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 **NORTON ROSE FULBRIGHT**

Cultivate

Food and agribusiness newsletter

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Cultivate

Cultivate delivers market insight into the global food and agribusiness sector. It is published three times a year by Norton Rose Fulbright and is available online and in print.

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Editorial

In the 16th issue of *Cultivate* we focus on the food and beverages industry.

Blockchain technology is in its early stages of adoption within the food industry but has been touted as a disruption that may revolutionize the industry. In this issue we explore how the potential uses of distributed ledger technology can improve food safety and disrupt the food industry's supply chain transparency and many other uses around the world.

We also focus on the EU, discussing how the European Commission adopted a proposal for a directive on unfair trading practices in business-to-business relationships in the food supply chain. Elsewhere in Europe, we look at how the Italian labor court handed down a landmark decision on the Foodora case and how adopting a risk-based supervision system using big data can identify future risks in the Dutch food and agriculture sector.

As businesses in Australia had until July 1, 2018 to transition to a new system of country of origin labeling for food products, we look at the requirements in place for priority and non-priority foods, and the claims businesses can make on their packaging under the new regulations.

In South Africa we discover how a new ecommerce app which combined the latest innovative technology resulted in community upliftment between fishermen and the marketplace and raised questions around the legal policy impacting fishing rights.

The Canadian Food Inspection Agency published a summary report on the Blended in Canada Wine Labeling Consultation. We discuss the results and some of the key takeaways from the consultation.

In our food safety updates we review the Safe Food for Canadians Regulation; the FDA commissioner's discussion on greater scrutiny of health claims on food packaging and the citizens' petition regarding labeling of added sugars in food.

We invite you to read about these developments affecting the food and agribusiness industry and welcome your thoughts on areas to cover in future issues.

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Calendar

August

Amsterdam, Netherlands, August 13–14, 2018
International Congress and Expo on Agriculture and Horticulture

September

Missouri, USA, September 10–12, 2018
AG Innovation Showcase 2018

Nairobi, Kenya, September 27–28, 2018
The Africa Food Security Conference and Agri Exhibition

October

San Diego, USA, October 29–31, 2018
International Conference on Sustainable Environment and Agriculture

November

Edmonton, Canada, November 5–8, 2018
28th Commonwealth Agriculture Conference

Blockchain – disrupting the food chain

By Sophie Lees

Blockchain was made famous, or perhaps infamous, by its use within the Fintech industry particularly in the context of Bitcoin and other cryptocurrencies. Distributed ledger technology has since exploded and is now in use, or the subject of use cases, in numerous other sectors.

Within the food industry global giants are already deploying their own blockchain technology. Walmart has filed for patent protection for its blockchain product, which may be used to verify the origin and journey of produce. Several jurisdictions have emerging cryptocurrencies for use within meat industries, particularly beef. IBM has launched a blockchain platform for the food industry, aimed to help growers, processors, wholesalers, distributors, manufacturers, retailers and others increase the accountability and transparency of supply chains.

This article explores the potential of distributed ledger technology to disrupt the food industry and its supply chains around the world, and some of the legal challenges associated with this.

What is blockchain?

Blockchain, or distributed ledger technology, is a digital ledger that records transactions in a peer-to-peer network. It is not stored in one place but is instead distributed across several, hundreds or even thousands of computers around the world. Think of it as the next chapter to existing online transaction registers such as those

operated by land registry departments and intellectual property offices.

Advantages of using distributed ledger technology include

Chronological

Each “block” in a blockchain is made up of information about a transaction, including a timestamp. As more transactions or steps take place the blockchain grows but the blocks remain in chronological order, making it easier to trace their progression.

Transparency

Anyone with access to a blockchain can see the entire chain. Once a block is in the chain it cannot be deleted or edited. Such changes would form a new transaction further down the chain. Any proposed changes to the ledger are analyzed and verified by the network before they are added and are visible to all with access to the ledger.

Public

A blockchain may be distributed across a public network or a private network but in each case transactions are recorded across many computers allowing independent participants to verify and audit transactions quickly and often inexpensively.

Real-time

When a new transaction occurs each user’s blockchain is updated and syncs automatically, enabling information exchange in real-time.

Distributed ledger: use cases in the food industry

Global food and consumer laws are honing in on transparent and ethical supply chains and the importance of properly informing consumers (by way of example see the recent Australian Competition and Consumer Commission [decision about misleading health claims for products](#)). These trends create a prime opportunity for disruption of the food industry.

Blockchain technology is still in its early stages within the food sector but has been touted as a disruption that may revolutionize the food industry. One of the obvious benefits of using blockchain to record food supply chain transactions is establishing and maintaining consumer trust. Real time updates and transparency of changes and new transactions mean that information about the subject of a particular ledger is up-to-date and reliable.

This trust function is of keen interest to consumers, retailers and regulators in the food industry for whom it is critical, and in some cases a matter of life and death, to be able to obtain current and complete supply chain information about products.

This section explores use cases in the food industry to which distributed ledger is already being applied.

Use case: food safety

According to [World Health Organisation figures](#), 1 in 10 people fall ill and 420,000 people die each year as a result of contaminated food. Forty percent of these deaths are children aged under 5 years old. Blockchain has the potential to provide full traceability in food supply chains and equip manufacturers and retailers to identify and contain contamination risk. The instant availability of this information could significantly improve food quality and safety by facilitating the early identification and effective recall of contaminated or otherwise unsafe products.

In 2017, IBM partnered with a consortium of companies including Driscoll's, Nestlé, Unilever to focus on opportunities to *“identify and prioritize new areas where Blockchain can benefit food ecosystems and inform new IBM solutions”*. IBM has since launched IBM Food Trust, a solution with blockchain-powered modules to increase supply chain traceability and enable users to quickly address food safety issues.

How does this work in practice? Take the example of the [recent death of an Australian](#) after eating a frozen pomegranate product contaminated with Hepatitis A. If the transactions for this product were recorded on a distributed ledger, authorities could quickly work out where the contaminated products were manufactured, where other products from this manufacturer were distributed and to which consumers potentially contaminated products have been sold. Manufacturers and retailers are then able to execute a rapid and targeted product recall with a view to containing the risk.

Without readily available supply chain information, the food industry has to rely on traditional means to manage product safety risk, inform consumers (often using the media, which causes adverse publicity for all brands involved) and recall potentially contaminated products. These traditional processes are often less effective, more expensive and slower than a distributed ledger approach could be. Using distributed ledger technology could also avoid unnecessary food waste in a recall scenario. With precise information about each product's journey to the consumer, it will be possible to narrow the window of potential contamination, pinpoint risk and reduce “just in case” recalls.

Use case: combatting food fraud

Food fraud is prevalent worldwide and presents itself in various guises. It may involve consumers being misled or deceived as to the origin, nature or characteristics of the food product. It may involve counterfeiting in which fake and often poor quality substitutes are offered to consumers (either with or without their knowledge that the product is not “the real deal”).

Information about the origin of a product or its ingredients, including farm, production and manufacturing details, could all be recorded and disseminated using blockchain technology and the availability of this information could help to combat both forms of fraud described above.

Supply chain visibility is attractive to consumers and supermarket-suppliers alike, allowing them to investigate and promote the food quality and ethical considerations that are increasingly of interest to consumers, such as

- Sustainable farming (particularly in the context of fish).

- Fair trade (coffee, chocolate and sugar).
- Whether or not food is organic (meat, fruit and vegetables).
- Food origin (for example, whether food is made in a country and what “made in” actually means for processed foods – consumer trust has been tested over the years in this context (see for example the [UK horse meat scandal](#)) when products have been described as “made in” the country in which ingredients are processed but the ingredients themselves have a very different provenance).

Blockchain technology is generating interest in the tuna industry, which has been hampered by illegal and unregulated fishing, sustainability issues and allegations of modern slavery. Sustainability and eco-claims are widely used on tuna packaging, and it is often difficult for consumers to understand which products are actually fulfilling those claims. In 2018, Fijian fishing company [Sea Quest Fiji](#) partnered with US software company [ConsenSys](#) and [World Wildlife Fund](#) to pilot a system that tracks the journey of tuna products from the ocean to consumers to ensure it had been sourced ethically and sustainably.

Counterfeiting and passing off behaviour costs the industry millions of dollars every year. Full supply chain traceability, as could be delivered by distributed ledger technology, may allow commonly faked products e.g. olive oil, fish, juice, wine, coffee and meat to be identified and removed from the market delivering product safety and brand protection benefits to consumers and food producers alike.

Distributed ledger technology may also provide a new brand protection tool for those lucky few that produce or sell such premium products and are actively engaged in preventing counterfeits. For example, champagne producers have spent millions to ensure that only sparkling wine produced in the Champagne region in France according to the stringent regulations of the *Comité Interprofessionnel du vin de Champagne* may be described as “Champagne”. That does not stop some from trying to leverage the prestige and premium status associated with Champagne products. Blockchain technology could be used as a detection and enforcement tool by bodies such as the CIVC to identify and remove non-compliant products from the market.

Use case: enforcement of existing laws

Many countries offer legal protection to food and drink products that are named according to the region from which they originate – Champagne is an example, but other products including Parma ham, Colombian coffee, Feta cheese and Tequila all leverage similar rights to maintain a premium product.

In addition, some countries are deploying country of origin labeling laws to provide transparency to consumers about where their food originates from. Food labeling reforms have been deployed by the Australian Government, imposing country of origin labeling requirements for food sold in Australia. As of July 1, 2018, these reforms are live and businesses selling food in Australia must comply with the relevant labeling requirements (see page 14 for more information).

Consumer purchasing decisions are heavily influenced by food labeling, and it is critical that labeling is accurate and transparent. The laws described above help to achieve this, but need

to be proactively applied and enforced to be effective. If distributed ledger technology is deployed, regulators will have an accessible and reliable means by which to verify the claims made by manufacturers and retailers on their product labeling and evidence for enforcement.

It seems that the wheels are already in motion to implement blockchain technology to support new Australian country of origin laws, with IP Australia reportedly trialing blockchain technology to create a smart trade mark that consumers can use to verify the provenance of the product to which it is attached. The trial will initially be deployed to Australian exports of baby formula to China, and Chinese consumers will be able to use the smart trade mark to follow the supply chain of a particular product and determine whether it is a genuine Australian export or a counterfeit.

Use case: market access and efficiencies

For businesses, the ease and speed with which information can be shared using distributed ledger technology could contribute to increased efficiencies and cost savings in food markets more generally by facilitating automation, removing duplication and deploying smart contracts.

Wheat farmers around Australia have been piloting a cloud-based blockchain platform named AgriDigital that allows grain growers, buyers and bulk handlers to track produce, manage contracts, receive real-time compensation for deliveries, and purchase goods, in one place. The ability to conduct live verification gives purchasers the confidence to make immediate payment, and the ability to achieve real-time compensation is invaluable for smaller producers who have long struggled with what may be crippling payment delays imposed

by retailers. This use of blockchain technology has delivered benefits for local suppliers and commercial purchasers alike, and may make venturing into overseas markets easier for in-country producers.

What’s your beef? Distributed ledger and the beef industry, a case study

Beef has had a troubled history, with the BSE crisis in the UK of the 1990s and the more recent horse meat scandals in Europe, and is still often perceived as a high-risk industry. As a result, high-quality beef products sourced from trusted countries carry a premium price tag particularly if such products are not readily available locally. In these countries, consumers rely heavily on claims of quality and origin in their purchasing decisions.

In China, for example, beef imports from countries such as Australia, New Zealand and the United States are considered premium products and priced accordingly. Local or cheaper imports retail for AU\$4/kg, whereas Australian labeled beef products can command a price of anywhere between AU\$38/kg to AU\$120/kg. This significant price difference has resulted in fraudulent activity, with opportunists in China passing off cheaper beef products as premium import products. As fraud becomes more prevalent, consumer trust suffers and demand for these premium import products may fall.

Concerns about quality and certification of origin in the beef industry have led to consumers in China actively investigating the provenance of imported food, and the deployment of blockchain technology to distribute beef supply chain information to consumers.



Australia

BeefLedger is a distributed ledger technology designed for the beef supply chain. It was launched out of the Queensland University of Technology and provides provenance data to consumers about Australian produced beef and a payments platform for transactions in the beef supply chain. It is powered by its own cryptocurrency, the BLT (BeefLedger Token).

The goal is that using a QR code anyone can access the entire history of a beef product, from field to fork. This transparency will help to deliver better value to consumers (who know that the product is of the quality described), producers (who can secure better value for their high quality products) and retailers (who can be confident about the quality and origins of products they buy wholesale). It will also provide an audit trail for regulators to use to verify compliance with the claims that are made about a product – for example

“grass-fed”, “made in Australia” or “organic”.

United Kingdom

The UK Food Standards Agency has also trialed blockchain technology in the beef industry and **recently announced the successful completion** of a beef provenance pilot program at a UK cattle slaughterhouse. This pilot facilitated information sharing between the slaughterhouse and the Food Standards Agency to assist with inspections of beef supplies, and is expected to ease the administrative burden of a part of the food chain that is subject to extensive inspection and record-keeping obligations. Phase 2 of the pilot is expected to include beef farmers.

United States

A consortium known as BeefChain launched in Wyoming with the objective of providing a means to verify the “free-range” status of beef products. This consortium is tagging calves with

a radio frequency tag, which will be used in conjunction with a blockchain powered platform to be able to track the life of the cattle and ultimately verify that beef products are in fact Wyoming-certified free-range beef.

This platform is intended to deliver value back to the ranchers responsible for rearing the cattle and has been backed by the State of Wyoming which has passed new laws that will facilitate the use of digital currency within the platform.

This pilot is interesting for trademark lawyers, because it appears that verified beef products will be labeled with the Wyoming certified beef mark and that mark will operate as a form of certification mark. Holders of existing certification marks might take note of the use of distributed ledger technology to enforce the rules that are conditions of applying a particular certification mark.

France

French hypermarket Carrefour has deployed blockchain technology to enable consumers to trace the supply chain of certain products. Unlike the pilots described above, Carrefour deployed their distributed ledger technology pilot for chicken products. Consumers are able to obtain information about the origins of the product, including the name of the farmer and how it was reared, and follow its journey to the supermarket shelf. Carrefour recently announced that following the success of the pilot this technology will be rolled out for other food categories including ground beefsteak.

Distributed ledger in the food industry: legal considerations

Legal uncertainty

The relative youth of blockchain technology means that the laws of many jurisdictions do not anticipate the use of this technology. For a period, there will be a degree of interpretation and uncertainty about how existing laws apply to distributed ledger transactions. The application of traditional contract law and “offer and acceptance” contracts to contracts formed on a blockchain, for example, remains subject to uncertainty. The involvement of governments and regulators in blockchain trials, however, gives confidence to the industry that deployment of this technology seems to be supported (at least in principle) by legislators.

Compliance

The application of distributed technology to Bitcoin, a revelation which was for a time associated with criminal activity, may give rise to concerns about money laundering. This risk is arguably heightened when the possibility of anonymous and confidential nature of transactions in the blockchain is considered. Those operating distributed ledger technology need to consider how to verify the identity of those transacting in their blockchain.

Collaboration

During the early stages of this technology, much of the development and research is being undertaken pursuant to collaborations and partnerships. The legal issues arising from the fact of collaboration are no different to be worked through are no different to any other similar arrangement. Parties should agree and document terms relating to liability and risk allocation, intellectual property ownership and commercialisation rights.

Data privacy

The inalterable nature of the blocks of blockchain creates data privacy risks. Personal data cannot readily be removed from the chain and inaccurate personal data in the chain cannot easily be altered. Distributed ledgers that reside in public networks may be more susceptible to hacking or other information security risks. As governments continue to tighten laws regarding privacy and data breaches, these risks could give rise to data privacy liability for operators of distributed ledgers.

Conclusion

Blockchain is becoming established as a core technology for agribusiness.

Legislators and regulators are increasingly requiring retailers and manufacturers to be transparent about food products and their provenance, and consumers increasingly demand food and supply chain information.

To be able to meet these demands, the food industry needs to rely on technology rather than manual processes to avoid what a significant administrative and financial burden. The legislators themselves also need to find a way of monitoring and enforcing the food standards they set, with ever-increasing volumes of food production and consumption.

There are hurdles to overcome, and the legal environment for blockchain technology at this stage remains somewhat uncertain. With retail giants such as Carrefour and Walmart in the advanced stages of deploying their own distributed ledger pilots, however, this technology looks set to become a key part of supply chain management and consumer protection for the food industry in the near future.

Sophie Lees is a senior associate in our Sydney office.

EU proposes new unfair trading practice rules in the agriculture sector

By Jay Modrall

Following a late 2017 **consultation** on improving the EU's food supply chain (the Consultation), in April 2018, the European Commission (the Commission) adopted a **proposal** for a directive on unfair trading practices in business-to-business relationships in the food supply chain (the Proposal). The Proposal addresses one of the three main areas covered by the Consultation. Another, the expansion of **antitrust exemptions** for so-called value-sharing agreements, has been adopted in the meantime. Action on the third, pricing transparency in the food supply chain, is expected later this year.

This article discusses the background of the Proposal and compares the specific elements of the Proposal to the actions proposed in the Consultation. This article also briefly discusses the next steps and offers conclusions on the Commission's initiative.

Background

Continuing economic pressure on EU farmers has recently focused intense attention on the need for regulatory reforms. In 2016, the Commission created an Agricultural Markets Task Force, which adopted a **final report** in November 2016. In August 2017, the Commission launched the Consultation, seeking input on three main topics addressed in the Agricultural Task Force's report: potentially unfair trading practices (UTPs) in the food supply chain; the possible need for increased market transparency in the food supply chain; and the advisability of extending the existing exemption for value-sharing

agreements in the sugar beet sector to other agricultural products.

In the Consultation, the Commission asked respondents to select the three most concerning practices from a list of 18 potential UTPs. In descending order of the frequency with which these potential UTPs were mentioned, these were

- Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices).
- Last-minute order cancellations concerning perishable products.
- Payment periods longer than 30 days for perishable products.
- Payment periods longer than 30 days for agro-food products in general.
- Imposing contributions to promotional or marketing costs.
- Unilateral termination of a commercial relationship without objectively justified reasons.
- Requests for upfront payments to secure or retain contracts (hello money).
- Imposing claims for wasted or unsold products.
- Imposing private standards relating to food safety, hygiene, food labeling and/or marketing standards, including strict verification procedures.
- Imposing an upfront access fee for selling a product (listing fees).
- Programed overproduction leading to food waste.
- Withholding by one party of essential information to both parties.
- Passing onto other parties of confidential information received from a partner.
- Requiring additional payments to have products displayed favorably on shelves (shelf-space pricing).
- Imposing on a contract party the purchase of an unrelated product (tying).
- Inconsistent application of marketing standards leading to food waste.

- Imposing on suppliers costs related to product shrinkage or theft.
- Imposing a minimum remaining shelf life of goods at the time of purchase.

Of the respondents, almost all supported action to address UTPs in the food supply chain, and the vast majority of those supported EU action, alone or with Member States. There were also high levels of support for minimum EU enforcement standards in relation to transparency of investigations and results; the possibility of fines; the possibility to file collective complaints; confidential complaints; designation of a competent authority; and authorities' ability to conduct own-initiative investigations. The exceptions were retail organizations, who generally did not support such actions.

Meanwhile, in December 2017 the European Council and Parliament revised the existing agricultural antitrust exemptions in [Regulation 2017/2393](#). In an unrelated step, on November 14, 2017, the European Court of Justice issued a preliminary [ruling](#) that effectively gave farmers, recognized producer organizations (PO), associations of POs (APOs) and "interbranch organizations" (self-organized, vertically integrated entities created by different branches of the agri-food chain, including producers and at least one partner from another part of the supply chain, e.g. manufacturers, processors, trade and retailers) greater scope to cooperate without violating EU antitrust rules. Action on the third element of the Consultation, pricing transparency, is expected later in 2018.

The Proposal

The Proposal takes aim at the practices most frequently identified as problematic in the Consultation responses, though not in a uniform manner. The Proposal would also create a new EU enforcement mechanism for complaints against UTPs in the food supply chain.

UTPs

The Proposal defines two categories of UTPs.

First, the Proposal would require Member States to prohibit the following practices without exception

- Buyers paying suppliers of perishable food products later than 30 days of the receipt of the invoice or delivery of the products.
- Buyers cancelling orders of perishable food products at such short notice that the supplier cannot reasonably be expected to find an alternative buyer.
- Buyers unilaterally and retroactively changing terms concerning the frequency, timing or volume of the supply or delivery, quality standards or prices.
- Suppliers paying for wastage of food products that occurs on the buyer's premises and isn't caused by the supplier's negligence or fault.

Second, Member States would be required to prohibit the following practices unless they are agreed clearly and unambiguously in the supply agreement

- Buyers returning unsold food products to a supplier.

- Buyers charging a supplier for a payment as a condition for stocking, displaying or listing food products.
- Suppliers paying for the promotion of food products sold by the buyer (if such payments are agreed, provisions on the applicable costs and duration of the promotion would apply).

The Proposal would prohibit four out of the five practices most often identified as problematic by Consultation respondents. The Proposal did not address the fourth most-criticized practice, payment periods over 30 days for non-perishable agro-food products. On the other hand, the Proposal would require clear disclosure and agreement of three practices without prohibiting them outright, and did not address a number of other practices less criticized in the Consultation responses. Some of these, such as sharing confidential information and tying, could violate EU antitrust rules.

Enforcement mechanisms

The Proposal also creates new harmonized enforcement mechanisms, which were strongly supported by the Consultation responses. Each Member State will have to designate a public authority to enforce the prohibitions in the Proposal. These enforcement authorities will be required to cooperate and assist one another in investigations that have a cross-border dimension and to meet once per year at meetings facilitated by the Commission, assisted by the Committee for the Common Organisation of the Agricultural Markets.

Enforcement authorities will need to have at least the following powers

- To initiate and conduct investigations on their own initiative or based on a complaint.



- To require buyers and suppliers to provide all necessary information in order to carry out investigations on the prohibited trading practices.
- To take decisions establishing infringement of prohibitions and requiring buyers to terminate the prohibited trading practice.
- To impose fines that are effective, proportionate and dissuasive taking into account the nature, duration and gravity of the infringement.

Suppliers, POs and APOs can address complaints, which may be confidential, to the enforcement authority of the Member State in which the buyer is established. Enforcement authorities will publish their decisions and annual reports describing *inter alia* the number of complaints received and investigations initiated and closed, as well as summary descriptions of each investigation.

Scope

The Proposal would apply to relationships between buyers established in the EU who are not “small- and medium-sized enterprises”

and suppliers, regardless of where they are established, who are “small- and medium-sized enterprises” (including groups of such entities) in relation to the sale of food products.

Next steps

The European Council and Parliament have begun work on the Proposal. The Austrian Presidency, which began in July 2018, has identified the Proposal as a priority for adoption by year-end. Given the large number of proposed measures scheduled for adoption before the 2019 Parliamentary elections, however, it is unclear whether the Proposal will be adopted during the current Parliament. If adopted, Member States will be required to apply the new rules through their national laws no later than 12 months after the directive is published in the Official Journal.

Conclusion

The Proposal seems to be targeted particularly at suppliers of food products, especially perishable

products, for retail sale, and retail organizations were the strongest opponents of such measures in the Consultation. On the other hand, the Proposal did not address a number of commercial practices related to agro-food products in general (as opposed to perishable food products) or practice that were less criticized by respondents to the Consultation, such as category management practices. The Proposal also allows certain risk allocation practices so long as these are clearly agreed.

In sum, the Proposal raises fewer concerns for multi nationals operating in the agricultural sector than might have been expected based on the Consultation. However, the broad geographical scope of the Proposal may catch some multi-national companies who might not expect to be affected, and the new enforcement mechanisms may add a new layer of cost and bureaucracy to doing business in the EU.

Jay Modrall is a partner in our Brussels office.

Ecommerce and door-step delivery of food products

ABALOBI, a South African success story

By Alessia Maxwell

When one thinks of ecommerce and the door-step delivery of food products, one ordinarily thinks of the delivery of ready-made food products direct to the consumer. One seldom contemplates the delivery of raw food products direct to the consumer, and less so of instances where the order and delivery mechanism of such raw food products serves to uplift communities and entrench and enforce legal rights.

The ABALOBI app is one such instance where ecommerce has resulted in community upliftment in South Africa and the change in legal policy around fishing rights along South Africa's coastline.

The development of the ABALOBI app

The *Marine Living Resources Act, 1998* excluded small-scale and artisanal fishermen who catch and sell seafood to sustain their livelihoods. People involved in the post-harvest activities such as cleaning, processing and marketing of the seafood products were also traditionally excluded. When the South African government adopted further long-term fishing policies in 2005, which made no provision for small-scale fishermen, it resulted in dissatisfaction and unrest amongst the small-scale fishing community. These issues were taken to the Equality Court which ruled that a new policy was needed to secure the rights of small-scale fishermen.

The Small-Scale Fisheries Policy (SSFP) was adopted by Cabinet in June 2012 and sets aside preferential fishing zones for small-scale fishermen. It allows for sustainable marine resource co-management and greater access to markets and infrastructural support for the small-scale fishing sector. It also outlines the step-by-step approach for small-scale fishermen to gain and exercise their fishing rights.

Its practical implementation has taken some time. Researchers from the University of Cape Town, in collaboration with the National Department of Agriculture, Forestry and Fishing and a number of representatives of various small-scale fishing communities, have developed a free mobile app suite called ABALOBI (meaning "small-scale fisherman" in isiXhosa).

The app provides small-scale fishermen with a platform to exercise their fishing rights. Fishermen and other service providers (such as those who process seafood post-harvest) can register and record their catch of the day.

This information is accessible to the marketplace, such as restaurateurs, who can place orders directly. Payment and direct delivery of produce also takes place through portals in the app.

Another advantage is that marine researchers can access the catch data to track marine species distribution, and ultimately the sustainability of fishing practices along the South African coastline.

Legal challenges facing the ABALOBI app and ecommerce

In South Africa, food safety including preparation along the supply chain is currently in the spotlight. The post-harvest processing of the seafood catch, the delivery of the product and its consumption are potential food safety issues. With three parties involved in each transaction that takes place through the ABALOBI app (the fisherman, buyer and consumer) the question of ultimate liability arises should illness or death occur from the consumption of the seafood products. It is likely that new laws, more stringent regulations and higher food safety standards will be developed and imposed in the near future. However, at present, this is an area of legal uncertainty with the app.

The app also provides financial support for users. Fishermen can load their banking details onto the platform, which then provides for the direct



payment by buyer to the individual fisherman. Users can also access their cash balances similar to a cash book, which is stored on the app.

As with all mobile and cyber platforms, there is a risk of unauthorized release of information. In the last year, there have been a number of cyber-attacks and incidents of cyber hacking of organizations where personal details risked public release. This, in addition to rising incidents of credit card fraud, raises concerns regarding the exposure of personal information through cyber-crime. The *Protection of Personal Information Act, 2013* (POPIA), governs how personal information is collected, stored, used, shared and deleted. Once POPIA is fully in force, the ABALOBBI app will need to comply and have appropriate and reasonable measures in place to protect user information.

POPIA also requires the mandatory notification of any breach of personal information to the Information Regulator and the owners of such personal information.

Conclusion

While the ABALOBBI app combines the latest innovation with sustainable fishing practices and cooperation between fishermen, the marketplace, consumers and researchers, it raises a number of legal concerns with ecommerce and food product delivery in South Africa.

Legal regulation in the food product delivery and ecommerce industries is on the rise. Mobile app suites and other forms of ecommerce must remain vigilant to such changes in the law.

Alessia Maxwell is a senior associate in our Johannesburg office.

Jumping into the new country of origin food labeling requirements

Is your packaging up to scratch?

By Georgina Hey and Rebecca Brenikov

As previously updated, businesses had until July 1, 2018 to transition to a new system of country of origin labeling for food products in Australia. The incoming *Country of Origin Food Labeling Information Standard 2016* (Standard) imposes stricter labeling requirements on “priority”, as opposed to “non-priority”, foods and is intended to help consumers better understand where their food comes from.

Uncertainty comes as part and parcel of any regulatory overhaul and businesses have occasionally struggled with how to apply the regulations. It’s too early to tell how readily companies have complied. In this update, we look at the different requirements in place for priority and non-priority foods, and the types of claims businesses can make on their packaging under the new regulations.

Key takeaways

- Always bear in mind the overarching prohibition of conduct that is misleading or deceptive (or is likely to mislead or deceive), when developing labeling to comply with the new system.
- Non-priority foods (e.g. lollies, ice cream, biscuits, ready-to-drink coffee, wine etc.) are subject to less onerous labeling requirements than priority foods (priority foods being everything but non-priority foods). However, if a business wants to use the green and gold Kangaroo symbol

in relation to a non-priority food, it must comply with the stricter rules that apply to priority foods.

- If a priority food claims to have been “made in Australia”, the specific nature of any minor overseas processing must also be declared on the label.
- If your Australian ingredients are sent overseas for processing and re-imported into Australia, you may not be able to claim that your product is grown, produced or made in Australia.
- If your business is in the process of updating its packaging to comply with the new Standard and has any questions, please get in touch with a member of our IP Team.

Priority versus non-priority foods

What labels do I need to use?

It is important to note that the Standard does not apply to all foods.

For example, food sold for immediate consumption at a café or restaurant, or food sold on the premises where it has been produced, such as at a bakery. However, assuming that the Standard does apply, labeling obligations depend on whether the food is classified as a (i) priority food or (ii) non-priority food.

Non-priority foods

Businesses should assume that their food products are priority foods unless they fall into one of the seven non-priority food categories set out in the Standard. The categories for non-priority foods are: (i) seasoning, (ii) confectionery, (iii) biscuits and snack foods, (iv) soft drinks and sports drinks, (v) tea and coffee, (vi) alcoholic beverages, and (vii) bottled water.

Make sure to check the Standard thoroughly before deciding your food is non-priority as some foods, like muesli bars, are defined as priority despite being commonly thought of as snack foods.

If your food is non-priority, you only need to include a text statement identifying the country of origin (e.g. “Product of Australia” or “Made in Italy”). You can use the same labeling system as is required for priority foods if you want, but if you choose this option you have to comply with the Standard as if your product was a priority food. This could be an attractive option for businesses to standardize their approach across all products, particularly if the new Standard proves popular with consumers.

Priority foods

All priority foods are required to bear a “standard mark label”, which may consist of up to three elements; (i) the Kangaroo symbol; (ii) a bar chart indicating the proportion of Australian ingredients; and (iii) explanatory text indicating the food’s country of origin and the percentage of Australian ingredients. All standard mark labels must be contained within a clearly defined box.

The exact requirements of the label depend on the country of origin and whether the food was “grown”, “produced”, “made” or “packed” there. Below are set out some rules of thumb and example labels.

Grown, produced or made in Australia

Requires all three components:



Packed in Australia

Requires the explanatory text component and the bar chart element. Must not use the kangaroo symbol:



Grown, produced, made or packed overseas

Requires the explanatory text component as a minimum. Must also include the bar chart element if any Australian ingredients are claimed. Must not use the kangaroo symbol:



Grown in, produced in, made in, packed in – what is the difference?

Claiming that a product is grown or produced in Australia

“Grown” and “produced” claims are likely to be very similar, however, the Standard advises that you should use a “produced” claim for products containing ingredients that aren’t grown, such as sauces containing water or salt (neither of which can be “grown” according to the Standard).

The rules for claiming that a priority food was grown/produced in Australia are stricter than for other countries. To make a “grown/produced in Australia” claim, all ingredients must have been grown/produced in Australia. Furthermore, if there is more than one ingredient, all or virtually all of the processing must have occurred in Australia.

For other countries, a “grown” or “produced” claim can be made if each significant ingredient was grown or produced in that country and all or virtually all processing also occurred there. Whether an ingredient is significant depends on the nature/function of the food, not the proportion of the ingredient.

The less onerous “significant ingredient” test also applies to non-priority foods grown/produced in Australia but, as mentioned, if you wanted to use a standard mark label for a non-priority food you could only do so if all ingredients were Australian grown/produced.

Claiming that a product is made in Australia

The “made” claim is broader than the grown/produced claims. You can say your product is “made” in Australia or another country if it underwent its last substantial transformation there. A food undergoes a substantial transformation in a country if the food

- Was grown or produced there.
- Or is, as a result of one of more processes in that country, fundamentally different in identity, nature or essential character from all of its ingredients or components that were imported into that country.

The “last substantial transformation” test is likely to prove confusing for a lot of businesses. While unclear how the Australian Competition and Consumer Commission (ACCC) will apply the test you should be aware that

- The terms “identity”, “nature” and “essential character” aren’t defined in the Standard so, for the moment, you should think about their ordinary meaning.
- The ACCC recommends that businesses consider each imported ingredient and then work out how the finished product differs from each one, rather than focusing too heavily on the manufacturing processes. Even if a process is complicated, it won’t result in a substantial transformation if it only changes the food’s appearance.

- A list of processes that the ACCC believes will and won't result in substantial transformations is set out in the ACCC's recent [Country of origin food labeling guide](#).

For example, the ACCC says that juicing fresh fruit is a substantial transformation, but reconstituting fruit liquid concentrate is not. Fully baking a frozen, raw product would most likely also be a substantial transformation according to the ACCC, but not finishing off the baking of a partly-cooked product.

Claiming that a product is packed in Australia

If your food doesn't pass the "last substantial transformation test" but it is packed in Australia, you could make a "packed" claim. You will still need to declare the proportion of Australian ingredients in the products (including if there are no Australian ingredients), and you will not be able to use the kangaroo symbol. The below label is one such example.



What about Australian ingredients sent overseas for processing and re-imported into Australia?

Unless the overseas processing is very minor, making a "grown/produced/made in Australia" claim may contravene the Standard for goods processed overseas.

In the case of very minor processing, you would need to declare the specific nature of the processing on the packaging (see the below example).



Also bear in mind that if any foreign ingredients are added to the food during overseas processing you cannot claim the food is grown or produced in Australia, no matter how minor the processing.

If the processing amounts to a substantial transformation, you will need to declare that the product was made in that country. You can, however, add explanatory text and a bar chart to indicate the percentage of Australian ingredients.



Summary

The changes canvassed above are aimed at creating greater clarity for consumers, but they can be onerous for businesses to apply in practice. Businesses that do not comply with the Standard risk penalties of up to AU\$1.1 million. Therefore, they cannot be ignored.

As the changes are bedded down in practice, there will be some uncertainty and it's too early to tell how some aspects of the new system will work for businesses. Businesses will need to accept some pain during the implementation process, but it is hoped that as the changes become the norm, they will also create benefits for consumers to drive market growth.

Georgina Hey is a partner and Rebecca Brenikov is a senior associate in the Sydney office.

Labeling examples are extracts from the Country of Origin Food Labeling Style Guide v2.1 August 2017, prepared by the Australian Government.

Risk-based supervision using big data in the Dutch food and agriculture sector

By Joeri Noteborn

An interview with Hubert Noteborn, program manager Data Intelligence and Risk-based Strategy of NVWA2020.

Before holding the position of program manager Data Intelligence and Risk-based Strategy, Hubert was the head of the Integrated Risk Assessment department and deputy director of the Office for Risk Assessment and Research of the Netherlands Food and Consumer Products Safety Authority (*Nederlandse Voedsel – en Waren Autoriteit*, NVWA). From 2015 to 2018 he was also the vice-chair of the Scientific Committee of the European Food Safety Authority (EFSA).

Holding a PhD in mathematics and life sciences, Hubert started his career researching innovative medicines used in cancer treatment. Afterwards, he became head of the genetically modified organisms and novel food safety testing program in the RIKILT-Institute of Food Safety at Wageningen University and Research Centre. Subsequently he moved on to work in government service at the NVWA (and its predecessors), where he is currently engaged.

The NVWA recently published several reports on integrated supply chain analysis.¹ These reports reveal how the NVWA envisages adopting a risk-based supervision system going forward and aims to become a data-driven regulator.

To identify future risks in the poultry, red meat and dairy products supply chains, the NVWA uses intelligence gained from identifying the greatest risks in the food industry at a very early stage and analyzing data from social media, information on the complex food industry “ecosystem” and consumer preferences.

What does risk-based supervision in the food industry entail?

Risk-based supervision is a comprehensive, formally structured system that assesses risks within the food industry, giving priority to resolving an issue or mitigating a risk rather than, the more traditionally, compliance-based supervision of conducting inspections and enforcing compliance with laws, rules, regulations and policies. Risk-based supervision focuses on assessing the degree of risk in a specific link of the food supply chain or a specific company’s business operations and subsequently determining how to reduce that risk. This means that, instead of periodic inspections, a food producer (for example) will continuously be monitored, both for compliance with relevant rules, but more importantly how the producer manages certain risks.

Why monitor food producer risk?

It goes without saying that food is of vital importance to all of us and food safety is a global cross-border issue, not confined to one jurisdiction only. Food is produced on a global scale within complex continuously evolving supply chains, consisting of the following links or stages: supply of raw materials, primary production, processing, distribution and finally end sales to consumers. These stages are, to a great extent interconnected, which creates a resilient food system but also magnifies its vulnerabilities. For example, if a harvest fails in a part of the world, this can be compensated by sufficient crop production or an abundance of food stock in another part. On the other hand however, a pest that affects the main grain-producing regions (Ukraine and the US) can have a serious impact on the financial system (as a result of fast rising food prices) and the social system (social upheaval). As the various stages of the food supply chains are interconnected, effective risk management requires a holistic approach. It is therefore important to have the best possible understanding of each link in a supply chain and anticipate how that supply chain evolves. Identifying the most threatening risks is fundamental to ensure a timely, proportionate and decisive approach to managing and mitigating such risks and preventing adverse health effects. In addition, current and historical data needs to be analyzed to predict how changes in

¹ <https://www.rijksoverheid.nl/documenten/rapporten/2018/03/28/integrale-risicoanalyse-pluimveevleesketen>; <http://edepot.wur.nl/445502>; <http://edepot.wur.nl/445459>.

business strategies, innovations and new technologies will transform global food supply chains, trade policies, and future food production.

How does the NVWA anticipate developments in the food industry?

The NVWA uses horizon scanning to explore what the future might look like and to analyze whether its policies prepare it adequately for potential opportunities and threats. Horizon scanning is based on the assumption that developments outside of the food supply chain, such as climate change, are either directly or indirectly linked to unknown patterns of food-related challenges. In addition, existing frameworks such as the DPSIR² model are used, providing a framework for analyzing the interactions between society and the environment, based on the interdependence of the various components. This allows the NVWA to better characterize certain issues, making it easier to identify and plan a response. Furthermore the scenarios developed from the DPSIR model help to understand social, economic and environmental trends and their impact on the food supply chains including which knowledge is used to determine where future intervention is best directed.³ Lastly, intelligence is shared within the EFSA and in the context of bilateral agreements.

How exactly are risks identified and how do emerging technologies (such as big data) fit into this?

For the NVWA to be able to make risk-based decisions, data must be translated into intelligence and evidence that can be acted upon. The innovation in data science techniques is making the large amounts of data collected by the NVWA, as well as the food industry, increasingly valuable (it becomes an asset) and ensures the best decisions can be made.

To identify the most significant risks that need specific or extra attention from the regulator, the NVWA uses Integral Risk Analysis (IRA), with systems embedded in its strategy. This is also used to examine the likelihood of a risk materializing and the potential impact thereof. IRA combines insights from (i) a scientific risk assessments (i.e. risk assessments that are relevant to the food supply chains in the Netherlands), (ii) information on fraud and fraudulent behaviour (i.e. assessments of risks arising from rule-breaking behaviour for financial gain) and (iii) knowledge and wisdom gained from decades of supervisory and regulatory experience. The latter includes information on compliance with (or violations of) legislation and regulations, of which there is a lot of quantitative data, among other things from inspection reports, results of laboratory analyses and compliance analysis. To translate this raw data into intelligence and evidence, the data has to be analyzed by data scientists together with NVWA's inspectors that possess qualitative information, like intuition and (existing) know-how.

Rather than providing a list of all risks imaginable or proven shortcomings in compliance (on a large-scale), the IRA offers an insight into actually identified

and current risks in the Dutch food industry as well as the management of those risks by showing the level of compliance with relevant law and regulation. I consider this to be one of the key elements of the "IRA tool box". By combining this information with trend analysis and scenarios, evidence obtained from inspections, reports from the 24/7 complaint line(s) and social media analysis, the NVWA is able to identify significant risks and high-risk profiles that require specific or extra attention and the management of certain risks by the relevant company or link in the relevant food supply chain is put under increased scrutiny.

The IRA approach gives the NVWA the potential to make intelligence-led choices when taking enforcement measures. In doing so, for example, the NVWA looks for the balance between the most effective enforcement measure and most appropriate intervention (within the confines of Dutch law). This is still a work in progress and on an annual basis the direction in which the NVWA is headed is assessed and adjusted, as necessary.

What is the end goal, and how will predictive analytics (e.g. big data) be embedded in the organization?

As the use of predictive analytics becomes increasingly important in the full scope of NVWA's supervisory and enforcement task, it is essential to effectively and efficiently manage the scarce and scattered know-how and abundance of gathered intelligence and identified risks, while having limited capacity. In the end, the goal is to deploy people and resources as efficiently and effectively as possible to ensure public interests such as food safety, animal welfare or plant health are safeguarded in the best possible way.

² Drivers, Pressures, State, Impact, Response model of intervention.

³ <https://english.nvwa.nl/documents/risicobeoordeling/voedselveiligheid/archief/2016m/precaution-for-food-and-consumer-product-safety>.

To arrive at the right insights and develop a proactive approach to ensuring food safety, optimal data management and data governance are necessary. The NVWA's current priority is to bring together knowledge about data usage (both by engaging data stewards and data scientists) and data sharing among other (European) regulators with the food industry itself. The idea is to develop an ecosystem that places the information demand centrally by integrating data from different sources so that NVWA and food producers can work together and generate insights about emerging risks in supply chains.

The NVWA is working on a comprehensive data and information management strategy. To stay ahead of growing data complexity and keeping the ability to access the relevant information, the NVWA has implemented the so-called "4 Quadrant model" for data deployment.⁴ To date this has shown that the development of high-quality data analysis is not a linear process, but a process that requires a research, prototyping design facility: the NVWA's Data Science Laboratory (DSL). The DSL welcomes data scientists and others who are fascinated with the possibilities of turning big and complex data into intelligent and innovative tools. I also note that there is still a lot to learn from current proof of concepts such as

- Satellite imaging data (i.e. remote sensing technology) used for monitoring changes in vegetation vigor during the season (e.g. to identify the outbreak of plant pests) or cross-checking the monitoring of declared land use (Regulation (EU) No. 809/2014).

- Meteorological data used to predict mycotoxin risks in crops.
- Geographic Information System (GIS) and location intelligence to detect illegal fishing and/or trade in illegal fishery products, or to control the utilization of animal manure (i.e. nitrate Directive 91/676/EEC) or to implement cost-effective logistics (e.g. navigating day-by-day inspections).
- Social media analysis to understand consumer concerns and trends.
- Image analysis and automated processes (e.g. camera supervision in slaughterhouses).

What are the key challenges for the NVWA in the future?

One of the challenges is a further exploration of the accessibility, collation and possible integration of public and private data. This is to strengthen the transition towards a data-driven supervision. Chain management responsibility, and consequently ensuing risk-based supervision, will only be really effective if relevant information that is known to entrepreneurs is shared, especially with each other, but also with the regulator, if applicable. A lot of relevant information is known within the food supply chain long before it is mandatorily reported to the regulator or other governmental institutions.

Has the NVWA considered the implications of the GDPR?

Yes. Predictive analytics and recording data for later analysis puts the NVWA at risk in the sense that it is recording

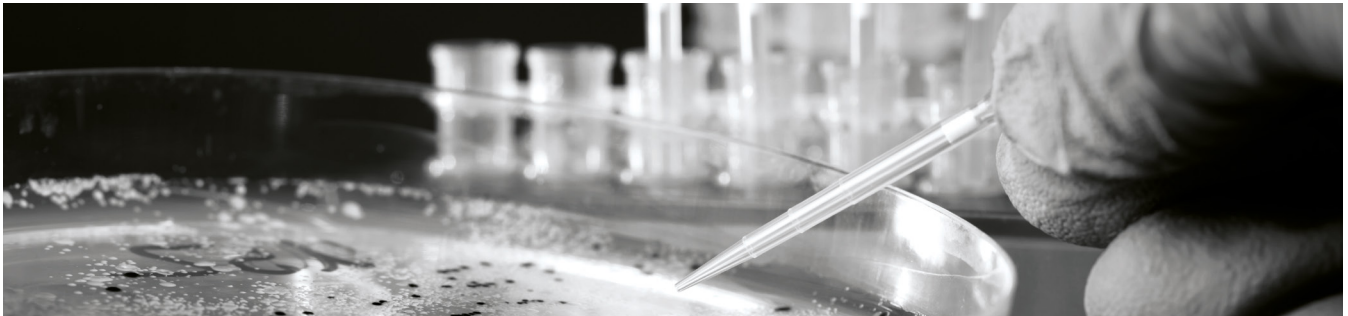
(sensitive or personal) data that may not be in compliance with the General Data Protection Regulation (Regulation EU/2016/679), GDPR. Sharing and compiling data indeed raises questions about what is allowed and what is not under the GDPR? Given the NVWA's ambitions, I think we certainly have an interest in researching what data, including public data, may or may not be used in the context of our risk-based supervision.

Data-driven supervision goes hand-in-hand with certain compliance requirements including the disclosure of certain information and self-reporting obligations. That being said, legal uncertainty should be avoided, especially with a view to prevent situations in which inequality between market parties and regulatory authorities can occur. I am referring to the proportionality principle.

How will the NVWA address the huge scale of available data in the future?

I am convinced that by developing an enterprise data management strategy and applying data science, everyone can benefit. Investors and risk managers can use big data and intelligence for better informed decisions, risk assessors can deploy smart analytics to find new and re-emerging risks and incentives for fraud, business operators can automate (machine learning/artificial intelligence) their compliance tasks, thereby saving time and money. Finally, entrepreneurs can create software and enable ecosystems that make it all possible: from big data to big dating.

⁴ This model is developed by Ronald Damhof, the Enterprise Data Architect of the Dutch Central Bank (*De Nederlandsche Bank*).



Innovative technologies, such as predictive analytics, provide for great opportunities in the context of effective and efficient supervision, do new technologies also provide for new risks in the food industry?

New technologies emerge rapidly and it is expected that in the next 5 to 10 years, breakthroughs will occur that will substantially impact the interaction between producers, legislators and consumers in the food industry. The increasing use of blockchain technology in the food and agricultural sector could have a disruptive impact on government supervision of food supply. Instead of the regulator ensuring the trustworthiness of market parties and providing security as a service, this is replaced by a “trusted algorithm”. Food safety will then be arranged by “a machine”, without any government interference. Other examples of innovations that likely will have or, have already had, an impact on the food and agriculture sector are advanced robot technology (digital framing) and the endeavour to create “meatless meat” as substitute for proteins.

In the Netherlands, we have seen interesting developments from the Delft University of Technology in the areas of 4D printing (also known as 4D bioprinting, or shape-morphing systems), producing “self-organizing

matter” or “self-growing materials” such as mushroom-forming fungi that can be used as packaging material. In addition, Dutch dairy farmers have started using sensors and advanced software that sends a message to the farmers’ phone, alerting the farmers that one of their cows is giving birth. I fully endorse the circular economy (Food system 6 for example) as it is beneficial to reuse products and save energy sources. But it also increases the risk that waste ends up in the food chain. There has been an increased interest in using insects for food and feed as a suitable and sustainable alternative for animal proteins. Besides the food supply chain, private households produce the most food-waste. This waste (or substrates such as kitchen waste) could be used to rear/farm insects, which is particularly attractive as this is a low-capital investment. However, the insects that are being fed with food waste or kitchen waste substrates may contain undesirable substances that could harm humans and/or animals.

What the internet was for information-sharing, blockchain technology is for traceability and food safety in the agricultural sector that places regulatory supervision in a completely new framework. As said, this technology will require the NVWA to adjust its approach, whether this involves the use of blockchain by the NVWA itself or the by food and agricultural market parties.

In addition, would it not be fair to grant an enterprise an exemption from inspection by the regulator if it can demonstrate that it is able, with the help of blockchain technology, to comply with food safety and ethical standards? This provides for a challenge for lawyers and for the legislator going forward.

Another example is the rapidly increasing number of novel gene editing (CRISPR-Cas9) cases. This revolutionary technology offers the opportunity to eliminate today’s dislike against genetically modified crop breeding as it enables efficient and precise genomic modifications. However, in this particular case, there is a need to move from a primarily pre-market approval strategy to a safe-by-design strategy. The latter aims at addressing health and safety risks already during the R&D phase, rather than addressing risks shortly before the relevant product is put on the end market or has already been distributed. For this to be effective, it is imperative that there is some level of cooperation between the food industry (e.g. the corporates and farmers and other producers), research institutions, academia, national and European enforcement bodies and other international partners.

Joeri Noteborn is an associate in the Amsterdam office.

Italian labour court hands down landmark decision on Foodora case

By Vincenzo Di Gennaro and Attilio Pavone

Italian labour court hands down landmark decision on Foodora case with potentially far-reaching implications for any company active in Italy's growing Gig economy.

On May 7, 2018 the Labour Court of Turin handed down a landmark decision in a case brought by delivery bike drivers or couriers (riders), working for Foodora, an online food delivery company that offers meal delivery in 10 countries worldwide, including Italy.

Amongst other things, the riders, each with a freelance work contract with Foodora, sought a relabeling of their work contracts from the "freelance" category to the "subordinate employment agreement" category. In effect, the relabeling of the work contract requested would give rise to an obligation on the part of Foodora to pay the riders an increased wage as well as to pay certain social security contributions not previously paid. In addition, the riders would gain certain protections provided by Italian law relating to the dismissal of employees (compensation and/or reinstatement in case of unlawful dismissal).

There is an abundance of case law relating to the differences between a freelance employment relationship and a subordinate employment relationship, both of which generally relate to the employer's right to give orders and directives to the worker. In view of this case law, and the fact that

the riders in this case were completely free to accept or refuse any meal delivery requests from Foodora, the Court decided that the relationship between the riders and Foodora fits within the category of freelance, not subordinate, employment.

The Court's decision may be appealed on the basis of certain provisions of Italy's labor law reform, which was passed in 2015 (the Jobs Act). One of the objectives of the Jobs Act was to make subordinate employment more attractive to companies/employers, by providing them with economic incentives to offer subordinate contracts, and also by weakening some of the protections previously provided to employees, for example, in the case of unfair dismissal. At the same time, the Jobs Act aimed to reduce as much as possible the "grey areas" pertaining to freelance workers, in particular for those freelance workers who are subject to the control of the employer. In this respect, the Jobs Act introduced a specific rule which provides that if the employer has the power to determine the place and the time in which the freelance worker has to carry out his or her activities, then all the aspects of the subordinate employment relationship shall be applicable to that worker. As to this point, the Court

expressly stated that since Foodora did not have the power to unilaterally determine the place and the time of the riders' activities, the riders could not be considered subordinate employees.

In the event that the Foodora decision is appealed, it is likely that this will lead to a discussion as to the fine line between the right of the employer to dictate to the worker the place and time for the requested activity and merely coordinating the activity that it requests the worker to perform in a way that is less invasive.

The Court's decision and the decision of any appellate court could have far reaching implications for all companies active in Italy's growing Gig economy.

Attilio Pavone is a partner and Vincenzo Di Gennaro is a senior associate in our Milan office.

Update on “Blended in Canada” wine labeling

By Robyn McLaren

The Canadian Food Inspection Agency (the CFIA) published a **summary report** on the Blended in Canada Wine Labeling Consultation (the “Consultation”). In light of the Consultation’s results and effective March 12, 2018, the CFIA has replaced the current voluntary country of origin statement for wines blended in Canada with new statements in effort to minimize consumer confusion.

Background

As with many foods sold in Canada, the CFIA mandates that the label of wine sold in Canada must include a statement indicating its country of origin. For more than 20 years, the CFIA has accepted the following voluntary country of origin statement for wines that have been blended in Canada from wines imported from numerous countries:

“Cellared in Canada by (naming the company), (address) from imported and/or domestic wines.”

Although the CFIA introduced this statement with the intention of clarifying a blended wine’s countries of origin, consumers and industry stakeholders have voiced concerns with respect to the misleading nature of the phrase “Cellared in Canada”. Many stakeholders believe that this statement is not well understood by consumers and can be mistakenly interpreted as indicating a high degree of Canadian content when a wine may be a blend of primarily imported wines.

Overview of Consultation

In response to these concerns, the CFIA conducted a consultation seeking feedback from consumers, industry associations, businesses, governments, and non-governmental organizations. Participants were asked whether they would support the following proposed statements for wines blended in Canada over the existing “Cellared in Canada” statement

- For primarily imported wines: “International blend from imported and domestic wines”.
- For primarily domestic wines: “International blend from domestic and imported wines”.

Results of Consultation

866 stakeholders participated in the Consultation: 40 percent were industry stakeholders (including wine associations and wine enthusiasts) and the remaining 60 percent were largely individuals from the general

public. In its summary report, the CFIA confirmed there was strong support amongst participants for the proposed statements and noted that “of the 866 participants [in the Consultation], nearly 81 percent of all respondents were supportive of the proposed statements, while almost 19 percent were not supportive.”

Those who were supportive of the proposed statements felt that the existing “Cellared in Canada” statement was unclear and/or misleading, that the new statements were more fair to local growers/producers, that the new statements were more informative, and that the new statements made it easier for consumers to differentiate blended wines from Canadian wines.

Take away

Given the results of the Consultation, the CFIA has revised the wine country of origin labeling policy. As of March 12, 2018, the voluntary country of origin statement “Cellared in Canada” will no longer be used and the CFIA will now accept the new statements for country of origin declarations for wines blended in Canada from numerous countries.

Robyn McLaren is an associate in our Toronto office.

Food safety

Safe Food for Canadians Regulations – an overview

By Sara Zborovski and Robyn McLaren

On June 13, 2018, the final *Safe Food for Canadians Regulations* (SFCR) were published in the *Canada Gazette, Part II (CGII)*. These long-awaited regulations complete Canada's new food safety legislative package and will come into force on January 15, 2019.

Background

In June 2012, the Government of Canada tabled the *Safe Food for Canadians Act* (SFCA). This omnibus legislation consolidates a number of food-related statutes and is the cornerstone of Canada's new, modernized federal food safety system. The SFCA received royal assent in November 2012; however, its implementation has been delayed, repeatedly, pending finalization of the SFCR.

Overview of the SFCR

As summarized by the Canadian Food Inspection Agency (CFIA), the SFCR “will make [the Canadian] food system even safer by focusing on prevention and allowing for faster removal of unsafe food from the marketplace”.¹ Specifically, the SFCR will

- Require food businesses that import or prepare food for export or to be sent across provincial or territorial borders to have licences.
- Outline preventive controls and steps to address potential risks to food safety.

- Require businesses to trace their food back to their suppliers and forward to their purchasers so as to reduce the time it takes to remove unsafe food from the marketplace.²

SFCR licensing requirements

As mentioned above, the SFCR will require businesses that import food or prepare food for export or to be sent across provincial or territorial borders to hold licences to conduct their activities. The Government of Canada introduced this licensing requirement in order to align Canada's regulations with international food safety standards and improve access to global markets.

The need for a licence under the new regulations will be determined based on a business' activities. As identified by the CFIA, food businesses involved in the following activities will be required to obtain a licence under the SFCR

- Importing food or food products.
- Manufacturing, processing, treating, preserving, grading, packaging or labeling food for export or to be sent across provincial or territorial borders.
- Exporting food (where an export certificate is requested).
- Slaughtering food animals from which meat products are derived for export or to be sent across provincial or territorial borders.

- Storing and handling a meat product in its imported condition for inspection by the CFIA.³

Timelines and takeaways

As the SFCR will come into force on January 15, 2019, businesses and their counsel must quickly become familiar with the new regulations and the licensing, traceability, preventive-control and other requirements they contain. Although some regulatory requirements will be phased in over a period of 12 to 30 months based on food commodity, type of activity and business size, others will have to be met immediately upon the SFCR coming into force.

The CFIA has published *timetables*, based on food and activity, indicating the timelines for complying with the SFCR requirements. The timelines, relevant to various businesses, are presented according to type of food commodity, namely: (i) dairy products, eggs, processed fruit or vegetable products; (ii) fish; (iii) meat products and food animals; (iv) fresh fruit or vegetables; (v) honey and maple products; (vi) unprocessed food used as grain, oil, pulse, sugar, or beverages; (vii) food additives and alcoholic beverages; and (viii) all other food. Businesses and their counsel should review these tables in order to develop a timely plan for implementing any changes required to achieve SFCR compliance.

Sara Zborovski is a partner and Robyn McLaren is an associate in our Toronto office.

¹ <http://www.inspection.gc.ca/food/sfcr/eng/1512149177555/1512149203296>.

² *Ibid.*

³ <http://inspection.gc.ca/food/sfcr/information-for-media-and-consumers/licensing/eng/1528488744086/1528823568405>.

Food safety

FDA commissioner discusses greater scrutiny of health claims on food packaging

By Robert Kantrowitz

The US Food and Drug Administration (FDA) Commissioner Scott Gottlieb spoke at the *Wall Street Journal* Global Food Forum (Forum) and shed light on his views regarding food labeling.

Specifically, Dr. Gottlieb said that he wants FDA to take a closer look at the health claims on food packaging. He further expressed that FDA should take greater initiative in scrutinizing these claims because he is concerned that certain food manufacturers put claims on products as marketing techniques, rather than the products actually having substantiated consumer health benefits as stated in these claims, which is the regulatory requirement.

Also at the Forum, Dr. Gottlieb emphasized that FDA is looking at how to more uniformly define the terms “healthy” and “natural” on food packaging. These terms have been the subject of recent lawsuits, particularly in California, due to growing consumer health and labeling concerns.

Dr. Gottlieb also discussed the status of the Food Safety Modernization Act (FSMA), which we’ve discussed at length on this blog since it was signed into law by President Obama on January 4, 2011. The law provides FDA with heightened oversight of produce and imported foods, aiming to avert outbreaks of food-borne illnesses. According to Dr. Gottlieb, FDA has allowed companies more time to comply with some parts of the law, such as new produce inspections and monitoring of water supplies on farms. FDA has announced a similar compliance extension for the Nutrition Facts Label rule. However, Dr. Gottlieb said that FDA still intends on implementing these laws in the future.

There has been much speculation that Dr. Gottlieb is high on the US President’s list to succeed Tom Price as the head of the US Department of Health and Human Services (HHS), after Price’s recent resignation. When asked during the Forum whether he

might be a candidate for HHS, Dr. Gottlieb said he can best serve the administration in his current role at FDA, but will serve the President in whatever capacity he is needed. To date, FDA has essentially been the only agency that has been successful in accomplishing objectives under this administration; if Dr. Gottlieb transfers from FDA to HHS, it will be interesting to see whether and how that changes.

The Health Law Pulse will continue to monitor developments regarding FDA’s treatment of health claims on food packaging and FSMA implementation.

Robert Kantrowitz is an associate in our New York office.

Food safety

FDA receives citizen petition regarding labeling of added sugars in food

By Kim Gold

The nonprofit science group, Union of Concerned Scientists, filed a [citizen petition](#) with the US Food and Drug Administration (FDA), urging the FDA to prohibit foods with high amounts of added sugars from being labeled or advertised as nutritious or healthy. The petition was opened for public comment until July 25, 2017.

The petition seeks amendments to current FDA regulations on the nutrient and health content claims for packaged foods to include a “disqualifying level” for added sugar, over which foods may no longer use “healthy” labeling or advertisements. This would be in line with the disqualifying levels already put in place by the FDA for total fat, saturated fat, cholesterol, and sodium. The petition describes “disqualifying level” as an amount of added sugar that exceeds an FDA-determined percent of calories per serving. The petition, however, does not suggest a specific disqualifying amount or level.

The petition cites to existing US government guidance, such as the US Department of Health and

Human Services (HHS) and the US Department of Agriculture’s (USDA) joint [2015-2020 Dietary Guidelines for Americans](#) (“dietary guidelines”), as well as international organization standards, such as the World Health Organization’s nutrition recommendations, to claim that there is a clear link between high added-sugar intake and increased health risks. Further, the petition states that the lack of any “disqualifying level” for added sugars labeling and advertising sends consumers mixed messages about the actual risks associated with the consumption of high added-sugars.

The petition focuses in particular on the health risks to children who consume high levels of added sugars, stating that these children have an increased chance of obesity. The petition also points out how consumers may be misled into thinking that foods with high levels of added sugars are actually healthy. For example, the petition states that the least healthy cereals marketed to children often have the highest number of healthy claims on their labels and packages.

The petition comes after the FDA [revised its Nutrition Labeling standards](#) to require the labeling of added sugars on nutrition labels, in response to the revised HHS and USDA joint dietary guidelines, which advised consumers to consume no more than ten percent of their daily calories from added sugars.

Manufacturers must revise their food labeling by July 26, 2018 to comply with the Nutrition Labeling standards that were passed last year.¹ The petition is part of the [FDA’s greater reassessment of “healthy” claim labeling](#), which we will continue to follow. Please check back for updates.

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¹ However, manufacturers with less than US\$10m in annual food sales will have an additional year to comply.

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