In summary, infringement of a PGI will occur if:

— There is any commercial use of a PGI in respect of products not covered by the PGI registration, where such products are the same as products registered under that name (e.g. potatoes being called "Ayrshire New Potatoes" when they are either not from Ayrshire and/or have not been produced in accordance with the approved methods provided to the EU);

— There is any misuse or imitation, even if the true origin of the products or services is indicated (e.g. black pudding being sold as "Glasgow black pudding in the style of Stornoway Black Pudding");

— There is any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product used on the inner or outer packaging or advertising material liable to convey a false impression as to its origin; and/or

— There is any other practice liable to mislead the consumer as to the true origin of the product.

In practice any infringement may well cover a number of these possible scenarios. In the event of an infringement of a Scottish PGI, court action can be taken against the infringer (most likely in the form of an interdict (the Scottish equivalent of an injunction)) to prevent further infringement together with the appropriate claims for financial relief (e.g. damages and legal costs). Equivalent court remedies are also available in the English and EU member state courts.

Brexit Implications

Given PGIs are currently legislated for at EU level, the question of where Scottish (and indeed UK) PGIs will sit, following Brexit, is one which has caused particular concern amongst the food and drink industry. As with all matters Brexit, there is uncertainty.

In the event of the UK leaving the EU with a negotiated deal, it is likely any such deal will simply allow for all current UK PGIs to continue to be protected in both the UK and EU (albeit probably under two different schemes). Likewise, current EU PGIs would likely continue to be protected in the UK under reciprocal arrangements.
If the UK were to leave without a deal, it is envisaged that the UK would set up its own scheme which would mirror the current EU regulations currently in place.
The Department for Environment, Food and Rural Affairs ("**DEFRA**") would manage the scheme, maintain the current register and process new applications. The good news is that as at the date of the UK's withdrawal, all current UK PGIs will be protected under this new UK-wide scheme. This new UK scheme will be open to all producers, whether based in the UK, EU or beyond. So far so good.

However, in the event of a no deal Brexit, the protection on offer to both UK PGIs in the wider EU and EU PGIs in the UK (both presently protected under the current EU scheme) is unclear. Whilst the EU could simply grant all current UK PGIs automatic protection under the EU scheme (in which case DEFRA would likely reciprocate), it may be that all current holders of UK PGIs have to reapply for EU protection. Whilst DEFRA have offered support and guidance, this could well be a costly and time-consuming affair. In the event that re-applications are required, there may be a period where UK PGIs are unprotected in the EU (one would expect there may be a backlog in processing reapplications) as they await the application being granted. If this resulted in a period whereby Scottish/UK PGIs did not have protection in the EU, this could allow copycat imitators or products of a lesser quality to fill the void, until PGI protection is restored. Whilst the other forms of IP detailed above (e.g. trade marks etc) would likely still apply and offer protection against this, there is no doubt that the value of PGIs would be diminished.

Conclusion

The current PGI regime operated by the EU is extremely valuable to the food and drink industry in Scotland. It is clear that Government must do all they can to prevent any dilution of protection either in the UK or wider EU for food and drink products currently benefitting from PGIs.

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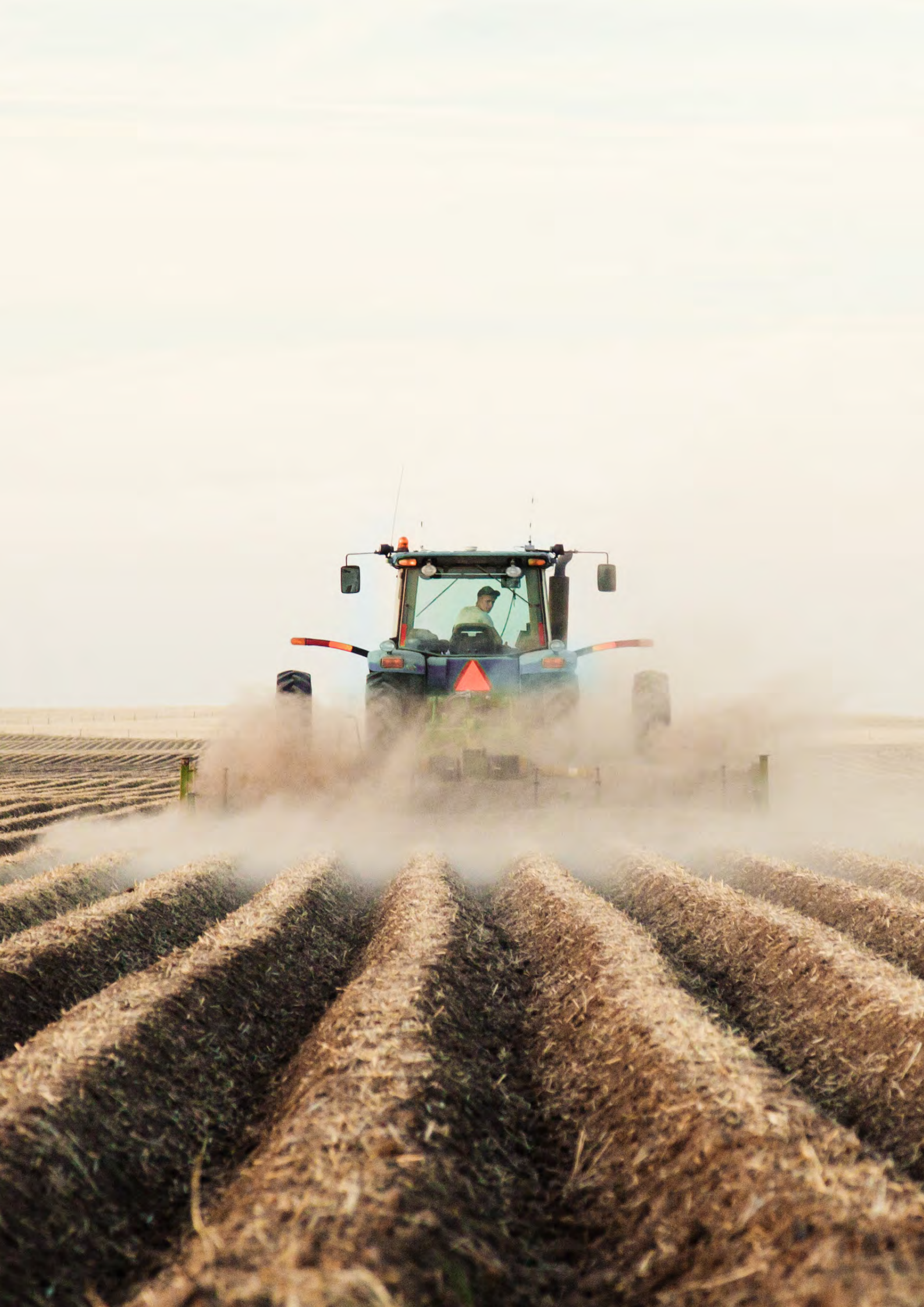

Recruitment of EU nationals post-Brexit: How to deal with a 'no deal'

Brexit – the long and winding road. With UK businesses crying out for certainty, it seems that things are changing more quickly than ever. This rapidly evolving state of affairs is a major challenge for businesses in all sectors, with the lack of progress demonstrated by the recent call by the Institute of Directors for all employers to step up their preparations for a departure from the EU without a deal.

Many employers in the food and drink sector are feeling the impact of this with particular force. Businesses with a high reliance on migrant workforces, such as those with large harvesting or production operations, are in a position where they are heavily reliant on their continued ability to recruit migrant workers. However, there is a big question mark over their ability to do so in the near future. This also extends to the service side of the industry, such as restaurants, which have historically relied on specialist migrant labour. With the current political climate trending towards a harder (or "no-deal"), Brexit, as early as 31 October, what can employers do to make sure that they will continue to have access to the labour that they need?

Deal or no Deal?

The future position will depend on whether the UK's departure from the EU is under a negotiated deal, or whether it takes the form of a "hard" Brexit and we leave without a deal.

If there is a deal, it is very likely that the future immigration position for EU nationals will be covered as part of that deal. Theresa May's long-negotiated, but so far unsuccessful, Withdrawal Agreement, provided for a "transition period" lasting until 31 December 2020. Until that point, migrants from the EU would be free to move to the UK to work and would be eligible to apply for indefinite leave to remain if they stayed for at least five years. The rationale behind this was to reduce the shock impact to businesses who rely on a continuous cycle of migrant recruitment.

However, in the event of no-deal, there would be no transition period. Free movement would end on 31 October 2019 with immediate effect. Potentially, no EU staff who arrived in the UK after that date could be lawfully hired. Employers conducting a right-to-work check of an EU national would be left in a very difficult position – did the new recruit move to the UK before or after 31 October 2019? An employer who gets that wrong could be liable to a civil penalty notice of up to £20,000 per illegal worker. So far, we do not have solid answers to that concern, nor many others.

How can we prepare?

At this stage, many employers in the sector are making their Brexit plans on the assumption of no-deal. This presents a particular challenge on the recruitment front because it is not certain what the post-Brexit immigration landscape will look like for EU nationals, although we expect that it will not distinguish from EU nationals and migrants from countries outside the EU, such as Australia and the United States.

The government has brought forward a draft Bill with key policy objectives such as (i) streamlining the sponsorship system to make it easier for employers (particularly those previously reliant on an EU workforce) to obtain the people they need, and (ii) reducing the skills threshold for migrant workers and removing the annual cap and resident labour market test. Both of these objectives are particularly relevant to the food and drink industry and have the potential to relieve at least some of the pressure on businesses in the sector.

Aside from those policy objectives, there will also be a trial of a temporary worker route in the UK with the aim of meeting the need for lower skilled workers. Under this route, qualifying individuals could enter the UK to work for up to 12 months, and then be required to leave for a cooling off period of 12 months. There would be no requirement for sponsorship and those entering would have no recourse to public funds and would not be able to apply for settlement. This could be of particular assistance to businesses in the manufacturing side of the industry, which has traditionally relied more heavily on short term migrant labour.

All these measures, however, seem a long way off and they are unlikely to fully mitigate the shock of a no-deal Brexit.

So what can we do?

We suggest the following "top tips" to food and drink industry employers to Brexit-proof their recruitment processes.

1. If you do not have a sponsor licence, consider applying for one now. This means that you may be ahead of the crowd if there is no-deal and points based sponsorship is needed for EU migrants sooner rather than later.
2. Engage with your existing EU workforce and consider what support your organisation might be prepared to provide to them in terms of regularising their status through the EU settlement scheme.
3. Make contingency plans for the event of a sudden fall in applications for employment in areas where there is a significant presence of EU nationals and consider how those areas could be resourced by settled labour.
4. Review systems for conducting right to work checks and monitor guidance from the Home Office in order to ensure that checks comply with any changes.

Employers in the sector should also keep in mind that the most straightforward and reliable option to ensure the recruitment of EU citizens is for them to arrive in the UK before Brexit. The rights of those citizens who do will be protected, whether the deal is negotiated or not. As the odds of a "no deal" Brexit shorten, it becomes increasingly important to ensure that any key strategic hires are here before 31 October 2019.

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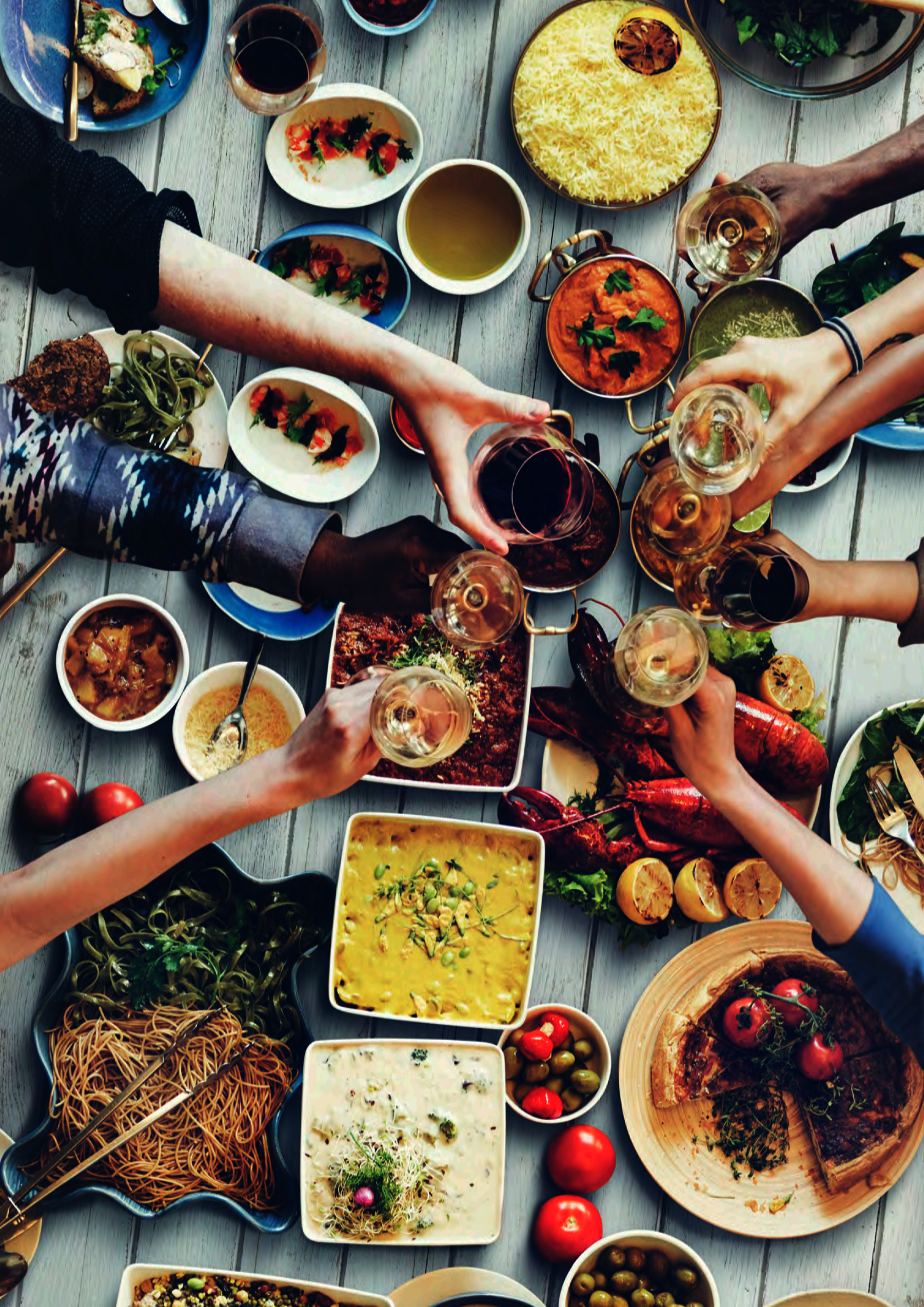

Top of the class: A new procedure for class actions could bring increased risks to Scotland's food and drink industry

Class actions – that is, court cases raised against the same defendant by multiple claimants – are commonplace in the US but have until recently been relatively rare in the UK. That is, however, beginning to change and the forthcoming introduction of a new class actions procedure in Scotland marks a significant development in this space.

These changes will be of interest to businesses in the food and drink sector, which has been the subject of ever-increasing class actions in the US over the last decade. Allegations of mislabelling and misleading manufacturer claims have been at the forefront of this trend. Recent targets include products described as "natural", "healthy" and "handmade", as well as products sold in packaging allegedly larger than necessary for the contents (so called "slack fill" claims). It is a feature of such claims that the value of each individual consumer's share in the class action may be very modest indeed - there have been settlements that have resulted in consumers receiving only a few dollars of coupons each. However, if the class of claimants is big enough, the overall cost of such claims to the business – both financially and reputationally – can nevertheless be very substantial.

The UK has not traditionally taken the same approach to class actions as the US. However, in recent years there has been a growing recognition that more effective collective redress mechanisms are required to enable groups of individual claimants to enforce their rights collectively against businesses. In Scotland, this has led to the introduction of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which came into force earlier this year. The 2018 Act sets out a framework for a new procedure that will make class actions more readily available in Scotland in future.

Does that mean we could in future see the sort of claims being raised in Scotland that the US courts have been plagued with? Hopefully not, but much will depend on the detailed rules that are put in place to add flesh to the bones of the framework the 2018 Act establishes. In particular, the extent to which the "opt-out" procedure is made available will be very influential – that is a feature of the US system that has been fundamental to the growth of the highly active class actions market in the US.

Opt-out class actions

In an opt-out class action, all members of the identified class of claimants are included in the action automatically. They do not need to actively choose to be involved, though they can choose to "opt-out" of the action if they wish. The action is taken forward by a representative claimant on behalf of the whole class and, if successful, all members of the class are entitled to share in any award made by the court. This inclusive approach to identifying the claimants covered by the claim maximises the potential value of the claim from the outset and makes opt-out class actions highly attractive to specialist law firms and funders.

The position in the UK to date has been very different. Whilst class actions are not unknown, there is only one forum (the Competition Appeal Tribunal) which currently offers an opt-out procedure. In all other courts and tribunals, class actions can only currently be taken forward on an "opt-in" basis. In an opt-in action, any claimant who wishes to share in any compensation awarded requires to actively choose to participate in the action. This has the effect of restricting the potential value of the claim to those claimants who can be located and persuaded to participate, thus reducing the attractiveness of such claims to specialist lawyers and funders.

A key aspect of the new Scottish procedure which will be potentially game-changing in UK terms is that the 2018 Act framework enables opt-out procedure to be made available for any type of claim. So, for example, this could be used for claims involving defective products, mislabelling, false advertising, environmental hazards, data breaches and workplace claims. It is, of course, possible that the detailed rules currently awaited will restrict the scope of the opt-out procedure, perhaps by identifying particular types of claim that it may (or may not) be used for, or by identifying particular "benchmarks" or characteristics such claims must have.

As regards the class of claimants, the 2018 Act envisages that an opt-out action would automatically include all claimants based in Scotland who fell within the designated class (e.g. any consumer who bought a particular product during a particular period of time). In addition to this automatic inclusion, claimants outside Scotland would also be able to opt-in to the proceedings. A class action that therefore achieved a high profile on social media might quickly attract large numbers of claimants from other parts of the UK and beyond.

Given the potential for very large classes of claimants to be quickly built, care will need to be taken by the drafters of the rules to strike a fair and reasonable balance between claimants and defendants. Whilst opt-out procedures can be viewed as empowering consumers in the exercise of their rights, real questions can arise in practice over the extent to which particular claims produce any meaningful benefit to such consumers. By way of example, a 2013 class action against Red Bull – claiming that the slogan "Red Bull gives you wings" misled consumers – was settled for $13m. The US court approved fees to the claimants' lawyers of approximately $3.4m and the representative claimants received $5,000 each. The rest of the class was predicted to receive either $15 of Red Bull products or $10 cash. In the end, the numbers of consumers who sought to claim a share of the settlement was such that each claimant actually received either a 4-pack of Red Bull or $4.23. Red Bull made it clear that from their perspective, this was a nuisance settlement reached to "avoid the cost and distraction of litigation".

In the US, many businesses facing such claims may end up settling them for similar reasons, even where they firmly believe the claim to be unmeritorious. This is, to some extent, driven by the fact that the general rule in the US courts on litigation costs is that each side meets its own costs, regardless of who wins. Consequently, class action specialist law firms will usually only be risking their own time and costs in taking forward a claim in the hope a settlement can be agreed.

By contrast, the general principle on litigation costs in the Scottish courts is "loser pays", meaning that the unsuccessful party must meet not only their own costs, but their opponent's costs (although this rule is set to change in relation to personal injuries claims). Whilst it is possible for claimants to obtain third party funding and/or litigation insurance to cover or mitigate potential adverse costs, the risk of exposure makes such funding and insurance more difficult and/or costly to obtain. The "loser pays" rule has therefore traditionally had a deterrent effect on the raising of unmeritorious claims. This may prove to be an important check on potential abuse in future.

What next?

How the new Scottish regime will work in practice will greatly depend on the detailed rules that are currently awaited. It is vital that those rules balance the understandable policy objective of empowering individual claimants to collectively enforce their legal rights with the need to discourage unmeritorious claims driven by the hope of achieving potentially lucrative settlements. This can be achieved provided the drafters of the rules give proper thought to the types of claims opt-out procedure should be made available to and the "benchmarks" such claims should have to meet. In addition, ensuring important domestic litigation rules, such as the "loser pays" principle, are respected will provide further protection against abuse.

The new procedure will be a significant change to the litigation landscape in Scotland and will clearly take time to fully bed-in. However, the legal machinery is gradually being put in place and over the coming months and years we will see this continue to develop. Businesses would be well advised to maintain a watching brief on these developments both in Scotland and across the UK and Europe, to ensure that they are ready for the litigation risks of the future.

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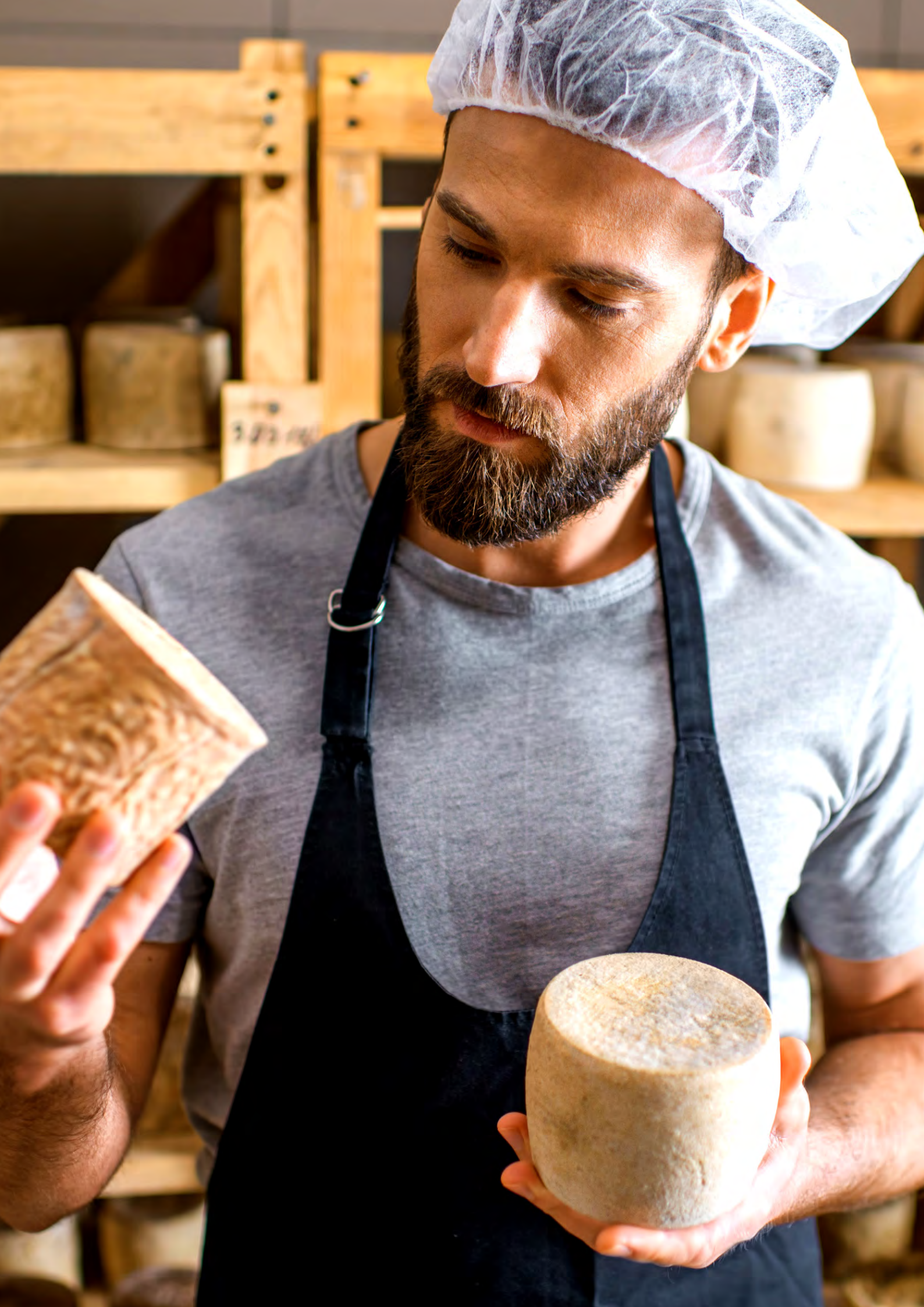

Show me the money… the Scottish self-reporting regime for bribery and corruption

The food & drink sector is the darling of Scottish business: growing at pace, rich with innovation and supporting over £14 billion of GDP, as Scotland's biggest employer. The sector, happily, shows no signs of slowing down as consumers continue to demand Scottish produce on menus and plates, both at home and abroad.

From dairy and distilling, to strawberries and seafood, all players in the sector require to navigate the regulatory environment. That includes recognising the threat of bribery in the sector, by putting in place adequate due diligence procedures, to guard against the threat of corruption.

If the unthinkable happens and bribery bites, what do you need to know? This article focuses on the Scottish self-reporting regime for bribery and corrupt practices.

The basics

Described earlier this year by the House of Lords Select Committee as having created "*an international gold standard for anti-bribery and corruption legislation*", 2019 marks the eight-year anniversary of the Bribery Act 2010 coming into force.

The Bribery Act 2010 makes it a criminal offence to bribe another person and, for commercial organisations, it is also now illegal to fail to prevent bribery (unless it can be shown that the offence took place, notwithstanding adequate procedures to prevent it were in place).

On 1 July 2011, to mark the commencement of the 2010 Act and to highlight the Crown's commitment to encouraging good corporate governance and to creating a corporate culture in which bribery is not hidden, the then Lord Advocate approved an initiative for businesses to '*self-report*' bribery offences. The initiative has recently been extended until June 2020.

The Scottish self-reporting regime

In return for self-reporting, businesses that self-report may avoid a criminal prosecution, and instead be referred to the Civil Recovery Unit for civil settlement.

The self-reporting scheme is operated by the Crown Office and Procurator Fiscal Service "**COPFS**", and is separate from the regime operated by the Serious Fraud Office "**SFO**" in England & Wales, where deferred prosecution agreements "**DPAs**" were introduced in 2014. DPAs are not currently available in Scotland and it appears, following the House of Lords Select Committee review, that there are no immediate plans by the Scottish Government to consider these further.

Although the Bribery Act 2010 is a UK wide piece of legislation, the investigation and prosecution of bribery offences are dealt with by different authorities north and south of the border and the approach to enforcement is not the same. Here, we look at the regime in Scotland, highlighting some key considerations for businesses contemplating a self-report.

Who should self-report in Scotland?

Although each case will be considered individually, factors that suggest that a business should report to COPFS, rather than the SFO, include that:

— the business has its headquarters or registered office in Scotland;
— the business is predominantly carried on in Scotland; or (most importantly)
— the wrongdoing took place in, or mostly in, Scotland.

Where cross-border issues arise, COPFS will liaise with the SFO to decide who will deal with the case.

Jamie is a manager at a celebrated biscuit producer. The producer relies heavily on one supplier for their flour. The managing director of the flour supplier asks if Jamie can find a position at the factory for her son. A well-paid position is duly created for the supplier's son. Jamie's HR department do not know he has done this.

Ciara is a business development executive in a Scottish gin distillery. Business is booming, but the market is competitive, with many new gins launching each year. Ciara is bidding to partner a major international conference, to be held in Scotland in 2020, as its official gin partner. The partnership will bring international exposure for the gin. Ciara meets up with the conference marketing team. She says that, in order to cement their working relationship, the marketing team will be offered a holiday of their choice, using the distillery's air miles.

Bill is foreman of a fish processing waste plant. He has a contact at his local authority. He knows it is important to maintain good business relationships with his contacts. He regularly takes his contact out for lunch, dinners and to concerts in their local area. While out one night, he asks his contact to "overlook" the plant's dumping of unauthorised waste.

Iona is in charge of exporting at a strawberry producer. Each week, she pays small £25 bribes to customs officials, to guarantee and expedite fast passage of the fresh strawberries.

What is required for a self-report?

From the outset, COPFS made clear that self-reporting is not a "soft option"; minimum requirements must be met before a self-report is accepted. The business must:

— conduct a thorough investigation, which may include engaging forensic accountants;
— disclose the full extent of any criminal conduct discovered;
— describe the steps put in place to prevent a repeat; and
— commit to meaningful dialogue with COPFS in its assessment and any ensuing investigation.

The report must be made by a solicitor, and the business must be clear that the report is made on behalf of its board (or the partners, in the case of a partnership), and that the business has received legal advice before making the report or disclosing information to the authorities. COPFS will not accept reports made by individuals; where an individual wishes to make a report without the knowledge of the business, he will be directed to the appropriate law enforcement agency who will investigate outwith the terms of the initiative.

Potential outcomes

A civil settlement is not guaranteed following a self-report; every case is considered on its own merits, and there may be cases where a criminal investigation is deemed appropriate. COPFS will take into account factors such as the seriousness of the offence, the extent of wrong doing within the business, whether senior management took action quickly, whether the business had adequate anti-bribery measures in place at the time of the conduct - and whether it has reviewed these procedures in light of what happened. Where criminal proceedings are instigated, the maximum penalty is 10 years' imprisonment and an unlimited fine for individuals, and an unlimited fine for businesses.

While COPFS is willing to have discussions with the business's solicitor about whether a report is likely to be accepted, it will not give any guarantees about how the business, or former or current officers and employees will be dealt with. There may be cases where the conduct is sufficiently serious that COPFS will decide that it is in the public interest to prosecute either the business or individuals connected to the business – or both. Although perhaps cold comfort, the business would be able to rely on the self-report as a mitigating factor in any subsequent prosecution.

Confidentiality and legal privilege

When deciding whether to make a report, confidentiality is also a key consideration. It's important to be aware that COPFS will not enter into discussions with solicitors about a possible report unless the identity of the client is disclosed. In addition, any information provided, including the report, may be used by the authorities in any subsequent action, whether civil or criminal, and may be shared with the SFO or law enforcement agencies in other jurisdictions where they request assistance with investigations. As legal advice is protected from disclosure, businesses should consider engaging solicitors early. This is particularly important if the business ultimately decides not to make a self-report.

Finally, even where a civil settlement is reached, publicity will generally follow unless a compelling reason for confidentiality exists, and our experience suggests that careful management of this aspect with customers and suppliers is required.

What has happened to businesses who have self-reported in Scotland?

Of the five cases in which a self-report has been accepted by COPFS, no corporate prosecutions have as yet followed for that entity in Scotland. In one case however, the former managing director was subject to individual prosecution.

Where the self-report is accepted, the case will be dealt with by the Civil Recovery Unit who will quantify the appropriate level of settlement by reference to the gross profit obtained by the business as a result of its unlawful conduct.

Five companies have agreed civil settlements with COPFS since the Bribery Act came into force, four of which have attracted publicity. Of these five, only one has (tangentially) been connected to the food and drink sector in Scotland.

The first company to self-report in Scotland was Abbot Group, an oil & gas company, who paid £5.6 million in 2012 in relation to corrupt payments made by an overseas subsidiary in 2007. Other settlements have varied from around £200,000 to around £2 million. As further practice develops north and south of the border, it will be interesting to observe whether the market perceives any benefits to reporting in either jurisdiction, as a result of the distinct schemes.

Why self-report?

Although there are no guarantees, the self-reporting initiative provides an opportunity for the business to avoid various repercussions arising from a criminal prosecution, such as the debarment provisions under Article 45 of the EU Public Sector Procurement Directive 2004, which prohibit the business from tendering for public sector work. Other implications for businesses convicted of bribery include:

— Financial penalties;
— Serious Crime Prevention Orders - designed to prevent, restrict or disrupt activities that might involve serious criminal activity; and
— Financial Reporting Orders, which compelling regular financial reporting.

A self-reporting business may also be able to retain an element of control over the investigation and ensuing publicity, and may have a greater degree of certainty in relation to its financial exposure, bearing in mind the unlimited nature of the fines on prosecution.

Deciding to self-report is a difficult process for any business and there is no one size fits all solution. The reality for a self-reporting business is often a lengthy investigation, which may uncover further criminal conduct as it progresses, and can broaden in scope if COPFS decides additional investigation is required. Investigations tend to be expensive, and distracting for management – and may also lead to litigation. Notwithstanding these important considerations, self-reporting may still be the right option for the business; taking independent legal advice as soon as bribery comes to light is a sensible precaution.

For advice on self-reporting in Scotland, or regarding anti-bribery and corruption policies and training, please contact Colin Hutton and Emma Boffey from the CMS Scotland Risk & Investigations team.

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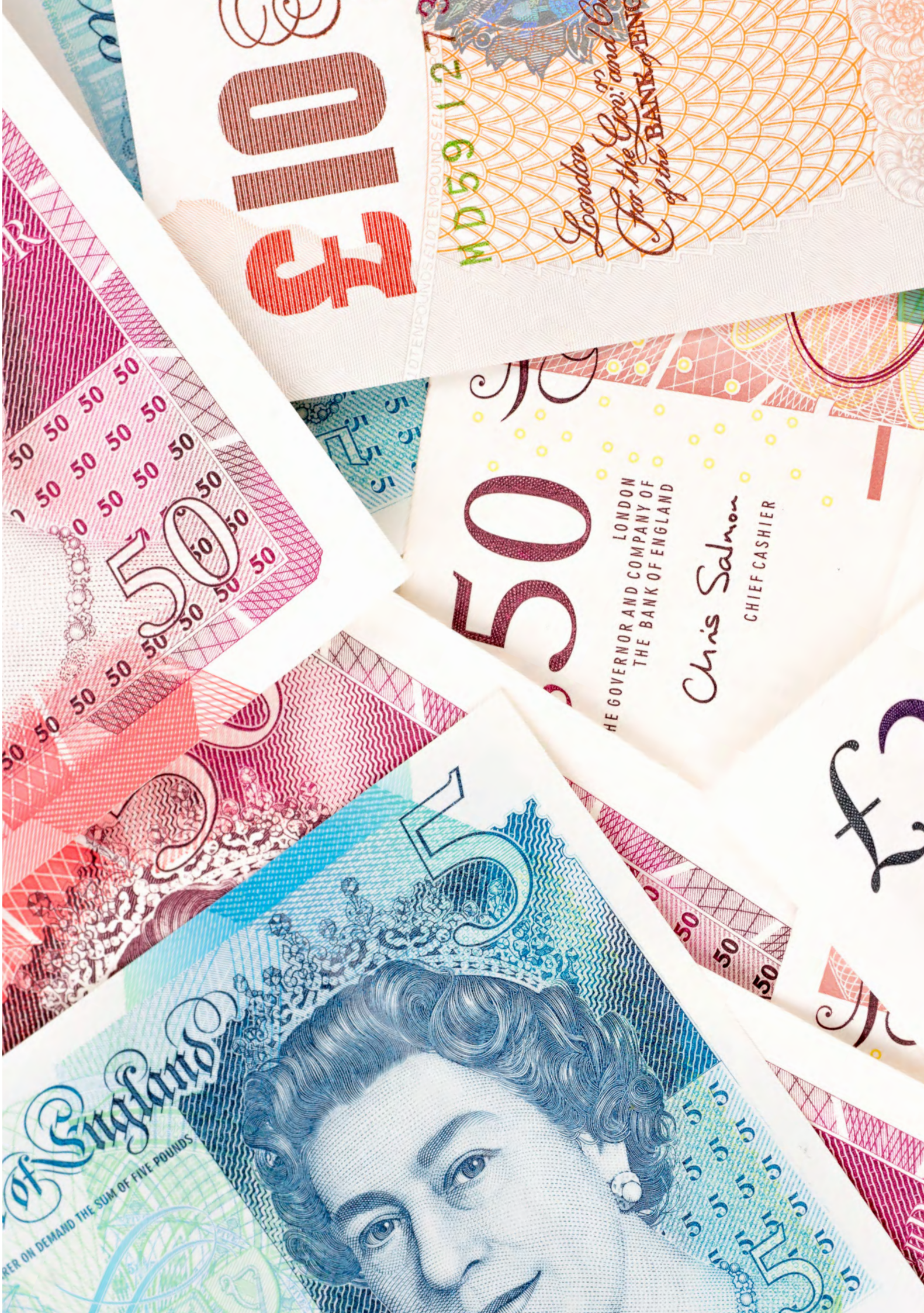
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