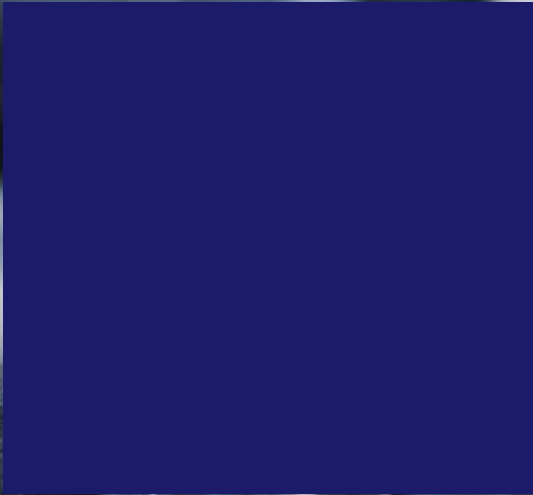




FRESHFIELDS BRUCKHAUS DERINGER

## Our food law practice

A unique landscape; a unique approach





'This established team is a top choice for food law issues.'

**Chambers UK 2010, ranked first tier for product liability: food**

Standout ranking at the *FT* Innovative Lawyer Awards 2008 for our study of industry attitudes to the EU's product recall regime.

'Observers highlight the firm's use of its solid international network in matters pertaining to product safety and product recall. The lawyers provide assistance to clients from a vast range of industries, including... food manufacturing.'

**Chambers UK 2009, product liability: mainly defendant**

## Introduction

Vast on-the-ground experience of complex food-related regulation. An unrivalled awareness of the brand reputational impacts of food safety crises. Outstanding technical legal skills. An understanding of how things work and how to get things done. A commitment to 24/7 client service throughout our 27 business centres around the world. Superb language and cultural skills. A practical, problem-solving approach.

These are some of the qualities our clients – and we – expect from the members of our food law practice. Because our team has these qualities, it remains widely recognised and respected as providing a unique approach to this unique regulatory landscape.

The food, beverages and feed sectors remain highly competitive and managing the commercial and legal risks associated with developing, manufacturing and marketing these products in the global market is increasingly challenging.

Businesses in these sectors face a uniquely complex and constantly changing regulatory environment in each of the jurisdictions in which they operate. They are increasingly required to respond strategically to major contemporary issues, such as:

- nutrition and health claims;
- sophisticated regulatory enforcement investigation into the causes of food safety outbreaks (including the use of pulsed field gel electrophoresis (PFGE) for bacterial strain identification);
- 'health warnings' and product labelling restrictions;
- regulatory developments facilitating group actions and funding;
- product classification and ingredients disclosure;
- 'obesity' claims and other liabilities arising from product misuse;
- product advertising and promotional restrictions; and
- new corporate citizenship and directors' duties requirements.

This brochure briefly explains who we are and what we do. Most importantly, it explains how we can use our knowledge of your sector – and of the consumer, industry and regulatory attitudes that are driving rapid change within it – to help you formulate proactive strategies in response to the legal issues you face and the deals that you do.

Also included within this brochure are summary sheets addressing some of the regulatory issues mentioned above and other core topics, including:

- notification and recall obligations;
- best practice and regulatory enforcement;
- food hygiene and HACCP;
- labelling and consumer information; and
- regulating sustainability – carbon footprints and food miles.

Please take a closer look and feel free to contact us to discuss these issues.

## Diverse talents – one team

### Our lawyers

Our food law practice consists of a team of lawyers with extensive experience of advising clients in the food, beverages and feed sectors.

The team comprises specialist partners and associates within Asia, Europe, the Middle East and the US who have an in-depth knowledge of food law in its broadest sense and the regulatory framework that applies to businesses that operate in these sectors.

Members of the team have obtained unique experience of how food law operates in practice as a result of secondments to the in-house teams of major industry players and working closely with national and international regulators and lawmakers.

### Our group

We were one of the first law firms to develop specialised sector groups, such as our Consumer and Healthcare Goods (CHG) group, that integrate knowledge and experience of the market in which you operate with world-leading skills in our industrial legal practice areas.

The development of a dedicated food law practice within our CHG sector group means that we are uniquely placed to offer clients co-ordinated and rapid access to solutions to sector-related issues irrespective of where they arise and in a cost-effective way.

### Other areas of practice

In addition to our core practice of assisting clients with complex food safety and regulatory compliance matters, as a firm we have also acquired an international reputation for advising food, beverage and feed businesses in the context of:

- antitrust, competition and trade;
- public and private mergers and acquisitions;
- private equity;
- dispute resolution;
- environmental and planning law;
- the low carbon economy;
- employment, pensions and benefits;
- intellectual property (IP) and information technology (IT);
- structured and asset finance; and
- insurance coverage.

'With its strong international platform, the firm is able to tap into localised expertise across the globe.'

*Chambers UK 2010, product liability: mainly defendant*

Law Firm of the Year, Western Europe  
*PLC Which Lawyer? Awards 2007-09*

International Law Firm of the Year  
*PLC Which Lawyer? Awards 2005-08*

Global Law Firm of the Year  
*Who's Who Legal 2009*





'The four-partner, London-based team of this "damn good firm" and international powerhouse is a core part of Freshfields' international product risk and liability practice. As such, it often finds itself as worldwide co-ordinating counsel for large multinationals on defence of claims and regulatory compliance. Offering "superb consistency and quality in all jurisdictions," the team handles a broad mix of work for clients... advising on matters ranging from labelling, product recall and regulatory compliance to the product risk and liability aspects of corporate transactions.'

**Chambers UK 2008, product liability: mainly defendant**

Environment, Planning and Regulation  
Law Firm of the Year

**JUVE Awards 2008-09**

## Global lawyers – specialist food law expertise

### Our regulatory expertise

2010 is the fifth anniversary of the general framework law on food safety (Regulation (EC) 178/2002) coming into force. Our lawyers have been identified as market leaders in advising global food manufacturers and retailers on the implementation and ramifications of the EU food law regime flowing from this, including on product quality controls and HACCP analysis, as well as the use of nutrition and health claims in product promotion and labelling, and 'competitive regulation'.

We have also advised a number of major clients on the operation of comparable international regimes on notification, product recall and other corrective action requirements. For those clients that already have highly sophisticated recall systems in place, we offer peace of mind when facing issues beyond the scope and scale of those previously handled. In 2008, we published a major study on the subject of product recall in the EU, which contains practical advice based on our experiences (see [www.freshfields.com/publications/pdfs/2008/mar10/21238.pdf](http://www.freshfields.com/publications/pdfs/2008/mar10/21238.pdf)).

The team has assisted clients with managing multi-jurisdictional regulatory investigations and enforcement proceedings, ensuring that they are able to navigate successfully the different attitudes and drivers that inform regulatory decision-making in different countries.

Where necessary, we have also helped our clients bring legal challenges to decisions made by regulators and to legislation. For instance, we advised on the ground-breaking judicial review and interim relief challenge to the validity of EU labelling requirements under Directive 2002/2/EC. In this case, the European Court of Justice – for the first time at the behest of a private party – annulled part of a directive as a disproportionate interference with commercial rights.

The team also has a strong litigation capacity with an excellent record of handling contentious product liability claims and consumer complaints, including cross-border litigation. This function has become increasingly important to leading global businesses in light of recent predictions that the product liability sector will experience an increase in class actions.

### Our regulatory monitoring unit

Our food law team is supported by a regulatory monitoring unit designed specifically to deal with the challenges faced by businesses with leading global brand portfolios in understanding and managing the risks created by disparate regulatory regimes in multiple jurisdictions – including the 'disharmonised harmony' of the EU and Member States' legal regimes. This understanding provides the platform for delivering highly cost-effective, strategic advice.

The unit addresses specific client needs relevant to multiple jurisdictions. In doing so, it provides the following services:

- review and comparative analysis of different regulatory regimes;
- real-time monitoring and analysis of regulatory developments; and
- electronic management of multi-jurisdictional information.

The unit has an established network of lawyers in over 127 countries, with whom it works closely on regulatory matters. These comprise the firm's network of international offices and relationships with one or more of the leading local law firms in other jurisdictions. Many of the local lawyers have been working with the unit for over five years. We have a network of trust and confidence, but we are also happy to work with clients' preferred lawyers.

## A leading international law firm – with local expertise

### Our international network

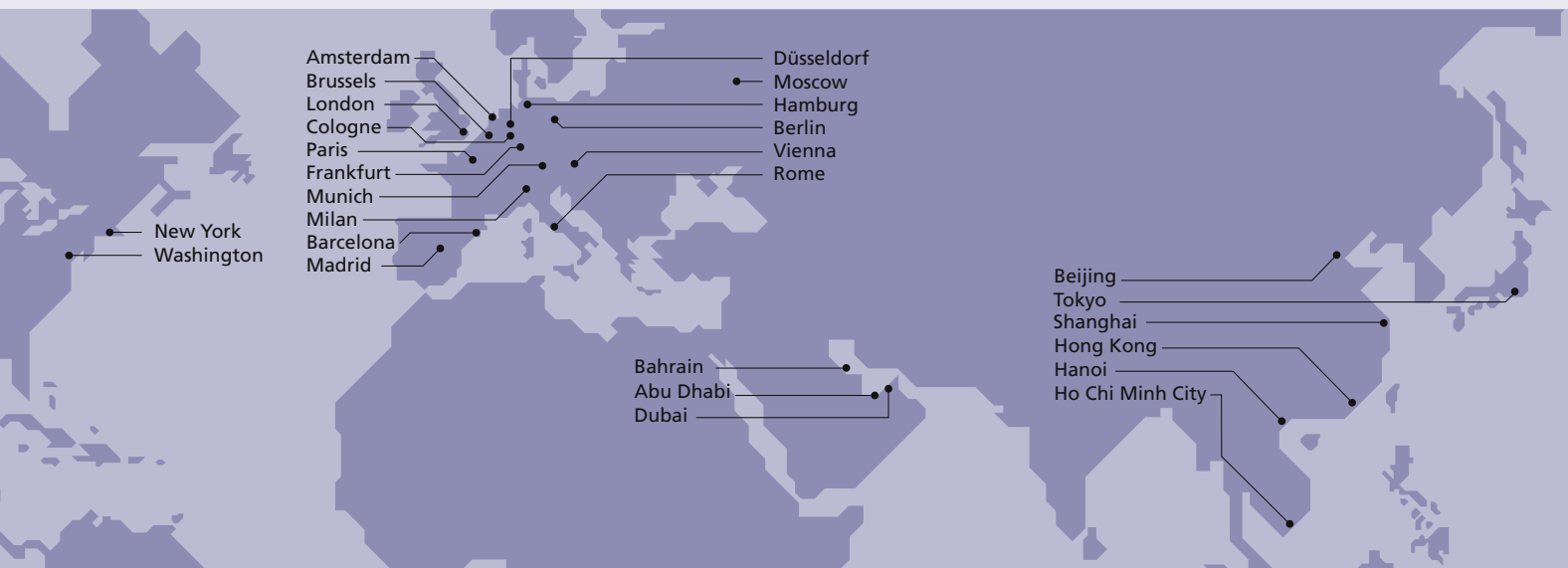
At Freshfields Bruckhaus Deringer we provide our clients with exceptional advice that makes a real difference to their businesses. This approach demands the highest standards of intellectual rigour and service delivery as we strive to exceed our clients' expectations.

Our international approach is founded on leading local capabilities and experience, backed up by the knowledge and experience of the wider firm.

With over 2,400 lawyers in 27 key business centres around the world, we provide a comprehensive service to national and multinational corporations, financial institutions and governments.

We have a wealth of expertise in our chosen practice areas – areas selected because of their critical importance to our clients. But we also invest in developing the specialist industry knowledge of our people so that they can combine their legal skills with genuine understanding of the markets in which our clients operate. This approach enables us to go beyond simply responding to today's issues.

We think ahead – identifying the challenges of the future and advising our clients on how best to meet them.



## Food safety – notification and recall



### Introduction

2010 is the fifth anniversary of the general framework law on food safety (Regulation (EC) 178/2002) coming into force in the EU. It also follows a period of close scrutiny by regulators in the US and the People's Republic of China (PRC) of the robustness of their food safety notification and recall regimes. Now is therefore a good time to review the effects of the product recall and notification obligations imposed in the EU and how they compare with similar obligations elsewhere.

The EU continues to pursue its policy of strengthening consumer confidence in food safety and harmonising laws and regulations to ensure the free movement of food and feed, with the inevitable consequence of increased regulation of the food industry.

### Which obligations affect me most?

The general framework law created new obligations for all businesses in the food chain, from primary producers to retailers. This has meant that food business operators (FBOs) must:

- ensure the safety of food within their businesses at all times;
- not market food that is unsafe; and
- maintain effective tracing systems and records.

For this reason, many FBOs have interrogated their incident management plans over the past five years to address food safety. The question to be answered is whether they have sufficient training and resources to ensure that, upon being made aware of a potential food safety problem, they are able to carry out the required risk assessment, management and communication.

### How has the definition of 'unsafe' food been applied?

Several high-profile cases in the first five years of implementation have emphasised that:

- under the regime, food is unsafe if it is considered to be injurious to health or unfit for human consumption;
- safety must be assessed by reference to conditions of use, information provided to the consumer and consumer vulnerability; and
- regulators have repeatedly adopted the precautionary principle as a basis for action. This has allowed intervention where decisions have to be made to protect health but scientific information about the risk is inconclusive or incomplete in some way.

As a result, the past five years have demonstrated how sensitive the trigger can be for food recall and highlighted the enlarged, and increasingly sophisticated, role of food law regulators in overseeing crisis responses.

### Which changes have proved to be significant?

The broad definition of unsafe food has been extremely significant, as reflected by the attention paid to it in extensive EU and Member State regulatory guidance. The general framework law obliges FBOs to take reactive steps if they 'have reason to believe' that food for which they are responsible is unsafe. These steps include withdrawal, recall and notification to regulators.



These obligations mean that it has become difficult for companies to characterise a recall as 'voluntary', which has public relations as well as insurance implications. Establishing whether an obligation to notify has arisen is particularly problematic. It relies on a number of ill-defined concepts that, despite the publication of extensive guidance by the European Commission and many national regulators, remain difficult to apply in practice. In the UK, the Food Standards Agency (FSA) has advised FBOs to notify as soon as an 'incident' – defined as 'any event where, based on the information available, there are concerns about actual or suspected threats to the safety or quality of food that could require intervention to protect consumers' interests' – has occurred.

Therefore, the first five years of this regime have shown it to be crucial for FBOs to consider the following key questions when deciding whether to notify.

- When will an FBO have reason to believe its food is unsafe?
- Has the product been 'placed on the market'?
- Has it left your 'immediate control'?
- How 'immediate' does notification have to be?

Despite the volume of non-binding guidance published, the precise amount of information that must be notified also remains uncertain. This is significant because a regulator that receives information that is incomplete but indicates some risk to public health is now likely to feel obliged, on the basis of the precautionary principle, to seek or to implement robust corrective action and to ensure that its counterparts across the EU and elsewhere are informed (see below on the EU's Rapid Alert System for Food and Feed (RASFF) and the International Food Safety Authorities Network (INFOSAN)).

### **The internationalisation of a food safety crisis – RASFF and INFOSAN**

RASFF is primarily a tool for exchange of information about food and feed between EU competent authorities when a risk to human health has been identified and measures have been taken, such as withholding, recalling, seizing or rejecting the products concerned. It consists of:

- alert notifications (if the food is on the market and immediate action is required); and
- information notifications (if a risk has been identified but immediate action is not needed because the product is not yet on the market).

RASFF's prominence increased significantly over the first five years of the operation of the notification obligations under the new EU food law regime, resulting in an unparalleled exchange of information by regulators. In 2008, 1,728 notifications (534 alert and 1,194 information notifications) were exchanged through RASFF (in 2007, there were 961 alert and 2,015 information notifications). Data for 2009 is not yet available.

If the number of RASFF alert notifications has begun to decrease, the scope of the information exchange becomes broader year-on-year. Since 2005, RASFF has been linked with INFOSAN (the network established by the World Health Organization for the dissemination of global food safety information) as a 'focal point' for information exchange and as its emergency contact point. As such, RASFF is contacted by INFOSAN if there is a major, international, non-EU contamination

or food safety emergency, and RASFF will notify INFOSAN if an emergency arises within the EU.

INFOSAN has faced its first major challenge with its handling of the melamine contamination of milk powder primarily manufactured in the PRC in 2008. Its emergency surveillance system detected the contamination and requested further information from the Chinese government. Within just five days an alert was issued through the INFOSAN network and a global food safety incident was in play. Following that, regular update alerts were issued to the entire network and specific alerts sent to countries known to have imported contaminated products.

### **What does this mean for me?**

The use of RASFF and INFOSAN means that information about product crises spreads across the EU and beyond within a shorter period of time than ever. This increases the risk of regulatory intervention and media interest beyond the countries where any withdrawal or recall action is taking place.

This has serious strategic implications for any FBO involved in a product crisis. A company may choose in the early stages to make 'courtesy' notifications in countries that are not affected by a recall, to reassure regulators that there is no risk to their consumers (although such a strategy itself carries clear risks of escalation). Alternatively, it may seek to convince the authorities it initially notifies that no RASFF notification is required (eg on the grounds that the risk in question should not be classified as 'serious'). At their most extreme, the systems result in the immediate exchange of data among all 177 members of INFOSAN, including the 27 EU Member States, the US, Canada, Japan and Australia.

RASFF and INFOSAN require that a cautious media and consumer information strategy should extend beyond those countries that are subject to the corrective action. Further, they reinforce the need for sophisticated regulatory monitoring systems to ensure you know that your product complies with food law wherever it is sold.

## Food safety – best practice and regulatory enforcement



### Best practice and benchmarking

In the consumer products industry, and particularly in the food and drink sector, complying with legislative requirements is not enough to gain the confidence of regulators or consumers: manufacturers and importers are often expected to achieve industry standards that surpass legislative norms.

Satisfying ‘soft law’ requirements by benchmarking against industry standards, keeping pace with market best practice and introducing product stewardship are important in successfully defending regulatory and litigation challenges.

Implementing best practice ensures a proper level of accountability on an international basis and leads to the highest standards. It maximises food business operators’ (FBOs) ability to rely on the ‘due diligence’ defence (which applies to certain breaches of UK food law).

Benchmarking enables comparison between an organisation’s processes and best practices within the industry. It can form the basis of quality management and continuous quality improvement. For this reason, regulators increasingly tell industries to benchmark their practices by reference to industry standards or a good manufacturing practice (GMP). Failure to do so is likely to cause regulatory concern even if legislative requirements have been met. Furthermore, consistency with a GMP may offer a defence in criminal or civil proceedings.

### Auditing the supply chain

Auditing the supply chain for food safety and hazard analysis critical control point (HACCP) compliance continues to be fundamental for businesses supplying products to EU consumers, given:

- EU requirements on food traceability;
- the need for effective benchmarking (as discussed above); and
- a number of high-profile food recalls over the past few years.

But, as well as using audits to ensure the supply of safe food, the industry is increasingly relying on them to ensure that product sourcing is ethically responsible and sustainable. This raises difficult legal considerations given that:

- the question of working conditions in the global supply chain is an increasingly sensitive topic;
- the proliferation of codes of conduct has led to duplication of efforts and, in some cases, has sent a confused message as to what is expected; and
- the criteria against which a supplier is audited need to be transparent, sensitive to the differences in supply conditions between markets and responsive to changing regulatory requirements and consumer concerns.

### Investigations

In the light of the above, FBOs are increasingly required to undertake internal investigations, as well as audits, to:

- determine the causes of internal breaches of food safety and hygiene procedures and the extent to which the FBO may face criminal and/or civil liability;
- re-affirm best practice; and
- maximise their ability to rely on the ‘due diligence’ defence.



Complex legal issues need to be addressed before any investigation starts, including:

- employees' duties to co-operate and their rights to separate legal representation;
- whether findings can be protected from disclosure by legal privilege;
- dealing with conflicts of interest and other ethical issues;
- effectively managing a crisis (eg how to advise senior management) and complying with corporate governance requirements if failings are identified; and
- notification obligations to the authorities and insurers.

FBOs are also more likely than ever to be subject to sophisticated regulatory enforcement investigation into the causes of food safety outbreaks (such as the use of pulsed field gel electrophoresis (PFGE) for bacterial strain identification).

Our global investigations practice offers clients an integrated, cross-border investigations team with global regulatory capabilities. It helps multinational businesses manage the mounting risks posed by cross-border investigations from regulators and prosecution authorities from around the world. The practice is based in 13 jurisdictions and comprises 67 partners and 142 lawyers.

### **Regulators' powers**

Regulators' investigative powers are determined at a Member State level. In the UK, the powers include the right to enter and inspect premises, to seize and detain records without notice during 'dawn raids' and to conduct interviews with employees under caution.

The UK's Regulatory Enforcement and Sanctions Act (RESA) 2008 has considerably enhanced local authorities' powers by enabling them to apply for ministerial authority to use new civil sanctions against an FBO.

### **Who can be liable?**

The primary obligations under food safety legislation in the EU fall on FBOs. In addition, in the UK, individual directors and officers of an FBO (including those purporting to act in such a capacity) may also be personally liable if an offence is committed with their consent or connivance or is attributable to their neglect.

### **What sanctions can be imposed?**

Sanctions for non-compliance are determined by each Member State's national legal system and are not harmonised across the EU. They will generally take the form of fines (for the FBO and/or individuals), but may also include imprisonment. For example, failing to initiate withdrawal or recall procedures is punishable in the UK by a potentially unlimited fine and/or imprisonment for up to two years.

## Food safety – hygiene and HACCP



### Introduction

Since the EU's food hygiene package was implemented, food hygiene rules have been clearer, but – in some cases – far stricter, having been consolidated in a single, transparent hygiene policy applicable throughout the food chain 'from the farm to the fork'.

- The onus is clearly placed on food business operators (FBOs) to ensure that food reaching EU consumers is safe. This applies to all FBOs, including caterers, primary producers (farmers and growers), manufacturers, distributors and retailers.
- All FBOs, except primary producers, must have a hazard analysis critical control point (HACCP) system in place to identify critical points where food safety hazards arise. They must also implement and maintain permanent food safety management procedures to control hazards and regularly verify that the procedures adopted are working effectively.
- Effective record-keeping remains essential given that the accuracy of new scientific techniques for identifying microbial contaminations (including the use of pulsed field gel electrophoresis (PFGE) for bacterial strain identification) has increased the risk of prosecutions for food hygiene failings.
- The European Commission has frequently said that the hygiene package means that imports must meet the same high standards as are demanded of EU products or they will not be allowed access to the EU market.

### Is a formal HACCP procedure necessary for all food businesses?

HACCP principles allow for flexible implementation, particularly for small businesses, which may adopt a 'HACCP-light' approach. This allows such businesses to assess and control hazards without the need for a formal HACCP procedure, especially if food is handled under well-known and widely taught procedures, such as in restaurants, the bakery and confectionery sector or retail outlets.

However, FBOs still need to undertake an additional examination for hazards that may not be predicted.

### Does my business need to be registered?

All FBOs must be registered with the competent authorities before opening. The premises of certain types of businesses must be approved rather than registered, including those producing meat and meat products, eggs, milk, dairy products and fish products.

### What training must I give my staff?

Food handlers must receive adequate supervision, instruction and/or training in food hygiene to enable them to handle food safely. Those responsible for the development and maintenance of HACCP procedures must have sufficient knowledge and understanding of HACCP to ensure that the procedures are suitable.



Adequate training does not necessarily involve participation in formal training courses. It could be achieved through information campaigns from third parties or competent authorities.

Training should be proportionate to the size and nature of the business.

### **Guidance on the food hygiene package and good practice**

The EU has issued formal guidance documents to help FBOs understand the legal requirements on the hygiene of foodstuffs, HACCP procedures and principles, import requirements and rules on official food controls.

In addition, the food hygiene package has encouraged the development, dissemination and use of guides to good practice for food hygiene and applying the HACCP principles. There are primarily two types of guides.

- National guides: Member States' food safety authorities have developed guidance notes to be read in conjunction with the EU regulations. For example, the UK Food Standards Agency published its Principles for Preventing and Responding to Food Incidents in April 2008, which aim to summarise best practice for FBOs.
- Community guides: if a Member State or the Commission considers that there is a need for uniformity, the Commission may develop Community guides on a particular issue.

Although these guides are not legally binding:

- they can be used on a voluntary basis as an aid to compliance with obligations; and
- if an FBO is using such a guide, the competent authorities should take it into account during enforcement activity.

The Commission has also set up a register making the national guides available to Member States and FBOs. To date, the available guides cover areas as diverse as beekeeping and HACCP systems for use in abattoirs and meat-cutting plants.

## Labelling and consumer information – new challenges



### Introduction

In the current age of health-consciousness, allergy-awareness and fears over ‘obesity’ and ‘irresponsible drinking’, clear and accurate labelling has become a crucial concern for food business operators (FBOs), in terms of legal obligations and brand management as well as the obvious need not to mislead or cause harm to the consumer.

### Nutrition and Health Claims Regulation 2006

When this regulation was adopted three years ago, the EU said: ‘Only products offering genuine health or nutritional benefits will be allowed to refer to them on their labels.’ It has sought to achieve this goal by ensuring that any claim made on a food label in the EU is clear, accurate and substantiated.

It has imposed significant additional information requirements on manufacturers making (on product labelling or in advertising):

- nutritional claims (eg ‘low fat’ or ‘high fibre’); and
- health claims (eg that a product reduces disease risk or aids weight loss).

Although this regime purports to enhance consumers’ ability to make informed and meaningful choices, the food industry has – justifiably – been highly critical of the delays and poor communication that have plagued the introduction of the regulation.

Recent experience has also shown that:

- the role of the European Food Safety Authority (EFSA) in assessing applicant submissions to enable the EU to produce a final list of permitted health claims has been exceptionally controversial, with difficult questions arising about the protection provided to proprietary data and whether the type of claim wording approved by EFSA is readily comprehensible to consumers; and
- enforcement authorities have interpreted the regulation’s requirements expansively, with marked differences of approach between and within individual Member States.

Accordingly, manufacturers need to be sophisticated in the way they approach the use of any claims that may fall within the scope of the new regime. They are likely to require specialist advice to obtain successful authorisation of claims and to challenge regulatory decision-making that adversely affects their commercial interests.

### Consumer Protection from Unfair Trading Regulations 2008

These regulations implement the EU’s Unfair Commercial Practices Directive and apply to all consumer products, not just food. They impose a general prohibition on commercial practices that:

- are contrary to the need for professional diligence; and



- materially distort (or are likely to materially distort) the average consumer's economic behaviour with regard to the product.

FBOs are guilty of an offence if they knowingly or recklessly engage in such practices.

In addition, the regulations prohibit specific misleading actions, omissions and aggressive commercial practices on a strict liability basis: ie regardless of whether the trader knowingly or recklessly engaged in them.

### **Proposed EU regulation on provision of food information to consumers**

In January 2008, the European Commission adopted a controversial proposal for a regulation on the provision of food information to consumers. This was designed to simplify and consolidate existing labelling legislation throughout the EU and is awaiting a decision of the European Parliament, with June 2010 set as the indicative date for the plenary sitting.

The new regulation aims to create a clearer, fairer system for all food operators in Europe, by laying down clear-cut rules that are proportionate and flexible to the constantly changing market and that do not pose unnecessary burdens. Key features include:

- the introduction of a mandatory declaration of certain nutrients on the front of packs; and
- improved legibility of information and labelling on 'alcopops' to show their energy content.

This development reflects the Commission's view that the EU needs a system that gives consumers easy access to the most important and relevant information on food labels, while still encouraging industry innovation.

It is envisioned that a three-year transition period will apply once the regulation has come into force, with an additional two years for small companies.

The precise impact of this new regime remains to be seen and food manufacturers will need to analyse their new obligations carefully.

### **Country of origin labelling (COOL)**

Consumer pressure for clearer COOL has increased since the 2008 pork dioxin contamination issue in the UK and Ireland. The Food Standards Agency (FSA) produced revised guidelines for COOL in October 2008. At an EU level, the proposed EU regulation on provision of food information to consumers (discussed above) would retain voluntary COOL for most products, unless the absence of country of origin information could mislead consumers. The existing separate rules for beef, veal and certain other products will continue to apply.

Unlike this largely voluntary regime, the US adopted mandatory COOL rules for meat and other products in 2009. This move to a mandatory regime is indicative of a broader trend.

Research commissioned in the UK by the FSA and published in January 2010 shows that even though COOL is not necessarily a top priority for UK consumers, confusion remains over what the phrase ‘Produced in the UK’ actually means. This is likely to reinforce the view of regulators that there is a need for greater clarity on the labels on some of our most popular foods.

### **Food miles**

Food miles on product labelling are coming under unprecedented consumer and regulatory scrutiny. Although some commentators believe that the notion of food miles will be superseded by a lifecycle carbon footprint, it remains important to consumers that they understand how far food travels – not least because many are keen to support local producers. This is despite the fact that new evidence suggests that much air-freighted food may be ‘greener’ than domestically produced food.

The food miles debate is not just about global warming, but also about the use of sustainable raw materials, supporting particular local economies and ethical supply chains (see the sheet on ‘Food safety – best practice and regulatory enforcement’).

## Food sustainability and security



### Introduction

The Copenhagen summit is over, but the quest for a climate-friendly future lives on. Similarly, although the recent spike in global food prices has eased off, governments around the world are worried about food security. This raises complex questions about the interplay between low carbon and sustainability trends and how they apply to emerging and mature markets.

The strategic implications of these trends for the food industry are being influenced by factors including:

- the relationship between climate security and food security, and the role of evolving science in that debate;
- the use by industry of regulatory advocacy to seek to align emerging low carbon initiatives and mandatory carbon-reporting requirements;
- how regulators aggressively police the low carbon claims/'greenwashing' made to consumers; and
- which businesses will benefit from the emerging trends – and which will not.

In particular, growing public awareness of and interest in sustainability issues (such as carbon footprints and food miles) and food security concerns are having a dramatic effect on the food industry.

### Carbon footprints

Consumers and consumer action groups are becoming ever more determined to understand and scrutinise the green credentials of snack, food and beverage producers. The more industry responds to this, the more interested regulators become in turning voluntary carbon-labelling best practice into law.

Major food companies continue to sign up to schemes to measure the amount of carbon emitted during food production. This is resulting in food labelling that shows consumers the amount of greenhouse gases produced in the manufacture, delivery and disposal of a food product. Under the most prominent UK scheme, administered by the Carbon Trust, businesses using the labels must commit to a 'reduce or lose' policy: if they do not reduce their organisation's carbon footprint within two years, the Carbon Trust will withdraw the carbon label.

The British Standards Institution (BSI) has joined forces with the Carbon Trust to develop a Publicly Available Specification for carbon labelling (PAS 2050). This drive to standardise assessment approaches reflects a global trend. The UK standard could form the basis for other such schemes worldwide or, ultimately, an international scheme. Equally, compliance could become mandatory or bring benefits in future regulatory contexts.



Other international standards have already been developed. Although measurement methods and questions of scope are controversial, they are central to carbon footprinting. A lack of consistency between schemes and auditors means that any carbon strategy must be chosen with care – especially in view of potential links with developing mandatory regimes. The UK government, for example, published guidance on carbon neutrality at the end of 2009, while also consulting on the role of the government in defining carbon-related terms.

In the meantime, the food industry is left to consider whether lessons learned from the use of competing food safety standards and other labelling schemes (including ‘traffic light’ nutritional information on packaging) suggest that it should:

- push for a harmonised template for carbon labelling (especially for air-freighted food); or
- adopt company-specific eco-labelling strategies (at the risk of increasing consumer confusion with inconsistent food labelling).

In relation to their own energy use, many manufacturers and retailers in the food industry will soon be subject to measurement, reporting and management obligations under UK climate change regulations. The new scheme is aimed mainly at the energy use of buildings, including lighting, heating and refrigeration. Although this will not require a full analysis of supply chains, it is expected to force many organisations to acquire new energy-monitoring equipment and procedures. In addition, all regulated organisations will be ranked in a public league table according to their carbon-reduction performance.

Efforts to ensure sustainability continue to be driven by industry and consumers, but further regulation is inevitable because:

- the EU has agreed to reduce carbon dioxide emissions;
- the UK has amended its company law to state explicitly a director’s responsibilities in respect of the environment for the first time; and
- the UK has announced that it is planning to reduce the environmental and social costs of food transport in the UK by 20 per cent by 2012.

### **‘Greenwashing’**

With allegations that the communication of questionable environmental claims (or ‘greenwashing’) is on the rise, regulators are paying closer attention to the merits of green/carbon claims used by the food industry. One regulatory response is the development of guidance and standards against which to measure such claims. In just one illustration of this new dynamic, the UK’s television and print media advertising codes have been overhauled to address the question of greenwashing. Legislation prohibiting labelling that misleads consumers is increasingly being applied to green/carbon claims.

## Food security

There is also a growing concern about the potential for major disruption to domestic food supply chains as a result of global pressures such as climate change, international energy concerns, geopolitical tensions and international terrorism.

The increased emphasis by governments on food security was illustrated when, in January 2010, the UK unveiled the Food 2030 strategy, which sets out plans to boost UK food production while reducing the resulting environmental impacts. Reducing, re-using and reprocessing waste is a major objective of Food 2030, with authorities working with producers to find new ways to increase recycling and make packaging lighter – which would be cheaper and use less fuel during transport. Food 2030 also reinforces the need for the development of better storage systems and the application of novel technologies to produce energy from food waste.

The precise legal implications of global pressures remain difficult to discern, but they raise the need to ‘stress test’ certain supply chains to secure production and supply. A number of relevant issues include:

- the need for robust processes to predict when a supplier may be unable to meet its obligations;
- reliance on any one supplier or region – what would be the impact if suppliers failed to meet their product or packaging obligations?
- the need to review the strength and depth of force majeure and indemnity clauses in supply contracts and to consider whether current insurance cover is adequate; and
- the need to review existing contracts with customers to ensure they are capable of adapting to unexpected price and supply developments.