

THE FOOD, BEVERAGE
AND COSMETICS
LAW REVIEW

SECOND EDITION

Editors

Kara L McCall and Elizabeth M Chiarello

THE LAWREVIEWS

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PREFACE

Food, beverage and cosmetic companies provide products that are beneficial to consumers, important to the economy and in high demand. Consumers are not only seeking high-quality products at reasonable prices but also increasingly considering sustainability, methods of manufacture and use (or omission) of certain ingredients. These demands require companies to not only be looking ahead towards the ‘next big thing’ in these consumer industries but also be considering how those attributes that are so important to customers (some of which have not been universally defined) can be communicated in a true and non-misleading way. What’s more, companies need to act in compliance with the regulatory schemes of the locations in which they sell, and also make sure that their products – some of which are quite cutting edge – are safe and effective.

Regulatory, legislative and civil litigation frameworks vary dramatically from country to country and from locality to locality within each country. These laws and regulations may be similar, or they may be directly contradictory. Some types of products may be subject to extreme scrutiny, whereas others seem to be of less interest (and where on that spectrum your product falls may differ from day to day). Each jurisdiction is different, and advice from local legal experts is absolutely necessary before operating in (including selling into) any jurisdiction. This guide, however, is intended to provide a general overview of both regulatory and civil legal frameworks in key countries for consideration by legal practitioners in these industries.

This is the second edition of *The Food, Beverage and Cosmetics Law Review*. It was developed because of the increase in class action litigation relating to claims, particularly health benefit claims, made in the labelling and marketing of food, beverage and cosmetic products. We have also seen an increase in concern about food safety and food tracing across the world – a result of food-borne illness outbreaks. This second edition covers 11 jurisdictions and includes a high-level overview of each jurisdiction’s legal framework for food, beverage and cosmetic products, and a year in review, followed by discussions of legal frameworks relating to food, beverage and cosmetic safety (including recalls); supply chain issues (including sustainability, anti-corruption, and labour and immigration); special legal issues relating to sales and marketing (including whether regulatory approvals are required); general product liability and intellectual property laws; the role of trade organisations (including certifications); and unique issues relating to financing and mergers and acquisitions in this space.

We hope that all readers find these chapters useful and informative. We wish to thank all of the contributors who have been so generous with their time and expertise. They have made this publication possible.

Kara L McCall and Elizabeth M Chiarello

Sidley Austin LLP

Chicago

September 2022

UNITED KINGDOM

Ciara Cullen, Ben Mark, Sarah Mountain, Ellie Ward, Harpreet Kaur, Karen Hendy, Tom Purton, Oliver Bray, Dorothy Flower, Lambros Kilaniotis, Gavin Reese, Mamata Dutta, Florence Page, Melanie Musgrave, Eleanor Harley, Andrew Martin and Joshy Thomas¹

I OVERVIEW

Representing 20 per cent of total UK manufacturing and contributing £30 billion to the UK economy in 2021, the food and beverage industry is the UK's largest manufacturing sector.² On a marginally smaller scale is the UK cosmetics industry, which, in 2020, was worth £27 billion.³

With the exception of advertising, in the UK, separate regulatory regimes apply to food and beverages on the one hand, and cosmetics on the other. Post-Brexit, the manufacture, sale and marketing of food and beverages in England, Scotland and Wales (Great Britain (GB)) is governed by a mixture of domestic law and retained EU law. Retained EU law applies only to GB. Businesses operating in Northern Ireland (NI) must comply with the EU law specified in Annex II to the Northern Ireland Protocol (the Protocol).⁴

The Food Safety Act 1990 (FSA 1990) provides the legal framework for all food legislation in GB. Retained Regulation 178/2002⁵ (the General Food Law) outlines the legal requirements for the production, processing and distribution of safe food. Article 2 of the General Food Law defines 'food' as any substance intended, or reasonably expected, to be ingested by humans and includes drinks. The FSA 1990 adopts this definition, and references in this chapter to 'food' should be construed as including drinks, unless otherwise stated.

The Food Standards Agency (FSA) is the independent government department responsible for food safety, hygiene and business regulation in England, Wales and NI. Food Standards Scotland is the Scottish equivalent.

Turning to cosmetics, following the UK's departure from the EU, cosmetic products placed on the market in GB must comply with Schedule 34 of the UK Cosmetics Regulation⁶

1 Ciara Cullen, Ben Mark, Karen Hendy, Tom Purton, Oliver Bray, Dorothy Flower, Lambros Kilaniotis, Gavin Reese and Sarah Mountain are partners; Mamata Dutta is a legal director; Florence Page, Natalie Drew and Melanie Musgrave are senior associates; Joshy Thomas is a knowledge lawyer; and Ellie Ward, Harpreet Kaur, Andrew Martin and Eleanor Harley are associates at Reynolds Porter Chamberlain LLP.

2 FDF, Facts and stats: <https://www.fdf.org.uk/fdf/business-insights-and-economics/facts-and-stats/> (last visited 24 July 2022), Copyright 2021 The Food and Drink Federation – www.fdf.org.uk.

3 <https://www.finder.com/uk/beauty-statistics> (updated 31 December 2021) (last visited 9 August 2022).

4 Protocol on Ireland/Northern Ireland: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf (last visited 9 August 2022).

5 Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

6 The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.

(the Cosmetics Regulation). There are as yet⁷ no significant variations between this and the equivalent EU legislation. Cosmetic products placed on the market in NI remain governed by EU Regulation 1223/2009.⁸ The Office for Product Safety and Standards (OPSS) is the competent authority responsible for the implementation of legislation, and Trading Standards is responsible for its enforcement.

The Advertising Standards Agency (ASA) is the UK's independent regulator of advertising across all media and products, including food, beverages and cosmetics. The ASA applies certain codes (discussed in more detail in Section III), which contain both general and product-specific rules.

II YEAR IN REVIEW

As anticipated, being in the immediate post-Brexit period has resulted in a flurry of new legislation, consultations and government guidance, resulting in some divergence, albeit much of the substance of the old regimes remains. Different rules continue to apply to the manufacture and sale of food and cosmetics in GB and NI for as long as the Protocol remains in force. This has caused major distribution issues, with some businesses ceasing to supply to the NI market altogether.

Key changes for the food industry include guidance published in May 2022⁹ detailing changes to the labelling requirements of spirit drinks, including low and no alcoholic beverages sold in the UK, and ASA amendments to the Broadcast Committee of Advertising Practice (BCAP) and Committee of Advertising Practice (CAP) Code rules on low alcohol drinks. As there is no BCAP and CAP guidance on alcohol alternatives, the ASA launched a consultation (which closed in May 2022) on advertising alcohol alternatives together with some proposed guidance. The Calorie Labelling (Out of Home Sector) (England) Regulations 2021 (the Calorie Labelling Regulations) came into force in April 2022. These regulations require qualifying businesses that sell food for immediate consumption, either in a cafe, restaurant or other catering establishment or as takeaway food, to provide information relating to the energy content (in kilocalories) of the food they sell to consumers. The Calorie Labelling Regulations followed September 2021 government guidance on calorie labelling in the out of home sector.¹⁰ Moving from labelling to packaging, the plastic packaging tax (PPT) came into effect on 1 April 2022, requiring those who manufacture or import plastic packaging into the UK to register for PPT, submit a PPT return and pay any tax due. The first PPT return covering the period 1 April to 30 June was due for submission and payment by 29 July 2022. There are also changes in sight to importation rules for food and feed of non-animal origin. The FSA has proposed amendments to retained Regulation 2019/1793: Controls Applied to Imported Food and Food Safety. The proposal, to apply a temporary increase of official controls and special conditions governing the entry into GB of certain

7 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13197-EU-chemicals-strategy-for-sustainability-Cosmetic-Products-Regulation-revision-_en (last visited 10 August 2022).

8 Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products.

9 <https://www.gov.uk/guidance/labelling-spirit-drinks#full-publication-update-history> (last visited 9 August 2022).

10 <https://www.gov.uk/government/publications/calorie-labelling-in-the-out-of-home-sector/calorie-labelling-in-the-out-of-home-sector-implementation-guidance> (last visited 9 August 2022).

food and feed of non-animal origin from certain countries, was open to consultation until 7 July 2022.¹¹ Secondary legislation is expected in the autumn to implement the changes proposed by the FSA.

For the cosmetics industry, leaving the EU meant the introduction of the Cosmetics Regulation. Of note is the requirement for companies wishing to sell cosmetic products in the UK to establish a ‘responsible person’ (RP) in the UK, whose name and address must be printed on product labels. The RP is responsible for a product’s compliance with the Cosmetics Regulation and for notifying the product on the UK’s submit a cosmetic product notification portal before sale. For products made outside the UK, the country of origin must also be clearly shown on labels, with ‘made in EU’ no longer sufficient. Other developments include the Health and Care Act 2022 receiving Royal Assent. The Act contains provisions that, once enacted, will provide for a licensing regime for those in England who carry out specified cosmetic procedures, and updates the technical annexes to the Cosmetics Regulation to reduce permitted levels of salicylic acid and prohibit deoxyarbutin use in cosmetics.

The UN Climate Change Conference (COP26) summit, which closed in November 2021, brought parties together with the aim of accelerating action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change. The result is that sustainability has been high on the agendas of government and industry alike. Following a consultation in September 2021,¹² the UK’s competition regulator, the Competition and Markets Authority (CMA), published its advice to the government, in March 2022, on how the competition and consumer regimes could better support the UK’s net zero and environmental sustainability goals,¹³ including proposed changes to consumer law. The CMA has also published guidance¹⁴ in the form of a Green Claims Code to help businesses understand and comply with their existing consumer law obligations when making environmental or sustainability claims. The guidance applies to all businesses trading in the UK and is based on principles of truthfulness, openness and clarity. Before making an environmental claim, businesses must consider the full life cycle of their products, and all claims must be substantiated. Non-compliance could result in businesses facing regulatory enforcement action, with the CMA and certain trade bodies having the power to bring court proceedings and impose fines. Retailers and online marketplaces could also be liable for misleading claims included on product packaging by manufacturers and are advised to carry

11 <https://www.food.gov.uk/news-alerts/consultations/amendments-to-retained-regulation-20191793-controls-applied-to-imported-food-and-feed-not-of-animal-origin> (last visited 9 August 2022).

12 https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs?utm_medium=email&utm_campaign=govuk-notifications&utm_source=87a9b8a7-21b5-4bca-8303-5491829e8f9f&utm_content=immediately (last visited 1 September 2022).

13 <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government#actions-for-the-cma> (last visited 1 September 2022).

14 CMA, Making environmental claims on goods and services: <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services> (last visited 10 August 2022).

out thorough due diligence before putting products on the market. In June 2022, the ASA published guidance on environmental claims.¹⁵ The ASA guidance also provides analysis of key ASA environmental claims rulings.

Other developments of note to food businesses are the forthcoming restrictions relating to products deemed to be high in fat, salt or sugar (HFSS). The Food (Promotion and Placement) (England) Regulations 2021¹⁶ (the FPPR 2021), in force from 1 October 2022, set out restrictions on the physical placement of HFSS products, in store and online, and price promotions (such as '3 for 2'). Rules banning multibuy deals on HFSS foods and drinks, including buy one get one free and '3 for 2', and restrictions on free refills for soft drinks are delayed until October 2023.¹⁷ Government plans to ban all TV and UK on-demand service ads for HFSS products before a 9pm watershed are also paused. They will now come into effect in January 2024. This was apparently due to the delay in the Health and Care Act 2022 receiving Royal Assent, as well as to allow the industry more time to prepare for them. The government issued guidance¹⁸ in April 2022 intended to help businesses comply with the regulations. For both industries, covid-19 delivered mixed fortunes and now businesses are facing soaring costs as a result of the war in Ukraine and rising energy prices. Although trading conditions have been extremely challenging for the hospitality sector and operators of bricks and mortar stores, the pandemic created substantial demand for food delivery services, skincare and at-home treatments, and shifted consumer shopping preferences online. However, in June 2022, retail sales volumes continued on a broad downward trend, reflecting the rising cost of living.¹⁹

III FOOD AND COSMETIC SAFETY

i Food

GB has a wealth of law that protects human health and consumer interests in relation to food. These laws apply to all stages of production, processing and distribution, with a few exceptions.

Before food can be safely placed on the market, the following requirements must be complied with:

- a* traceability of food (each segment of the supply chain must be able to trace all food received and supplied by them);
- b* appropriate presentation of food;
- c* suitable information provided;
- d* prompt recall and withdrawal of unsafe food; and
- e* food imported into GB must comply with applicable food law.

15 <https://www.asa.org.uk/news/environmental-claims-the-advertising-codes-and-you.html> (last visited 10 August 2022).

16 The Food (Promotion and Placement) (England) Regulations 2021, SI 2021/1368.

17 <https://www.gov.uk/government/news/government-delays-restrictions-on-multibuy-deals-and-advertising-on-tv-and-online> (last visited 10 August 2022).

18 <https://www.gov.uk/government/publications/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price/restricting-promotions-of-products-high-in-fat-sugar-or-salt-by-location-and-by-volume-price-implementation-guidance> (last visited 10 August 2022).

19 <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/bulletins/retailsales/june2022#retail-sales-in-june> (last visited 10 August 2022).

Responsibility for food information policy and regulation is currently divided between various departments and agencies, including the Department for Environment, Food & Rural Affairs (Defra), the FSA and the Department of Health.

The FSA (and, for Scotland, Food Standards Scotland) has responsibility for general food labelling rules and product-specific legislation. Defra (and the equivalent devolved departments) leads on marketing standards, including labelling measures. The Department of Trade and Industry is the lead department for labelling rules on net quantity of pre-packed foods.²⁰

Most legislation is enforced by local authorities, by trading standards officers (TSOs) and environmental health officers. The FSA supervises local enforcement and works with enforcement officers to ensure that laws are enforced consistently throughout the production, processing and distribution of food.²¹

ii Cosmetics

OPSS is the UK's competent authority for cosmetic products. Products placed solely on the GB market must comply with the Cosmetics Regulation,²² whereas products placed on the NI market must comply with the EU law specified in Annex II to the Northern Ireland Protocol.²³

In the UK, enforcement is performed by local TSOs, who review the contents of product information files (PIFs), monitor compliance with good manufacturing practices and carry out physical product checks and laboratory analysis, when necessary. A PIF is a dossier of information that must be maintained by the applicable RP when a cosmetic product is placed on the UK market, and must contain certain prescribed information, including safety certificates and details of animal testing. Cosmetics made for GB consumption must be notified to the submit a cosmetic product notification service. A separate process applies in NI.

iii Food additives and contaminants

Regulation (EC) No. 1333/2008²⁴ is enforced in England by the Food Additives, Flavourings, Enzymes and Extraction Solvents (England) Regulations 2013. Similar provisions apply in Scotland, Wales and NI. The regulations contain a list of approved food additives, conditions of use for food additives and specifications (purity criteria) to be established for permitted food additives.

20 <https://publications.parliament.uk/pa/cm200405/cmselect/cmenvfru/469/46905.htm> (last visited 7 July 2022).

21 <https://publications.parliament.uk/pa/cm200405/cmselect/cmenvfru/469/46905.htm> (last visited 7 July 2022).

22 <https://www.gov.uk/government/publications/cosmetic-products-enforcement-regulations-2013/regulation-20091223-and-the-cosmetic-products-enforcement-regulations-2013-great-britain> (last visited 7 July 2022).

23 <https://www.gov.uk/government/publications/cosmetic-products-enforcement-regulations-2013/regulation-20091223-and-the-cosmetic-products-enforcement-regulations-2013-northern-ireland> (last visited 7 July 2022).

24 Regulation (EC) No. 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives.

iv Recalls

In the UK, the process for product recalls differs slightly between food and cosmetics.

If a business has reason to believe that a food that it has imported, produced, processed, manufactured or distributed fails to comply with applicable law, it must take immediate steps to withdraw it from the market and inform the competent authority (the FSA). If food has already reached the consumer, the business should inform consumers of a product's withdrawal from the market and, if necessary, recall that product when other measures are not sufficient to give a high level of health protection.²⁵

Businesses must inform the competent authority if they have placed food on the market that may be harmful to human health, and outline the steps taken to prevent risks to end consumers. In these circumstances, various actions need to be taken swiftly, and suitable recall procedures are therefore vital.

With cosmetics, if the RP has reason to believe that a product is non-compliant, it is their duty to initiate steps to procure compliance, withdraw the product or perform a recall. Primarily, a TSO will look to the RP to take corrective action if they identify a non-compliant product. TSOs have powers to prevent further distribution of products if the RP fails to act within the stipulated time frame, or where immediate action must be taken.²⁶

IV SUPPLY CHAINS

i Labour and immigration

UK Visas and Immigration governs the right to work in the UK. Broadly, four factors determine the relevant visa:

- a* the person's citizenship;
- b* their reason or reasons for coming to the UK;
- c* their personal circumstances and skills; and
- d* the period for which they wish to stay.

In effect, the UK operates a points-based immigration system. There is an emphasis on skilled workers, albeit immigration rules are relaxed to mitigate labour market skills shortages. The type of working visa depends on:

- a* the person's skills and qualifications;
- b* whether they are sponsored and have a job offer;
- c* whether they will be joined by their family; and
- d* the work they will perform.

Commonwealth citizens have the right to work in the UK if they have a British parent (or, in some cases, grandparent) and satisfy other criteria. Irish citizens have an automatic right to work in the UK.

25 <https://www.food.gov.uk/sites/default/files/media/document/food-traceability-withdrawals-and-recalls-guidance.pdf> (last visited 10 August 2022).

26 <https://www.tradingstandards.uk/consumer-help#Recalls> (last visited 10 August 2022).

ii Processing and certifications

The UK requires organic products to be labelled differently, depending on whether they are produced for GB, the EU or third country markets.²⁷ Pre-packed foods can be labelled as ‘organic’ only if at least 95 per cent of the farmed ingredients of agricultural origin are organic²⁸ and all other ingredients, additives and processing aids are listed as permitted within the organic regulations.²⁹ To produce or sell food labelled as organic, a company must register with one of the organic control bodies. Following Brexit, and from 30 September 2022, a statement of agricultural origin will need to be included on all organic pre-packed products produced in GB.³⁰

In the cosmetics industry, terms such as ‘natural’ and ‘organic’ are largely unregulated. As such, responsible beauty brands rely on independent bodies to award certifications (and apply trusted logos) in respect of products that satisfy the necessary criteria. The most widely used certifications in the UK include the Soil Association Organic Standard and COSMOS.³¹ The COSMOS Organic certification requires products to contain at least 90 per cent organic ingredients,³² whereas the COSMOS Natural label can be used for products that contain some organic ingredients but also unfarmed ingredients, which cannot, by definition, be organic (such as water or salt). Products may apply the vegan trademark³³ where no animal-derived ingredients have been used, no animal testing was conducted, no genetically modified organisms were used involving animal genes and no non-vegan products were prepared in the same facility.

iii Sustainability

Sustainability in the UK food, beverage and cosmetics industries is led by both business initiatives and (more recently) legislation. The Environment Act 2021 (which was passed into law on 9 November 2021) confers powers on national authorities to require producers to pay the costs of disposing of specified products and materials at their end of life.³⁴ Under the Environment Act 2021, a deposit return scheme for drinks containers has been established, and many businesses are also introducing their own schemes. From 1 April 2022, the UK’s plastic packaging tax took effect. The tax applies to plastic packaging in the UK that contains less than 30 per cent recycled plastic content at a rate of £200 per metric tonne. The

27 <https://www.gov.uk/guidance/organic-food-labelling-rules> (guidance last updated 26 January 2022/page last visited 10 August 2022).

28 ‘Organic farming’ can include (1) avoiding artificial fertilisers and pesticides; (2) using crop rotation and other forms of husbandry to maintain soil fertility; (3) controlling weeds, pesticides and diseases using husbandry techniques and approved materials to control pests and diseases (where necessary); and (4) using a limited number of approved products and substances (where necessary) in the processing of organic food.

29 Commission Regulation (EC) No 889/2008.

30 Although new labels must comply with the requirements, operators may use up existing labelling in the UK market until September 2022.

31 COSMOS is a not-for-profit independent association that joins five separate entities of different European countries (including the Soil Association from the UK) to create a unified certification for manufacturers of natural and organic products seeking to enter the European market.

32 ‘Organic’ is defined with reference to Regulation No. (EC) 834/2007 and includes ingredients that have not been genetically modified or used herbicides or synthetic fertilisers.

33 The vegan trademark logo is owned and managed by the UK-based Vegan Society, which grants a licence to use the trademark on the basis that the relevant conditions are satisfied.

34 Section 51 Environment Act 2021.

Environment Act also confers powers on national authorities to implement regulations about charges for specified single-use plastic items, although there is little detail yet on how charges would be applied.

iv Anti-corruption rules

The nature of supply chains is such that there are inherent opportunities for bribery and corruption. Such risks are heightened by cross-border activity, complex chains and over-reliance on third parties, along with interactions with governmental bodies and public officials. The UK's Bribery Act 2010 criminalises both active³⁵ and passive³⁶ bribery, along with a corporate offence of failure to prevent bribery.³⁷ The Ministry of Justice guidance sets out six key principles for anti-bribery and corruption compliance:

- a* risk assessment;
- b* proportionality of procedures;
- c* due diligence;
- d* top-level commitment;
- e* training; and
- f* monitoring.

'Adequate procedures' is the one defence to the 'failure to prevent' and is available to organisations able to demonstrate compliance across the six key principles. Larger companies can leverage third-party due diligence platforms to screen counterparties, enabling them to select appropriate risk mitigations.

v Due diligence and monitoring

Deforestation

The Environment Act requires large businesses ('regulated persons') to establish and implement a due diligence system to identify any forest risk commodity (FRC) or a derived product (such as cocoa, soy and palm oil) that has been subject to illegal deforestation. This includes providing an annual due diligence report. Regulated persons will also be prohibited from using FRCs or products derived from FRCs without compliance with local laws. In response to the government's initial consultation, various food retailers signed an open letter arguing that the obligation should apply more broadly than 'illegal' deforestation and noting that certain regions facing deforestation may have weak domestic and international legislation. However, the government's view is that supporting national governments' own requirements is the 'best path to long-term sustainability' and has not widened the obligation.³⁸ Failure to comply could result in companies being fined in the UK, at levels to be determined. There has been some criticism of this legislation as some feel that it does not address human rights issues or companies trading outside the scope of FRC and does not protect other biodiversity and climate-critical ecosystems.

35 Section 1 Bribery Act 2010 offences cover the offering, promising or giving of a bribe.

36 Section 2 Bribery Act 2010 offences cover the requesting, agreeing to receive or accepting of a bribe.

37 Section 7 Bribery Act 2010 is a corporate criminal offence whereby a person performing services on the corporate's behalf (such as an employee, supplier or subcontractor) pays a bribe to obtain or retain a business advantage for the organisation.

38 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933985/due-diligence-forest-risk-commodities-government-response.pdf (last visited 8 August 2022).

vi Labour

The UK Modern Slavery Act 2015 has extraterritorial reach outside the UK and requires relevant companies³⁹ to publish a statement outlining the steps taken to address slavery and human trafficking in their supply chains. This may be enforced by an injunction, punishable with an unlimited fine. In response to the UK's consultation on transparency in supply chains,⁴⁰ the UK will introduce further measures, including mandatory publication of annual statements on a government-run reporting service,⁴¹ to seek to enhance transparency by enabling public buyers, investors, consumers and others to scrutinise the actions that organisations are taking to prevent modern slavery. The UK government has also published a set of principles⁴² to assist businesses in minimising supply chain risks, such as checking suppliers' tax and legal compliance. Although in its early stages, the UK's pending Modern Slavery (Amendment) Bill seeks to make it a criminal offence to supply a false modern slavery and human trafficking statement, to make it a criminal offence for companies using supply chains that fail to demonstrate minimum standards of transparency and to improve standards of transparency in supply chains.⁴³

V SALES AND MARKETING

i Regulatory framework

The General Food Law framework and the FSA 1990 require food business operators to ensure that any food placed on the UK market is safe and that its labelling, advertising and presentation is neither false nor misleading. Specific labelling requirements are set out in the Food Information Regulations 2014 (the FIC Regulations). Pre-packed food, non-pre-packed loose food and food served in restaurants or ordered to take away must state whether any of the 14 allergens listed in the FIC Regulations are present. Since 1 October 2021, all ingredients and allergens must also be clearly labelled on foods that are pre-packed for direct sale (PPDS).⁴⁴ 'PPDS' refers to foods that are packed before being sold by the same food business to end consumers, and the post-October 2021 regime applies to permanent and temporary or movable premises (such as market stalls and food trucks).

As well as allergen and ingredient lists, food labels and packaging must also include the name of the food, net quantity (for foods above 5 grams or 5 millilitres), 'best before' or 'use by' date, name of the business whose name the food is marketed under or the address of the

39 This applies to commercial organisations that (1) are a body corporate or partnership (wherever incorporated or formed), (2) carry on a business or part of a business in the UK, (3) have an annual total turnover of £36 million or more and (4) supply goods or services.

40 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf (last visited 4 August 2022).

41 <https://modern-slavery-statement-registry.service.gov.uk/> (launched in March 2021) (last visited 4 August 2022).

42 <https://www.gov.uk/government/publications/use-of-labour-providers/advice-on-applying-supply-chain-due-diligence-principles-to-assure-your-labour-supply-chains> (last visited 4 August 2022).

43 Modern Slavery (Amendment) Bill, HL Bill 32 2021-2022 (as introduced on 15 June 2021) <https://bills.parliament.uk/publications/41860/documents/390> (last visited 3 August 2022).

44 The Food Information (Amendment) (England) Regulations 2019, also known as Natasha's Law, were implemented following the tragic death of Natasha Ednan-Laperouse, who suffered an allergic reaction to a takeaway baguette in 2018.

importer, country of origin or place of provenance where not including this could mislead consumers, preparation and cooking instructions (where relevant) and mandatory nutrition declaration (alcoholic drinks are exempt).

Certain foods are governed by product-specific regulations that include additional labelling requirements. For example, consumers must be informed if products contain sweeteners or sugars, aspartame and colourings, liquorice, caffeine or polyols.

The use of nutrition and health claims for food and beverages is governed by Regulation 1924/2006⁴⁵ and Sections 13, 15 and 18 of the CAP Code.⁴⁶ Only authorised nutrition and health claims listed in the GB Nutrition and Health Claims Register (the NHC Register)⁴⁷ can be used for products placed on the GB market. Nutrition, fitness and health claims are expressly prohibited for alcoholic beverages containing more than 1.2 per cent alcohol by volume (ABV).

Article 19 of the Cosmetics Regulation mandates the following labelling requirements: the RP's UK address, country of origin (for imported products), declared quantity of contents, date of minimum durability period after opening, warning statements and precautionary information, product function, batch code and declaration of ingredients (on product packaging only), including the 26 potential allergens for fragrances annexed to the Cosmetics Regulation.

Claims made about cosmetics should not mislead consumers by implying that products possess characteristics that they do not have. To aid businesses in making justified claims regarding cosmetics, the common criteria for the justification of claims must be followed.⁴⁸ The common criteria include legal compliance, truthfulness, evidential support, honesty, fairness and informed decision-making.

Non-surgical cosmetic treatments (such as Botox and fillers) have come under the spotlight, and, in 2022, key changes are expected for aesthetics regulation in the UK. The Botulinum Toxin and Cosmetic Fillers (Children) Act, which came into force in England on 1 October 2021, means that it is illegal to administer the products to or book an appointment for those aged under 18 years.⁴⁹ The Health and Care Act 2022⁵⁰ contains provisions⁵¹ that, following public consultation and once enacted, will prohibit any individual in England from carrying out specified cosmetic procedures unless they have a personal licence. They will also prohibit any person from using or permitting the use of premises in England to carry out

45 Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

46 ASA, Non-broadcast Code: <https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>.

47 <https://www.gov.uk/government/publications/register-on-adding-vitamins-and-minerals-to-foods/great-britain-register-on-the-addition-of-vitamins-and-minerals-and-of-certain-other-substances-to-foods>.

48 Commission Regulation (EU) No. 655/2013 of 10 July 2013 laying down common criteria for the justification of claims used in relation to cosmetic products.

49 <https://www.gov.uk/government/publications/botulinum-toxin-and-cosmetic-fillers-for-under-18s> (last visited 9 August 2022).

50 Received Royal Assent on 28 April 2022.

51 Section 180 Health and Social Care Act 2022.

specific cosmetic procedures unless they have a premises licence. On 25 May 2022, following a six-month grace period, new CAP and BCAP rules came into force prohibiting cosmetic interventions advertising from being directed at under-18s.⁵²

Following changes to EU cosmetics laws, the government intends to update the technical annexes to the Cosmetics Regulation to reduce permitted levels of salicylic acid and prohibit deoxyarbutin use in cosmetics⁵³ (the annexes set restrictions on the ingredients that can be used in cosmetic products). The changes will come into effect between October 2022 and March 2023.

ii Consumer protection and false advertising

The UK has a robust consumer protection regime. The Consumer Protection from Unfair Trading Regulations 2008 (UTRs) provide a framework for the protection of consumers from unfair commercial practices. In particular, the UTRs include provisions that prohibit traders from engaging in unfair or misleading practices, including a ban on advertising that includes false or deceptive messaging. Failure to comply with the UTRs can result in fines and, in serious cases, criminal convictions and custodial sentences.

The spirit of the UTRs is mirrored by two codes, which apply to the advertisement of all products and services in the UK, across all media: the CAP Code, which applies to non-broadcast advertising (such as printed press, online ads (including social media) and billboards, etc.), and the BCAP Code, which applies to broadcast advertising (together, the Codes). As is noted in Section I, the ASA is the UK's independent regulator of advertising and is responsible for enforcing the Codes.

At a general level, both Codes provide that adverts must not (or be likely to) materially mislead and require traders to substantiate all claims made in them. Certain product-specific rules also apply. Of particular note for advertisers of cosmetic products are Rules 3.7 of both Codes and Rule 12.1 of the CAP Code, which require any claims made in ads to be substantiated by documentary evidence based on available scientific knowledge. If claims imply that a cosmetic product has more than an insignificant physiological effect, they may stray into the realm of 'medicinal claims', which are permitted only in very limited circumstances, where licensed and corroborated by medical evidence.

Food and drink has its own dedicated section in both Codes: Rule 15 in the CAP Code and Rule 13 in the BCAP Code. Of particular note is the requirement that marketing communications must not contain claims that state, or imply, that foods prevent, treat or cure human disease. The Codes also mandate that marketing communications containing nutrition or health claims must be supported by evidence showing that they meet the conditions specified in the NHC Register. Additional Rules apply to weight control products.

The ASA investigates complaints made by third parties (including consumers and competitors), as well as proactively monitoring advertisements itself. If an advert is found to breach either Code, the ASA can order its withdrawal or amendment, seek undertakings from the advertiser and publish its ruling on its website. If advertisers persistently breach the Codes, matters can be escalated to other bodies, who can impose fines or take court action. Social media influencers are a particular focus for the ASA, with various rulings issued against

52 <https://www.asa.org.uk/news/new-targeting-rules-for-cosmetic-interventions-advertising-come-into-force-today.html> (last visited 9 August 2022).

53 <https://www.gov.uk/government/news/planned-changes-to-toys-and-cosmetics-regulations#full-publication-update-history> (last visited 10 August 2022).

influencers who fail to appropriately label posts as ‘paid promotions’. In relation to cosmetics, the ASA has held that where the use of beauty filters in a social media advertisement exaggerates a product’s efficacy or otherwise misleads consumers about the advertised product, such an advertisement would be in breach of the CAP Code rules.⁵⁴

VI PRODUCT LIABILITY

The UK has a robust product liability regime, and manufacturers who fail to comply risk liability for defective products that are placed on the market. Manufacturers can be sued by injured consumers under:

- a common law (negligence);
- b the Consumer Protection Act 1987 (CPA); or
- c contract (based on implied statutory terms that products will be of satisfactory quality and fit for purpose).⁵⁵

Typical claims include that a food or beverage contained an undisclosed allergen or that a contaminant was introduced during production and resulted in injury. Cosmetic manufacturers could face similar claims, particularly where products cause adverse side effects about which consumers were not forewarned.

Importers, retailers and wholesalers could also find themselves liable. In those circumstances, and if the defect arose during the production process, importers, retailers and wholesalers may join the manufacturer to any proceedings, or seek a contribution claim, to pass on all, or some, of the liability. As well as the financial implications of such claims, the potential for reputational damage is also a very real risk and concern to all supply chain participants.

Although consumers can pursue claims in contract or negligence regarding injurious products, action under the CPA is more likely. This is because the CPA imposes a strict liability regime, under which the claimant does not need to establish that the manufacturer was at fault in supplying a product, only that the product was ‘defective’ because its safety ‘is not such as persons generally are entitled to expect’.⁵⁶

Where a consumer brings a claim under the CPA, the court is obliged to take into account ‘all the circumstances’ to determine whether the product is defective.⁵⁷ This will include how the product is marketed, any instructions or warnings accompanying the product and what might reasonably be expected to be done with the product. For more information on labelling and marketing requirements, see Sections III (Food and cosmetic safety) and V (Sales and marketing).

Case law⁵⁸ suggests that the court will weigh up the risks and benefits presented by a product, whether the risk was avoidable and the cost burden of taking extra safety measures.

54 <https://www.asa.org.uk/rulings/skinny-tan-ltd-in-association-with-elly-norris.html> and <https://www.asa.org.uk/rulings/we-are-luxe-ltd-t-a-tanologist-tan-in-association-with-cinzia-baylis-zullo.html> (both last visited 9 August 2022).

55 Consumer Rights Act 2015, Sale of Goods Act 1979.

56 Section 3(1) Consumer Protection Act 1987; claimants may also have a claim where a producer has breached safety regulations made under Section 11(1) of the Consumer Protection Act 1987.

57 Section 3(2) Consumer Protection Act 1987.

58 *Wilkes v. DePuy International Limited* [2016] EWHC 3096 (QB); *Gee v. DePuy International Limited* [2018] EWHC 1208 (QB); *Hastings v Finsbury Orthopaedics Ltd & Anor (Scotland)* [2022] UKSC 19.

In addition, the court will give weight to evidence that a product was placed on the market in compliance with regulations designed to make it safe (such as the PPDS allergen labelling requirements referred to in Section V).

Subject to the court's discretion, personal injury claims must be brought within three years of the date on which the cause of action accrued or, if later, the date the injured person came to have knowledge.⁵⁹ Claims under the CPA are also subject to a 10-year 'longstop', meaning that an action cannot be brought after 10 years from when the product was placed on the market.⁶⁰

VII INTELLECTUAL PROPERTY

When used effectively, intellectual property (IP) is a vital tool, which helps food, beverage and cosmetics businesses to stand out from what, in the UK, is a crowded market. For businesses operating in these industries, the key IP rights are typically trademarks or passing off, copyright, design rights and, for some, trade secrets and patents. Before Brexit, UK and EU IP laws were harmonised. They remain predominantly so now but will likely diverge over time.

A trademark can consist of any sign that can be represented clearly and precisely.⁶¹ Although shapes, colours and sounds are all capable of registration, trademarks usually consist of brand names, logos, product packaging and slogans. A trademark's key function is to allow consumers to identify a product's origin. They allow their owners to prevent third parties from using the same, or similar, marks that might confuse consumers by, among other things, suggesting an association between two brands. Trademarks that have a 'reputation' in the UK are afforded an enhanced degree of protection. Regardless of whether they have a trademark registration, businesses that have generated goodwill in the UK can also sue under the common law tort of passing off, where third parties misrepresent their goods or services as those of the business (such as lookalike products).

Copyright arises automatically when certain formalities are met and protects (among other things) original written, pictorial and photographic works, including product packaging, logos, marketing materials and website content. Copyright does not need to be registered, and generally subsists for 70 years from the end of the year in which its creator dies.⁶² Owners can use their copyright to prevent various unauthorised acts, including the copying of their work and the distribution of substantively similar materials.

Design rights typically protect functional products, provided that they are novel,⁶³ although protection can also extend to two-dimensional items, such as patterns, layouts and logos. Both registered and unregistered design rights exist in the UK, and both provide their owners with the exclusive right to produce products to the design.

Trade secrets have both statutory protection, under the Trade Secrets (Enforcement, etc.) Regulations 2018, and common law protection, as a specific type of confidential

59 Section 11A(4) and Section 33 Limitation Act 1980.

60 Section 11A(3) Limitation Act 1980.

61 Trade Marks Act 1994, Section 1(1).

62 Copyright, Designs and Patents Act 1988, Section 12(2).

63 Registered Designs Act 1949, Section 1B(1).

information. To be capable of protection, information must be secret and have commercial value because of its secrecy. Of the types of information capable of protection, secret formulae and recipes are likely to be most relevant to the food, drink and cosmetic sectors.

Patents generally protect technical ‘inventions’, for example a new technology that allows a food or cosmetics manufacturer to make products faster or using an improved process. The registration process can be lengthy and expensive but, once granted, patents provide a 20-year monopoly⁶⁴ and, consequently, a significant competitive advantage to their owners.

Food and drink products that originate from recognised geographical areas and are produced using traditional methods can also be protected in the UK as geographical indications (GIs). The similar EU scheme previously extended protection to the UK but, following Brexit, a local scheme⁶⁵ applies for businesses wanting to protect their products through GIs in the UK. The UK scheme protects three designations of GI products, each of which possesses its own unique logo, namely:

- a protected designation of origin (e.g., ‘Cornish clotted cream’);
- b protected geographical indication (e.g., ‘traditional Cumberland sausage’); and
- c traditional speciality guaranteed (e.g., ‘traditional Bramley apple pie filling’).

Food, drink and cosmetics brands typically regard the UK as a key jurisdiction for protecting their IP and are active at enforcing their rights. In 2021, a number of brands took action against discount supermarkets⁶⁶ following the sale of lookalike products. In the UK, the leading discount supermarkets are known for stocking largely (or even entirely) own-brand products, which can make certain trademark infringement and passing off arguments difficult (namely, likelihood of confusion and misrepresentation). This has been reflected in how various cases, such as the one involving caterpillar-shaped cakes, have played out.⁶⁷

VIII TRADE ORGANISATIONS

Various trade associations operate in the UK food, drink and cosmetic industries. Some, like the British Soft Drinks Association and Chilled Foods Association, represent specific subdivisions, whereas others, notably the Food and Drink Federation (FDF) and Cosmetic, Toiletry and Perfumery Association, represent their sectors as a whole.

Trade associations often play an active role in lobbying the government on matters that impact their members. When the HFSS restrictions were being proposed calling for the introduction of a sugar and salt tax, the FDF warned that this could lead to price increases for consumers and would put additional pressures on manufacturers, who are reformulating products in anticipation of the upcoming HFSS advertising restrictions noted in Section II.

64 Patents Act 1977, Section 25.

65 Agricultural Products, Food and Drink (Amendment etc.) (EU Exit) Regulations 2020/1637.

66 *Philip Warren and Son Ltd v. Lidl Great Britain Ltd* [2021] EWHC 1097 (Ch), *William Grant & Sons Irish Brands Ltd v. Lidl Stiftung & Co Kg and others* [2021] CSOH 55 (25 May 2021). In April 2021, Marks and Spencer Group plc, which operates a chain of high-end supermarkets, issued proceedings against German discount supermarket Aldi in relation to the former’s ‘Colin the Caterpillar’ cake and the latter’s ‘Cuthbert the Caterpillar’ alternative. The case settled in late 2021. The details of the settlement are confidential; however, the Cuthbert cake is once more available from Aldi with changes to its packaging (‘Cuthbert the Caterpillar’ is now merely ‘Cuthbert’), a reformulated chocolate face and a bow tie.

67 See footnote 65.

There are many benefits of joining trade associations, including insight into legal and other industry developments, potentially increased influence over policymakers, best practices and standards, and networking opportunities. Participation may be particularly helpful for overseas companies looking to expand their activities into the UK. However, by their very nature, trade associations bring competitors together, so it is important to ensure that this interaction is only for legitimate purposes and is in compliance with competition law. In particular, trade associations must not be a conduit for the exchange of commercially sensitive information among their members.

The CMA has previously taken enforcement action against trade associations (and members) where they have overstepped the boundaries of legitimate cooperation.⁶⁸

UK competition law largely mirrors the European regime, prohibiting both anticompetitive arrangements, decisions and concerted practices (the Chapter I prohibition)⁶⁹ and the abuse of a dominant position (the Chapter II prohibition).⁷⁰ There are potentially serious consequences for both companies and individuals who infringe competition law. As well as reputational risks and the potential for private damages actions, businesses can be fined up to 10 per cent of their worldwide turnover. Directors of UK companies can face disqualification for up to 15 years⁷¹ and disqualifications are on the rise. In the UK, individuals involved in a cartel⁷² risk prosecution and up to five years in prison or a fine, or both.⁷³

Before joining a trade association, businesses should check their membership rules and practices. The membership criteria and rules should be transparent, objectively justifiable and non-discriminatory and should not restrict members from taking independent, commercial decisions. The trade association should have a competition law compliance policy in place and should prohibit the sharing of commercially sensitive information. It should not make any recommendations that could hinder competition, including pricing or output recommendations.

IX FINANCING AND M&A

The year 2021 saw an unprecedented surge in M&A deals across the food and beverage sector. There was a near tenfold increase in the value of relevant deals from 2020 to 2021. Part of the scale of this jump was inevitably due to the low base following the covid-19

68 e.g., the Showman's Guild of Great Britain for exclusionary practices, a private eye surgeons' membership organisation for the exchange of commercially sensitive information and price recommendations, the Association of Model Agents for the exchange of commercially sensitive information and price fixing, and a local estate agents' association for limiting competition between its members through a rule prohibiting members from advertising their fees and discounts in the local newspaper.

69 Competition Act 1998, Section 2: This prohibition relates to agreements, decisions or concerted practices between undertakings and associations of undertakings that may affect trade in the UK and that have as their object or effect the restriction, prevention or distortion of competition within the UK.

70 Competition Act 1998, Section 18.

71 Enterprise Act 2002, Section 204 (extending the Company Directors Disqualification Act 1986 to include disqualification for competition infringements).

72 i.e., an individual agrees with at least one competitor to fix prices, limit or prevent production or supply price, share customers or markets, or rig bids.

73 Enterprise Act 2002, Sections 188 and 190.

pandemic. However, other factors contributed to the boom, including private equity funds targeting premium areas of the food market, stability of cash flow in the sector and cheaply available debt.

The total value of UK deals that were disclosed in 2021 was £23.2 billion – almost double the disclosed deal value of £12.6 billion for 2020.⁷⁴ There were a number of mega-deals that contributed to a bumper 2021, most notably US private equity house Clayton, Dubilier & Rice's acquisition of Morrisons for over £7 billion in October and Unilever's sale of its tea business, Ekaterra, to CVC Capital Partners for £3.8 billion in November (although a lot of activity occurred earlier in the year). The surge in activity was mirrored in cosmetics, with estimates of M&A activity having increased by well over 50 per cent compared with the previous year.⁷⁵ This was led primarily by strategic buyers, followed by private equity investment.

It has been suggested that the increase in deal volume in food and beverage in the first quarter of 2021 was reflective of dealmakers' and businesses' desire to recover lost ground following the pandemic. Indeed, there was then a decrease in activity in the second half of 2021, which has continued into 2022. In Q1 2022, there were 35 transactions across the food and beverage sector – around a 55 per cent decrease from the comparable period in 2021.⁷⁶ Rising inflation concerns amid wider uncertainty will also have contributed to this decrease, and prospective acquisitions may be put on hold until the uncertainty eases. Across the sector, supply chain and labour issues, the ongoing impact of covid-19 and Russia's invasion of Ukraine are all likely to play a role.

Environmental, social and governance considerations continue to gain in prominence. Unilever's attempts to sell PG Tips and Lipton were almost scuppered last year by concerns raised by bidders about working practices. Investors are clearly thinking about these issues more, and it is anticipated that this trend will develop over coming years in the food and beverage and cosmetics industries and more widely.

X SPECIAL ISSUES FOR CERTAIN PRODUCTS

i Alcohol

In the UK, anyone wishing to sell alcohol must be licensed by the applicable licensing authority, with the Licensing Act 2003 being the key legislation. Premises selling alcohol must also be licensed, and businesses selling alcohol to the public must ensure that the wholesalers supplying them have been approved by HM Revenue & Customs, under the Alcohol Wholesaler Registration Scheme.

The UK has robust advertising rules, with alcohol assigned its own sections of the Codes.⁷⁷ Among other things, the Codes prohibit ads that encourage excessive drinking.

74 <https://www.grantthornton.co.uk/news-centre/private-equity-deals-dominate-food-and-beverage-sector/> (last visited 10 August 2022).

75 <https://www.business-sale.com/insights/sector-guides/cosmetics-set-for-continuing-recovery-and-ma-growth-222992> (last visited 1 September 2022).

76 <https://foodmanagement.today/deal-activity-in-food-sector-remains-steady-despite-challenges/> (last visited 1 September 2022).

77 Rule 18 of the CAP Code: https://www.asa.org.uk/type/non_broadcast/code_section/18.html and Rule 19 of the BCAP Code: https://www.asa.org.uk/type/broadcast/code_section/19.html (both last visited 9 August 2022).

Marketing communications must not be directed at people under the age of 18,⁷⁸ and people shown drinking in ads must neither be nor seem to be under 25 years old. Comparisons may be made between alcoholic products of varying strengths, but the Codes expressly prohibit health claims (express or implied) in relation to beverages containing more than 1.2 per cent ABV. This has been a particularly pertinent consideration in recent years as businesses determine how best to lawfully market increasingly popular lower alcohol alternatives.

In January 2022, following public consultation, the ASA amended the BCAP and CAP Code rules on low alcohol drinks.⁷⁹ Under the amended rules, low alcohol drinks (those above 0.5 per cent ABV, up to and including 1.2 per cent ABV) can be advertised alongside and promoted as preferable, based on their alcohol content or intoxicating effect, to higher strength similar beverage alcoholic drinks. Previously, they could not be promoted as 'preferable' to higher strength drinks, as the mere reference to the higher strength drink was classed as promotion, in breach of the advertising rules. The ASA considered that this prevented the proper promotion of a category of products that consumers were increasingly invested in and so removed the restriction. There is no BCAP and CAP guidance on alcohol alternatives – non-alcoholic drinks (those at or under 0.5 per cent ABV) that are intended to replace alcoholic drinks in contexts where they would normally be consumed. Therefore, in February 2022, the ASA launched a consultation⁸⁰ on advertising alcohol alternatives⁸¹ together with some proposed guidance.⁸² Strict labelling laws also apply to alcohol. For spirits, only those that meet the requirements of a category of 'spirit drink' prescribed by the Spirit Regulations⁸³ (e.g., whiskey or vodka) can be named after that category. Similarly, for wines, a product can be named as such or as a specific category (e.g., 'sparkling wine') only if it meets the requirements specified in the Wine Regulations.⁸⁴ Although beverages containing more than 1.2 per cent ABV are exempt from the requirement, under the FIC Regulations, for product packaging to bear an ingredient list and nutrition declaration, products with an ABV of 1.2 per cent or less are not. 'Low alcohol', 'de-alcoholised' and 'alcohol-free' products must also comply with specific descriptors.

78 <https://www.asa.org.uk/topic/alcohol.html> (last visited 9 August 2022).

79 <https://www.asa.org.uk/resource/changes-to-the-rules-on-advertising-low-alcohol-products.html> (last visited 9 August 2022).

80 <https://www.asa.org.uk/resource/asa-consultation-on-advertising-alcohol-alternatives.html> (last visited 9 August 2022).

81 The consultation closed on 5 May 2022.

82 See footnote 81.

83 Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages.

84 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products.

ii Foods and food supplements as ‘borderline products’

A food product or supplement may fall within a category that is somewhere between food and medicine (e.g., ‘nutraceuticals’).⁸⁵ This may result in confusion around the appropriate classification and therefore regulation of the product.

In the UK, the body responsible for the regulation of medicinal products is the Medicines and Healthcare products Regulatory Agency (MHRA). The MHRA determines whether a product satisfies the definition of, and therefore falls to be regulated as, a ‘medicinal product’.⁸⁶ In making its determination, the MHRA will consider various factors, such as claims made about the product; its composition, function, marketing and promotional materials; and the possible risks associated with its use.⁸⁷ A product that is determined to be a ‘medicinal product’ must comply with the Human Medicines Regulations 2012, unless an exception applies.⁸⁸

iii Cannabidiol

Cannabidiol, more commonly known as CBD, is one of the many active compounds naturally produced in cannabis. Certain criteria must be met for CBD products to be lawfully made available for human consumption under the Misuse of Drugs Regulations 2001.⁸⁹

The majority of CBD products are sold as oils and food supplements; however, in 2016, the MHRA decided that CBD products that are used for a ‘medical purpose’ should be regulated as medicines.⁹⁰ The MHRA has cautioned that the regulatory status of some CBD products (not currently deemed to be medicines) may change, such that they may, in future, be classified and regulated as ‘medicinal products’.⁹¹

In January 2019, CBD extracts were granted ‘novel food’ status, meaning that they were added to the Novel Foods Catalogue (a list of foods that have not been made widely

85 ‘Nutraceuticals’ may include a range of health products or supplements. There is no agreed standard definition for the term; however, in June 2021, the UK’s Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) published an independent report that included a proposal that this be addressed: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994125/FINAL_TIGRR_REPORT__1_.pdf (last visited 22 August 2022).

86 ‘Medicinal product’ is defined in Article 1 of Directive 2001/83/EC of the European Parliament and Council of 6 November 2001 on the Community code relating to medicinal products for human use.

87 MHRA Guidance Note 8 ‘A guide to what is a medicinal product’ March 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872742/GN8_FINAL_10_03_2020__combined_.pdf (last visited 22 August 2022).

88 Human Medicines Regulations 2012 [SI 2012/1916].

89 See Home Office Guidance ‘Drug licensing factsheet: cannabis, CBD and other cannabinoids’. Updated 17 June 2021: <https://www.gov.uk/government/publications/cannabis-cbd-and-other-cannabinoids-drug-licensing-factsheet/drug-licensing-factsheet-cannabis-cbd-and-other-cannabinoids> (last visited 22 August 2022).

90 ‘MHRA statement on products containing Cannabidiol (CBD)’. Last updated 20 December 2016: <https://www.gov.uk/government/news/mhra-statement-on-products-containing-cannabidiol-cbd> (last visited 22 August 2022).

91 MHRA Guidance Note 8 ‘A guide to what is a medicinal product’ March 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872742/GN8_FINAL_10_03_2020__combined_.pdf (last visited 22 August 2022).

available for public consumption, in the UK or EU, before May 1997).⁹² Before being placed on the market in GB, a novel food must obtain the requisite pre-market authorisation, which includes an assessment of its safety.^{93,94}

XI OUTLOOK AND CONCLUSIONS

The UK's food, beverage and cosmetics industries have stood resilient in the face of a challenging post-Brexit and covid-19 environment. However, reverberations continue to be felt as the industries manoeuvre global supply chain disruption, an energy crisis brought on by the war in Ukraine, declining consumer confidence, widespread threats of strike action, a rise in National Insurance contributions, rapidly increasing inflation and interest rate rises. For the food and beverage sector in particular, opportunities in non-EU markets could provide a much-needed boost, but workforce and fuel shortages and the rise in energy and commodity prices are a pressing and very real concern, with various retailers reporting slowing or declining sales growth rates. It is also likely that we will continue to see price increases in consumer goods. The UK's animal welfare⁹⁵ and food safety standards,⁹⁶ which are among some of the highest in the world, also look set to be an ongoing battleground, requiring the UK to consider how much (if at all) it is willing to compromise to secure international trade deals with key nations.

Sustainability looks certain to remain a key focus for both industries over the coming year as environmental issues continue to permeate and influence global politics and consumer spending habits. Compliance with the Green Claims Code will be crucial, with food, beverage and cosmetics businesses expected to be firmly on the CMA's radar, given heightened consumer and regulatory concern about misleading claims from advertisers within these sectors. A dual public and government focus on health and well-being means that the forthcoming regulation of HFSS products will also be monitored closely, with many within the food and beverage industry bracing themselves for the impact of additional proposed advertising restrictions. Regulation of nutraceuticals and novel foods such as cannabidiol is also anticipated.

In terms of more general trends, we anticipate that digital spending will see continued growth, especially in the cosmetics space, as consumers continue with their passion for social media influencers and online marketplaces. Although post-pandemic high street footfall statistics show that there is still very much a demand for the bricks and mortar store shopping experience among UK consumers, the role of the physical store appears to be shifting towards a hybrid strategy, with nearly a quarter of consumers purchasing a retail product online

92 Food Standards Agency 'CBD products linked to novel food applications': <https://www.food.gov.uk/business-guidance/cbd-products-linked-to-novel-food-applications> (last visited 22 August 2022). See also Food Standards Agency 'Cannabidiol (CBD) guidance'. Last updated 11 March 2021: <https://www.food.gov.uk/business-guidance/cannabidiol-cbd> (last visited 22 August 2022).

93 See footnote 93.

94 Food Standards Agency 'Novel foods authorisation guidance'. Last updated 31 December 2020: <https://www.food.gov.uk/business-guidance/regulated-products/novel-foods-guidance#process-for-authorisation-of-a-novel-food> (last visited 22 August 2022).

95 <https://api.worldanimalprotection.org/> (last visited 10 August 2022).

96 <https://foodsecurityindex.eiu.com/index> (last visited 29 September 2021).

while in a physical store in 2021.⁹⁷ On the other hand, big digital players like Amazon are seeing their bricks and mortar store sales rise. The metaverse is also on the radar for food and cosmetics brands as it is likely to open conduits for engagement with customers who want to enhance their digital, as well as physical, experience.

⁹⁷ <https://www.retailconomics.co.uk/retail-insights/thought-leadership-reports/outlook-for-the-UK-retail-and-consumer-industry-2022> (last visited 9 August 2022).

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