Welcome to Eversheds' news and information for the food and drink sector

22 December 2010

Welcome to the ‘news’ for the food and drink sector, helping to keep you up to date with legal and commercial industry-wide developments. Below you will find articles on:

- **Country of origin labelling - changes in the UK ‘rules’, developments in Europe**
- **Preparing the immigration cap in the Food Sector**
- **European Chocolate Labelling Wars - Italy loses on 25 November 2010**
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- **A more certain landscape? OFT’s draft guidance on the application of competition law to land agreements**
- **Equitable setting off in different currencies**
- **Feed in Tariffs: Latest outcome of the Spending Review**

I would like to take this opportunity to wish you all a very **Merry Christmas and a prosperous New Year** from the Eversheds Food and Drink Sector Group.

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**Country of origin labelling - changes in the UK ‘rules’, developments in Europe**

On 24 November 2010 the Minister of State for Agriculture and Food, Jim Paice MP, and the Food and Drink Federation announced a new set of principles on country of origin labelling for food. This announcement coincided with developments in Brussels on this topic. It seems that we are now in the ‘end game’ in relation to the new rules about country of origin labelling which will be introduced by the forthcoming EU Food Information Regulation.

**The United Kingdom developments**

Currently, with the exception of beef, veal and imported poultry meat, the law requires the country of origin or place of provenance of foods to be given on labels only if the overall presentation of the food is such that consumers might otherwise be misled. However the Food and Drink Federation’s new statement of principles recommends that country of origin labelling should be given in all cases for the following products:
- Meat sold as such
- ‘Lightly’ processed meat products
- Liquid milk and fresh cream
- Cheese and butter

These recommendations are just that: there is no legal compulsion to give this information. It will be interesting to see how widely they are followed.

For **meat** the guidelines say that the label should indicate the name of a single country for animals born and reared in a single country. Otherwise the countries of birth and rearing should both be specified. Meat should only be called ‘British’ if the animals were both born and reared in the UK.

In relation to what has been termed ‘**lightly**’ processed meat products such as bacon, ham, gammon, sausages and burgers, the country of origin of the meat ingredients should be given, following the same principles.

The document does not recommend any routine indication of country of origin for **composite products containing meat**, such as pies and casseroles. However it goes on to say that where a voluntary origin declaration is given and meat is considered to be of primary interest to the consumer or to be a predominant component in the product, then the country of origin of the meat ingredient should be given. This appears to mean that if for example a product is labelled ‘Lancashire Hotpot - made in Britain’ then if the meat content is the predominant component or is considered to be of primary interest to the consumer, then the country of origin of the meat should be given - but perhaps only if the country of origin is not British.

For **milk and cream** the position is fairly straightforward: the country where the milk was produced should be stated. For **cheese and butter** what is required is labelling the country of origin of the liquid milk or of the “place” of manufacture. In other words the producer has a choice here as to whether to give the country of origin of the milk or the place (country or region or town) of manufacture. The guidelines do not say so, but in our view, to avoid misleading the consumer, the label will need to make clear whether the country or place named is where the milk was produced or where the cheese or butter was manufactured - rather than leave the consumer to guess which. The principles add one more point on milk and cheese: flags or imagery relating to a country should only be used where the product is made from milk originating in that country.

In all these cases the issue arises as to how to deal with **products from multiple countries**. The guidelines state that in those circumstances the situation needs to be made clear, for example:

- by stating the different countries which have contributed ingredients (or may have contributed ingredients if this varies from time to time for example with the growing seasons), or
- by indicating a part of the world, such as “Produce of the European Union”, “milk from the Alps”, or
European developments

The position in Europe is very fast-moving, but it seems quite likely that a final position on the new Food Information Regulation will be adopted in the next few months. It also seems likely that this will make country of origin labelling compulsory only for meat in the first instance, with proposals to come forward in the following three years to cover milk and milk products, meat used as an ingredient, single ingredient products and ingredients that represent more than 50% of a food.

If that is the situation which emerges, then even the initial position under the EU Regulation will be stricter than the new UK guidelines, since it will only be possible to state a single country of origin for meat if the animal was slaughtered in that country in addition to having been born and reared there.

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Preparing for the immigration cap in the Food Sector

On 23rd November 2010, the Home Secretary, Theresa May, made the long awaited announcement regarding the limits for workers from outside Europe which will come into effect in April 2011. In July 2010 interim limits were brought into effect to prevent a surge of applications in advance of the new permanent limits. Employers in the food sector wishing to recruit staff from outside the EU have been amongst those challenged by these interim limits, both by the availability of Certificates of Sponsorship under Tier 2 of the points-based system and the quota system which has applied to Tier 1. It is likely that the further changes will cause major recruitment problems for parts of the UK food and drink industry which has historically relied on a steady migrant workforce.

Although the Government states that the introduction of an annual limit will allow Britain to remain competitive in the international jobs market, employer’s experiences of the interim cap will undoubtedly lead them to beg to differ having seen the announcement to control those coming to the UK. From April 2011 the following changes will apply:
**Tier 1**

- The Tier 1 (General) route will close.
- Access under Tier 1 will be restricted to 1000 applicants who classify as entrepreneurs, investors (of which there were only 300 in 2009) and the "exceptionally talented". This will cover migrants who have won international recognition in scientific and cultural fields, or who show sufficient exceptional promise. Applications by those with exceptional promise will be endorsed by a competent body in the relevant field.

**Tier 2**

- An annual limit of 20,700 will be introduced for those coming into the UK under Tier 2 (General), allocated on a monthly basis.
- The Tier 2 (General) limit of 20,700 will not apply to in-country applications from those already in the UK, dependants of Tier 2 migrants and Tier 2 (General) applicants who are filling a vacancy with a salary of more than £150k.
- Currently Tier 2 (General) migrants must fill roles at NVQ level 3 or above. From April 2011 this will be increased and the role, and new recruits must be of graduate level. The Migration Advisory Committee will be asked to advise on graduate level roles and the shortage occupation list will be amended accordingly.
- The minimum level of English language competency for Tier 2 (General) applications will be increased from basic to intermediate level (B1 on the Common European Framework of Reference).
- The operation of Tier 2 (General) will change significantly in terms of the allocation of Certificates of Sponsorship to sponsoring employers on a monthly basis rather than pre-allocation on an annual basis, as is currently the case. In the event that the monthly limit is over subscribed, those with the most points will qualify for one of the Certificates of Sponsorship that are available. In these circumstances priority will be given to shortage occupations in the first instance, then whether the post requires higher academic qualifications and, finally, salary. It is unclear whether or not those who do not obtain Certificates that month will be carried over to the following month.
- Intra-company transferees will be excluded from this limit but only where salary (and permitted allowances) are £40k or more. Intra-company transferees with a salary between £24k and £40k will still be permitted to come to the UK but for a maximum period of 12 months. Those earning £40k or more will have a maximum stay of 5 years.

**Comment**

Guidance around these changes and their operation is to be released over the course of the next few months and we will keep you up to date with it as soon as it is released. However, even at this early stage, it is clear that the changes will have a significant impact on many food and drink sector employers.
In the meantime, employers can prepare by:

- revisiting historic reliance on Tier 1 (General) and considering the extent to which the Tier 1 "exceptional talent" route can be utilised;
- considering the merits of applying for a Tier 2 licence, where one is not already in place;
- ensuring that relevant managers are aware of the new limits, in particular in relation to Tier 2, and the need to make sure that applications under this route are made as early as possible, given the new quota. Recruitment should be planned well in advance to take account of this;
- considering the business visitor route where appropriate. This enables individuals to come to the UK for a finite period (usually up to 6 months) and undertake a number of permitted activities. However, caution should be exercised when using this route, as it substantially limits the activities a visitor can legally undertake; legal advice regarding the restrictions on the activities permitted whilst in this visa category should be sought where appropriate so as to avoid any risk of illegal working.

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European Chocolate Labelling Wars - Italy loses on 25 November 2010

The story so far

The Court of Justice of the European Union has finally ruled against Italian labelling laws which permit the use of the name ‘pure chocolate’ for chocolate products made with no vegetable fat other than cocoa butter. European Law allows products to be called ‘chocolate’ when they have up to 5% non-cocoa butter vegetable fat, but the Italian Law allegedly implied that such chocolate was ‘impure’.

The composition of chocolate has been a longstanding area of controversy in the European Union. The first attempt at harmonisation, in Directive 241 of 1973 failed to achieve a resolution, but a deal was reached by 2000, when Directive 36 enacted new rules. Those rules prescribe the exact names that may be used for different types of chocolate, such as plain chocolate and milk chocolate. The use of any other names for
those products is banned. It is specifically permitted for these products to contain up to 5% of non-cocoa butter vegetable fat.

However this was not popular in Italy, and the Italian implementing legislation in 2002 gave permission for manufacturers, if they wished, to use the term ‘pure chocolate’ for chocolate that contained no non-cocoa butter fat. The European Commission challenged this as long ago as 2004, but it has taken six years for the matter to get to court. This was partly because initially Italy responded by saying that they would change their legislation but then failed to do so. In January 2009 the European Commission finally got round to taking court proceedings.

**Italy’s defence**

Italy sought to defend its position by arguing that it is permissible to add adjectives such as ‘pure’ to the permitted sales name of ‘chocolate’. However the European Court held up that additional adjectives were not permitted under Directive 2000/36 except under specific tightly controlled conditions, which the Italian Law did not comply with. Furthermore the Court placed considerable emphasis on the fact that the use of the word ‘pure’ made adverse implications for products that did contain vegetable fat and thus interfered with the free circulation of those product throughout the European Union.

**What happens next?**

Under European Law, Italy is now required to correct its legislation ‘without delay’. If it fails to do so then the Commission can bring further court proceedings imposing financial penalties.

**Practical lessons**

This story is a good illustration of a perennial issue facing food manufacturers under European Food Labelling Law: although in theory there should be free circulation of goods which are labelled in accordance with the European Legislation, in practice most member states have certain sensitive foods in relation to which they are reluctant to permit full free circulation of goods. Any food business seeking to export to other European member states needs to take account of those sensitivities and decide either to take them into account or face lengthy legal battles. Chocolate is one of the prime examples, with France and Belgium also being very concerned about its composition, but there have been many other examples over the years such as the tight traditional German restrictions on the ingredients in beer. There is also a lesson here for food businesses facing such barriers to trade: using EU law to challenge the law of members states effective, but it can take a long, long time to achieve a result.

For further information or advice, please contact:

**Owen Warnock**

Partner
Focus on Food and Drink - Guest update from JLT

Going forward, we will be asking our clients and contacts in the food and drink industry to submit topical articles for our e-briefing.

This month we are delighted that JLT have submitted an article highlighting that although it is a tough climate for food and drink companies, it is one where the right insurance cover will help businesses take the pressure.

Click here to see the full article.

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Food and Drink Federation President’s Reception

The annual Food and Drink Federation (FDF) President’s reception took place on 8th December and the event was attended by members of Eversheds’ Food and Drink Sector Group.

The FDF’s president, Ross Warburton, addressed members with a welcome speech before handing over the baton to Jim Moseley of General Mills. Jim will take up the role of FDF President in January 2011.

At the reception, the Food and Drink Federation launched their ‘Five-fold Environmental Ambition: Progress Report 2010’. The report describes the significant progress already
made by the industry, including some of our clients, in reducing carbon emissions, waste and so on, and also sets new challenges for the future. Click here to view the full report “Building on Success”.

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A more certain landscape? OFT’s draft guidance on the application of competition law to land agreements

In April 2011, leases and other agreements relating to land – including those entered into before that date – will be brought within the full rigour of UK competition law for the first time.

Land agreements which have an appreciable effect on competition anywhere within the UK are likely to infringe Chapter I of the Competition Act 1998 and the implications could be severe.

Food and drink businesses really need to identify leases or agreements that could give rise to such restrictive effects and consider the possible consequences now, in advance of the April 2011 deadline. They may need to ensure that relevant staff receive training on the changes.

Please click here for full details.

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Equitable setting off in different currencies
Summary

Food and drink companies involved in international trade should be mindful of the High Court decision of *Fearns v Anglo Dutch Paint & Chemical Company Ltd*, which has shone new light on the principle of equitable set-off, particularly when applied to claims involving different currencies.

The key points from the judgment are:

1. where parties in dispute are cross-claiming sums from each other due in different currencies, the correct time to convert the sums into a common currency to reconcile their accounts would be the date of any judgment by the court as opposed to the date that the claims arose. The sums should be converted into the currency of the greater debt owed;
2. where applied, equitable set off does not extinguish liability, but acts as a means of recalculation the true extent of liability; and
3. the courts are more likely to entertain equitable set-offs against claims or judgments, in order to effect a commercial resolution for parties.

[Click here](#) to view the facts of the case.

If you have any questions or would like to talk to an expert on this please contact:

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Feed in Tariffs: Latest outcome of the Spending Review

On 24 November 2010, Greg Barker, the Minister of State for Energy and Climate Change at DECC, hosted a 'Briefing and Discussion on the outcomes of the Spending Review for the feed-in tariffs (FITs) scheme'. Eversheds attended this key stakeholders' briefing.

The key outcome is that the Government is characterising the amount of money available per year for FITs as a cap rather than a target. The stated amount is £360m for the FIT year 2014 / 2015. This is a 10% reduction in the previous target. DECC currently has no ability to change this amount nor the fact that it is a cap. The Government has always stated that if the target looked like it will be exceeded, and that there is to be 'higher than expected deployment' they would review and amend
the tariff rates. However, this was in the context of the FIT amount being a target rather than a cap.

A further concern was that Mr Barker stated that "greenfield" ground based solar PV was at risk of a reduction of a FIT. The reasoning for this was unclear but it appears to be as a result of the amount of FIT that would be paid to owners / developers of this type of installation. Mr Barker stated that the FIT was originally, and in his mind continues to be, for "consumers and communities". The inconsistency here is that if the concern is economic then this would affect all large scale installations that would benefit from FIT.

DECC are to review the outcome of the discussions in more detail but we would urge:

- clarity and certainty is provided at the earliest opportunity without unnecessary and unhelpful comments being made that result in uncertainty and therefore lack of funding
- there is a period of time during which there are no amendments to the FIT so that owners / developers can develop without risking a reduction in the FIT during the build-out phase
- that any review of the FIT is evidence based.

We would further urge that the rationale behind capping the FIT is revisited. Given the targets that the Government has set itself in relation to renewable energy, any U-turn is detrimental not just to the projects that require FIT subsidy, but also to the credibility of the UK as a place which has regulatory certainty, a key requirement for an investment.

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