HERBERT SMITH FREEHILLS

THE FUTURE OF CONSUMER

Trust on a plate

Consumer confidence and food safety

Consumer confidence in the origins and safety of the food they consume is a significant aspect of food brand protection and longevity. Maintaining that confidence involves the use of many different strategies, rights and regulatory controls at national and international level. It encompasses a number of areas, from the use of intellectual property to control the presentation of origin, to consumer protection, to compliance with acknowledged good practice standards, through to ensuring transparency in the supply and distribution chain.

Food is often one of the most distinctive elements of particular cultures, geographical areas, or nationalities; it often forms part of the cultural heritage of a community. Protecting food products is of key importance in protecting human's health, environment and welfare and can play a role in strengthening a community or nation's cultural identity. It can be a means of ensuring the continuation of expertise and skills related to food, maintaining food security and genetic diversity, as well as the traditional knowledge gained over time in agricultural techniques, food preparation and specific recipes.

Labelling regulations and intellectual property rights, including trade marks, designations of origin and geographical indications, can play a major role in food safety. Striking a balance between the protection of intellectual property (IP) rights in food products and the free movement of food between territories and ensuring a high level of security of production and distribution processes for all food products marketed within the EU, whilst improving the genuine trade of products, is one of the motivations behind the adherence to EEA-wide exhaustion of IP rights in relation to products placed on the market in the EEA with consent of the rights holder.

With the UK leaving the EU, the UK Government has sought to maintain the principle of exhaustion of rights for items of food or other goods first put on the market in the EEA, in order to ensure ease of movement into the UK post-transition. The EU does not propose to reciprocate however.

The UK is moving into new territory with its own geographical indications regime being introduced and a regulatory environment which will mirror the EU's at the end of the Brexit transition period but then have scope to diverge from there onwards.

In other parts of the world, such as Australia, labelling, geographical indications and consumer protection laws interact to provide a broad food safety regime. Health and nutritional claims, country of origin claims, credence claims and food recalls and class actions all form part of the Australian food safety landscape.

Indonesia is home to one of the largest Muslim populations in the world, so as well as understanding the origin, contents and safety of food and beverage products, Indonesian Muslim consumers are increasingly seeking assurance for Halal products consumed by them. Along with a large group of other laws under the so-called Omnibus Law on Job Creation, in October 2020 the Indonesian Parliament has removed a lot of red-tape from existing laws including those on halal certification that were perceived to hinder business efficiency in Indonesia, whilst maintaining consumer confidence.

In September 2020, China and the European Union signed what the EU press release termed as a "landmark" agreement to protect specific European Geographical Indications (GIs) in China and Chinese GIs in the European Union "against usurpation and imitation". The EU's press release stated the market for EU GIs to be around €74.8 billion, or 6.8% of EU food and drink, and exports of €16.9 billion accounting for 15.4% of total EU food and drink exports.This is the first bilateral agreement on geographical indications that China has entered into and indicates China's increased understanding and appetite for regional protection of food products to enable product growth around the world.

In addition, the development of new technologies such as distributed ledger technology (**DLT**) (including blockchain) and artificial intelligence (**AI**) can help to ensure the traceability of all stages of the food supply chain throughout the entire life cycle of the food product, from its agricultural origin to the consumer's table, in order to guarantee the quality and origin of the products and to ensure transparency and engender public trust in the products.

We address all these jurisdictions and issues in this latest edition of our Future of Consumer series.

Food trust issues in the European Union (with a focus on Italy) and new regimes in the UK post Brexit

This part of the article focusses on recent developments in legislation concerning the food sector, starting with the EU with a particular focus on the Italian jurisdiction and comparing this with developments in other jurisdictions worldwide, including the adaptation of the geographical indication and food safety regime in the UK necessitated by Brexit.

There are a number of legal tools that could be of significant help to the food sector in relation to safeguarding their food products, both in terms of protecting their products with IP rights and of guaranteeing transparency in the food chain, so as to mitigate issues relating to the manufacturing, distribution and import/export of food supplies. We also look at some of the most innovative trends being implemented by food companies.

International registration of geographical and appellations of origin – The Geneva Act comes into force

In February 2020 the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (**Geneva Act**) (administered by the World Intellectual Property Organisation "WIPO") officially came into force This is an international registration system providing protection for names identifying the geographic origin of products, such as coffee, tea, fruits, wine, pottery, glass and cloth. Appellations of origin and geographical indications are now able to be registered internationally (in the 31 countries that are party to this agreement) through a centralised system managed by WIPO. The Act required five parties to ratify and accede to the agreement, before it could come into effect; the EU was the fifth. Thus accession of the EU to the Agreement in November 2019, permitted the Geneva Act's entry into force three months later.

The IP rights registrable under the Act are described by WIPO as distinctive product designations that require a connection between the characteristics of a product and its geographical origin, and as "interesting marketing tools for producers, as they inform consumers about a product's geographical origin and a quality, characteristic and/or reputation of the product linked to its place of origin." They can do much to enhance the reputation of a company or region, as well as and consumer trust in the quality of their products.

What is the difference between an appellation or designation of origin and a geographical indication?

A **designation of origin (DO)** (or appellation of origin as it is also known) is the name of a region, place or country used to describe an agricultural (or food) product that originates in that place, whose quality or characteristics are essentially or exclusively due to that specific geographical environment and whose production, processing and preparation take place in the defined geographical area. A **geographical indication (GI)** is the name of a region, place or country used to describe an agricultural (or food) product that originates in that place, which possesses a specific quality, reputation or other characteristics attributable to that geographical origin, and one of the phases of production (the production and/or processing and/or preparation) of which product take place in the defined geographical area.

It is evident that the DOs have a strongest link with the territory, given that the protected characteristics have to be essentially or exclusively due to the specific geographical environment and all the phases of the cycle of life of the products have to be linked to that specific territory.

There are two key developments now that the Geneva Act has come into force: i) it is now possible to apply for international registration of both GIs and DOs via a single registration procedure with WIPO (it was already possible to do this for DOs under the Lisbon Agreement (of 1958) for the Protection of Appellations of Origin and their International Registration (**Lisbon Agreement**)), and ii) the admission of intergovernmental organisations as contracting parties.

Now the European Union has acceded to the Geneva Act it is possible to ensure the protection of a food product in all the contracting states, including EU member states, via a single registration. The UK is a party until the end of the Brexit transition period by virtue of being deemed in EU member state, but has not acceded in its own right and does not currently have plans to do so. For more information on the UK position on GIs and Dos and the new scheme being created in the UK for these protections, see the box entitled "Geographical indications – a new scheme of protection for the UK from 1 January 2020.

As WIPO's own commentary puts it "Together, the Lisbon Agreement and the Geneva Act form the Lisbon System, offering more comprehensive and effective international protection for the names of origin-based quality products. This is not only advantageous for producers who want stronger legal protection for their brands in global markets; it also benefits consumers seeking assurance about the quality, authenticity and traceability of products". Certainly, the registration of GIs and DOs in the WIPO international register could help the consumer to trust particular food products which attract these designations, offering confidence of a quality product with heritage and genuine connection with a particular area. In addition, the economic, cultural and social value of these IP rights could have a key role in supporting rural communities and agricultural development and in promoting job opportunities for local areas.

The view from Italy: The promotion of these types of IP rights related to food products are a priority for EU Member states such as Italy in order to ensure the effective protection of their agricultural production and to promote sustainable development and biodiversity for traditional crops eradicated in specific geographical areas.

Italy is a world leader in the field of agri-food products of excellence, with 861 agri-food products (food, wine and spirits) recognised by the EU in 2019 via GIs and DOs and thanks to this opportunity for extension of protection at an international level, Italian and especially European products may well gain more easily enforceable protection against counterfeiting and copy-cat products through a direct recognition of European DOs and GIs in other contracting states.

The Geneva Act also provides better protection for third party rights, given that anyone whose interests are affected by an International registration could request to its competent authority to notify a refusal of the registration (this in addition to the already provided ex officio refusal).

EU Geographical indications – stats and value

A recent European Commission press release accompanying the announcement of the China–EU GI agreement (see China section of this briefing) provided some interesting statistics on the breadth and success of the EU's GI system.

With more than 3,300 EU names registered as geographical indications, EU quality policy aims at protecting the names of specific products to promote their unique characteristics linked to their geographical origin as well as traditional know-how.

Around 1,250 non-EU GIs are also protected within the EU, thanks to similar bilateral agreements such as this one with China. These agreements also protect EU GIs in partner countries: some 40,000 instances of protection of EU GIs around the world.

In value terms, the market for EU geographical indications is around €74.8 billion, or 6.8% of EU food and drink, and exports of €16.9 billion accounting for 15.4% of total EU food and drink exports.

EU plans for improvements to the GI system

On 25th November 2020, the European Commission issued a Communication (CMO (2020) 760) in which it sets out an action plan for innovation and intellectual property in the EU. This includes plans to improve the Geographical Indications system. Describing GIs as "*part of Europe's cultural heritage*" and endorsing their contribution "*to the social, environmental and economic sustainability of the rural economy*", the Communication reaffirms the importance of GIs to the EU economy:

"*In 2017, Agrifood and drink products, whose names are protected by the EU as GIs, represented a sales value of EUR 74.76 billion within the EU, 7% of total sales in the European food and drink sector. Furthermore, GIs represent 15.5% of total EU agri-food exports, with a higher sales premium for protected product names.*"

The Commission's Communication states that GIs are often an important part of a local identity, and can be used to support, and thereby retain, unique skills, as well as attracting tourism and of course contributing to job creation. GI's provide consumers with indications of authenticity and give producers better visibility with consumers which, the Communication says "*can help them stay competitive and work together in niche markets, and give a boost to less developed regions*".

However, the EU believes that there is still untapped potential and that making protection and enforcement more precise and better identifying the roles of Member States and the Commission in the registration process could improve thingsBuilding on the results of the EU Food Quality Schemes evaluation which has been conducting a consultation (and which was due to give its final pronouncements before the end of 2020), the Commission will look at ways to strengthen, modernise, streamline and better enforce GIs for agricultural products, food, wines and spirits.

Geographical Indications – a new scheme for the UK from 1 January 2021

In the same way that trade marks already registered as EU trade marks before the end of transition will be replaced in the UK by equivalent rights post transition, geographical indications (**GIs**) (by this we refer to protected designations of origin, geographical indications and traditional specialities guaranteed) registered under the EU scheme prior to the end of transition will continue to apply across the remaining EU states post-transition and will also be replaced in the UK by rights under the new UK GI scheme.

However, those GIs registered under the EU scheme from 1 January 2021 will not apply in the UK (this includes all GIs, once registered, where applications were still pending at 1 January 2021). After 1 January 2021, applications for protection made under the EU scheme for Great Britain (GB) localised GIs, ie applications made by producers from England, Scotland and Wales, will be treated as "third country" applications by the EU scheme.

From 1 January 2021, the UK will set up its own GI scheme which will be managed by the Department for Environment, Food and Rural Affairs (**DEFRA**). The scheme will be open to producers from the UK and from other countries worldwide. New GIs can be registered under the scheme from 1 January.

The UK scheme will cover the geographical names of food, drink and agricultural products (including beer, cider and perry), spirit drinks, wine and aromatised wine. These are the same categories protected under the EU scheme, as under the Withdrawal Agreement, the relevant EU regulations will be incorporated as UK law (unless the UK and the EU come to a different agreement as a result of free trade negotiations). The UK scheme will use the designations of Protected Designation of Origin (**PDO**), Protected Geographical Indication (**PGI**) and Traditional Speciality Guaranteed (**TSG**), which again mirrors the designations available under the EU scheme.

The UK government has issued guidance (Protecting food and drink names from 1 January 2021 (28 September 2020)) on the new scheme, which also provides additional clarification on the interrelationship between this scheme and the EU scheme. From 1 January 2021, the EU scheme will no longer apply to the UK as it does to members of the EU – see the comments made by the European Commission in its Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of geographical indications (6 July 2020).

Current EU scheme: UK GIs registered under the European scheme before the end of the transition period should continue to receive protection in the EU, but applications that are pending with the EU at the end of the transition period will no longer cover the UK.

Under the current (and continuing) EU scheme, to register a product name as a geographical indication, EU producers have to address their application to national authorities for scrutiny. The Member State concerned thereafter forwards the application to the European Commission, who examines the request following the procedures laid down in the above listed EU legislation.

For non-EU product names to be registered as geographic indications in the EU, producers send their applications either directly, or via their national authorities, to the European Commission. From 1 January 2021, Great Britain producers (but not Northern Ireland producers – see below) will be treated as a "third country" under the EU scheme, and will first need to secure protection for new GIs under the UK scheme before applying under the EU scheme. The criteria applied to determine registration of an application from a GB producer are otherwise the same as those which apply to products originating from the EU as outlined in the relevant EU regulations. Once registered, a GB GI under the EU scheme will benefit from the same level of protection as EU GIs.

Protection in Great Britain under the new UK scheme: From 1 January 2021, producers will need to apply for a new GI in Great Britain under the UK scheme.

According to the Withdrawal Agreement (and unless an alternate agreed position is reached regarding GIs), the EU regulations that govern the EU scheme will be directly retained in UK law (save for any amendments made by a statutory instrument to deal with deficiencies). Therefore, the criteria for obtaining protection under the UK scheme should in theory be the same as that required under the EU scheme, though in practice it is possible that the criteria could be applied differently.

Under Article 54 of the Withdrawal Agreement, where a GI ceases to be protected under the EU scheme after 1 January 2021, the UK is not obliged to continue to provide protection for the GI either.

According to the UK government guidance, DEFRA will publish further guidance relating to the application process.

On 22 October 2020, the UK government published a draft statutory instrument, Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020 (Draft), which amends deficiencies to the retained EU regulations which govern the scheme for geographical indications.

Protection in Northern Ireland (NI): For new applications for protection in Northern Ireland and the EU from 1 January 2021, an application will need to be made under the EU scheme. Northern Ireland producers will need to make a separate application under the UK scheme for protection in Great Britain. Unlike EU producers, Northern Ireland producers will not need to be protected first under the EU scheme before applying for protection under the UK scheme.

In addition, registered GIs in relation to products that can be produced anywhere on the island of Ireland (including Irish Whiskey, Irish Cream and Irish Poteen) will continue to be protected and protectable under both the EU and the new UK schemes.

New UK regime logos: There are logos for each of the three UK designations that can be downloaded and used from 1 January 2021. For food and agricultural GI products produced and for sale in Great Britain and registered from 1 January 2021, the relevant UK logo must appear on the packaging and marketing material from the date of registration. As for food and agricultural GI products produced and for sale in Great Britain and registered under the EU system before 1 January 2021, producers will have until 1 January 2024 to amend the packaging and marketing materials to display the relevant UK logos.

As is the case under the EU scheme, displaying the UK logos will be optional in relation to wine and spirit GIs.

For food and agricultural GI products of EU origin and of Northern Ireland origin (ie that are not produced in Great Britain), the use of the UK logos will be optional from 1 January 2021. In accordance with the draft statutory instrument as at the time of writing, EU and Northern Ireland producers that have food and agricultural GI products registered under the EU scheme, even if is also registered under the UK scheme, can continue to use the EU logos on their products for sale in Great Britain from 1 January 2021 and beyond 1 January 2024.

Continued use of EU logos: Food and agricultural GI products of EU origin must, under existing EU regulations, display the relevant EU logos. The same will continue to apply to food and agricultural GI products of Northern Ireland origin that are registered under the EU scheme.

As noted above, for food and agricultural GI products produced and for sale in Great Britain that were protected under the EU scheme before the end of the transition period, the EU logo may continue to be used until 1 January 2024, after which these producers will need to add the UK logos to the relevant packaging and marketing materials. Great Britain GI products that are protected in the EU can continue to use the EU logo on products sold in GB (but it will no longer be mandatory under the EU regulations) in addition to the mandatory UK logo.

International protection: In February 2020, the Geneva Act of the Lisbon Agreement came into force. This treaty establishes the Lisbon System, an international registry for GIs through which registration can be obtained via a single application to WIPO. The EU acceded to the Geneva Act in November 2019, which enabled the Geneva Act to come into force.

The Geneva Act currently applies to the UK during the transition period. However, the UK will not be obliged in its own scheme to continue to protect geographical indications registered through the Lisbon System after the transition period ends (unless the UK ratifies the Geneva Act independently after the transition period). It seems unlikely that the UK will independently ratify the Geneva Act, as this issue is not addressed in the UK government guidance on geographical indications. Further, under Act 54(2) of the Withdrawal Agreement, where protection in the EU is derived from international agreements to which the EU is a party, the same level of protection does not need to be provided in the UK.

The UK government guidance on GIs does state that reciprocal international protection of UK GIs will continue after 1 January 2021, if protection is granted under an EU free trade agreement where the UK has signed a continuity agreement. The UK government guidance lists the Andean Community (being a free trade area comprising Bolivia, Colombia, Ecuador and Peru), Chile and Switzerland as examples, and recent developments in the UK government negotiations mean that a level of protection will also continue in Japan and Korea. Reciprocal international protection of UK GIs will also continue where protection is granted under other EU third country sectoral agreements (agreements that are not free trade agreements) where the UK has signed a continuity agreement.

It remains to be seen in the upcoming months whether the UK government's international negotiations mean that reciprocal international protection of UK GIs will have the same jurisdictional coverage as the UK previously had in the EU. If continuity agreements to EU free trade agreements cannot be agreed before 1 January 2021, then the UK is likely to miss out on a level of reciprocity of protection for UK GIs going forward, unless and until alternate agreements can be made.

China – Landmark agreement with the EU on GIs and New protection regulation for foreign GIs in China in sight

China is a market of 1.4 billion consumers and has become the third largest destination for EU agri-food products, reaching 14.5 billion euros in 2019.

On 14 September 2020, China and the European Union signed what the EU press release termed as a "landmark" agreement to protect specific European GIs in China and Chinese GIs in the European Union "against usurpation and imitation".

This is the first bilateral agreement in relation to Geographical Indications that China ever entered. China and the EU have agreed to give admission and protection to 550 GIs (275 each), including:

- EU GIs: Cava, Champagne, Feta, Irish whiskey, Münchener Bier, Ouzo, Polska Wódka, Porto, Prosciutto di Parma and Queso Manchego; and
- China GIs: Pixian Dou Ban (Pixian Bean Paste), Anji Bai Cha (Anji White Tea), Panjin Da Mi (Panjin rice) and Anqiu Da Jiang (Anqiu Ginger).

200 GIs, 100 for each of China and the EU, will be admitted and protected immediately after the agreement comes into force, which is expected to be early 2021, while the remaining 350 GIs (175 each), will be included in the system within 4 years from the agreement's entry into force. These GIs will have to follow the same approval procedure as the initial 100 (ie assessment and publication for comments).

In China, only the state designated GI protection institutions, industry associations or enterprises can apply for GI protection for products. Once a GI is approved, all the market players in the region whose products reach the standards will be protected.

China has its own GI system, providing protection in three ways:

- The geographical indications of agricultural products are approved and registered by the Ministry of Agriculture.
- The National Intellectual Property Administration is responsible for the approval and registration of geographical indications as collective trademarks and certification trademarks.
- The State Administration of Market Regulation assesses and approves the geographical indication products.

Protected GI products in China include:

- planted or farmed products from a particular region, and
- all raw materials from a region or part of the raw materials from other region, and produced or processed in the region in accordance with special processes.

China and the EU began cooperation on GI protection in 2006. In 2012, there were 10 GI names on both sides that were mutually protected. China is now in the process of enacting its new Geographical Indication Protection Regulation. The draft of the regulation was published for discussion in September of 2020. The new draft allows a foreign applicant, who has obtained the protection of geographical indications in his country or region, to apply to the State Intellectual Property Administration for GI protection.

New labelling rules in the EU and their impact in Italy

Aside from IP rights, another important area for food safety and trust is regulatory protection. In April 2020 new EU labelling rules came into force. EU Commission Implementing Regulation no. 775/2018 (alongside existing EU Regulation no. 1169/2011) on the provision of food information to consumers, as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food. This Regulation, as its title suggests, established a new requirement to label food with the country of origin or place of provenance of primary ingredients. "Primary ingredient" means an ingredient that comprises more than 50 % of that food or which is usually associated with the name of the food by the consumer.

The rules still apply if food packaging already shows the country of origin or place of provenance of a product through different means such as pictorial presentation, symbols, terms but that the origin or provenance this shown is not the same as that of the primary ingredient.

For example, take the case of a packaging for mozzarella cheese which depicts the Italian flag, or the background colours are green, white and red with Italian words or other symbols related to Italy, but the milk used to make the cheese did not come from Italy. The producer of this mozzarella cheese is obliged to indicate the specific country of origin of the mozzarella in order to avoid any confusion in the consumer's perception of the origin of the product created by the other elements. Note that the country of origin would need to be clearly indicated; the name/company name or address included in the label does not constitute a sufficient indication of the place of origin.

The Regulation will not apply to those products which have registered trade marks which indicate geographical origin from the requirement to indicate the principle geographic origin of the primary food ingredient. This could lead to misleading perceptions. However, if an unregistered trade mark is used then the rules still apply.

If Italian words or phrases (or recognisably Italian images) were to be registered as trade marks and used in this way for products that did not primarily contain ingredients from Italy, there are concerns in Italy that this could potentially lead to significant damage to the Italian food sector.

Consider the situation where a foreign company that uses a figurative trade mark containing Italian symbols, colour or words produces tomato sauce. Will a foreign consumer understand that the tomato sauce is not produced in Italy using Italian ingredients?

There are other impacts of the Regulation on existing Italian domestic laws. In Italy for example, there are ministerial decrees that set out an obligation to always indicate the origin of pasta, rice, milk, cheese and tomatoes. When these were made it was said that they would be in force until the Regulation was implemented. These legal provisions are generally broader than the protection that would be provided under the Directive and were supposed to be repealed but Italy decided to retain these decrees until 31 December 2021.

Criminal law aspects in Italy

A draft bill was approved by the Italian Cabinet of Ministers in February 2020, still under review by the Parliament at the time of writing, which contains new provisions on food crimes and in particular introduces the specific crime of agro-piracy. This could have a significant impact for companies in the food sector in terms of product liability, food safety and counterfeiting.

The reform was mainly focussed on reinforcing the criminal law consequences of food crimes to reflect the progress made in the manufacturing and retail areas of the food sector in combatting the increasing issue of food fraud (including on the Internet). We will have to wait to see how this new legislative framework will be implemented, but to date, it seems that it will play a key role in fighting food crimes.

The main objectives of the reform are indeed to reorganise in a systematic way the many legal provisions that might play a part in combatting food crime, to ensure an effective protection and revision of the penalties system.

The fight against food piracy in Italy

The fight against food piracy has already had some success in Italy. In 2019 for example, the Italian Central Department for Fraud Repression and Quality Protection for the Agri-food Products and Foodstuffs have dismantled a number of criminal associations related to the agri-food crimes. Among these we could mention the "Bad Juice" operation where juices and canned food falsely designated as "organic products" were seized, the "Ghost Wine" operation which discovered an unlawful commercial system that distributed a low-cost wine product made through alcoholic fermentation of mixtures of sugars obtained from sugar cane and beet unlawfully marketed as a quality product protected by DOs or Gis.

In October 2020 more than 4,000 counterfeit bottles of the prestigious and iconic wine "Bolgheri Sassicaia DO" were seized as a result of the "Bad Tuscan" operation. The operation led to the discovery of an International criminal network which produces in Turkey, sells and distributes in China, Korea and Russia fake bottles of one of the most expensive and well-known Italian wines, using poor quality wine and counterfeit labels, caps and packaging with extremely high profits and significant damages for the Tuscan wine's image.

Trust in the food supply chain in the UK

The Food Standards Agency was established following the BSE crisis in the 1990s to co-ordinate the regulation of food safety and quality. Promoting consumer confidence is one of the Agency's primary goals and it has made clear that it views the food labelling requirements summarised above as important both to the protection of public health and to maintaining trust:-

"Food authenticity is when food matches its description. Labelling is regulated to protect consumers who should have the correct information to make confident and informed food choices based on diet, allergies, personal taste or cost.

Mislabelled food deceives the consumer and creates unfair competition with manufacturers or traders. Everyone has the right to know that the food they have bought matches the description given on the label. Part of our role is to help prevent mislabelling or misleading descriptions of foods."

Consumer confidence was significantly undermined by the 2013 horsemeat scandal, in which frozen food products labelled as containing beef and sold by many well-known retailers were found to contain horsemeat. This prompted a far-reaching review into the integrity of food supply chains. Following the review a number of important changes were made, including the creation of a National Food Crime Unit within the Agency "give greater focus to enforcement against food fraud in government by analysing intelligence, initiating investigations and liaising with other criminal and regulatory enforcement agencies".

The Agency's approach over recent years appears to have been broadly effective. Survey data from 2019 showed that more than two thirds of surveyed consumers had high levels of confidence in the Agency and in UK food supply chains.

Food labelling in the UK – general requirements

As in Italy, UK law also incorporates the European Food Information to Consumers Regulation (1168/2011) and the Implementing Regulation (775/2018).

Under the UK Food Information Regulations 2014, it is a criminal offence for food business operators to fail to comply with the EU-wide labelling requirements. These requirements include showing the following specific details on the packaging/label of prepacked food products:-

- The name of the food (which must include any processing eg 'smoked bacon', 'dried fruit' etc.)
- Ingredients (listed by weight)
- Allergen information
- A 'best before' or 'use by' date
- The name and address of the manufacturer or another company within the EU that is responsible for the product.
- Country of origin
- Nutritional information

This information must be (i) accurate; (ii) easily visible; (iii) clearly legible; (iv) easy to understand by the consumer; and (v) appear directly on the package or on a label. There are specific requirements as to font size and the position of certain information.

UK Obesity Strategy

In March 2019, the Secretary of State for Health launched a consultation regarding proposals to introduce a 9pm watershed on TV and online advertisements for food and drink that is high in fat, sugar or salt (HFSS). The consultation was in connection with the UK Government's national ambition to halve childhood obesity by 2030.

On 10 November 2020, the Government published a consultation paper, proposing a full online advertising restriction for HFSS products. With limited exception, the Government's latest proposal seeks to restrict all online marketing communications that are either intended or likely to come to the attention of UK consumers and which have the effect of promoting HFSS products. The Government's latest consultation closes on 22 December 2020, and states that the Government will then publish its consultation response for this consultation and the 2019 consultation.

Changes to the law on allergen labelling in the UK

If a prepacked food product contains any of 14 specified allergens, this must be stated on the label/packaging. The allergen information should be highlighted by using a different font, style or background.

At present, this rule does not apply to food that is packaged for sale on the premises (eg sandwiches and salads prepared and sold in coffee shops). However, as a result of consumer pressure following a number of high-profile cases of allergic reactions leading to death or serious injury, the UK Parliament passed the Food Information (Amendment) (England) Regulations 2019/1218, under which the same allergen labelling rules will apply to food packaged on the premises from October 2021.

There has been a significant rise over recent years in food products being withdrawn and recalled from sale due to the presence of undisclosed allergens.

Traceability – DLT and blockchain technology

Notwithstanding the advent of stricter rules and the more demanding checks that apply at national and international level on the food supply chain and products in relation to the creation and elaboration process and advertising, labelling, packaging and distribution requirements, there are still ongoing issues in relation to the effective monitoring of food traceability across borders and parties' ability to intervene quickly when issues arise and, where they do, to pinpoint where liability lies.

This is where new technologies come into play. Cutting-edge tech, such as distributed ledger technology (DLT) and blockchain, is able to play an important role in allowing food companies to trace their products, enhance consumer protection and to comply with applicable legal obligations. Thanks to these innovative tools – which can often process high volumes of data more quickly and cheaply, and with greater security, than more traditional methods – food companies may be able to use track and trace functionalities to facilitate (or improve) visibility of each single step in the product life cycle, recording each phase and potential transformation through which their food (or other product) may pass. The security and transparency which usually characterise DLT systems mean that such companies will be better able to engender trust among customers as to the origin of their products and the supply chains that brought them to market.

Food companies manufacture essential goods that, where contaminated or otherwise damaged for example, can present material risks to public health. Accordingly, there is considerable appetite from such companies for investing in technologies which allow them easily to trace and record their products at each stage along the supply chain, enabling them to respond quickly in the unfortunate event that a product recall is required, and to identify where responsibility for such damage or contamination is likely to lie.

In addition to consumer protection and trust, food traceability is also important in terms of improving the efficiency of supply chains, including as regards the reduction of food waste and improvement in stock management throughout the entire chain. DLTs can assist in relation to both.

Likewise, new technologies can play a key role in reducing food-related frauds and infringement of rights, while also potentially helping to reduce costs associated with the physical checks that may otherwise be required. As an example of the use of technology in preventing the flow of counterfeit goods, VeChain's cloud platform has been used by wine companies to combat fraudulent sales and ensure the legitimacy of products passed on to consumers.

IBM Food Trust (https://www.ibm.com/uk-en/blockchain/solutions/food-trust) was the first blockchain-based network committed to assuring the provenance, authenticity and traceability of food items as they move around the food supply ecosystem. The cryptographically-secure nature of blockchain means transaction partners can confidently and securely share food information, creating a more transparent and trustworthy global food supply chain. The efficiency of the blockchain solution was shown during its proof of concept phase, where the time taken to trace the provenance of mangoes in Walmart's US stores was reduced from seven days to just 2.2 seconds.

Smart legal contracts (SLCs), which sit on a blockchain-based ecosystem, can also be used to automate, administer and record contractual events between parties in the food supply chain and other regulatory compliance requirements. Indeed, some estimates suggest that around $155 billion is spent annually by companies in manually administering and ensuring compliance with contractual and compliance rules that apply within the private sector. The digitisation of contracts through SLCs should not only reduce the inefficiencies and costs of manual contract management, but may also serve to facilitate automated traceability processes which, when combined with the application of carefully calibrated AI tools, can help to generate reporting and valuable data insights with a speed and accuracy that, until now, has been beyond reach.

Food Safety and Trust in Australia

In Australia, a number of laws and standards operate together to ensure consumer confidence in food products. This includes:

- food safety standards, labelling and information requirements, set out in the Food Standards Code (**Code**), administered by Food Standards Australia New Zealand (**FSANZ**) and enforced by state and territory food authorities;
- intellectual property laws relating to geographical indications; and
- the *Australian Consumer Law* (**ACL**), which contains both general prohibitions against false or misleading representations, and specific provisions relating to the supply of consumer goods that do not comply with safety standards.

A brief snapshot of each of these areas and recent developments is provided below.

Food labelling and information requirements under the Code

Labels on food products provide information to consumers to guide consumer choice and protect consumer health and safety. In Australia, labels must therefore comply with the food labelling and information requirements set out in the Code. This includes both general standards and specific, detailed requirements in relation to ingredient labelling, nutrition claims, date marking, directions for storage and requirements for warning statements.

In Australia there has recently been an increased focus on the labelling of alcoholic beverages. For example, following FSANZ reviews of alcoholic beverage labels in 2020, beverage manufacturers now have three years to include pregnancy warnings on their products. Prior to this, these warnings were not mandatory in Australia.

Health and nutrition claims are also becoming increasingly prevalent on food labels and advertising as the 'health and wellness' trend continues. In 2013, specific requirements were introduced into the Code specifying the types of claims that can be made and the criteria to be met. Among other requirements, all health claims must be supported by scientific evidence. Accordingly, businesses should ensure they have sufficient scientific evidence to substantiate any health claims made, and robust record keeping practices for this evidence.

Protection of Geographical Indications

Current GI protection regimes:
A Geographical Indication (**GI**) is an indication that identifies a product as originating from a specific region associated with a particular quality, reputation or other characteristic. In Australia, GIs can be protected by:

- registration under the *Trade Marks Act 1995* (*Cth*) (the **TM Act**) as a 'certification trade mark' (**CTM**); and
- in the case of wine, also under the *Wine Australia Act 2013* (*Cth*).

Examples of GIs registered in Australia include 'Darjeerling' for tea and 'Parmigiano Reggiano' for cheese. Once a CTM is registered, the GI may not be used by a producer unless the product meets the 'certification rules' that specify the criteria to be met in order to use the GI, and the producer has obtained approval from the CTM owner. Similarly to a registered trade mark, the owner of the CTM is entitled under the TM Act to pursue remedies for infringement of a CTM, such as damages and injunctions.

In June 2018, Australia commenced negotiations for a free trade agreement with the European Union (**A-EU FTA**). One of the EU's current proposals seeks increased protection for a large number of GIs, comprising a list of 236 spirit names and 172 agricultural and other names. The standard of protection also currently sought by the EU goes beyond the level of protection currently provided in Australia, by seeking protection for the expanded list of GIs against 'misuse, imitation or evocation' of a GI, even if translated, transcribed or transliterated.

The Australian Government is currently undertaking industry and community consultation in relation to the possible development of a new Australian GI right to accommodate possible terms of the A-EU FTA, with the consultation period which ended on 30 November 2020.

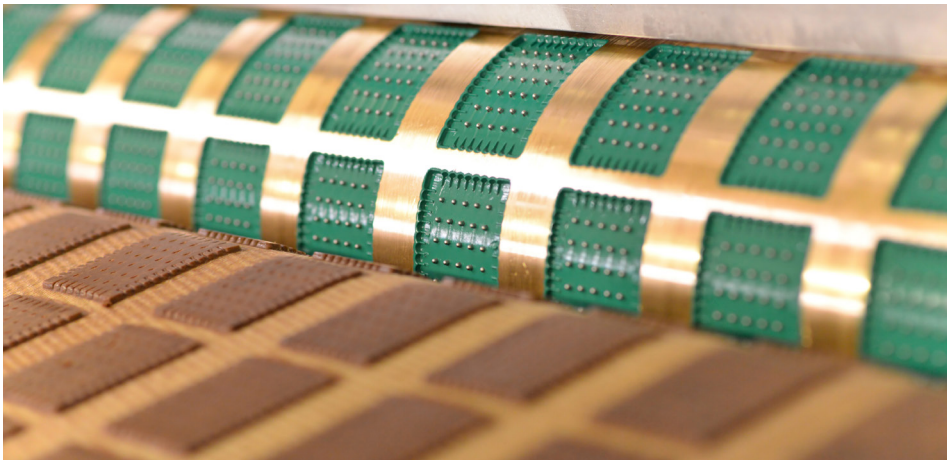
Consumer protection regime

The ACL prohibits businesses from engaging in conduct that is misleading or deceptive, or which is likely to mislead or deceive. This is a broad provision that can apply to a wide range of conduct. Significantly, a business may be found to have contravened these consumer protection provisions even where the business did not intend to mislead or deceive.

Businesses may face a range of penalties including potentially significant fines and infringement notices for breaching the ACL. In addition to the ACCC, consumers and competitors may also bring proceedings for breaches of the ACL. In addition to individual proceedings, the proceedings brought by consumers can take the form of a class action (including class actions which seek to leverage a successful ACCC prosecution).

The Australian Competition and Consumer Commission (**ACCC**) has made misleading conduct in relation to the sale and promotion of food products one of its key priorities for 2020, and has become increasingly active in scrutinising claims in food products in respect of health and nutrition, country of origin and credence (foods having some premium attribute, eg eggs being 'free range').

Health and nutritional claims: In addition to the requirements relating to health and nutrition claims under the Code, businesses should also ensure that any health or nutritional claims are not otherwise false, misleading or deceptive under the ACL. For example, a food manufacturer was ordered to pay a $2.25 million civil penalty for misrepresenting that its snack products were beneficial for children, when this was not the case given the high sugar content of the products. Significantly, the court found that the combination of imagery and words on the



packaging of the product conveyed the representation of 'nutritiousness and health' and 'naturalness and goodness', even though the packaging did not contain any express health claims.

Country of origin claims: 'Country of origin' claims are claims or representations that a product was grown, produced or made in a certain country. Since July 2018, most foods for retail sale in Australia must comply with the mandatory country of origin labelling regime known as the *Country of Origin Food Labelling Information Standard 2016* (**COO Standard**). One of the stated aims of the COO Standard is to provide Australian consumers with greater certainty about the origins of food products.

Because of the strict rules implemented by the COO Standard, food and beverage operators should take particular care when using wording, images, or labelling that suggests that a product is Australian made or grown. For example, the Federal Court has held that a company could not describe combination fish oil and vitamin D capsules as "Made In Australia" in circumstances where the encapsulation occurred in Australia using imported ingredients. In addition to complying with the labelling requirements of the COO Standard, food businesses should keep records that support any country of origin claim for a minimum of 12 months after the sale of the product.

The ACCC has also stated that country of origin claims will be a focus area in 2020 and we expect it will remain a focus area for some time.

Credence claims: Food and beverage operators should also take additional care when marketing their products using language like 'premium', 'natural', 'organic', 'environmentally friendly' or 'free-range'. In relation to 'free-range' claims, following a number of successful enforcement actions against businesses for misleading 'free-range' claims in connection with egg and pork products, the ACCC has issued particular guidance on the use of this term in that context. However, businesses should be aware that compliance with industry standards may not be a sufficient defence to a claim for misleading or deceptive conduct as such claims are assessed against how an ordinary and reasonable consumer is likely to understand them.

Food recalls and class actions

Both the ACCC and state food authorities have the power to mandate a recall of food which is deemed unsafe due to the presence of undeclared allergens, contaminants or foreign matter. In practice, the ACCC usually defers to decisions of the state or territory food authorities. FSANZ is responsible for coordinating recalls with the relevant food authority and food business but does not have powers to order or enforce a food recall.

Most recalls are voluntarily initiated by food businesses, which are required to have a system in place for managing food recalls should they believe a product is unsafe.

Once a food business has a reason to believe a product it has supplied is unsafe, the business should immediately contact the relevant state or territory food authority to determine whether a recall is required. If a recall is necessary, the food business must notify FSANZ and provide detailed information about the affected food. The food business must also notify all direct customers such as distributors and retailers. In the case of a consumer level recall, the food business must also notify the public.

In extreme cases a food recall, or a failure to initiate a recall, can lead to prosecution or class actions against food businesses. In 2010, a class action was launched against the Australian distributor of a soy milk and its Japanese manufacturer and exporter. The affected milk had been the subject of a voluntary recall of the product in 2009. The product contained excessive levels of iodine which led to thyroid problems in consumers. The class action settled for $25 million, the largest for a food safety class action in Australia.

Indonesia – Food safety rules and Halal certification

With more than 270 million people, Indonesia is home to one of the largest Muslim populations in the world. In addition to understanding the origin, contents and safety of food and beverage products, Indonesian Muslim consumers are increasingly seeking assurance for Halal products consumed by them. There is also a growing Halal industry as Indonesia is consistently ranked as the highest spending country worldwide for Halal food with a total expenditure of US$173 billion.[1]

In Indonesia, the safety and suitability of food for consumption by end-consumers is primarily regulated by the Indonesian National Agency of Drug and Food Control ("**BPOM**"). BPOM's role as food and drug regulator is to oversee, check, test, approve, register and monitor consumer products, including food and beverage imported to, distributed and sold in the Indonesian market to ensure they meet the minimum standards and requirements under Indonesian law. All food and beverage products, except for food and beverage products with a shelf life of less than 7 days, are required to be registered with BPOM before they can legally be sold to end-consumers in Indonesia.

The BPOM product registration process is relatively straight forward and can now be done online. The product registration process consists of the following steps:

- preparing the documents which are typically required to be submitted along with the product registration application among others, a draft of the product label; certificate of analysis for food and beverage classified as high risk or medium risk; the composition of the product; the certificate of free sale or health certificate; the Hazard Analysis and Critical Control Points (HACCP) validation certificate; information on the product code, production process and shelf life; and an authorisation letter for the distribution of the product in Indonesia;
- submitting the documents along with the related distribution company establishment documents;
- payment of the product registration fee; and
- if any, responding to any requests for additional information from BPOM.

The product evaluation process requires a maximum of 30 business days, however, in practice, the time it takes to register a food and beverage product usually takes anywhere from two to twelve months depending on the type of product being registered. Infant milk formula, for example, which is seen as a high risk product, typically takes much longer to register than tinned tomatoes, which is seen as a low risk product.

In addition, BPOM also regulates the labelling of food products, including the required product information and language to be used on food labels.

Under applicable BPOM regulation, food product labels must contain certain information, including, among others, the product name, the list of ingredients, the net weight, the name and address of the producer or importer, Halal information (if required), the production date and code, the expiry date, the distribution licence number and information on the origin of certain ingredients.

BPOM also requires that processed food product labels:

- be in the Indonesian language;
- be correct and not misleading;
- be easy to access and read; and
- include relevant warning if the product contains, among others, artificial sweetener, pork or pork derivative ingredients or is part of the same production process as pork related products and allergens.

Importantly, Halal certification and labelling on food and beverage products is also a paramount consideration for an increasing number of Indonesian Muslim consumers when considering what products they consume, and in 2014 the Indonesian Parliament enshrined this consideration into law when it introduced a requirement that all products, including food products, imported, distributed and sold as Halal in Indonesian territory be Halal certified before they can be sold to end-consumers. However, this does not mean that the relevant products must be "Halal" (or *Shariah* compliant) as products that are produced using non-Halal materials are exempt from the Halal certification requirement provided they are labelled "non-Halal."

The Indonesia Minister of Religious Affairs has granted food and beverage manufacturers and suppliers a transitional period until 17 October 2024 to obtain a Halal certificate for their products, noting that transitional periods apply for other types of products (eg, drugs and cosmetics). Until then, food manufacturers and suppliers can continue to sell their products to end-consumers, and the Indonesian Halal certification body or BPJPH (*Badan Penyelenggara Jaminan Produk Halal*) has been tasked with supervising and training such food manufacturers and suppliers on how to obtain Halal certification for their products and to comply with the mandatory Halal certification requirement.

The Halal Law is one of the 78 laws amended by the so-called Omnibus Law on Job Creation ("**Omnibus Law**"), recently passed by the Indonesian Parliament on 5 October 2020 to remove a plethora of complexities and red tape across a range of existing laws seen to hinder business efficiency in Indonesia. The Omnibus Law has, among others, simplified the Halal certification process and Halal certificate renewal process and various matters will be further regulated in an implementing Government regulation.

1. The 2019/20 State of the Global Islamic Economy Report: *Driving the Islamic Economy Revolution 4.0.*

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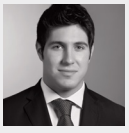

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This article is part of our **Future of Consumer series** on upcoming issues affecting the Consumer Sector. For other articles in this series see the Future of Consumer pages of our website or contact Rachel Montagnon

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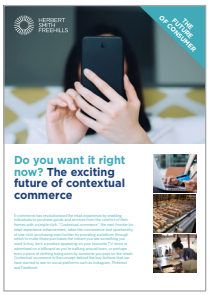

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