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NORTON ROSE FULBRIGHT

Cultivate

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In this issue:

Editorial

In the 17th issue of *Cultivate* we focus on the logistics and transport industry.

In the labour-intensive area of farming and agriculture, unmanned aerial vehicles (UAVs) can provide substantial benefits. In this issue we focus on the ownership of data and the liabilities a company may face when capturing, and transmitting data from UAVs. Also, with new federal laws being introduced in Canada which makes Electronic Logging Devices mandatory in truck transportation, we look at the positive impact this has for many farm employees in North America.

We also focus on the EU, discussing the European Court of Justice's judgement on new methods of genetic engineering and how the judgement will affect the growth of genetically modified foods.

Elsewhere in Europe, with the UK's discussion to leave the EU this year, we look at the changes that the UK's food industry and agriculture industry may face. We discuss how the regime for production quotas and subsidies in the UK will change when the Common Agricultural Policy no longer applies; and look at the government's two notices addressing both farm payments and rural development funding if the UK should the leave without a deal.

With new laws coming into effect around medical cannabis use, we have been looking at the legal implication for business and workers. For example, we look at the obstacles and practical solutions UK businesses may face when planning to invest or be involved in activity relating to Canadian cannabis. We review what the legalization of cannabis in Canada means for employees and employers in the transportation industry and also look at why the Agricultural, Food and Rural Affairs Appeal Tribunal dismissed a union's unfair labour practice complaint in its first labour relations decision.

Globally, dairy-free and plant-based diets are becoming more popular for health and environmental reasons. It is unsurprising that dairy-free milk alternatives (and the inevitable backlash from dairy traditionalists) are on the rise. But should these products be allowed to call themselves "milk"? In this issue, we consider how this question has been answered recently in the USA, Europe and Australia.

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

January

Singapore, January 23-25, 2019
2019 International Conference on Agriculture, Food and Biotechnology (ICAFB 2019)

Sydney, Australia, January 30-31, 2019
ICFSPT 2019 : 21st International Conference on Food Safety and Packaging Technologies

Osaka, Japan, January 28-29, 2019
13th International conference in Agriculture and Plant Science

February

London, UK, February 28 2019
22nd Euro-Global Summit on Food and Beverages

March

Nice, France, March 25-28 2019
Global Food Safety Conference 2019

April

Dubai, UAE, April 1-2, 2019
Global Forum for Innovations in Agriculture

Toronto, Canada, April 12-13, 2019
International Conference on Food Technology and Advanced Nutrition

Drones in Agriculture – collecting data and delivering potential liabilities

By Paul Keller and Susan Ross

Referred to as "drones" by hobbyists, unmanned aerial systems/vehicles (UAS or UAV) have significantly evolved from their early days as military equipment to today's commercial applications. With the advent of certain technologies at reasonable prices, UAVs are now typically equipped with sophisticated satellite global positioning systems, high-resolution cameras, real-time surveillance, obstacle avoidance technologies, and robotics.

In the labor-intensive area of farming and agriculture, UAVs can provide substantial benefits, depending upon the model and equipment on the UAV

- **Viewing and monitoring the land.** Drones can enable farmers to see if certain plants are starting to show signs of disease, insect infestation, animal activity, too much moisture, etc.
- **Mapping the land.** Getting an accurate map of the land can help with more efficient and effective crop yields, and can assist in determining damage after severe weather events.
- **Soil analysis.** Some of the more expensive UAVs can be used to create 3D maps, helping to measure and analyze soil, moisture content, and erosion of the soil.
- **Spraying and irrigation.** Some UAVs with ultrasonic echoing or thermal sensors can identify when parts of a field have become dry or require spraying with insecticides (without the risks to human health that traditional insecticide\spraying can raise).

Unfortunately, UAVs have some limitations as well

- **Limited flight time.** If the UAV can fly for 20 minutes on a single battery charge, a large field could require many flights.
- **License required.** In the US, the Federal Aviation Administration requires a license to operate an UAV.
- **Expense of initial purchase of UAV, equipment, and repairs.** Drones can cost thousands of dollars, and cameras and sensors can add significantly more to the purchase. Software will need to be updated, and parts may need to be repaired or replaced.
- **UAV crashes.** The UAV may run out of power and crash to the ground, damaging both the UAV as well as the camera or other accessories. The UAV may crash into a third party's property, causing damage to that property. Even worse, the UAV may crash into a person or an airline full of passengers, causing extensive personal injury.
- **UAV insurance is becoming available, somewhat similar to automobile insurance.** Liability insurance would typically include coverage for damage to people and third-party property. Damage insurance (known as "hull insurance") would cover damage to the UAV itself. Finally, payload insurance would cover the equipment the UAV is carrying, such as cameras and sensors.
- **Personal privacy and data risks.** Because UAVs are not yet common, many individuals fear that the drone is "spying" on them. The information gathered by UAVs is not selective – their sensors and cameras capture information about the entire area inspected, regardless of its relation to the UAV's primary purpose. Thus a host of issues may arise when data is incidentally collected.

This article focuses on the ownership of that data and the liabilities companies may face when capturing, storing, and transmitting such data.

Potential liability

The collecting, retaining, and using of large amounts of information by UAVs may pose liability issues that fall under traditional torts (like negligence, duty-to-warn, and strict liability). The software on UAVs allow them to fly over a site, record imagery,

find defects, and potentially (with artificial intelligence) make decisions on the data collected. If a company's UAV finds, records, and stores data related to a defect in a third party's assets, the company may be liable to the third party for negligence.

To find negligence, courts weigh whether a company conducted itself according to a duty of care to others, and whether it took adequate safeguards in carrying out activities, all according to the standard of care as defined by prevailing professional practice. Plaintiffs can establish the requisite level of care through expert testimony, published literature, professional guidance documents, and the nature of the relationship between plaintiff and defendant.

An invitee relationship could pose liability for negligence, such as where one company invites another onto its property for business dealings. Liability exists if the company owning the property knew or should have discovered a dangerous condition but did not. For example, an electrical company owning land may permit a telephone company to run phone lines on its land. As the telephone company is an invitee onto the electrical company's property, the electrical company may owe a duty to the telephone company to warn it of a dangerous condition that is hidden or unknown, or to protect it against a foreseeable dangerous condition. Accordingly, an electrical company that hires a UAV to inspect its lines but does not report the existence of a defect that was incidentally found by the UAV to the telephone company may be negligent, even if no one at the electrical company reviewed the part of the UAV's recording with the line's defect.

A licensee relationship could also pose liability for negligence, such as where a person is permitted to enter property by the owner but does not provide a material benefit to the property owner. Liability exists if the property owner knows of a hidden danger but does not disclose it to the licensee. No liability exists, however, if the property owner does not know of the danger. For example, if a person is allowed to farm on a piece of a neighbor's land and the neighbor's UAV records a dangerous defect in the farmer's land, the neighbor may not be required to report the defect to the farmer if it does not view the recording of the dangerous defect. The neighbor would only have to report the dangerous defect to the farmer if it views the recording and knows of it.

Liability for negligence or negligent disclosure may also be established if there is a contractual duty between companies that specifies a duty to warn third parties. For a company to avoid liability for a negligent disclosure claim, it should disclose defects it finds to the third party in a way consistent with standard practice.

Potentially, states could classify UAVs under a strict liability standard if states view UAVs as an abnormally dangerous activity. Under this standard, a company flying a UAV that records and stores dangerous defects on another company's assets, no matter the other company's status, would have a duty to warn the other company of the defect.

Use of UAVs everywhere – will liability follow?

Used for property inspection

When assessing a property for real estate purposes, inspectors can use UAVs to inspect roofs, asbestos, and other deficiencies.[1] Small UAVs that are camera-equipped can fly over buildings to capture imagery, then use the imagery to make a high-resolution map or 3D model of the building for inspection[2]. Some UAVs can also stream its observations in real time. While the benefits of increased information obtained faster are numerous, complications may arise from the excess data.

What if the UAV captures a dangerous defect in a property used by a neighbor to hunt on—is the buyer required to tell their neighbor of the defect?

If the buyer already owns the home, then the neighbor is a licensee. Thus the home owner has a duty to warn the neighbor of any defects observed when watching the UAV's recordings. However, if a defect is on a portion of the recording that the home owner does not view, then the home owner does not personally know of the defect and thus would not be liable to the neighbor for not reporting the defect.

Used to inspect railroads

UAVs can be used to inspect train tracks for weather damage, HAZMAT issues, and maintenance needs. Typically inspections are done manually, but in the future, UAVs will be able to make 360 degree inspections of bridges and record areas made unstable due to tornados or hurricanes. Legal issues arise if in the data collected, the train company misses a defect and an accident later occurs.

Are train companies liable for missing a HAZMAT issue?

A UAV inspecting a railroad for a HAZMAT issue would likely fall under strict liability. Here, if a UAV recorded

1 https://www.lowesforpros.com/articles/blog-using-drones-for-building-inspections_a6472.html
2 https://www.lowesforpros.com/articles/blog-using-drones-for-building-inspections_a6472.html

a dangerous defect, then the company would likely be strictly liable for not reporting the dangerous defect to the correct authority. In this scenario, it is critical to limit recordings to the necessary location and time frame and have an employee view all recordings made.

What if a UAV records a defect after a hurricane or tornado?
Such a scenario is dependent on timing and what is recorded. A railroad company could defend itself from a negligence claim by contending that the weather was an intervening cause that prevents it from being the cause of the defect.

Have a plan to curb potential liability

Because the law on UAV use is still sparse, companies should consider the use of UAVs carefully. They should consider whether to clearly set out the scope of responsibility and liability (and indemnity) when conducting an inspection, a study of a site, or a monitoring effort in the relevant contracts. Additionally, you should have appropriate insurance coverage to protect your company from liability.

Companies must also be cognizant of the way data is collected and stored. Companies should add to their data retention plans information about data collected by UAVs and create a timeline for any unrequested or unused information, like an imagery recording to be discarded, to avoid liability beyond any contractual obligations. Furthermore, the vast amount of data collected must be stored and retained in a safe and secure way, especially if the data contains personally identifiable information (e.g. license plate or registration number). State laws that govern data security and data breaches need to be considered, and remember that many states require users to be notified of a breach if one occurs.

Paul Keller is a partner and Susan Ross is senior counsel in our New York office.

Electronic logging devices and privacy in North America transport

By Allison Numerow and Sarah Miller

This season Canada is introducing new federal laws which will make Electronic Logging Devices (ELDs) mandatory in truck transportation. ELDs communicate with vehicle engines to record driving time. Mirroring the American ELD laws that passed in 2017, these laws allow the trucking industry across Canada and the United States to have uniform tracking and logging of drivers' hours. Previous to the ELD mandates, trucking companies relied on paper and pencil to record hours. Accordingly, these new laws mean a large expense for trucking companies to update their fleets with the technology.

The move to ELDs is motivated by safety. ELDs will record each driver's hours of service on the road, making it more difficult for drivers to falsify their driving records and extend their hours. ELDs effectively enforce limits on drivers' hours of service by strict monitoring, which is reported when the drivers enter weigh stations. The goal is that strict monitoring and enforcement will mean fewer breaches in the drivers' hours of service, less fatigue and therefore fewer accidents. With ELDs effectively limiting the number of hours a driver can be on the road, companies will need to hire more drivers. Time sensitive transports, such as livestock, will have to be monitored more closely, ensuring humane treatment of the animals under animal protection laws while grappling with decreased hours of transport to get the animals or other time-sensitive transports to their final destination.

The use of ELDs signals an expected growth of data-collecting technologies in transportation. In order to track, protect, manage and control a diverse workforce and provide logistics for complex transportation, monitor-based technology is likely to be used more and more. As with all data-collecting and monitoring technology, this raises questions of employee privacy. Employers will have to balance business interests against employee interests, especially in Canada, where there are more rights-based privacy protections for employees.

In agriculture, protection for farm employees is increasing. Farm employees are subject to employment standards throughout North America. Large-scale farming operations could see similar ELD laws in future years to monitor the number of hours an employee may spend driving a tractor or harvester. There are technologies that can monitor tractor GPS, providing greater efficiency in seeding, fertilizing and harvesting but these can also raise employee privacy issues.

As the transportation industry adopts more technology and data-collecting devices into their operations, companies should keep in mind the need to balance safety and data collection with employee privacy issues.

Allison Numerow and Sarah Miller are articling students in our Calgary office.

European Court of Justice: plants developed with CrisprCAS9 subject to GMO regulation

By Dr. Klaus von Gierke and Ettje Trauernicht

The European Court of Justice's judgement on new methods of genetic engineering (*Conféderation paysanne and Others v Premier ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt*, C-528/16) was highly anticipated. A decision has been made by the judges in Luxembourg (judgment of 25 July 2018) which states that plants developed using new methods of genetic engineering, in particular, organisms processed using the CrisprCAS9 method, are classified as genetically modified and therefore subject to the strict regulations applicable in this field.

At the beginning of 2018, many supporters of new genetic engineering methods were still hopeful as the Advocate General Michal Bobek, stated that organisms treated with the CrisprCAS9 method should not fall under the strict regulations applicable to genetically modified food. Thus, the European Court of Justice's judgement came as a surprise to many hopeful supporters.

What is CrisprCAS9?

The CrisprCAS9 method is a form of mutagenesis that allows sections of the DNA of an organism to be cut out and replaced by other DNA strands or certain sections to be immobilized. Besides its application in medical science and pharmaceutics, the new method holds significant potential for the fields of plant breeding as well as for the food industry. In contrast to the traditional genetic engineering methods of transgenesis in which foreign DNA is used in organisms for their optimization, foreign DNA is not used in mutagenesis. Since the mid 20th century, conventional mutagenesis has been used in plant breeding to breed new varieties.

In these conventional methods of mutagenesis, plant organisms are specifically exposed to mutagenic conditions, e.g. UV radiation or treatment with chemical substances, to cause mutations in the plant genome and, thus, breed new varieties. Conventional methods of mutagenesis, however, do not offer the possibility to exactly control these processes. Therefore, it often takes several years to obtain the desired properties.

The new methods of mutagenesis, such as the CrisprCAS9 method, however, allow for targeted editing of the organism's DNA. Therefore, the development of new varieties that often takes several years using conventional mutagenesis methods can now be made much more efficient with these new methods.

Legal basis

The legal basis for genetic engineering procedures is Directive 2001/18 of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (Directive 2001/18), which has been implemented in Germany by the Genetic Engineering Act (Gentechnikgesetz – GenTG). In Article 2 II of Directive 2001/18, a genetically modified organism (GMO) is defined as "an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination". This includes, all organisms resulting from transgenic techniques and the implantation of foreign genetic material. Pursuant to Art. 3 I in conjunction with Annex I B No.1 of Directive 2001/18, however, organisms produced by mutagenesis are excluded from the scope of Directive 2001/18. Therefore, it was expected that organisms processed by use of CrisprCAS9 would also be excluded from the scope of Directive 2001/18.

The decision of the European Court of Justice

The Luxembourg judges were now confronted with the question of whether the new mutagenesis methods should also be excluded from the scope of Directive 2001/18. French environmental and agricultural associations had raised objections to the implementation of Directive 2001/18 in France and filed claims demanding that also organisms treated with CrisprCAS9 should fall within the scope of Directive 2001/18. For clarification of the facts, the French courts by way of a preliminary ruling procedure turned to the European Court of Justice, which has now decided that only methods of mutagenesis that have "conventionally been used in a number of applications and have a long safety record" shall be excluded from the scope of Directive 2001/18.

This only refers to the conventional methods of mutagenesis that already existed at the time Directive 2001/18 was adopted. By reference to the precautionary principle laid down in Article 191 TFEU, the new methods of mutagenesis should, according to the judges, be included within the scope of Directive 2001/18, since the risks of such procedures could not be assessed. However, the judges did not provide a more detailed justification or specification of potential risks.

Criticism of judgment

While opponents of genetic engineering, such as, consumer protectors and agricultural associations see their views confirmed by the judgment of the European Court of Justice, the decision is heavily criticized by scientific associations and the agricultural industry, which refer to it as a step in the wrong direction posing an impediment to scientific progress, and consider the argumentation of the European Court of Justice very weak.

Previously, the effects of organisms treated using CrisprCAS9 had been assessed as completely harmless by various independent scientific associations. Organisms bred with the new methods of targeted mutagenesis cannot even be distinguished from those bred by natural mutation or breeding. In this context, the question as to the burden of proof of whether organisms resulted from natural mutation or breeding (which is not subject to regulation) or targeted mutagenesis (regulated by Directive 2001/18) will therefore become increasingly important in the future.

Apart from this, it is criticized that the decision of the European Court of Justice prevents further progress in the breeding of new varieties adapted to climate change and reinforces the vision of GMO-free agriculture in Europe. In medical science, the new methods of genetic engineering have long been approved and accepted and could lead to substantial progress in research over the next few years. In view thereof, it is not clear why such progress should be impeded in the agricultural sector, also in view of the challenges that will have to be met in this area over the next few years and decades in order to ensure a sustainable food supply for the constantly growing global population. From the critics' point of view, this judgment, as well as the strict regulation in Europe, could cause Europe to lose touch with other regions of the world, in particular, the USA, where the new genetic engineering methods have already been tested in initial field trials and food processed using such methods will be available in supermarkets before long.

Notification procedure for GMOs

The question as to the burden of proving that a new variety has not been bred using targeted mutagenesis and is not subject to GMO approval is yet to be clarified.

When applying for approval of a new variety produced by use of modern genetic engineering methods (or a variety which has not demonstrably been bred exclusively by means of conventional mutagenesis), the strict approval procedure of the European Union is still to be followed to obtain a release permit. For seeds, this procedure is governed by Directive 2001/18, according to which an application is to be filed with the competent national authority (in Germany, the Federal Office of Consumer Protection and Food Safety) first. Provided that this application is complete, an assessment report for the variety approval applied for is drafted by the respective competent national authority and, together with the application, submitted to all other competent national authorities of the EU Member States. After the application has been reviewed by all Member States, every Member State has the possibility to state its opinion and raise objections to the approval of the variety applied for. Should an objection be raised by at least one Member State, the application for approval is sent to the EFSA, which will then prepare a scientific opinion on the variety applied for, in which, potential risks are classified. On the basis of this scientific opinion, the EU Commission ultimately decides upon the approval of the variety for which the application was made. Apart from that, each Member State also has the right to restrict the cultivation of an approved variety within its own territory.

This "opting-out" mechanism is provided for in Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC with regards to the possibility for Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory.

It remains to be seen to what extent the Member States, in particular, Germany, will make use of their right to "opt out" with regards to varieties that have been processed using new methods of mutagenesis. In principle, the initial aim could be to receive a general EU-wide approval of varieties processed using CrisprCAS9.

Dr. Klaus von Gierke is a partner and Ettje Trauernicht is of counsel in our Hamburg office.

EU Competition Policy in the Agriculture Sector

Jay Modrall

Introduction

In late 2018, the European Union (EU) Commission (the Commission) published its first report dedicated to the application of EU competition rules in the agriculture sector (the Report). The Report and an accompanying staff working document are based on input from national competition authorities (NCAs), Member States and private organizations, as well as the Commission's own work.
The Report focuses on EU competition rules and their derogations for farmers, producer organizations, associations of producer organizations and so-called "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, traders and retailers (POs, APOs and IBOs, respectively) between January 1, 2014 and mid-2017, as well as investigations by competition authorities in the agriculture sector from January 1, 2012 to mid-2017.

The Report is part of a long-running effort by EU authorities to improve the bargaining position of EU farmers and their associations, including through derogations from EU competition law restrictions that would otherwise limit their ability to cooperate and through enforcement of the competition rules, which has focused largely on violations by buyers and other upstream entities.

The Report provides much needed insights into the sector, and is intended to inform future policy choices. Outside the period covered by the Report, however, the derogations discussed in the report were significantly amended, and an important European court judgment arguably expanded farmers' ability to cooperate with one another. These developments are discussed below.

Background

EU competition law in the agricultural sector is a complex patchwork of general EU competition rules and highly technical sector-specific rules. Article 42 of the Treaty on the Functioning of the European Union (TFEU) provides that EU competition rules apply to the production of and trade in agricultural products only to the extent determined by EU regulations adopted under the Common Agricultural Policy (CAP). These regulations do extend EU competition rules to the agriculture sector, but they also provide for certain derogations for POs, APOs and IBOs.

The current legal framework is set out in Regulation 1308/2013 (the CMO Regulation). Article 206 CMO Regulation provides that EU competition rules apply to all agreements, decisions and practices relating to the production of, or trade in, agricultural products, subject to certain derogations. These derogations include general derogations largely carried over from the predecessor regulation, as well as a number of sector-specific derogations that were introduced by the CMO Regulation to enhance farmers' bargaining power.

The general derogations are set out in Articles 209 and 210 CMO Regulation. Article 209(1) exempts (i) agreements, decisions and practices "necessary for the attainment of the objectives" of the CAP and (ii) agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or recognized producer organizations or associations of producer organizations, unless the agreement, decision or practice entails an obligation to charge an "identical price" or "excludes competition." Article 210(1) CMO Regulation exempts practices of recognized IBOs with the object of carrying out permitted activities. Article 210(2) CMO Regulation provides that the derogation for IBOs only applies where the relevant agreement, decision or practice has been notified to the Commission and the Commission has not found that it is incompatible with EU rules within two months.

The main sector-specific derogations introduced in the CMO Regulation were set out in Articles 169-171 and related to the olive oil, beef and veal products and certain arable crops sectors. These articles allowed joint sales and agreements on quantities provided that (i) producers integrated in POs,

(ii) these POs carried out activities other than joint-selling that create efficiencies (such as joint procurement, joint distribution, joint storage, etc.) and (iii) the POs' sales did not exceed certain share thresholds. However, the CMO Regulation was amended as from January 2018 to abolish these sector-specific derogations.

In addition, the CMO Regulation sets out special rules for the dairy, ham and sugar, fruit and vegetables and wine sectors. In particular, Article 125 CMO Regulation, as implemented by Commission Regulation 2016/1166, permits so-called value-sharing agreements in the sugar beet sector to address challenges stemming from the end of the sugar beet quota system in October 2017, which would otherwise have compromised the position of beet growers. The January 2018 amendment to the CMO Regulation that eliminated the sector-specific derogations mentioned above extended the derogation for value-sharing agreements for the sugar sector to other agricultural sectors.

Separately, in the November 2017 Belgian Endives judgment, the European Court of Justice decided that Article 101 TFEU may not apply within recognized POs and APOs to practices such as coordination of volume and pricing policies, as well as exchanges of commercially sensitive information, where those practices are strictly necessary for and proportionate to carrying out the objectives of those PO and APOs. In other words, it may not be necessary for farmers and their associations to meet the stringent criteria for derogations under the CMO Regulation, or even the more general requirements of Article 101(3) TFEU, to be exempt from Article 101(1) TFEU's prohibition of anti-competitive agreements, decisions and concerted practices.

The Role of POs, APOs, IBOs and Competition Law Derogations

The Report discusses the role of POs, APOs and IBOs in the EU agricultural sector and the manner in which such organizations have benefitted from the CMO Regulation's derogations from EU competition rules. The Report notes that there are more than 1,700 recognized POs and 60 APOs in the fruit and vegetables sector; 300 recognized POs and 7 APOs in the milk sector; and about 200 recognized POs and nine APOs in the other sectors, mainly for meat, olive oil and cereals. The overall number of recognized POs may be over 4,000. According to a 2017 study, however, there are many more non-recognized POs/APOs than recognized POs/APOs in the olive oil, beef and veal and arable crops sectors, and the overall number of non-recognized POs and APOs also likely far exceed the number of recognized POs/APOs. There are currently 128 recognized IBOs in nine Member States, mainly in France and Spain and mainly operating in the wine and fruit and vegetables sectors.

Since the benefit of the CMO Regulation's competition law derogations only applies to recognized POs/APOs, many producers who participate in unrecognized POs are not taking advantage of the benefits offered by the CMO Regulation, including enhanced negotiating ability under the EU competition rules but also wider access to financing.

General Derogations

The Report provides little information on the application of the general derogation set out in Article 209, which since 2014 is based on a self-assessment system with no notification to the Commission or Member State authorities. The Report notes that in 2012 the Dutch NCA rejected an attempt by producers to rely on the predecessor of Article 209(1)(2) for an agreement relating to the production of silver-skin onions.

Under Article 210 CMO Regulation, which continues to require notification, the Commission received only two notifications from IBOs, one relating to an agreement establishing price grids for certain milk characteristics and another establishing a price grid for potatoes. The Commission did not object to either agreement.

Sector-Specific Derogations

The practical impact of the CMO Regulation's sector-specific derogations varies widely from sector to sector. In the olive oil, beef and veal and arable crop sectors, not a single PO fulfilled all administrative requirements (recognition and notification of volumes negotiated) to benefit from the CMO Regulation's sector-specific derogations that were eliminated in January 2018.

On the other hand, nine Member States reported on milk deliveries negotiated under collectively negotiated contracts benefiting from the sector-specific regime for milk under Article 149 CMO Regulation, representing 15 per cent of total EU milk deliveries in 2016. Under Article 150 CMO Regulation, French and Italian producers took advantage of the possibility for supply management for certain cheeses. Under Article 167 CMO Regulation, French and Spanish producers engaged in supply management for wine. Under Article 172 CMO Regulation, Italian producers were able to engage in supply management for certain hams.

The most popular sector-specific derogation proved to be the provision for value-sharing agreements in the sugar sector. Such arrangements were

used in 35 out of 42 agreements for which the Commission received information.

The CMO Regulation also allows for certain types of measure to be taken in particular situations, such as implementing "operational programmes" for production planning and to respond to crises. A number of such actions were taken under Article 30 CMO Regulation, benefitting from EU financial assistance. By contrast, no POs, APOs or IBOs took advantage of the possibility under Article 222 CMO Regulation to address situations of severe market imbalance, e.g. by withdrawing products from the market.

Article 101(3) TFEU

Even if a measure in the agricultural sector fails to qualify for an exemption under the CMO Regulation and could be caught by the Article 101(1) TFEU prohibition against anti-competitive agreements, decisions and concerted practices, such a measure could qualify for the general exemption for efficiency-enhancing agreements, decisions and concerted practises set out in Article 101(3) TFEU. The Report mentioned that two Latvian dairy cooperatives were allowed to fix prices for raw milk in 2013, as all prescribed conditions were respected. By contrast, the French authority did not accept claims that certain price-related actions by associations of slaughterers failed to satisfy the Article 101(3) requirements.

Enforcement

The Report and accompanying staff working document offer useful insights into investigations between January 1, 2012 and mid-2017 in the agricultural sector. The Report provides interesting information on the jurisdictions that are most active in antitrust enforcement in the agricultural sector, the agricultural products that are most often targeted, and the types of entities most often involved.

From January 1, 2012 to mid-2017, European competition authorities concluded about 126 investigations, with about 41 investigations still ongoing, leading to a total of 167 investigations. The Commission accounted for a significant portion of these investigations (22), but several NCAs were also very active, including those in Austria (24), Denmark (22), and Greece (21).

Infringements leading to the imposition of fines concerned a variety of agricultural products, but such infringements related most often to milk and dairy products (26 per cent), followed by fruit and vegetables (22 per cent), meat (16 per cent), and oilseeds, oil and fats (10 per cent).

The types of entities most frequently found to have infringed the EU competition rules were processors (39 per cent), retailers (26 per cent), wholesalers (12 per cent), and other types of associations (7 per cent). By contrast, agricultural producers, POs, and APOs were found to have engaged in antitrust infringements in a relatively small portion of cases (5 per cent, 4 per cent and 3 per cent, respectively). This is consistent with the fact that farmers, alone or in partnership, were the most frequent complainants, while processors were the most prominent targets. Antitrust probes were originated by complaints almost half of the time, with authorities acting ex officio in the rest of the cases.

Although only about one-fourth of investigations resulted in a finding of infringement, competition authorities identified a number of practices that were directly detrimental to farmers, such as Spanish buyers agreeing to pay lower prices for raw milk and allocating farmers between themselves, and French buyers of live pigs who agreed on quantities purchased with a view to reducing prices. Indeed, almost half (46 per cent) of the infringements identified concerned agreements on prices (either between competing processors or between processors and retailers), followed by information exchange (23 per cent), agreements on output (13 per cent), market sharing (10 per cent), and abuses of dominant positions (8 per cent). Interestingly, all cases of abuse of dominance concerned the milk and dairy sector.

The Report concludes with a brief reference to consultations and monitoring activities conducted by competition authorities. NCAs received 46 requests for advice and conducted 53 monitoring exercises, with Spain, Hungary and Italy accounting for almost half of these activities.

Conclusion

The Report and accompanying staff working document shed unprecedented light on the operation of the derogations from EU competition law restrictions intended to allow increased cooperation among farmers and their associations, as well as enforcement activity in the sector. The Report seems to confirm the common view that the derogation system does not work well. A substantial majority of farmers associations apparently do not bother to obtain official recognition to benefit from the derogations.

As regards general derogations, the Commission has no information to indicate that farmers' POs and APOs have relied on the general derogation set out in Article 209 CMO Regulation, while only two IBOs have relied on

the Article 210 CMO Regulation derogation. The 2017 Belgian Endives judgment may further erode the significance of the general derogation for POs and APOs.

As regards sector-specific derogations, no POs benefited from the sector-specific derogations introduced in 2013 and eliminated in January 2018. On the other hand, the popularity of the derogation for value-sharing agreements in the sugar sector suggests that the EU legislator was correct in extending the benefit of that derogation to other sectors as from January 2018. Several other derogations have also benefited producers of milk, cheese, wine and ham, but mainly in a few Member States.

Although the CMO Regulation's derogations from EU competition rules have so far offered limited benefits for EU farmers, farmers and their associations are active complainants to the Commission and NCAs regarding alleged infringements by processors and other upstream market actors, who do not benefit from the CMO Regulation's derogations. EU antitrust authorities have in fact found infringements in a significant number of cases. Again, however, these actions have been concentrated in a relatively small number of Member States and product areas. It is of course impossible to tell whether other Member States and product areas are relatively free of such behaviour, or whether additional enforcement action is needed.

In short, the Report suggests that the traditional focus on providing relief from the EU competition rules to allow farmers to cooperate in ways that would otherwise be prohibited may be misplaced, since, with a few exceptions, farmers themselves seem to feel little need for such relief. On the other hand, there is a significant amount of enforcement activity directed principally at upstream actors who do not benefit from such relief, and potentially room for significantly more.

Jay Modrall is partner in our Brussels office.

Brexit's impact on agriculture

By Claire Edwards

Set up in 1957, the European Union's Common Agriculture Policy (CAP) provides support to some 12 million farmers across Europe. EU agricultural and environmental subsidies currently account for a significant portion of the income of farmers, through access to direct payments (Basic Payment Scheme) and funding given to the UK for rural development projects.

Post-Brexit, these subsidies will no longer be available to UK farmers. The UK, post-Brexit and post-transition, will be operating outside of the CAP and the House of Commons briefing paper - 'Brexit: Future UK Agriculture policy' published in February 2018 – provides further clarity regarding how the UK plans to diverge from the CAP. According to the UK government's 25 Year Environment Plan released in January 2018, current direct payments to farmers in England will be replaced by a new environmental land management system based on providing "public money for public goods" – rewarding farmers' work in enhancing the environment and investing in sustainable food production. As indicated by the briefing paper, there will be a five-year transitional period from farming subsidies to a system of public money for public goods, which farming unions have largely supported. The benefits of environmental land management schemes are detailed in Defra's Future Farming and Environment Evidence Compendium, published in February 2018.

In its advice notices for the farming industry published in August 2018, the government specified that in the unlikely event in which the UK leaves the EU without agreement (in a "no deal" scenario) eligible beneficiaries will continue to receive payments until domestic legislation, set to govern the UK's agriculture industry, is introduced by Defra and devolved administrations. Funds for farm support (including both Pillar 1 and 2 of the current CAP) will mirror that currently provided by the EU until the end of the current parliament (expected in 2022). For projects agreed before the end of 2020, regardless of whether the UK leaves the EU without agreement, funding is guaranteed for their full lifetime. This means new projects signed after the scheduled leave date in March 2019 will also receive funding up to the value of programme allocations.

Given the strategic importance of agribusiness in the UK and the UK's significant food-processing industry which relies on raw agricultural product, as well as the fact that CAP support makes up around 50-60 per cent of farm incomes in England and a larger proportion in other parts of the UK, not surprisingly, there is concern, which may deter farmers from making long-term improvements and investment decisions. However, withdrawal from such policy may create an opportunity to build a more efficient and innovative farming sector tailored to UK priorities and farming systems.

What other changes may the UK's agri-food industry face post-Brexit?

Trade

Trade is vital to the agri-food industry – the EU being the UK's largest trading partner in agri-food products accounting for around 60 per cent of exports and around 70 per cent of imports. As part of the EU, the UK benefits from the "single market" (with free movement of goods around the EU) and a customs union (with tariffs on non-EU products set through either preferential trade agreements with other countries or through the World Trade Organisation).

If the UK leaves the EU without an agreement in place, businesses exporting and importing goods to and from the EU will be required to apply the same excise rules to goods moving between the UK and a country outside of the EU, meaning an import declaration will be required and potentially significant customs duties must be paid.

During any transition period, the UK will continue to remain in the EU customs union and single market. What follows after that is still unclear. The expanded version of the Political Declaration which originally accompanied the draft Withdrawal Agreement published on November 14, 2018, contains some detail on what the future trading relationship between the UK and the EU might look like. It

remains, however, non-binding and will be subject to further negotiation.

It speaks of an "an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation". It also recognizes that while the new relationship will be based on a balance of rights and obligations which must respect the integrity of the Single Market and Customs Union and the indivisibility of the four freedoms, it will also respect the outcome of the 2016 referendum including "with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom". It is unclear how these apparently competing visions can be reconciled.

On trade, the Declaration provides that the parties "envisage having a trading relationship on goods that is as close as possible". This will take account of the fact that post Brexit, the parties "will form separate markets and distinct legal orders" – although the parties envisage "comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition".

In relation to customs, there is no resolution to the question of the UK being outside the Customs Union, while avoiding a hard border between Ireland and Northern Ireland. However, there is a commitment to "build and improve on the single customs territory" provided for in the draft Withdrawal Agreement, obviating the need for checks on rules of origin. Moreover, there is acceptance that use of "facilitative arrangements and technologies will also be considered in developing any alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing". Although there is little indication as to what future customs arrangements will look like, there is nevertheless a stated desire on both sides to explore innovative solutions as to how a breakthrough might be achieved.

Access to labour

A serious labour shortage may face the sector once EU rules on freedom of movement cease to apply. Significant numbers of migrant workers are used in the agriculture and food processing sector, with an estimated 75,000 temporary migrant workers in agriculture every summer in the UK. This access to labour is essential as it underpins the UK food chain's timely delivery of high quality affordable food to consumers.

The UK government's final proposals on its immigration policy have yet to be published, but preferential access to the UK for EU citizens will cease after any transition period. However, the government is keen to ensure that post-Brexit there is access to seasonal agricultural labour. Any restrictions on the free movement of labour as a result of Brexit will have a huge impact on the UK's agri-food industry.

The Home Secretary commissioned the Migration Advisory Committee (MAC) to assess the impact of leaving the EU on both seasonal and non-seasonal employment. The MAC is an independent advisory non-departmental public body that advises the government on migration issues. In September 2018, 15 months after it was commissioned, the MAC published its final report, which includes its recommendations for the UK's post-Brexit work immigration system. While generally there will not be a new work migration route for low-skilled workers, the MAC report has suggested that a possible exception of seasonal agricultural scheme. Such a scheme is separate from other labour markets because 99 per cent of seasonal agricultural workers are from EU countries and the gap cannot realistically be filled by domestic workers. The Government White Paper setting out any such scheme is awaited.

Claire Edwards is knowledge of counsel in our London office.

Farm payments and rural development funding if no Brexit deal

By Claire Edwards

On August 23, 2018, the UK government published its first advice notices for industry on arrangements in the event of the UK leaving the EU without agreement. While the government states that a "no deal" scenario remains unlikely given the mutual interests of both parties, the advice notices ensure businesses are able to prepare for all eventualities.

In relation to the agricultural sector, the government has published two notices addressing both farm payments and rural development funding if the UK leaves the EU with no deal.

Farm payments

Financial support to some 12 million farmers across Europe comes from participation in the EU Common Agricultural Policy (CAP), through access to direct payments (Basic Payment Scheme) and funding for rural development projects. According to the UK government's 25 Year Environment Plan, post-Brexit the UK will operate outside of the CAP which will be replaced by an environmental land management system based on "public money for public goods" – principally rewarding farmers' work in enhancing the environment and investing in sustainable food production.

Until new agricultural policies are introduced through the Agriculture Bill (expected later this year), domestic legislation under the Withdrawal Act, which is currently being prepared by the Department for Environment, Food and Rural Affairs (Defra) and the devolved administrations, will preserve EU law as it currently stands.

If the UK leaves the EU in March 2019 with no agreement in place, in the short-term

- Eligible beneficiaries will continue to receive payments under the terms of the UK government's funding guarantee, requiring beneficiaries to conform to the same standards as they do currently.
- The same cash total as is currently provided in funds for farm support will continue until 2022, including all funding under Pillar 1 and 2 of the CAP.

Rural development funding

Currently, farmers, land managers and rural businesses in the UK are eligible for payments under EU Rural Development Programmes (RDP) funded under Pillar 2 of the CAP. RDP provides payments to those who manage their land in ways which benefit the environment, through better management of natural resources and adoption of climate-friendly farming practices. EUR 4,056 million of public money is available to the UK between 2014 and 2020.

In a no deal scenario, the government has guaranteed

- Any projects for which funding has been agreed before the end of 2020 will be funded for their full lifetime.
- Projects signed after March 2019 but before 2020 will receive funding up to the value of programme allocations.

In the immediate period after the UK leaves the EU, in a no deal scenario, there will be no substantive change to the agricultural industry. Payments and funding will continue in the short-term and change will only become apparent once new policies are introduced either through the Agriculture Bill in England, or new agricultural legislation in one or more of the devolved parliaments.

Claire Edwards is knowledge of counsel in our London office.

Canadian cannabis and money laundering risks for UK business

By Claire O'Donnell, Katie Stephen, Andrew Reeves, Thomas Hubbard and Sara Zborovski

Medical cannabis is already a big business in Canada. With the production of recreational cannabis legalized in October 2018, those businesses are expected to continue to grow, with Deloitte estimating that the total legal cannabis market will generate some CAD4.34 billion in 2019. However, UK corporates and financial institutions wishing to invest or be involved in activity relating to Canadian cannabis businesses face a real obstacle: doing so could technically constitute a criminal offence under UK money laundering legislation.

Committing a criminal offence, even on a technicality, could give rise to a wide range of issues for both firms involved and their senior management as well as third parties dealing with them, including from a regulatory perspective.

The issue is exacerbated because, despite the growth of the Canadian cannabis industry, its legalization in various US states, and London's position as a global financial centre, there is currently very little guidance for UK businesses with regard to cannabis-related activity. The position of the UK National Crime Agency (NCA) and other regulators is not clear, even though this activity is clearly not what the UK Proceeds of Crime Act 2002 (POCA) was designed to criminalize.

The issue

POCA prohibits receiving, dealing with, or being concerned in a transaction which facilitates (by whatever means) the retention or movement of the "proceeds of crime". Under POCA, "proceeds of crime" means any known or suspected benefit arising from criminal conduct. The offences are broadly drawn and there are few useful exceptions to them.[1] There is a carve out for criminal conduct which is illegal in the UK but legal in the country in which it occurs (the so-called "Spanish Bullfighter" exception). Some UK companies have sought to rely on the Spanish Bullfighter exception in dealing with overseas cannabis-related businesses but the exception only applies to offences which in the UK would result in a maximum custodial sentence of 12 months or less,[2] whereas the maximum sentence in the UK for supplying or being involved in the production of cannabis is 14 years.[3]

UK companies and financial institutions could potentially be penalized for entering into commercial transactions with cannabis businesses (for example insuring or investing in a cannabis-related business, or receiving funds from a cannabis-related business for services or goods provided).

Those within the UK regulated sector (including banks, accountants, insurers, and lawyers acting on transactions) could also face sanctions for failing to report suspicions of money laundering related to dealings with cannabis-related businesses by means of a suspicious activity report. FCA and PRA regulated firms and individuals may also need to consider their broader regulatory obligations.

The issue extends beyond those dealing directly with cannabis-related businesses: UK entities which do not transact with those businesses, but, for example, receive funds by way of dividend or cash pooling from a Canadian group company which does so, could also be caught by POCA because they may receive or deal with monies which are arguably tainted (the concept of fungibility means that even a small amount of criminal property can taint a wider asset, for example money in a bank account). There would also be potential issues for banks and asset managers receiving or being involved in the movement of funds from individual investors or owners of cannabis-related businesses.

Examples of those who may be caught by POCA

- A UK company wishing to invest in a cannabis-related business.
- A professional advisor acting for a cannabis-related business or an investor in such a business.

1 A UK company wishing to invest in a cannabis-related business.
2 Sections 327(2A), 328(3) and 329(2A) POCA and Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006/1070
3 Misuse of Drugs Act 1971

- A UK subsidiary receiving funds from a parent who has derived income from a cannabis-related business.

Seeking consent to proceed – a practical solution for UK companies and the NCA?

It is possible to obtain a defence to money laundering offences by making a disclosure (under s338 POCA) to the NCA prior to carrying out the relevant activity (commonly known as consent). However, the process does not provide a practical solution for ongoing business activity because it does not result in a blanket indefinite clearance for a particular type of conduct in the abstract (and so consent would need to be sought for every transaction with the delay, uncertainty and cost that would result).

Cannabis-related suspicious activity reports will also present a problem for the NCA as it is already flooded with reports: between October 2015 and March 2017 it received over 630,000 reports, including nearly 28,000 requests for consent. Given that more than 94 per cent of requests for consent are granted (a request will typically be refused when a criminal investigation is under way or will be started) it may be that the NCA would prefer to avoid an increase due to reports relating to dealings with cannabis-related businesses.

Guidance from the NCA on its position in relation to dealing with legal overseas cannabis-related businesses would be of great assistance. In the meantime anyone engaged (even indirectly) with such businesses will need to give careful consideration to the potential for inadvertently committing money laundering offences and the need for and practicalities of making disclosures.

Claire O'Donnell and Katie Stephen are partners in our London office. Sara Zborovski is a partner in our Toronto office. Andrew Reeves is a senior associate and Thomas Hubbard is an associate in our London office.

Legalizing cannabis causing trouble for Canadian drivers

By Allison Numerow and Sarah Miller

Driving while impaired by drugs has been illegal in Canada since 1925. Since that time, law enforcement has been tasked with reasonably determining whether an individual was impaired by drugs while driving as well as how to collect and provide such evidence to the courts regarding impairment. With the legaliazation of cannabis for recreational use in Canada, many questions arise around the issue of cannabis use in the workplace and how employers should implement standards of impairment in relation to the criminal standard. So, what does this mean for employers in the transportation industry in Canada?

Historically, the Canadian Criminal Code provided one provision to capture drug impaired driving. This section of the Criminal Code requires proof of impairment, but does not require measurable levels of the drug in the accused's system. Evidence of impairment instead comes from witness, particularly police testimony.

With cannabis legaliazation, a second provision has been introduced into the Criminal Code which prescribes blood drug concentration ("BDC") thresholds for impaired driving, giving law enforcement a quantifiable guideline to lay criminal charges for impaired driving. The problem with this quantifiable guideline is that the Government of Canada has acknowledged that the molecule tested in a person's BDC, tetrahydrocannabinol ("THC"), is a more complex molecule than alcohol and it is therefore difficult to determine what amount of THC would equate to measurable impairment. For cannabis, Canadian regulations state that THC BDC of 2 nanograms per millilitre or more will be sufficient to trigger summary offense criminal charges. The government has acknowledged that this threshold is not as a threshold for impairment, but rather as a precautionary level unassociated with any actual impairment.

For employees who have duties in transportation, driving and other safety-sensitive positions, this new criminal charge brings about new risks for companies. Employees may present to work as sober and functional and they may not know that although they have no visible signs of impairment, they may still test positive for THC under criminal law. In turn, the risk of these criminal charges may have a drastic effect on insurance. Insurance companies have traditionally refused to provide coverage when drivers are impaired. Therefore, they may refuse coverage if THC levels are detectable in the driver. Employers should review their insurance policies to determine the risks they expose themselves to by employing drivers. Similarly to law enforcement's BDC measurement for impairment, employers will not have a way to accurately measure THC with a correlation to impairment. To mitigate risk exposure, employers may have to update their drug and alcohol policies.

Private land operators, such as tractor operators, machinery operators, truckers on private logging roads and other similar professions are not exempt from the new Canadian laws. Along with employers, they too have duties surrounding workplace safety. Operating equipment while impaired by cannabis contravenes criminal law.

The transportation and agricultural industries in Canada face much uncertainty with the legaliazation of recreational cannabis use. The increased liability risks related to cannabis impaired driving and vehicle operation may cause an increase in business expenses to manage those risks. Companies should be prepared to address cannabis-related issues as they arise in the workplace.

Allison Numerow and Sarah Miller are articling students in our Calgary office.

Agricultural, Food and Rural Affairs Appeal Tribunal dismisses union's unfair labour practice complaint in first labour relations decision

By Richard J. Charney and Rebecca Liu

MedReleaf Corp., a licensed medical marijuana producer, successfully defended an unfair labour practice complaint filed by the United Food and Commercial Workers International Union (the UFCW or Union) at the Agricultural, Food and Rural Affairs Appeal Tribunal (the Tribunal). This is the Tribunal's first significant decision in the labour relations realm.

Since producing medical marijuana is considered part of the agricultural industry, labour relations at medical marijuana producers are governed by the Agricultural Employees Protection Act, 2002 (the AEPA) rather than the Labour Relations Act, 1995 (the LRA).

The LRA contemplates an exclusive bargaining agent model in which a single union represents every employee within a unit of employees, including employees who would prefer to be represented by a different union and employees who would prefer not to be represented by any union. While the exclusive bargaining model is the most common model in Ontario (and Canada), it is not the sole labour relations model in democratic countries.

Unlike the LRA, the AEPA contemplates that employees within a unit may be represented by different unions. In other words, under the AEPA, an employer may deal with multiple unions as well as employees who would prefer not to be represented by a union. The UFCW is challenging the constitutionality of the AEPA regime, the litigation of which was set aside pending the parties' litigation of the unfair labour practice issues. On August 29, 2018, the Tribunal completely dismissed the unfair labour practice application due to lack of merits.

Union must provide information about membership before it is entitled to make representations

In January 2016, the Union requested that MedReleaf disclose certain information to enable the Union to make representations pursuant to section 5(1) of the AEPA. This section requires employers to give each union that represents at least one employee "a reasonable opportunity to make representations respecting the terms and conditions of employment." MedReleaf would not provide such information until the Union provided evidence of whom it represented. The Union refused and alleged MedReleaf was in breach of its obligations by requiring the Union to provide such evidence.

The Tribunal held that for s. 5(1) of the AEPA to have any meaning, unions must provide sufficient information to allow the employer to know which employees the union represents. The reason for this is simple: since the AEPA is based on a non-exclusive bargaining model, there may be multiple unions representing employees within a workplace. An employer cannot meaningfully listen to a union's representations without knowing which employees that particular union represents.

In this case, the Tribunal held that MedReleaf did not deny the Union a reasonable opportunity to make representations. Rather, the Union had "derailed" the process by insisting on the traditional process pursuant to the exclusive bargaining agent model under the LRA.

No intimidation

The Union alleged MedReleaf had intimidated and coerced its employees into voting against the Union. Senior management met with employees to answer questions about unionization and express their preference the workforce remained non-unionized. The meetings were not mandatory and management did not ask employees whether they supported the Union. The Tribunal upheld MedReleaf's right to freely express itself and concluded MedReleaf did not contravene the AEPA.

The Union also alleged MedReleaf had used external agents, including the owner of a temporary employee agency and a former executive, to intimidate employees. The Tribunal held that MedReleaf was not liable because it did not enlist their assistance. When the Union raised concerns about these individuals' communications to employees, MedReleaf responded appropriately by immediately directing them to cease communicating with its employees.

Terminations were not a reprisal

The Tribunal rejected the Union's allegations that MedReleaf had dismissed certain employees as a reprisal for supporting the Union. While MedReleaf laid off some casual employees after deciding to outsource some of its labour, the Tribunal held that MedReleaf's decision was motivated by its desire to better manage its labour costs in response to fluctuations in its labour requirement. The desire to minimize labour expenses is not evidence of anti-union animus.

Certain employees on whose behalf the Union was seeking relief had signed releases in exchange for a severance package. The Union argued the releases did not bind it because it was not a signatory to the release. The Tribunal held that allowing the Union to proceed on the employees' behalf would undermine the finality of the release, which is consistent with the case law that signed releases ought not be lightly invalidated in the interest of promoting settlements.

Conclusion

This decision establishes that a union's insistence on following the traditional exclusive bargaining agent model in the agricultural industry will be found to be an impediment to its own rights under the AEPA. A union is not entitled to make representations until it has provided proof of its membership. This decision also confirms an employer's freedom of expression about unions, provided it does not use intimidation or coercion. Finally, this decision emphasizes the importance of enforcing settlements. Signatories to a release cannot undermine the finality of a settlement by asking a non-signatory to seek relief on their behalf.

MedReleaf was represented by the Toronto office of Norton Rose Fulbright Canada LLP.

Citation: *United Food and Commercial Workers International Union v MedReleaf Corp*, 2018 ONAFRAAT 12.

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No use crying over spilt (plant-based-dairy-free-alternatives-to) milk?

By Georgina Hey and Isobel Taylor

Every trendy café these days seems to have a selection of dairy-free milk alternatives as long as a wine list, from the usual suspects like soy, coconut and almond, to more unusual new favorites like rice, hemp, pea, flax and oat. With vegan, dairy-free or plant-based diets becoming more and more popular for health, environmental, ethical or lifestyle reasons, it is unsurprising that dairy-free alternatives (and the inevitable backlash from dairy traditionalists) are on the rise.

But should these products be allowed to call themselves "milk"? In this article, we consider how this question has been answered recently in the USA, Europe and Australia.

Milking the dairy industry dry in the USA

The standard of identity set by US food regulator Food and Drug Administration (FDA) describes milk as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows". However, much to the frustration of the dairy industry (who first brought this issue to the FDA's attention back in 2000), this standard has typically not been strictly enforced. As a result, producers of plant-based dairy alternative beverages have been freely using the term "milk" to describe their products for decades, despite the fact that, as FDA Commissioner Scott Gottlieb quipped at a summit in July, "an almond doesn't lactate".

Now that plant-based imitation milk products have exploded in terms of their range, pervasiveness and mainstream popularity, it seems the FDA has finally decided that enough is enough. It recently announced that it intends to start enforcing the strict, traditional definition of "milk", reflecting a concern that consumers might be misled about the nutritional properties of plant-based dairy alternatives.

The FDA is currently seeking public comment on the matter before issuing new guidance on the use of the word "milk". It remains to be seen whether the existing narrow standard will be retained (as the dairy industry hopes) or whether the new guidance will feature an updated standard, which arguably reflects evolving consumer understandings of the meaning of the word "milk".

TofuTown gets cheesed off in Europe

The FDA announcement comes after the European Court of Justice (ECJ) handed down a preliminary ruling last year, regarding the advertising and promotion of plant-based products using dairy designations.[1]

A German company called TofuTown came under fire for selling products with names like "tofu butter", "plant cheese" and "rice spray cream" from the Verband Sozialer Wettbewerb (the German equivalent of the Australian Competition and Consumer Commission). The Verband Sozialer Wettbewerb asked the ECJ to interpret EU legislation regarding the use of designations for milk and other dairy-based products to assist in determining whether TofuTown's product names were in violation.[2] This legislation reserves the use of terms including "milk", "cream", "butter", "cheese" and "yoghurt" for products made from mammary secretions (with some named exceptions such as "peanut butter"), giving the dairy industry an effective monopoly over these words.

For its part, TofuTown argued that the way in which consumers understand words like "milk" has changed in light of the increased use of the word to describe plant-based milk alternatives in recent years. TofuTown argued that using words which have been traditionally associated with dairy products in conjunction with qualifiers such as "tofu", "veggie" or "rice" to indicate the plant-based origin of the products meant its advertising would not confuse consumers.

1 Court of Justice of the European Union Case C-422/16 *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH.*

2 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 17, 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

The ECJ did not agree, holding that the fact that TofuTown had added descriptors did not prevent them from infringing the regulations, as the likelihood of consumer confusion could ultimately not be excluded.

Australia: the land of milk and honey?

Under the Australia New Zealand Food Standards Code, as in the US, milk is defined as "the mammary secretion of milking animals."[3] The Code also requires that "if a food name is used in connection with the sale of a food (for example in the labelling), the sale is taken to be a sale of the food as the named food unless the context makes it clear that this is not the intention" (emphasis added).[4] Interestingly, one of the specific examples provided under this section states that if the context within which foods such as soy milk or soy ice cream are sold is indicated by use of the word "soy" in the name, this will be sufficient to indicate that the product is *not* a dairy product to which a dairy standard applies.

In 2017, the Advertising Standards Board (now called the Ad Standards Community Panel) dismissed a consumer complaint against a Vitasoy advertisement picturing oat, coconut, rice, almond and soy products and describing them as "milk".[5] The complainant argued that "you cannot milk an Oat, like you can a cow. To base a whole advertisement around a lie, and a voiceover that says MILK, MILK, MILK, MILK over and over again is misleading. It just isn't true".

Vitasoy responded that consumers are familiar with the use of the term "milk" to describe plant-based alternatives that are milky in colour, texture and often used as milk substitutes. It relied upon the above-quoted Food Standard as well as the Macquarie Dictionary definition for milk, which defines milk as both the "white liquid secreted by the mammary glands of female mammals" and "liquid obtained by crushing parts of plants such as beans or nuts or tubers".

The Board considered whether the advertisement breached the AANA Food and Beverages Advertising and Marketing Communications Code, particularly whether the advertisement was false or misleading. The Board ultimately concluded that the advertisement was not misleading or deceptive in its promotion of the plant-based milk products, and specifically noted that most members of the community would accept and recognise plant-based "milk" products as milk.

While lacking the judicial force of a Court ruling, the dismissal of the complaint suggests that, at least in the Board's eyes, the wider community understands that the word "milk" can have multiple meanings, not limited to dairy milk. The Board also seems to ascribe to the average Australian consumer the basic level of intelligence required to recognise that a product labelled "almond milk" is made with (non-lactating) almonds, a level of confidence that apparently the FDA and the ECJ do not share.

Takeaway comment

Different approaches have therefore emerged around who can refer to their products as "milk". Any plant based "milk" producers will need to ensure their goods are accordingly compliant with local practice in any jurisdictions where their goods are available.

For now, in Australia at least, it's full steam ahead, while in the US and the EU, producers of plant based "milk" will have to be careful about how they describe their plant-based-dairy-free-alternatives-to-milk.

Georgina Hey is a partner and Isobel Taylor is an associate in our Sydney office.

3 Australia New Zealand Food Standards Code, Standard 2.5.1.

4 Australia New Zealand Food Standards Code, Standard 1.1.1¬–13(4).

5 Advertising Standards Board Case No. 0437/17.

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Washington DC

Canada

Calgary
Montréal
Ottawa
Québec
Toronto
Vancouver

Latin America

Bogotá
Mexico City
Rio de Janeiro
São Paulo

Asia Pacific

Bangkok
Beijing
Brisbane
Canberra
Hong Kong
Jakarta[1]
Melbourne
Port Moresby
(Papua New Guinea)
Perth
Shanghai
Singapore
Sydney
Tokyo

Africa

Bujumbura[3]
Cape Town
Casablanca
Dar es Salaam
Durban
Harare[3]
Johannesburg
Kampala[3]
Nairobi[3]

Middle East

Bahrain
Dubai
Riyadh[2]

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