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Impact of Brexit on Food and Drink Regulations

June 30, 2016

Food, Beverage, and Dietary Supplements

Last week, the UK voted to leave the European Union in an advisory referendum. The impact of Brexit on food and drink regulation in the medium-to-long term will very much depend on the form a post-Brexit UK will take, the relationship that the UK chooses to have with the EU, and indeed the relationship that the EU is willing to accept. That will not become clear for some time as it will likely take at least two years for the UK to negotiate an exit from the EU from the point when the UK notifies the EU of its intention to leave, which will not be until October 2016 at the earliest. But we have set out key considerations on this below based on two proposed models being discussed.

In the short-term, however, it is likely to be business as usual from a legal perspective since EU law will continue to apply either directly in the case of regulations (e.g., the general food law, food labelling, hygiene and manufacturing, food improvement agents, health/nutrition claims, foods for special groups, and novel foods) or indirectly (e.g., in the case of directives, which must be implemented into national law, such as the Food Supplements Directive 2002/46/EC). Nevertheless, companies need to start considering what steps they should take now to minimise impact and disruption if and when Brexit happens.

The Short-Term Impact of Brexit

At a minimum, companies should conduct a mapping exercise to check the following:

- What, if any, novel food, genetically modified (GM) food, or health claim applications are currently being managed by the UK as the applicable “rapporteur” EU competent authority? What is the timing for review by the European Food Safety Authority (EFSA) and/or approval by the EU Commission? Is this likely to happen within the next two years (the anticipated legal time frame once the UK formally gives notice that it intends to leave the EU)? Going forward, companies should also consider making such applications via a different Member State since there could be delays and disruption in handing over the application to a different Member State.
- For food improvement agents and flavourings, the application is made directly to the EU Commission, so these should not be affected as such. But a new UK approval system may need to be in place post-Brexit if a non-EEA model is adopted.
- EU food law requires the food label to include details of the food business operator in the EU responsible for labelling. If this is a UK entity, then companies should make plans for listing a different Member State entity going forward. This is particularly important for foods with a long shelf-life (two to three years) since these products may still be on the market post-Brexit.

- Companies that import into the EU with the UK as the EU entry point should check their supply chain arrangements to determine whether shipments into the EU can be made via a different Member State and what the lead time is for making the arrangements.
- Food and drink manufacturers may also want to start establishing greater links with, or a presence in, countries within the EU in order better to be able to influence EU laws and procedures via the national governments and representatives of those countries.

Medium-to-Long-Term Impact of Brexit

Broadly speaking, there are two different relationships that could emerge between the UK and the EU over the coming years. In considering these options, however, there is a fundamental tension between the UK's desire to participate in the EU's internal market and its conflicting desire to limit immigration, which was one of the key drivers behind the vote to leave. In return for participation in the EU internal market, the EU is likely to insist on free movement of workers. In other words, the UK will not benefit from free movement of goods and services to and from the EU without accepting immigration from the EU. The price of a free trade agreement with the EU may well also include acceptance of some EU social and employment regulation. This may ultimately force the UK out of the internal market.

The EEA Model

The UK would need to apply to sign the European Economic Area (EEA) Agreement, joining Norway, Iceland, and Liechtenstein as EEA member states. The EEA Agreement would allow the UK to participate in the EU's internal market, but it would require the UK to implement into its national laws the bulk of EU legislation designed to facilitate free movement of goods, services, capital, and persons. This includes EU food and drink legislation. However, EU food law governing food production, such as traceability, risk analysis, and a precautionary approach, and the various responsibilities and requirements for food business operators, have been a part of the EEA Agreement since May 2010. The Food Information to Consumers Regulation 1169/2011, which entered into force in the EU in December 2014, was incorporated into the EEA Agreement in October 2014 and as such this fundamental piece of food law also applies in the EEA.

So, the UK's implementation of existing EU food laws would remain valid, and the country could continue to implement future laws and rely on EU principles of mutual recognition that are important, particularly for food supplements since some markets have fast-track notification processes that rely heavily on the placing on the market in other Member States like the UK.

However, the UK would lose much, if not all, of the influence it has in the EU legislative, policy, and regulatory procedures since it would be relegated to an "observer" role. Rather than being able to influence and participate actively in the development of EU food law and policy, it would simply need to implement legislation that the EU Commission, EU Parliament, and EU Council adopt and accept guidelines and policy decisions by EFSA. The inability to have a meaningful impact on the legislative framework could have significant implications for areas of law currently ear-marked for harmonization, such as maximum levels in food supplements and also the EU's current investigation into the use of botanicals in food as part of the EU Commission's REFIT process.

The Non-EEA Model

Various non-EEA models have been discussed, including the so-called "Swiss" model (a range of separately negotiated bilateral treaties with the EU; Switzerland has approximately 130); the "Turkish" model (a customs union); and the "default" model (the WTO/free trade approach, where the UK would simply be a third party with no preferential access to the EU market).

In each case, it is likely that the UK would need to enter into free trade relations with the EEA and EU and negotiate bilateral agreements on a case-by-case basis. The last option in particular (the WTO model) would presume a total separation of the UK systems for food regulation from the EU. There would, for instance, be little difference between the situation in the UK and that in the United States although there may be scope to negotiate and adopt mutual recognition processes for food manufacturing facilities, for example.

That said, the standards to which companies develop and manufacture foods are harmonized in a number of ways, e.g., through initiatives such as the Codex Alimentarius, of which the UK has been a member since 1963. While being recommendations for voluntary application by members, Codex standards serve in many cases as a basis for national legislation and so in practice there are numerous areas in which there will be little change.

A fundamental aspect under a non-EEA model is that the UK would not be obliged to implement new EU laws or maintain existing ones, such as the EU Nutrition and Health Claims Regulation 1924/2006 (NHCR) which has already been the subject of several legal challenges. This could create some opportunities for the UK-specific market, particularly in terms of innovation and health claims. For example, prior to the adoption of the NHCR, the UK had its own system for approving health claims known as the Joint Health Claims Initiative, which had approved claims for wholegrain and heart health (claims that were later rejected by EFSA). A non-EEA model could potentially allow a similar scheme to operate again in the UK, much like the one that exists in Switzerland. The Swiss have their own system for authorising health claims that currently include claims approved by the Swiss Federal Office of Public Health for probiotics and the functioning of gut health whereas similar probiotic claims were rejected by EFSA under the NHCR.

At this stage, it is unlikely that the UK would attempt to introduce substantive revisions to food labelling concepts given the significant expense incurred by industry in complying with the new EU labelling rules, but there may be more room for introducing additional requirements (e.g., in relation to the UK traffic light system).

The UK/EU may also need to negotiate arrangements with the EU in relation to regulations that recognize regional and traditional foods (so-called Protected Designations of Origin, Protected Geographical Indications, and Traditional Speciality Guaranteed marks), such as Kentish Ale, Cornish pasties, and Stilton cheese (e.g., by the use of grandfathering arrangements or reciprocal agreements).

Summary

The full effects of Brexit on the food and drink industry will remain unclear until the UK's new relationship, whatever that may be, is established with the EU. In the meantime, companies can

get ahead of the curve with appropriate planning and tailor their response once the "model" the UK/EU adopts becomes clearer.

Covington will be hosting a webinar, "Brexit: The Changing Landscape for Food and Cosmetics," on July 6, 2016 at 12 p.m. EDT/5 p.m. BST/6 p.m. CEST. To register, please click here.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food, Beverage, and Dietary Supplements practice:

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