

Food & Drink

BULLETIN

current issues in your industry

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sleepless nights or
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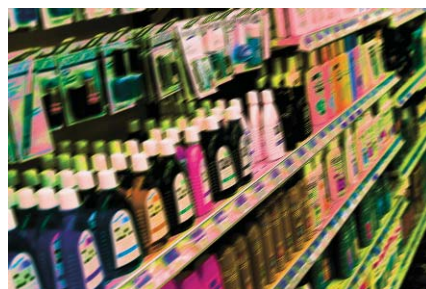
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The CMS Cameron McKenna Food bulletin is prepared by the Consumer Products group of CMS Cameron McKenna LLP. The bulletin summarises recent legal and regulatory developments that we believe would be of interest to our clients. It should not be treated 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.

This bulletin is intended for clients and professional contacts of CMS Cameron McKenna LLP. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The bulletin is intended to simplify and summarise the issues which it covers.

Welcome to our February 2008 edition of the Food & Drink Bulletin, where we take a look at some of the legal issues affecting your industry.



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With climate change becoming such a hot topic both politically and in consumer culture, and the burgeoning market for green products presenting commercial opportunities for the food and drink sector, we have tailored this edition to cover some of the environmentally focused legal developments that are influencing the way you do business.

Food and drink businesses in the modern world find themselves between a rock and a hard place: on the one hand they are under pressure to demonstrate their environmental credentials; but on the other they face the threat of censure from the ASA and accusations of 'greenwash' from pressure groups if their adverts overstate their achievements. Here we present a 'how to' guide on avoiding the pitfalls associated with communicating your own eco-initiatives.

In our article on director's duties, we look at how recent legislative changes have put a burden on directors to consider the impact of the company's decisions upon the environment (amongst other factors) and the knock-on implications for shareholder activism.

Elsewhere, we analyse how your business will be affected by implementation of 'The Merton Rule' – the stipulation by some local authorities that anything up to 10% of the energy of a new building must come from on-site renewable sources.

In our European article, we take a different tack, and explore the implications of Poland's laws forbidding retailers from charging producers a tariff to stock their products.

Also, turning to an issue that is increasingly gaining importance both nationally and globally, we look at the regulatory changes that are affecting the way water is used in the production process, and how food and drink companies are being squeezed as a result.

I hope you enjoy this bulletin. Please call or drop me a line if you would like to discuss any of the issues raised.



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Going Green

the new advertising environment

Our guide to speaking green

In demonstrating green performance in advertising without leaving black marks, here is our guide to avoiding some of the most common mistakes:

Avoid suggesting that green claims or product performance are a universal truth where the evidence is inconclusive, or scientific opinion is divided (as it can be in many environmental claims).

Be clear with terms such as 'recycled' and 'recyclable', since the latter only suggests re-use is technically possible, without stating whether it has taken place. A good claim should be specific: 'this product is packaged in 90% recycled paper'.

'Biodegradable' should only be used when the advertiser can substantiate the product will have no environmental impact in the full life cycle of the product.

Do not exaggerate or mislead consumers on environmental performance, or suggest exceptional qualities if the claim is based upon standard practice.

Avoid suggesting endorsement or certification by scientific or consumer bodies without express permission. Schemes such as the Soil Association logo, Forest Stewardship Council and Energy Saving Trust all offer accreditation schemes with clear eligibility criteria.

To satisfy demand from increasingly eco-aware consumers and to minimise impact on the environment, there is a growing need for all those involved in the food industry to adopt a greener approach. However, in promoting a green approach, businesses must ensure all advertising remains truthful, accurate and substantiated. Here's our guide to going green.

Green is the new black

All those involved in the food supply chain, from farmer and producer, to consumer and everyone in between, are being encouraged and cajoled to be more environmentally friendly. So, farmers are encouraged to implement sustainable agriculture policies, carriers to commit to reducing wastage and emissions in logistics and distribution and retailers are similarly tasked with reducing or changing the packaging for their products. Several large retailers were criticised by the Independent newspaper for the amount of food packaging used, whilst others have voluntarily taken steps to reduce waste. Even the end consumer is being actively encouraged (and in some areas required) to take more responsibility for household recycling by local authorities. Many large organisations have also begun to embrace an eco-approach, implementing top-level corporate social responsibility, seeking to minimise their impact on the environment. Even the duties of directors have been codified so as to require directors to have regard to the impact of their company's operation on the environment.

The past year also saw a number of eco buzz words used in the food sector and beyond, including 'carbon footprint', 'sustainable development', 'food miles',

joining existing terms such as 'environmentally friendly', 'recycled' and 'biodegradable'.

Flexing environmental muscle

As a result of such factors, the pressure upon all those involved in the sector to demonstrate their environmental credentials has become enormous. Similarly, eco-aware consumers have also emphasised the importance of such factors in their own buying choices, suggesting a green outlook can bring both financial as well as ethical and environmental benefits. Accordingly, green advertising has been one of the biggest trends in the sector in recent times. But it is not without its pitfalls.

As important as it is to demonstrate a green outlook to consumers, any advertising must, as always, be truthful, accurate and substantiated, particularly when environmental and other pressure groups are quick to point out errors or omissions in green claims. Misleading advertising or overstating green claims can damage a company's credibility, attract censure from the Advertising Standards Authority (ASA) and even undermine their core proposition. Such behaviour has even attracted its own entries in the new environmental vernacular, including consumer 'eco-fatigue' and advertiser 'greenwashing'.

Organic, naturally

Of particular importance to the food sector is the growth in the market for organic foods, although it should be noted that the guidelines for advertising such products are even stricter:

- Marketers should not claim that food is organic unless it comes from farmers, processors or importers who follow the minimum standards set down by Regulation (EEC) 2092/91 (on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs). Producers must also be registered with an approved certification body and are subject to regular inspection.
- Avoid claims that organic food production is 'natural', or any similarly 'absolute' term, if any 'approved' substances have, or might have, been used. Claims that organic food production is 'more natural' are likely to be acceptable.
- Marketers should not claim that organic food production uses only substances that occur in nature, or does not use artificial or manmade substances, if any 'approved' substances have, or might have, been used (organic regulations permit the use of certain natural pesticides, for example).

- Unqualified, absolute claims such as 'environmentally friendly' or 'sustainable' should not be used to describe organic food production, as all managed food production systems cause some damage to the environment. Claims such as 'friendlier' or 'more sustainable' are likely to be acceptable if marketers can show that less environmental damage is caused than by conventional farming methods.
- Marketers should, where appropriate, take account of the locality of produce - importing organic produce from further afield than equivalent conventional produce may have an adverse effect on the environment (so-called 'food miles').
- Marketers should not make objective claims that organic food tastes better than conventional food unless they hold convincing taste test evidence that consumers believe that to be the case.

How green are your advertising methods?

Such is the scrutiny of environmental assessment that all aspects of an organisation's activities will fall under the microscope. This includes not only the products and services of any advertiser, but the method in which the marketer chooses to reach out to the consumer. Large scale and untargeted marketing has

come under increased pressure recently, in particular, Direct Marketing (DM). Recent figures from The Environment Council claimed DM creates 1.25million tonnes of waste per year and has not done enough to embrace environmental policies, although the Direct Marketing Association has now agreed to meet a government target of 55% recyclable mailings by 2009. Further, advertisers are increasingly being encouraged to use more sophisticated and targeted databases to reduce wastage or, indeed, may consider avoiding physical mailing altogether and use email campaigns to contact consumers. The latter option offers both an environmentally friendly solution and a significant reduction in the costs of printing, since an electronic campaign has generally fixed costs regardless of the number of recipients.

For the time being, the green trend is here to stay and both consumers and regulators can be expected to become even more vigilant in weeding out the truly environmentally sustainable organisations from the would-be greenwashers. The food industry must plan for future generations of consumers, profit and, above all, the planet.

Directors' duties

sleepless nights or business as usual?



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Corporate social responsibility is by no means a new concept for directors of companies in the food and drink sector. In fact, it is a concept which many have been grappling with for some time now as part of day-to-day management. However, following the recent codification of directors' duties, it is no longer a factor they 'might' like to consider, it is a factor they 'must' consider as part of their duties as a director.

Substantial parts of the Companies Act 2006 (the Act) are now in force, including four of the seven codified directors' general duties which came into force on 1 October 2007; the other three codified duties are due to come into force later this year. The new set of directors' duties is the first time that such duties have been recorded in statute codifying a myriad of well-trodden case law. Notably, the Act has now established a clear link between the duties that directors owe to a company and matters of corporate social responsibility, many of which are highly relevant to the food and drink sector, such as ethical trading and environmental best practice.

Something old, something new

For the last 300 years, the law governing directors' duties has largely been derived from common law rules and equitable principles which have developed through the courts on a case-by-case basis. The law on directors' duties has therefore not always been readily accessible to those who need it most, directors. It was therefore a key objective of the new legislation to make the law more accessible by codifying the general duties of directors so that they reflect the existing law and provide greater clarity on what is expected of directors. This sentiment is to be applauded and

the Act now includes seven general duties that seek to reflect the existing law, as follows:

- To promote the success of the company
- To exercise reasonable care, skill and diligence
- To exercise independent judgement
- To act within the powers of the company
- To avoid conflicts of interest
- Not to accept benefits from third parties
- To declare any interest in proposed transactions or arrangements with the company

There is of course little that is controversial in the broad formulation of these duties. For example, few could doubt that directors should act within their powers and exercise reasonable care, skill and diligence. However, the simplicity of codification brings its own issues to the table, not least the fact that it is rarely possible to set out in statutory form the detailed principles on which the underlying cases have been decided. The Act provides that the new codified duties are to be based on the 'existing duties' and that regard should be had to the 'corresponding' existing

duties when interpreting the new ones. What this means in practice is that the existing law is almost superseded, but not quite. Effectively, this approach avoids the necessity for detailed codification of complex principles underlying each of the new duties, whilst suggesting that the courts should be reluctant to move away from the existing law underpinning each of the duties.

Until this relationship is tried and tested in the courts, the interaction between existing case law and the new duties will provide scope for uncertainty and judicial development – in particular, it will be interesting to see if the courts decide that the language used in the Act compels them to follow old precedents or affords them with an opportunity to look at issues afresh.

“The introduction of the new codified duties and an increased risk of directors' decisions being challenged, particularly by way of shareholder actions, means some directors may find themselves faced with a new era of decision-making and a few sleepless nights lay ahead; for others, it will be business as usual.”

Duty to promote the success of the company

One of the new codified duties is to 'promote the success of the company'. Lord Goldsmith, the government spokesman, has reportedly said that success for a commercial company will usually mean a 'long-term increase in value'.

The Act provides that a director of a company must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so shall have regard (amongst other matters) to:

- The likely consequences of any decision in the long term (e.g. cutting a company's research and development budget)

- The interests of the company's employees (e.g. moving a manufacturing process abroad, thus leading to redundancies among existing staff)
- The need to foster the company's business relationships with suppliers, customers and others (e.g. tightening of supplier terms of trade in order to improve cash flow)
- The impact of the company's operations on the community and the environment (e.g. the impact of new manufacturing processes on a company's carbon footprint)
- The desirability of the company maintaining a reputation for high standards of business conduct (e.g. reputational risk of using private information relating to competitors)
- The need to act fairly as between members of the company (e.g. ensuring that private shareholders are not disadvantaged by corporate transactions or share issues).

The introduction of these 'enlightened shareholder values' (the CSR Factors) has been criticised for creating an additional burden on directors, although most competent directors have long had regard to these factors. Their statutory formulation will arguably just make directors think harder about them.



“The main concern with the new rules is that they will lead to uncertainty and the prospect that almost every decision could be challenged with greater ease than under the existing rules.”

written record of having given regard to the relevant CSR Factors. This is particularly important in an increasingly litigious environment and against the backdrop of an increased risk of claims being brought against directors personally.

Shareholder actions

The changes to directors’ duties, some of which have been described above, are certainly capable of creating uncertainty, at least until the courts have had an opportunity to rule on questions of construction and the interaction of the new laws with the old. While the codification of duties has arguably helped to clarify directors’ legal duties and obligations, this clarification has also served to create clearer grounds upon which directors might be sued personally for breaching such duties. This is all the more significant given the parallel changes in the scope of the shareholder action – otherwise known as a ‘derivative claim’.

If a wrong is done to a company, the correct entity to seek redress is the company itself. However, wrongs committed against a company are sometimes attributable to the directors who will have the power to prevent the company from bringing a claim. This is said to be tantamount to a ‘fraud’ against the minority shareholders with the result that, under the existing law, the minority are allowed to bring an action against the wrongdoers in the name of and for the benefit of the company. Although derivative claims are possible under existing law, they are complex and limited in scope. The Act has made two important changes to the existing law in respect of derivative claims, which are:

- it will no longer be possible for a simple majority of shareholders to ratify the conduct of directors, thereby leading to an absolute bar on a derivative claim. The votes of a director and of anyone connected with the director will be disregarded for these purposes. This represents a significant qualification to the general principle of majority control which is a cornerstone for a number of English company law principles; and
- it is now clear that any breach of duty, even negligence, can be the subject of a derivative claim – there was some uncertainty about this point under existing law.

One of the consequences of allowing negligence to form the basis of a derivative claim is the likelihood of a disgruntled shareholder being able to present a credible argument that a specific decision was made negligently because the directors failed to have regard for, or placed too much (or too little) weight on certain factors. Arguably, this is more likely than ever now that directors have a specific list of factors (the CSR Factors) to which they must have regard in seeking to promote the success of the company.

The potential for claims to be brought against directors would therefore seem to have been increased and early evidence of this is in circulation. For example, the Corporate Responsibility Coalition (CORE) has produced a guide on how its members can use the Act to bring companies to account for their social and environmental impact as well as financial performance.

The legislators were, however, aware of the sleepless nights these changes may cause a conscientious director to endure. The Act introduces a number of safeguards to limit unwarranted or frivolous claims being brought in abuse of the court process. A shareholder will be required to seek the permission of the court to bring an action in the name of the company and the courts will have a largely unqualified discretion as to whether or not to allow a shareholder action to continue. In particular, one of the grounds to be taken into account by the court is whether the application is being made in ‘good faith’. This is an important protection for directors and it is likely to guard against, for example, a situation where a campaigner or interest group purchases a share solely for the purpose of being able to bring a shareholder action. It is likely that the court will treat such action as a claim brought in bad faith and designed to further a different objective, rather than shareholder protection.

The main concern with the new rules is that they will lead to uncertainty and the prospect that almost every decision could be challenged with greater ease than under the existing rules. With no cast-iron rules, a shareholder will be able to apply to court and attempt to persuade the court to allow a derivative claim to proceed. This will inevitably lead to some cases where this is a positive development leading to greater accountability on the part of directors, but there must be a risk that it creates a climate in which shareholders are encouraged to raise arguments in order to explore an issue publicly or to apply pressure on the directors.

Practical advice

The introduction of the new codified duties and an increased risk of directors’ decisions being challenged, particularly by way of shareholder actions, means some directors may find themselves faced with a new era of decision-making and a few sleepless nights lay ahead; for others, it will be business as usual. In order to acclimatise to this new era, it is recommended that:

If relevant, directors are careful to ensure that each of the six CSR Factors are considered, bearing in mind they are not exhaustive. In many situations it will be necessary to have regard to other factors.

Minutes do not necessarily need to give detail on how each relevant factor was considered if supporting board papers provide the relevant information. (A system of checking by the chairman or secretary before any paper is finally included in the board pack should be introduced, to ensure that all relevant factors are adequately covered).

Directors use independent advisers such as environmental and health service consultancies to help to establish the potential impact of business decisions before they are implemented.

The directors’ obligations in relation to their codified duties, in particular, the CSR Factors, should be brought to the attention of all directors on appointment.

The Institute of Chartered Secretaries and Administrators has recently published a guidance note on directors’ general duties under the Act and it is well worth a read; it may even help to avoid the unwanted attention of a derivative claim!

Conclusion

Many companies within the food and drink sector are already publicly demonstrating their ‘regard’ for the CSR Factors by publishing their policies on a wide range of corporate responsibility matters such as responsible drinking, food labelling and marketing to children, local sourcing and supplier relationships, all of which are potentially useful defensive measures to ward off derivative claims. But the reforms are still likely to create an environment in which challenges are made to actions and decisions of directors. In the context of broader shareholder activism and, let’s not forget, the uncertainty currently surrounding the world economy, there is a real prospect of increased litigation. One can only hope that the courts apply a sensible approach so as to minimise the scope for tactical action and other unnecessary claims.

“There is of course little that is controversial in the broad formulation of these duties. For example, few could doubt that directors should act within their powers and exercise reasonable care, skill and diligence.”

How will the Merton Rule affect your business?



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With an increasing number of local authorities requiring new buildings to generate at least 10% of their energy through on-site renewables, how will this affect your business?

What does this mean?

The requirement of a 10% renewable energy source was pioneered by the London Borough of Merton in 2003 in the council's Unitary Development Plan and is now commonly known as the 'Merton Rule'. It requires that all non-residential developments above a certain size generate at least 10% of their energy on site from renewable sources. To date, approximately 140 local authorities have adopted the Merton Rule and some have even gone further to demand 15% instead of 10%.

What makes the Merton Rule ground breaking is that one local authority has instigated national change. Government ministers have openly voiced their support for the rule and have referred to Merton council positively as a 'trailblazer'. The recent Planning Policy Statement (PPS) on climate change has cemented this view by requiring councils to adopt Merton Rule style policies to promote greater renewable energy use in non-residential developments. This has gone

The widescale adoption of the Merton Rule – 10% of energy through on-site renewables – by local authorities has significant implications for factory and warehouse development. When taking on new production or storage facilities, compliance by those installing the energy supply and equipment will be key.

some way to alleviate concerns of environmental pressure groups who feared the Government would give in to pressure from public lobbying by the British Property Foundation and developers and do a u-turn. That said, the PPS does not fully endorse the Merton Rule and does not go as far as to stipulate targets for local authorities to impose. Instead, local authorities will have autonomy to negotiate targets locally and this does seem reasonable. It would be unrealistic to impose a national target as there are variables which need to be considered e.g. the locality of the development and whether certain forms of renewable energy would be workable.

It will be interesting to see what approach local authorities adopt and in particular whether they will allow developers to rely on, or call upon, off-site renewables

as part of their contribution. To many this would be going against the Merton Rule which focuses on on-site renewables. A group of cross party MPs have recently introduced a private member's bill to Parliament which seeks to reinforce the Merton Rule and which would allow local authorities to insist upon on-site renewables. The second reading of the bill took place in late January and it remains to be seen whether the Merton Rule becomes law.

The Merton Rule in practice

The Merton Rule was first implemented in 2004 in relation to an application for planning permission for a 4,500 square metre speculative development comprising ten units of varying sizes to be used for warehousing/storage and distribution or general industrial purposes. In order to

calculate the developer's 10% requirement for the development, the energy consumption of the proposed units was multiplied by the total floor space of the development. Merton Council used the Energy Use Benchmark Guides provided by the Building Research Establishment (for the Department of Trade and Industry) to determine the likely energy consumption. Those guides set out what the energy consumption per square metre should be for certain types of buildings.

Once the composite energy consumption has been determined this is then converted into carbon emissions. These will differ depending on whether heating is produced with electricity or gas. Electricity supplied heat produces more carbon dioxide emissions than gas and so the amount of renewables required to generate 10% of the building's raw energy needs would increase. Therefore, to assess a building's likely carbon emissions it is necessary to consider the lighting and heating requirements. At Willow Lane the end users were not known and so the heating requirements could not be assessed. Therefore, only the electrical consumption for lighting could be considered. The developer at Willow Lane met his target by using micro turbines and solar panels. However, since the end users were not known the developer was required to provide a cash fund as

part of a section 106 agreement. This 'pot' would be made available to the occupiers so they could install energy efficient systems when their heating requirements were known.

How will the Merton Rule affect your business?

There are two main ways in which the Merton Rule could affect your business and the property or properties that your business operates from. Firstly, if you develop your own factories/warehouses you will have to comply with the rule and will need to ensure that you can comply with it. Secondly, if you lease your factory or warehouse there will be other considerations. Dealing with each in turn:

Constructing a new warehouse or factory

Going forward it is unlikely that local authorities will grant planning consent without a commitment to provide on-site renewable energy. Therefore, this must be borne in mind at the earliest stage of planning. For instance, when considering whether a site is appropriate for your needs you will have to ensure that there is sufficient room to include, for example, a wind turbine or a combined heat and power plant. Location will also be key as to what type of renewable energy is possible.

"What makes the Merton Rule ground breaking is that one local authority has instigated national change."

You should consider the master planning of the site from the earliest point. Following the recent PPS it is likely that a local authority will place more significant weight on renewable energy objectives, and so this should be factored in from the outset where possible. We suspect that councils will require compliance with their individual renewable policy as a condition to planning consent.

There will inevitably be an additional cost involved in complying with the planning policy. These additional costs will include feasibility studies at the outset and the cost of actually installing the relevant equipment. To try to recoup some of these costs it may be worth investigating whether any surplus energy can be sold back to the grid.

You should consider whether a back up energy supply is also required to avoid interruption to your business.

Why should you embrace the Merton Rule?

Because there are a number of advantages.

In today's society businesses are being asked to take stock of how they operate and to consider the social, economic and environmental impacts they have on society. By embracing the Merton Rule and finding ways to make your business more energy efficient you will be doing your part for the greater community and enhancing your company's corporate social responsibility.

The implementation of the Merton Rule will prompt ideas internally that could have a wider effect. The lessons learnt may also be passed on to other areas of the business.

There may be wider implications. It is likely that other countries will seek to reduce carbon dioxide emissions in similar ways and so what is learnt from the Merton Rule may help your business in other countries in which it operates.

And because in practice you will in all likelihood have no choice in any event.

Leasing a warehouse or factory

When entering into an agreement for lease you need to carefully consider who is responsible for installing the equipment and making it operational. An agreement for lease will normally be between a landlord and a tenant and so if a third party is responsible for installing the equipment you will need to ensure there is a separate arrangement detailing its obligations. If the installation of the equipment is delayed this could delay you taking up occupation. Such issues must be borne in mind when negotiating with a landlord.

The landlord will be responsible for the initial outlay in connection with the installation of the relevant equipment and you should ensure that he does not try to recoup the costs from you. For example, if you are taking a warehouse unit on an estate the landlord may try to recover its costs through the service charge. You should therefore ensure that the service charge contains a specific exclusion which does not allow the landlord to recover the costs of the initial construction of the estate, which includes the relevant equipment.

You should ensure that you know you will be responsible for maintaining the equipment, as any breakdown would interrupt your use of the property and your business. If the landlord is responsible then the lease needs to include a landlord's covenant obliging it to repair the equipment as soon as reasonably practicable. If the energy company is responsible for maintenance and repairs then you need to be aware of its obligations (if any) to repair. It would be sensible to enquire whether insurance for business interruption is available in such circumstances. If you are particularly concerned that your business could not operate without the equipment then it may be appropriate to consider whether you would require step in rights to enable you to take over day

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to day control in the event landlord/energy company defaults. For instance, if you have a refrigerated warehouse and the electricity supply breaks down you will want to ensure this is repaired as quickly possible to minimise loss. The inclusion of step in rights would allow you to take whatever steps are required to achieve this. It may also be worth discussing a back up energy supply with your landlord.

Poland and the UK Listing fees and retailers



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The law in Poland relating to the collection of listing fees by retailers from suppliers has been uncertain for some time, but case law has come down in favour of the suppliers. In this article, we compare the legal background to such practices in Poland and the UK.

In Poland, the charging of 'listing fees' is now illegal

The practice of collecting 'listing fees' – payments demanded by retailers in return for stocking the products of their suppliers on the shelves – is widespread in the supermarket industry. The fees take various forms, including slotting allowances, 'jubilee fees', fees for exhibition, promotion, and various discounts and price reductions for the buyers. Retailers have been very inventive in that respect. Generally, they are applied when the buyer is economically stronger than the supplier.

They have divided the food industry. For supermarkets such fees are a fantastic method of increasing profits, as they are often higher than the margin itself. They argue that listing fees spread the risk of failure of a given product between a

retailer and a supplier; thus the suppliers contribute to the marketing of such products which otherwise would have had no chance to appear on the market. The opponents claim that such fees represent a significant barrier to entry, especially for smaller suppliers who cannot afford to pay them, and as such are anti-competitive.

In Poland, the anti-competitive character of listing fees has been debated for some time. Although they are usually attacked from an anti-trust law angle, they have finally been recognised as forbidden under the Law on Unfair Competition (the Law). The Law (which operates in parallel with the anti-trust law) prohibits an 'act of unfair competition' which is defined as 'any activity contrary to the law or good practice, which threatens or violates the

“In Poland, the anti-competitive character of listing fees has been debated for some time. Although they are usually attacked from an anti-trust law angle, they have finally been recognised as forbidden under the Law on Unfair Competition.”

interests of other entrepreneurs or clients.’ One such act listed by the Law is ‘blocking other entrepreneurs from entering the market’. It should be noted that acts falling within the scope of the definition of the Law on Unfair Competition are prohibited irrespective of the market share of the relevant player. A violation of the Law results in sanctions different to those under anti-trust provisions – not administrative proceedings from a competition authority but court suits from other market players.

It has been uncertain for some time whether collecting listing fees of various types could be recognised as an act of unfair competition. Retailers argued that the parties could freely establish their contractual relations, and particularly define prices for the products supplied and their advertising.

In the Jeronimo Martins case, in which a retailer demanded a fee in return for accepting supplier’s products for sale in its shops, the Polish Supreme Court explicitly stated that such action constituted a prohibited act of unfair competition. Furthermore the court also recognised the agreement providing for such a fee as contradicting the principles of good practice and – on those grounds – invalid under the general provisions of Polish civil law. At the same time, the provisions of the Law on Unfair Competition were specified in more detail, i.e. the Law specifically recognised ‘hindering other entrepreneurs from accessing the market, in particular through collecting fees for accepting products for sale, other than the [profit] margins’ as an act of unfair competition.

In such circumstances, retailers began to apply more complex structures and hide listing fees in the form of promotional fees or various discounts or reductions reserved for them. These practices were

also firmly disapproved of by judicial decisions. In the Carrefour case, the court ruled that the supermarket could not collect fees for promotions organised in the shop, as the products being promoted already belonged to the supermarket, and therefore there was no promotional service to the supplier in this case. The court decided that such a promotional fee was simply a hidden fee for accepting products for sale, prohibited by the Law on Unfair Competition. The court has taken a similar position regarding an ‘unconditional discount’ for the supermarket. The court noted that this discount was not contingent upon the volume or value of products purchased and in fact was not proposed by the supplier but enforced by the buyer. As such, in the court’s opinion, it was not a classic discount aimed at raising the turnover but a hidden fee for taking products for sale.

Thus, aside from the fact that it may be the subject of the Polish competition authority’s scrutiny as a practice infringing anti-trust law, the collection of listing fees in Poland may also be attacked on the grounds of the Law on Unfair Competition, as an act of unfair competition blocking access to the market. The supermarkets must remember that the buyer’s market share is not relevant for the violation of the Law on Unfair Competition, as well as that courts ruling under this Law apply the very broad definition of ‘fees for taking products for sale’.

What are the sanctions for violating the Law on Unfair Competition? An entrepreneur whose interests were threatened or violated may demand cessation of the relevant activity and recourse in damages. It may also demand that the violating party publish a relevant statement regarding the case (usually in the press or other mass media). In certain circumstances the

violating party may also be required to pay a relevant sum of money for a specified public goal.

Additionally, any agreement concerning listing fees may be regarded as invalid. This means that, for example, it will not be possible for a supermarket to set off fees against amounts due to a product supplier.

From the point of view of suppliers who, for various reasons, decide to pay the listing fees, the illegal nature of such fees may have material tax consequences. If such a fee is recognised as contrary to law, the revenue office may question crediting it towards the revenue costs for income tax purposes. Additionally, a supplier may not be able to recover VAT under invoices evidencing the expenditure of this fee.

The situation in the UK

Listing fees have also been the subject of the UK competition authorities’ scrutiny. When, in 2000, the Competition Commission conducted an investigation into UK supermarkets, one of the findings of the report was that supermarkets were engaged in various practices in their relationships with suppliers which adversely affected competition in the grocery market. The Competition Commission recommended that any supermarket having a share of at least 8% of the supply of groceries in the UK should be required to give undertakings to comply with a Code of Practice (the Code).

The Code requires that a supermarket shall not require a supplier to make any lump sum payment as a condition of stocking or listing that supplier’s products. The Code permits such payments only where such payment is made in relation to a promotion, is made in respect of new products which have not been stocked by the supermarket in the previous year in 25% or more of its stores or where it reflects a reasonable estimate by that supermarket of the risk run in stocking, displaying or listing such new products.

Another provision of the Code is the requirement that a supermarket shall not require a supplier to make any lump sum payment to secure better positioning or an increase in the allocation of shelf space

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for any products unless the payment is made in relation to a promotion.

It is unclear the extent to which the provisions of the Code have been upheld by supermarkets. In 2004 the Office of Fair Trading (OFT) reviewed the Code and found a widespread belief among suppliers that the Code was not working properly. However, due to fear on the part of suppliers, the OFT received no hard evidence or any complaints about any specific conduct of any supermarket. This report, together with other concerns of the Office of Fair Trading and third party groups, ultimately led to the Office of Fair Trading referring the grocery sector to the Competition Commission for another in-depth investigation in 2006.

The Competition Commission’s provisional findings were issued in October 2007. In these, the Competition Commission discusses lump-sum payments only briefly, observing that in general it does not consider that obtaining lump-sum payments from suppliers distorts competition between grocery retailers or between suppliers with the exception of the possible effect of these payments on small suppliers. The Competition Commission states ‘For example, slotting allowances are lump-sum fees that are payable by a supplier to a retailer for the introduction of a new product line. By compensating a retailer for the risks and the costs of listing new products, slotting fees may facilitate the introduction of products which retailers may otherwise be deterred from stocking. However...slotting allowances run the risk of acting as a barrier to entry or expansion for small suppliers less able to make these payments regardless of the sales potential of their product. In addition, larger suppliers might choose to

bid up lump-sum fees to increase barriers to entry. Furthermore, unless the lump-sum payment reflects a compensating service, it may result in higher unit prices at the wholesale level and consequently feed into higher retail prices’.

The Competition Commission has not, so far, made any specific recommendations as to lump-sum payments although it has expressed concern at supply chain practices in general and is currently consulting on whether the content and operation of the Code of Practice should be changed. The Competition Commission is due to issue its report and make its final recommendations in March 2008.

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Water usage in food production...

is water the new carbon?



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Water governance will be a much discussed issue in 2008. The food and drink sector is at the forefront of many voluntary initiatives in the area but it will need to continue to lead as well as be responsive to emerging developments.

'Water is the new carbon' has become an oft-repeated comment about the water resource management issues facing society at large. The actual quote is attributed to Carter Roberts, President and CEO of the World Wildlife Fund – US, at a conference in July 2007, but what exactly will it mean in practice?

There is undoubtedly a growing recognition that water is a resource that must be better managed going forward. Experiencing drought and severe flooding reminds us all of the power of water or lack of it. But water governance is not just about addressing the effects of climate change.

2007 saw a number of developments in the area of water governance with particular impacts on, and often involving or led by, the food and drink sector. Whilst the concepts underpinning balancing water use may not be as well defined yet as those surrounding carbon, developments are moving rapidly and 2008 will undoubtedly bring more. In particular, the need to gather more detailed and reliable information on water use in order to underpin an analysis of how to reduce an organisation's 'water footprint' has been identified as a key issue.

Water governance and the wider context

Global initiatives to address the issues surrounding sustainable water management are beginning to be combined with clear and more targeted legislative requirements and policy initiatives at the national and European level. These are complemented by numerous voluntary initiatives and action taken by industry – many led by the food and drink sector.

The figures on the importance of water to poverty alleviation and human and ecosystem health are familiar and remain compelling. According to the United Nations Development Programme (UNDP), over one billion people lack access to water and over 2.4 billion lack access to sanitation. Whilst the areas most affected by this are Africa (water) and Asia (sanitation), water shortages are no longer considered to be an issue with limited relevance to other parts of the world. Even England has very recently experienced legal restrictions on use of water in certain areas of the country.

There is, of course, a link between water resources and the effects of climate change and it is this part of the picture that tends to be particularly visible. Although the issues surrounding management of water resources are in

many respects free-standing, water resource issues need to fit in with other environmental initiatives including those that address climate change.

The UNDP has a Water Governance focus area which emphasises an integrated approach to water resource management and which has organised some seminal events. The UNDP defines water governance as the range of political, social, economic, and administrative systems that are in place to develop and manage water resources and the delivery of water services at different levels of society.

Corporate reporting of environmental performance and commitments going forward is in many cases required or at the very least expected. One of the key performance indicators that readers of those reports, whatever format is followed, will expect to see included is water consumption – with a commitment to future reduction in consumption.

Voluntary industry initiatives

2007 saw two well-publicised industry initiatives with particular relevance to water resource management issues. These types of initiatives invariably attract some criticism as an attempt by industry to avoid a more onerous legislative requirement to take action.

That ignores their immense value in raising awareness of the issues and setting a benchmark for what is to be expected of participants in the sector.

Food and Drink Federation – The environment - making a real difference and the 2008 Federation House Commitment

In 2006, Defra introduced the Food Industry Sustainability Strategy. It encouraged the food industry to voluntarily tackle its environmental impacts and suggested an industry-wide absolute target for reduction in water use by 2020.

Whilst not limited to water issues, the 'five-fold environmental ambition' programme launched in October 2007 by the Food and Drink Federation sets out actions in five priority areas where federation members can make the biggest difference to improving the environment. In addition to commitments in the areas of reduction of carbon dioxide emissions, reduction and ultimate elimination of food and packaging waste

to landfill, reduction in the levels of packaging and environmental standards in transport practices, there is a commitment to 'making significant reductions in water use to help reduce stress on the nation's water supplies.'

The more specific goal, subject to conservation of water not compromising food safety and hygiene, is an industry wide target to reduce water use, outside of that embedded in products themselves, by 20% by 2020 measured against a 2007 baseline. Central to achieving this goal will be the new Federation House Commitment ("FHC") on reduction of water usage by companies in the food and drink industry. Announced by the Federation on 28 January 2008, the Food and Drink Federation worked with Envirowise, the government's expert advisor to business on resource efficiency, to develop the FHC. The basic pledge made by companies who become members of the FHC is to review on-site water use including, within six months of signing, developing and then delivering a

"The figures on the importance of water to poverty alleviation and human and ecosystem health are familiar and remain compelling."

"cost-saving water reduction action plan." Envirowise will act as an independent administrator of the FHC and members must report annually to them on water and cost savings made.

The CEO Water Mandate

The CEOs of six corporations, involved in the UN's much wider Global Compact corporate citizenship initiative, launched this water specific initiative during July 2007. The mandate was developed in partnership with the UN Global Compact and the Government of Sweden. At the launch, the six initial signatories noted that 'the private sector have an important stake in helping to address the water challenge faced by the world today' and the Water Mandate asks companies to make progress in six areas.

The Mandate is intended to be voluntary and aspirational but nonetheless be a commitment to action. The basic scheme involves the signatories making 'pledges' in the six key areas identified: direct operations; supply chain and watershed management; collective action; public policy; community engagement and transparency. Chief Executive Officers of companies in the food and drink sector are signatories along with other sectors, including water service companies involved in infrastructure and supply. The initiative is open to companies of all sizes and from all sectors and since the launch, there have been a number of new signatories.

The Mandate requires, inter alia, setting water conservation and wastewater treatment targets and including water sustainability considerations in business decision making such as facility siting and production processes. This will then tie in with the transparency pledge. Many organisations already report information on water takings as well as any pollutant and contaminant releases associated with operations, so this may not be a particularly onerous part of the pledge.

The Water Mandate has not been without its critics. Criticisms note the lack of clear commitment on how companies will be held accountable for any actions they claim they will make. A concern whether 'water dependent industries' should be taking the lead in water policy making through

legislative initiatives will undoubtedly be addressed going forward as awareness of the need for and ways to achieve better water governance become better understood and more widely expected.

European developments

'Water efficiencies must be at the core of our policies...Water saving behaviours by European citizens and industry must be actively encouraged and promoted.' Stavros Dimas, Environment Commissioner, 18 July 2007.

A July 2007 Communication from the European Commission entitled 'Water Scarcity and Droughts' identified an initial set of policy options to be taken at European, national and regional levels to address the issue of water scarcity. The Communication identified putting the right price on water with a 'user pays' principle becoming the rule as being at the heart of the various policy options.

Although the discussion has not yet produced new legislation with the primary purpose to encourage improved water governance, there is already a very large body of existing legislation which deals with quality of water resources and water supplied for human consumption. Legislation such as the Water Framework Directive and the Integrated Pollution and Prevention Control Directive (which applies to some manufacturers in the food and drink sector) can also provide a means of addressing water usage in production processes.

At their 30 October meeting in Luxembourg, the European Environment ministers asked the Commission to present a follow-up report in 2008, including deadlines for the implementation of the measures identified in the communication, and to review and further develop the evolving EU strategy for water scarcity and droughts by 2012. The ministers also highlighted the fundamental problem of ineffective water management, which influences water scarcity and can induce additional impacts when a drought occurs. In this context, the Council called for a more common approach to drought risk assessment and drought management planning.

New UK Water Strategy for 2008

Defra aim to publish a new water strategy in early 2008. "Future Water" will influence the policy framework for how water is supplied, consumed and utilised.

The Environment Agency is the main regulator for the management of water resources in England and Wales. Their mandate extends to regulating abstraction of water, environmental monitoring, regulation of certain industries through the Pollution Prevention Control (PPC) regime and planning for future water needs. The Environment Agency is also the body which brings prosecutions for causing water pollution and has powers to seek to have water pollution remedied.

The Environment Agency has a published Water Resources Strategy. During 2007, the Agency consulted on a new strategy and expects to publish the final version during 2008.

In addition to the wider issues associated with water stress in parts of the country and management of resources, the Environment Agency has indicated that by 2009, it hopes to be able to publish league tables of industrial firms based on resource efficiency. There is already a pollution inventory providing data for food and drink manufacturing and an index showing the physical quantities of water, energy and materials used by site per unit of output over a particular year may not be far off. Commercial issues, such as information on production rates, will need to be addressed if such an inventory is put in place, but that would not stop the information being used to focus on products causing the greatest environmental damage.

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