

Consuming ISSUES

Current topics in the consumer products industry



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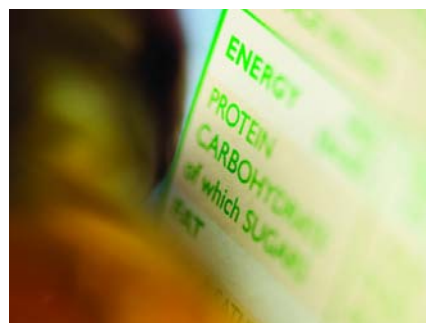
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Consuming issues is prepared by the Consumer Products group of CMS Cameron McKenna. It should not be treated as a comprehensive review of all developments in this area of law nor of the topics it covers. Also, while we aim for it to be as up-to-date as possible, some recent developments may miss our printing deadline.

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

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Preparing to face a crisis



Welcome to the Winter 2008 edition of our Consumer Products Bulletin, where we take a look at some of the legal issues affecting the industry.



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There is no doubt that the consumer products industry is coming under increasing economic pressures. With consumers buying less, raw material and energy costs fluctuating and regulation on the increase it is a difficult time for manufacturers and retailers. So, in response, this edition of our bulletin looks at some of the key issues you will be facing and offers guidance on what you can be doing to address them.

Keeping abreast of competition rules is particularly crucial in the current economic climate where deep discounts and price wars are rife. Our first article looks at the dangers of competition law and how companies can help to mitigate the risks, especially important given the intense scrutiny of the sector by the Office of Fair Trading (OFT).

We then look at the changing face of regulation within the cosmetics sector including the consolidation of the existing patchwork of legislation that is the Cosmetics Directive into the new Regulation as well as the guidance available around cosmetics advertising, in light of the ongoing development of new and innovative products continuing to push the boundaries in terms of claims.

Food plays a vital role in everyday life but the importance of food labelling from a legal perspective has undoubtedly gained importance in recent times. With the number of products available continuing to grow, and customers wanting to compare the merits of one product to another, the information

provided on food labels is critical. This article focuses on issues and trends concerning the labelling of foods and the regulation that surrounds it.

With a number of important changes to employment law just around the corner our next article looks at some of those proposed changes and their likely effect on the consumer products industry. Such changes include the Temporary Agency Workers Directive, the Equality Bill and the Employment Bill. Read on to learn about how they may impact on your business.

Our final article looks at how companies can be prepared to face a crisis. No business in this sector is immune to a crisis, which can range from product recalls, environmental incidents through to corruption charges or investigations. Here we look at what you can do to prevent a crisis happening in the first instance as well as how to respond if such a crisis occurs.

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

Tough times on the high street – keeping on the right side of the competition rules



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With daily headlines warning of an existing or imminent recession, and with consumers hard hit by inflation and the rising cost of living, the consumer goods sector is coming under increasing economic pressures.

Consumers are spending less, sales on the high street are declining and suppliers are pushing through increased manufacturing costs. For retailers, this is leading to intense pressure on margins leading to aggressive tactics to win sales from consumers – deep discounting and promotions, early sales and price wars.

This difficult climate is now combined with much greater scrutiny from the competition authorities. 2008 has been the year in which the regulators have got tough with the consumer products sector

as the UK's competition authority, the Office of Fair Trading (OFT), as well as other national competition authorities are increasingly being required to justify their actions by reference to consumer interest.

In 2008 alone, dawn raids and investigations have been commenced in the coffee, chocolate, cosmetics, and wine product sectors by the Belgian, German and Spanish authorities (the German authorities raiding both coffee and chocolate manufacturers). The European Commission has launched an investigation into the detergents sector with dawn raids on at least five manufacturers in Austria, Belgium, Czech Republic, Germany, Hungary, Italy and Spain. In Germany, the Federal Cartel Office in February 2008 fined four household goods companies €37 million for price fixing and exchanging information about retailer rebates on shower gel, washing-up liquid and toothpaste and in July 2008 fined makers of luxury cosmetics

“This difficult climate is now combined with much greater scrutiny from the competition authorities. 2008 has been the year in which the regulators have got tough with the consumer products sector.”

and perfumes a total of €10 million for systematically exchanging information. In July 2008, the Russian Government announced that it is to focus on suspected cartels within the food and fuel sectors in an effort to curb rising inflation. Within the UK, the OFT has fined dairy producers and retailers £120 million and has fined at least six tobacco producers and retailers £132 million for exchanging pricing information. Further, in April 2008 the OFT launched a series of dawn raids and investigations against grocery retailers and suppliers.

What are the competition law dangers?

Price coordination

The greatest danger is the temptation to coordinate prices. The consumer products sector is characterised by branded and homogeneous goods with transparent pricing. Price will often be the key factor in a consumer's buying choice, particularly

in times of economic pressure and thus for those consumer products in which the retail market is relatively concentrated, such as the grocery, electronics, toys, and health and beauty sectors, there is often intense price competition leading in times of economic downturn to well publicised 'price-wars'.

The desire by retailers to match or undercut competitors in such conditions can create the conditions for price coordination, which at its most extreme can involve cartel activity. Indeed, the investigations and fines which have occurred in 2008 and are listed above all principally relate to the exchange of price information and price coordination.

The indirect exchange of information is an increasingly common focus of OFT investigations into the consumer products sector and featured in both the tobacco and dairy cases.

In the tobacco case, the allegations against 12 tobacco manufacturers and retailers were that a number of the parties engaged in the indirect exchange of proposed future retail prices, as well as allegations that the parties entered into arrangements that restricted the ability of retailers to determine their selling prices by linking the retail price of a manufacturer's

brand to the retail price of a competing brand. In late 2007 and early 2008, seven parties including three supermarkets entered into early resolution agreements with the OFT and accepted fines totalling £120 million for the indirect exchange of information relating to the retail prices of dairy products.

Indirect information exchange occurs when either a retailer or supplier becomes the conduit for pricing (or other commercially sensitive) information between competing suppliers or retailers. For example, in the tobacco case the OFT alleged that Imperial Tobacco and Gallaher used Asda, Somerfield and Shell as conduits, and that Sainsbury's exchanged information with Tesco via Imperial Tobacco.

Such an exchange usually takes place at the account team level. So, for example, one retailer's buying team is likely to have asked or been informed perhaps verbally or by way of email of the future retail pricing of the other retailer by the sales team of, for example, a tobacco company. It is not necessary for detailed information to be exchanged, or for the exchange to last over a sustained period of time for an infringement finding. Brief information received by a manufacturer, such as the fact that one retailer will be dropping prices the following week and

“The greatest danger is the temptation to coordinate prices. The consumer products sector is characterised by branded and homogeneous goods with transparent pricing.”

which is then passed on by the manufacturer's sales team to another retailer may be sufficient for the OFT to find a competition law breach and significant fines to be awarded.

There may be more direct forms of price exchange such as that which occurred between the cosmetics and perfume manufacturers who were fined €10 million by the German Federal Cartel Office for systematically exchanging information on sales figures, pricing, advertising campaigns and product launches which had the effect of restricting competition in the market. At its most extreme, exchanging information as part of an organised and coordinated effort



“Difficult economic conditions can give rise to companies engaging in various types of conduct that may be found to be abusive.”

Taking advantage of market share

Companies with a large market share will need to be particularly careful in using aggressive pricing in order to avoid any allegations that their conduct is abusing a dominant position and risking the imposition of fines.

There is no precise threshold above which dominance is presumed and the level will vary from market to market depending on its particular characteristics. As a rough guide, dominance is usually presumed where there is a market share of 40% or more.

Difficult economic conditions can give rise to companies engaging in various types of conduct that may be found to be abusive. Seeking to maximise sales by dropping prices to very low levels can risk allegations of unlawful predatory pricing where those prices are, for a sustained period, at below cost price. Manufacturers with dominant positions should be especially careful not to discriminate between retailers, many of whom may put strong pressure on the manufacturer to keep supply prices very low. Discriminatory pricing whereby a manufacturer may offer different discounts to different retailers for the same products can constitute an abuse of a dominant position. Dominant manufacturers, keen to avoid their products being sold at a discount, should also be careful in refusing to supply any retailer. An objectively unjustifiable refusal to supply by a dominant undertaking will always be unlawful.

Mitigating competition law risks

At times such as these, when many employees keen to keep jobs, meet targets and secure bonuses may be tempted to

engage in unlawful commercial conduct, it is essential that strict compliance policies are put in place and are policed.

For a competition law compliance policy to be effective, training must be comprehensive. All new joiners should be trained as part of their induction and regular updates or refreshers should be provided to all staff. Particularly thorough and practical training should be given to sales and buying account teams. Particular emphasis should be given on the sales teams’ relationship with retailers and the limits on what information can and cannot be exchanged. For retailers, the reverse: buyers should be warned about facilitating the exchange of information between manufacturers and should be prohibited from using manufacturers to gain any information about the activities of competing retailers. Participation in trade association meetings or other trade events should also be closely monitored.

Sales teams should ensure that they have an up-to-date picture of their market shares and any pricing and promotional initiatives, particularly discounts, should be carefully checked to ensure that in circumstances where a dominant position may be held, prices are not predatory or discriminatory.

Given the current intense scrutiny of the sector by the OFT (and other competition authorities) and in light of the recognition by the OFT in its published guidance that the conditions for a cartel are more commonly found in times of general recession, implementing clear compliance measures within the day-to-day business practice of account sales, buying and marketing teams will help to avoid many of the competition law dangers.

between competitors to fix prices will constitute cartel activity. Cartel activity was a feature of the OFT’s investigation into price fixing of replica football kits in 2003 in which a number of sports goods retailers agreed with suppliers in a series of meetings to fix the resale prices of replica football kit. The OFT imposed fines totalling more than £30 million.

Resale price maintenance

The need for retailers to discount products can be unwelcome for some brand owners, particularly high-end or luxury brand owners. To maintain brand image and prestige, they may wish to prevent their products being discounted heavily. Fixing a resale price, imposing a minimum resale price, enforcing or using incentives to adhere to a recommended price or prohibiting discounting are all forms of resale price maintenance and all are considered a serious form of competition law breach, liable to fines. Lladro, the porcelain figurine producer, was found guilty by the OFT in 2003 of engaging in such conduct by preventing retailers from selling its products at a discount.



The changing face

of cosmetics regulation

Today’s manufacturers of cosmetic products face a myriad of challenges, such as changing consumer trends, new and expanding markets and the evolving environmental agenda. Moreover this year in particular has seen a number of regulatory developments that some would argue indicates a shift down the road to a tougher regulatory framework.



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Directive or Regulation?

At the beginning of the year the European Commission published a proposed Regulation to replace the existing Cosmetics Directive. The Regulation will do away with the current patchwork of legislation resulting from individual member states choosing to implement the existing Directive as they see fit. The European Commission’s proposal is currently under review and is expected to receive approval by the end of 2008, and to be finalised before the European elections in 2009. Whilst some fear that the changes will bring about even more regulation, increasing vigilance requirements and placing tougher requirements on non-compliant products, others embrace the proposals in the hope that it may

help to clarify the Directive’s numerous provisions and consolidate them all into one discrete document, saving companies both time and money.

The proposals include the clarification of what information must be contained within a cosmetic product safety assessment and the introduction of a centralised, electronic notification system for information that must be provided prior to a product being placed on the market.

In addition to its work on the proposed Regulation, the European Commission launched the CosIng (COSmetic INGredients) online database, to supply information in relation to some 15,000 cosmetic product ingredients in an accessible, consolidated and



regularly updated form. The Commission hopes that the database, which displays the chemical and internationally recognised names of each ingredient, so as to enable correct product labelling; the existence and type of any specific EU legislation in place for a particular ingredient; and hyperlinks to Opinions of the Scientific Committee on Consumer Products, will ease the process of ensuring that product reformulations are regulatory compliant – which is no small task in an industry that reportedly replaces or modifies around 25% of its products annually.

Just how compliant are your advertisements?

One area of regulation that the industry is no stranger to is that of advertising and media. Companies often find themselves subject to close media scrutiny and are often called upon to justify their media copy, whether for the ingredients it uses, the manufacturing processes it employs, or the effectiveness of its products and the claims associated with them. The industry is at the forefront of many scientific and technical advances and continues to push boundaries and develop new and innovative products. As it does so the claims associated with those products are subject to ever closer scrutiny.

In the past year several recent Advertising Standards Authority (ASA) adjudications highlight the fact that it has perhaps never been more important

for a company to be able to substantiate the claims it makes about its products and their efficacy. A recent ASA survey into the compliance of cosmetic product advertisements with the CAP Codes found an overall compliance rate of 93%. Although this compliance rate may appear to indicate an acceptable level of compliance to many, the ASA reported that it is was significantly lower than the rates of other sectors such as telecoms and gambling. The greatest cause for concern was the relatively low compliance rate for skin cream advertisements, with 19% (being 24 out of the 126 skin cream advertisements reviewed) held to be in breach of the Codes. Inadequate evidence for anti-ageing, skin-regenerating, and skin-rejuvenating claims and unsubstantiated claims of a product's ability to firm and tone the skin were identified as some of the main areas causing concern at the ASA.

In response, the ASA has begun to focus its attention specifically on cosmetics advertisements, and in doing so has worked with the Cosmetics, Toiletries and Perfumery Association (CTPA) and Clearcast to develop industry specific guidance (Guidance). The Guidance is based upon the need for the consumer to be well informed of product characteristics and is intended to help advertisers understand more clearly the framework in which cosmetic claims appear, and the way in which cosmetic claims may be classified. It sets out a

framework for establishing how claims should be prepared, supported and assessed. It is widely hoped that the Guidance will rectify industry concerns regarding the fairness and consistency of the treatment afforded to cosmetic product advertisements.

Some of those areas covered by the Guidance include:

- The importance of a common understanding of the meaning of various terms such as 'cumulative effect', 'permanent effect' and 'physiological action'
- the classification of claims into six distinct groups: sensory, performance, ingredient, product aesthetics, combination and comparison claims
- the nature, type and quality of evidence that could be used to support a claim
- guidance on the type, selection, conduct and reporting of studies.

Pharmaceutical, Cosmetic or Cosmeceutical?

Over recent years claims made in relation to various new cosmetic products have edged ever closer to the borderline with medicinal products, and in some instances medical devices. There has been some concern over how to classify this new generation of product and thus

ensure compliance with the relevant regulatory framework.

Directive 2001/83/EC relating to medicinal products for human use defines a medicinal product as 'any substance... used or administered... with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action.'

It is widely acknowledged that cosmetic products affect the physiology of the tissues to which they have been applied to a greater or lesser extent. However, this does not make them medicinal products. European Commission guidance on the demarcation between cosmetic products and medicinal products recognises this and makes clear that only where there is more than insignificant modification to physiological function can a product be classified as a medicine. Clearly therefore, if a cosmetic product's effect on physiological function is not caused through one of the above-mentioned actions and is not more than insignificant, it is not a medicinal product.

The Guidance concludes that insignificant effects on the metabolism are an inevitable part of any cosmetic product's physiological effect. However, this does make the product a medicinal one. If a product does not satisfy the definition of a medicinal product but satisfies the definition of a cosmetic product, it is a cosmetic product. It is perhaps worth noting therefore that given the above, and the overarching aim of the Guidance being to inform the consumer of a product's characteristics and preventing misleading claims, the industry should be wary of allowing products to be defined as 'cosmeceuticals', as has happened in some sections of the media.

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The question of whether a product is a cosmetic or a medicine is properly and legally the remit of the Medicines and Healthcare products Regulatory Agency (MHRA) and the Guidance rightly refers to the expertise of the MHRA's Borderlines Section. As developments in product innovation continue to be made it is perhaps inevitable that more and more borderline issues will be raised and it will be interesting to see how the regulatory framework can deal with these challenges and what future adaptations may need to be made.

As the industry continues to develop new and innovative products and pushes the boundaries in terms of claims and advertising, it is perhaps understandable that the rules governing advertising, including industry specific guidance, may need to develop to keep pace. However, the issue of changing the regulation governing product development, ingredients, safety and integrity is more polarising in the opinions it creates, with some left singing the benefits while others feel only an ever increasing burden. Whilst consolidating the existing patchwork of legislation that is the Cosmetics Directive can arguably only be seen as a benefit, the introduction of increasing vigilance and product safety requirements could be seen as potentially burdensome and some may argue unnecessary. Regulating any area of business requires a fine balance to be

drawn between being forward thinking enough so as to proactively legislate for likely future issues and not putting in place a framework that is too restrictive so as to have the effect of curtailing innovation and being over-burdensome. It will be interesting to see if and how this balance can be struck over the coming months.



Food labelling

issues and trends



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Although food has always played a vital role in everyday life, the importance of food labelling from a legal perspective has undoubtedly been rapidly gaining in importance in recent times.

Indeed, as the list of products available on the market grows ever longer, the risk of confusion on the part of consumers as to which product to choose and the relative merits of one product as compared to another become ever greater. Although there are numerous factors that can lead to confusion, it is clear that one of the most frequent traps into which consumers fall regards interpretation of the information that is provided on food labels.

In Europe, the issue of food labelling is regulated above all from the standpoint of protection of consumers' interests and health. A list of general principles relating to labelling of food products was elaborated at EC level as early as in 1993; in accordance with these rules, food labelling must above all be clear, to-the-point, understandable, verifiable, practical and characteristic of a given product, and – in particular – cannot under any circumstances mislead the consumer. However, it took several more years before a labelling-specific legal

framework was established in 2000, in Directive 2000/13 EC. This directive echoes the principles elaborated in 1993 by placing specific emphasis on protection of consumers and prohibiting all labelling that could be misleading as to the properties of a given foodstuff (e.g. its ingredients, characteristic traits, durability or origin), the effects that consumption of that product will induce, and in particular labelling that suggests that a given product has unique properties when in fact a number of products possess such characteristics.

The Directive provides a general framework that all other, more specific, labelling-relating legislation must comply with. A number of related acts regulate labelling issues with respect to specific food groups (e.g. foodstuffs intended for consumption by infants and small children, diet foods, dietary supplements etc.), and generally introduce further, more stringent labelling requirements.

Specific issues

European-level guidelines relating to labelling of foods intended for infants are particularly rigorous, and impose a number of restrictions. First and foremost, there is a prescribed name in the language of each member state for products aimed at infants aged up to six months and infants aged six months or more (in English: 'infant formula' and 'follow-on formula', respectively). In addition, infant formulae must be labelled with a statement to the effect that they are suitable for particular nutritional use by infants from birth when they are not breast fed, whilst the labels of follow-on formula products must state that they are suitable only for particular nutritional use by infants over the age of six months, that they should form only part of a diversified diet, are not to be used as a substitute for breast milk during the first six months of life and that the decision to begin complementary feeding, including any exception to six months of age, should be made only on the advice of professionals with the appropriate qualifications (doctors, nurses, pharmacists etc.). Furthermore, along with a number of requirements relating to nutrition labelling, infant formulae and follow-on formulae must be labelled in such a way as to not

discourage breastfeeding, and – interestingly enough – must not be labelled with any pictures of infants.

Another category of foodstuffs that is highly regulated is that of dietary supplements, i.e. products that are concentrated sources of nutrients or other substances with a nutritional or physiological effect, used to supplement one's everyday diet. Obligatory elements of the labels of such products include the names of the categories of nutrients or substances that characterise the product or an indication of the nature of those nutrients or substances, the portion of the product recommended for daily consumption, and a warning not to exceed the stated recommended daily dose. Furthermore, dietary supplements must be labelled so as to state that they should not be used as a substitute for a varied diet, and the way in which they are labelled, presented or advertised cannot suggest or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients in general.

At present, manufacturers of dietary supplements are obliged to declare the amount of nutrients or substances with a nutritional or physiological effect present in a given product on the label in numerical form per portion of the

“Although there are numerous factors that can lead to confusion, it is clear that one of the most frequent traps into which consumers fall regards interpretation of the information that is provided on food labels.”

product as recommended for daily consumption on the labelling. In addition, the net quantity of a product must be declared in units of mass (grams, etc.) or units of liquid (millilitres, etc.) However, many manufacturers stress that this requirement is inappropriate for food supplement products, which are sold in dose form, in products containing 30, 60, 90, 120, etc. capsules or tablets, highlighting that declaration of the quantity of such products by weight could mislead consumers.

Labelling in practice

A particular category of labelling that is growing in significance, especially in light of growing concerns over the

general health of Europe's population and in particular increases in the number of cases of problems such as obesity and diabetes, is that of nutrition labelling. Of course, nutrition labelling must comply with the general principles of labelling, i.e. be clear, concise, and above all provide the consumer with as much information as possible in order to allow him or her to make a conscious, well informed choice as to consumed foods. However, there have recently been numerous discussions as to the form that such labelling should take, the information that should be displayed (including the order in which it should be presented), and the relative merits of a given form of nutrition labelling over another in terms of clarity and usefulness.

The main point of these discussions is the issue of how information should be presented from the standpoint of graphics. In the UK, the prevailing trend is implementation of the 'traffic light' system of food labelling, in accordance with which foods are labelled on the back of the packaging with specific information, but also carry 'front of pack' labelling providing key information as to the calorie count of the food (or portion of food) and amounts of key nutrients such as carbohydrates



“EU member states implement labelling regulations to a varying degree, with some countries introducing much more advanced national legislation than others.”

(including sugars), fibre, proteins, fats etc. This information is additionally colour-coded green, orange, or red (green for ‘healthy’ nutrients, orange for nutrients that are considered reasonably healthy when consumed in moderation, and red for nutrients that should be consumed only in limited quantities, e.g. saturated fats) with the aim of turning consumers’ attention to the health benefits or potential dangers of eating a given food.

Meanwhile, other EU member states seem to prefer labelling food products with information as to guideline daily amounts (GDAs) on the back of the pack, with some countries implementing additional colour coding schemes in an attempt to make this information more clear to consumers. However, the degree to which labelling requirements are fulfilled varies significantly throughout the EU; some foodstuffs are labelled in a practical and highly informative way, whilst others often provide little to no information to aid consumers in their choice of products.

A key instrument in ensuring protection of consumers is the imposition of

sanctions in cases where manufacturers or other food business operators, such as importers, breach labelling regulations. This is especially vital in light of the global financial crisis, which is already making consumers increasingly cautious; it would be very damaging from an economic standpoint if consumers began to lose faith in the protection provided in relation to a basic commodity like food. In practice, however, as mentioned above, EU member states implement labelling regulations to a varying degree, with some countries introducing much more advanced national legislation than others. Sanctions for incorrect labelling also vary, as the European food law framework foresees the competence of member states with respect to establishing and then imposing sanctions with respect to manufacturers and other food business operators that do not label their products correctly. In the UK, the general basis for imposition of such sanctions is contained in the Food Safety Act 1990; in other countries (particularly in Central and Eastern Europe), provisions relating to sanctions are often scattered amongst various legal acts, and levels of implementation of these legal provisions by national authorities vary significantly.

Food labelling trends and future developments

Discussions currently underway in the European Parliament and the Commission show that labelling is truly an issue of European scale, even or perhaps especially in light of the current financial situation, which is causing consumers to be more cautious and more concerned about what exactly they are putting in their shopping baskets. Food labelling matters such as origin labelling and nutrition labelling are constantly the topic of talks and negotiations at varying levels, as are questions as to where the basic starting point for consumer information should be located, what graphic forms of information are acceptable (especially on such new forms of foodstuffs as genetically modified products, dietary supplements and foods for infants and small children), and how information should be presented in practice so as to appeal to and inform various groups of consumers. In terms of legislation, the trend seems to be labelling of food products with GDAs, with the concept of a hybrid system including colour coding of GDA information currently under discussion; however, only time will tell whether this system will ultimately prove acceptable and sustainable.



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Employment law

Key developments for the consumer products industry

A number of important changes to employment law are just around the corner and these changes are particularly relevant to the consumer products sector. We take a look at these proposed changes and their likely effect.

Agency workers: Temporary Agency Workers Directive

Temporary agency workers are an important source of flexible labour in the consumer products sector, especially for those businesses that incur seasonal or other spikes in their business. It will also become ever more important in the current economic climate where headcount is back on the agenda.

This summer, the Government brokered an agreement between the CBI and the TUC to give equivalent rights to temporary workers after 12 weeks in a given job. This agreement seeks to promote fairer treatment for agency workers without removing the important flexibility that agency work can offer, which was an important precursor to the EU Council’s agreement of the terms of the draft Temporary Agency Workers Directive (the ‘Directive’).

The Directive applies to ‘workers with a contract of employment or employment relationship with a temporary agency, who are assigned to user undertakings (third party businesses) to work temporarily under their supervision and direction’. The Directive does not therefore apply to those workers who are genuinely self-employed.

The purpose of the Directive is to ensure ‘the principle of equal treatment’. What this means is that agency workers should be entitled (as a minimum) to the basic working and employment conditions that he/she would have been entitled to had they been recruited directly by that business to whom they supply their services (the end user) to occupy the same job. Basic working and employment conditions are those laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in

force relating to the end user in respect of: the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

The Directive also provides that agency workers shall be given access to the amenities or collective facilities of the end user, including canteen and childcare facilities and transport services, under the same conditions as permanent workers directly employed by the end user, unless a difference in treatment is justified by objective reasons. This clearly has cost implications for a user of agency workers.

The Directive does not cover other employment law rights and neither the UK agreement nor the Directive give unfair dismissal rights or redundancy rights to agency workers against the end user. The Directive does not therefore change fundamental employment laws but simply provides for equal treatment in terms of pay and basic employment conditions for agency workers.

The Directive assumes equal treatment from the first day of work but allows member states to make their own arrangements in certain circumstances which may include a qualifying period for equal treatment, for example, the 12 weeks set by the UK following the agreement

reached between the CBI and TUC. No details are provided of how this qualifying period will be calculated, so businesses will have to wait until its implementation in the UK to find out whether the 12-week qualifying period must be 12 continuous, unbroken weeks and whether in 'a given job' means the same job or any job with the same end user. Clarity is also required on whether the equal treatment will commence on the first day when the job is scheduled to last more than 12 weeks or whether it will only start after 12 weeks.

On 22 October 2008, the European Parliament approved without amendment the Directive. The Directive must now be implemented into UK law within three years and the UK Government indicated when it reached agreement with the UK social partners in May 2008 that it would introduce implementing legislation in the 2008-2009 Parliamentary session.

The proposed law is likely to have a significant impact on the Consumer Products sector, particularly in the UK where there are an estimated 1.4 million agency workers (as many as a third of all agency workers in the EU). However, many key elements of the Directive remain ambiguous leaving employers and users of agency workers unclear as to the impact it will have on their organisation. It is hoped this clarity will be achieved before the Directive is implemented in the UK.

Working time: 48 hour working time limit

The right of UK workers to opt out of the Working Time Regulations 1998 (the 'Regulations') has been under threat since 2004. However, this summer saw the UK secure the continuing right for its workers to opt out of the 48-hour working time limit under the Regulations, a right that is particularly important in businesses where flexibility is important.

Under the Regulations, UK workers cannot work more than an average of 48 hours per week in any 17-week period. Where a worker is required to work in excess of this limit, they can be asked to opt out

"The Directive also provides that agency workers shall be given access to the amenities or collective facilities of the end user."

of the 48-hour limit in writing. However, they are not under any obligation to do so and it is unlawful to dismiss a worker or otherwise victimise them for refusing to opt out. An opt-out agreement may last indefinitely but a worker is entitled to cancel it by giving a maximum of three months' written notice.

In June 2008, the EU Council reached agreement on a proposal for amendments to the Working Time Directive from which the Regulations derive. These proposals make any such opt-out subject to additional safeguards, including the imposition of a 60-hour cap on permitted average working time over a three-month period unless permitted in a collective agreement or agreement between social partners.

It is proposed that an opt-out will be void if signed at the same time as an employment contract or within four weeks of starting work. Within the first six months of employment, or up to three months after the end of any probationary period, workers will be able to opt back in to the Regulations with immediate effect. Any opt-out agreement cannot last more than a year without being renewed in writing.

It is anticipated that there will be UK regulations in April or October 2010 to implement these amendments to the Working Time Directive. Employers requiring the flexibility of the opt-out will then be required to review any new or existing opt-out agreements, particularly if incorporated into employment contracts, as these will become void.

Equality Bill

The Government has published a White Paper on the Equality Bill, setting out proposals for an Equality Bill to be published in the 2008/09 Parliamentary session. The proposals will consolidate

"Businesses targeting particular age groups as customers are likely to fall foul of the new laws unless such action can be objectively justified."

the current discrimination legislation into a single Act and outlaw unjustifiable age discrimination by those providing goods and services (in line with other discrimination legislation): this means that businesses targeting particular age groups as customers are likely to fall foul of the new laws unless such action can be objectively justified. The new laws will include attempts to reduce inequality through greater transparency by introducing an equality 'kite-mark' scheme for businesses with appropriate equality credentials and making it unlawful to prevent employees from discussing their pay. The proposals also include introducing wider powers for employment tribunals to make recommendations in discrimination claims so that recommendations can apply to the whole workforce and not just the successful claimant.

One proposal in particular has hit the headlines, being the extension of positive action to enable employers to take under-representation into account when selecting between two equally qualified candidates. Despite the media hype it seems that this will only apply in extremely limited circumstances and should be distinguished from positive discrimination which is generally prohibited and which would occur, for example, if a less qualified candidate

was selected because he or she was from an under-represented group.

Employment Bill

The notable proposals included in the Employment Bill are the repeal of the unpopular statutory disciplinary and dismissal procedures and grievance procedures introduced by the Employment Act 2002; changes to the national minimum wage and employment agency enforcement regime; and giving employment tribunals discretion to increase awards by up to 25% if an employer unreasonably fails to comply with a Code of Practice, such as the new ACAS Code of Practice covering workplace disputes.

Although the Government's original intention was for the Employment Bill to receive Royal Assent in the summer of 2008, it has been delayed and the Bill will now come into force later than envisaged. However, the dispute resolution provisions will come into force at a date to be appointed by the Secretary of State and the Government has proposed 6 April 2009.

Disability discrimination

In a recent case, the European Court of Justice ('ECJ') has decided that the prohibition of discrimination against

employees on grounds of disability under the European Directive for Equal Treatment is not limited to employees who are themselves disabled. The ECJ ruled that employees are also protected against direct discrimination (including harassment) by reason of their being the primary carer of a disabled person. This is known as associative discrimination or discrimination by association. The ruling does not however extend to Article 5 (making reasonable accommodation in the workplace for disabled workers) or Article 7 (positive action).

Employees working in the public sector will benefit straightaway from this ECJ decision as EU directives are directly enforceable against public authorities. For private sector employers the immediate impact will depend on whether the UK tribunals can interpret the Disability Discrimination Act 1995 (the DDA) so as to give effect to the directive which will be considered when the case referred to above returns to the employment tribunal. In the event that the UK tribunal decides that the DDA cannot be interpreted consistently with the Directive, employees will have to wait until Parliament amends the DDA. Either way the eventual outcome will be that associative discrimination will be unlawful in the UK, so employers should consider now what amendments they should make to their policies and practices to prevent associative discrimination.





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Preparing to face a crisis

No business is immune to a crisis. Any company may face problems such as product recalls, antitrust investigations, environmental incidents, large-scale labour disputes, criminal offences by the company's employees or even corruption charges or investigations.

They may be very different in substance, but they will all have one thing in common – they attract a lot of unwelcome media attention and rapidly change from being an internal company issue into a public event. This is especially noticeable in the consumer products industry, which is already at the forefront of media speculation and public interest.

Negative consequences of an improperly managed crisis may be devastating. Negative press coverage may ruin the company's reputation. Depending on the nature of the problem, the company may also face administrative sanctions, civil litigation (in the form of numerous lawsuits filed by the injured third parties or even a class action), as well as criminal investigations against its senior management. The necessity to recall a product from the market is likely adversely to affect sales and, consequently, the company's financial situation. All of this is very likely to jeopardise the company's credibility and even halt its business entirely.

However, this does not have to be the case. History shows that proper action and response in the event of a crisis may result in the company recovering and becoming even stronger. Take the well-known US examples of Johnson & Johnson and the cyanide-laced Tylenol

capsules, Odwalla and their apple juice thought to be the cause of an outbreak of E. coli bacteria, or Texaco, and their story of a disgruntled employee who tape-recorded a racially discriminating discussion among several Texaco managers and sent it to the press at a time of court proceedings alleging a racial bias in Texaco personnel practices. In all of the above situations, proper crisis management, by acting immediately, accepting responsibility and communicating with the public to keep them updated, saved the companies' reputations and money.

How do you properly manage a crisis? Two things are important: being prepared for a crisis and undertaking prompt and adequate action once a crisis situation occurs.

Crisis prevention

Being prepared is, as usual, a big element of success. One of the key issues is to predict potential crisis situations. Depending on the nature of the business, these may include: antitrust investigations (related to alleged competition law violations), product liability issues, often connected with recalling a product from the market, criminal offences by the company or senior employees,

corruption charges or investigations, environmental incidents, large-scale labour disputes (for example strikes) or other labour related issues, such as harmful actions by disgruntled employees, work safety violations or workplace violence (erratic or threatening employee behaviour). One of our consumer products clients learned the hard way after experiencing an unanticipated antitrust dawn raid in one jurisdiction, but it meant that the client was well prepared to meet similar investigations in other jurisdictions, which may have had more far reaching effects. In this way, effective co-ordination and communication across different jurisdictions was vital.

After identifying potential crisis situations, each company should think of the adequate compliance programs and procedures covering the areas where a crisis is likely to occur (relating to, for example, antitrust, discrimination, sexual harassment, occupational health and safety, environmental regulation, etc.). It is important to not only have appropriate programmes and procedures, but really to implement them. One of the safeguards to maximise effective implementation is to make the responsible employees periodically certify that they

“Proper crisis management, by acting immediately, accepting responsibility and communicating with the public to keep them updated, saved the companies' reputations and money.”

have acquainted themselves and complied with all programmes and procedures.

The next step would be to create the crisis management team, i.e. the group of people responsible for managing the relevant crisis situation. The group should ideally be made up of no more than six people including, among others, the head of the company, a senior lawyer and a PR or communications expert.

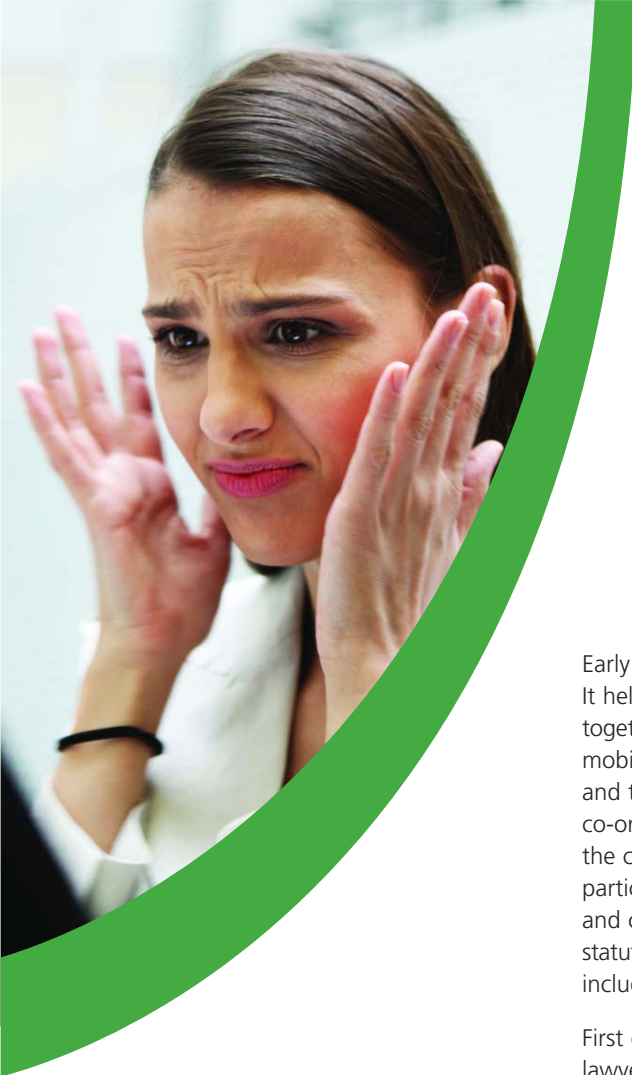
Finally, a crisis management plan should be prepared, i.e. a detailed and comprehensive, but also simple and clear, document setting up the procedure for all of the employees on how to behave in the event a crisis occurs (including the names of the members of the crisis management team and their contact details). The plan should be made known to all the employees in the company and rehearsed, if possible.

Dawn raid preparation programmes and training are generally very valuable for

companies. Companies should try to maintain dawn-raid manuals, providing clear information on the key actions to be taken by the relevant employees in the event of an antitrust, or other similar investigation on the company's premises. Training should also be given to the employees, ranging from receptionists and secretaries to senior management. This should then allow companies to keep the situation under control in the event of an unexpected visit of competition or other authorities. The behaviour of the employees after training and their awareness of the company's rights and obligations should help to avoid the chaos common in these types of situations and the potential there would otherwise be for lack of co-operation and co-ordination.

Crisis response

With good preparation, a successful response in the event of a crisis should not be problematic. ▶



“As media freedom is protected in different ways in different jurisdictions, it will most probably be very difficult to stop publication, but it may be possible to manage how the story is being reported.”

Early identification of the incident is key. It helps to pull the whole organisation together, possibly before the story breaks, mobilise the crisis management team and then act promptly, in a focused and co-ordinated manner. In the course of the crisis response, two things need particular attention: legal assessment and compliance with any relevant statutory obligations, and communication, including effective media management.

First of all, in the event of a crisis, the lawyers need to be fully mobilised. Depending on the nature of the crisis, a company may need to comply with various reporting obligations, both in terms of notifying the relevant public authorities (such as the industry regulator, responsible ministry or consumer protection office) or making the relevant publications. It may also be obliged to undertake other actions, such as recalling a product from the market, undertaking negotiations with trade unions, or securing the site. Being subject to close scrutiny of the press, compliance with the law in every aspect and at each stage is critical. Sometimes, it will also be important to start preparations for inevitable litigation (whether individual lawsuits filed by the injured third parties or even a class action). Here, the sooner the preparations are commenced, the better and less costly the results at a later stage.

Also, for successful crisis response, media management is crucial. A crisis, especially in the easily accessible consumer products sector, will very likely quickly become a public story. As media freedom is protected in different ways in

“Companies should always be ready to implement effective crisis management policies and procedures, and to ensure they have a dedicated and well prepared team ready to take action.”

different jurisdictions, it will most probably be very difficult to stop publication, but it may be possible to manage how the story is being reported. In such a situation, it is much better to talk to the press than to avoid doing so. Last year, in the UK, the turkey producer Bernard Matthews was heavily criticised for its management of the media, as well as for its slow response in informing regulators after a bird flu outbreak at one of its plants. Being responsive allows the company involved to influence the information being made public, making sure that the story is presented accurately, and is not exaggerated. Even with, in many jurisdictions, the right to respond and to correct the publication, it is far easier and more effective to make a statement at an early stage.

Finally, while concentrating on external communications, one should not forget the importance of the internal communications. Employees need to be fully informed and updated. This will help to preserve internal integrity and staff commitment.

In conclusion, the negative consequences of crisis situations may be, to a large extent, mitigated by the measures discussed above. Very often, it is a question of not only the money, but also the reputation, and sometimes even the further existence of the company. Thus companies should always be ready to implement effective crisis management policies and procedures, and to ensure they have a dedicated and well prepared team ready to take action.

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