

EC food law – A Brief Overview

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I. Food Law at the heart of the Single Market:

An understanding of food law is important because:

- The food industry is the leading manufacturing sector in the EU in terms of turnover², value added, employment and number of companies;
- It has a direct impact on citizen's daily lives, involves controversial issues (such as Genetically Modified ("GM") products) and provokes intense debate amongst many different interest groups;
- There has been a shift over the last ten years towards an emphasis on concerns such as quality, health and safety, partly as a response to modern problems such as BSE, avian flu and GM products. Risk assessment and management – and the institutional arrangements to deal with these issues – have also become important across the board, not only in the food and drink sectors;
- Following the BSE crisis, the Commission's services were reorganised to separate the regulatory function (DG AGRI) from risk assessment and management (DG SANCO), with the creation of the European Food Safety Agency (EFSA) to provide independent scientific advice to the Commission on food and feed safety;
- One example of risk assessment employed within the Single Market context (often in relation to foodstuffs) is the "precautionary principle". This principle provides a mechanism for determining risk management measures in order to ensure the high level of health protection chosen in the Community, where a risk to health exists but scientific uncertainty persists;
- *Cassis de Dijon*³ (1979) was an important case not only for the food and drink sector, but for the free movement of goods and other fundamental principles of Community law;

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² Turnover in 2006 was €870 billion.

³ Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

- In interpreting Article 28 EC, *Cassis* laid the foundations for mutual recognition in the Single Market, a principle whereby the EU Member States accept that a product should be allowed to be offered for sale in their own territory, irrespective of whether it complies with national legislation, provided that it has been legally manufactured and marketed in another Member State;
- In 1985, when the Commission launched its White Paper on completing the internal market, it announced a “new approach” to internal market legislation (mainly directives). In contrast to the “total harmonisation” approach followed previously,⁴ the “new approach” was based on minimum harmonisation of essential requirements of health and safety, leaving scope for the mutual recognition of national rules on the basis of equivalence. The “new approach” in food law was confirmed by Commission White Papers in 1985, 1989 and 1997;
- A key question now is whether mutual recognition is still an effective principle for ensuring the free movement of food and drink products in the EC or whether “total harmonisation” has staged a comeback. Certainly, modern food law regulations or directives are more detailed than the term “minimum harmonisation” would indicate;
- Mutual recognition is not a perfect solution. The sheer volume of new problems that have arisen in relation to food has meant that the Commission continually updates its policies and proposes new legislation. Four new measures were adopted at a recent Council meeting alone, covering food enzymes, food additives, flavourings and ingredients.⁵

II. Key EC Food Legislation:

Regulation 178/2002 - general principles and requirements of food law:

EC food law was comprehensively revised in 2002 in the wake of several food-related crises. This Regulation, which was the result of the revision process, sets out the general principles and main requirements of EC food law. It creates a base upon which much of the other legislation operates, lays down procedures in matters of foods safety and establishes the European Food Safety Authority. The EFSA offers technical support in all areas impacting on food safety and provides the European institutions and Member States with scientific advice. This Regulation is also the legal basis for the Rapid Alert System which ensures information relating to food (and animal feed) safety is disseminated amongst all the relevant bodies in the EU and for an emergency procedure.

⁴ In the area of food law, directives adopted between 1960 and 1985 were sometimes called “recipe”, “compositional” measures or “vertical harmonisation” measures because they sought to achieve total uniformity of national rules for specific products such as jams, honey etc.

⁵ Proposal for a regulation establishing a common authorisation procedure for food additives, food enzymes and food flavourings. Proposal for a regulation on food enzymes and amending Council Directive 83/417/EEC, Council Regulation 1493/1999, Directive 2000/13/EC, Council Directive 2001/112/EC and Regulation 258/97. Proposal for a regulation on food additives. Proposal for a regulation on flavourings and certain food ingredients with flavouring properties for use in and o foods and amending Council Regulation 1601/91, Regulations 2232/96 and 110/2008 and Directive 2000/13/EC. These measures were adopted by the Council on 30 October 2008.

Regulation 1924/2006 - nutrition and health claims made on foods:

This Regulation sets out rules in relation to nutrition and health claims used as advertising on food products. As well as limiting the use of certain claims in a general way (i.e. those which are false, difficult to understand or misleading), the Regulation also sets the conditions for the use of particular claims which are listed in the Annex to the Regulation such as “low energy”, “with no added sugars”, etc. For instance, if it is claimed that a food is high in fibre, the product must contain at least 6 g of fibre per 100 g or at least 3 g of fibre per 100 kcal. Should manufacturers wish to obtain authorisation for a new claim or to amend the existing list in the Regulation, they must submit an application to the Member State concerned, which then forwards it to the EFSA. The Commission then makes a decision on the use of the claim on the basis of the EFSA's opinion.

Directive 2000/13 - on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs:

This Directive sets out the general requirements for labelling, presentation and advertising of pre-packaged foodstuffs and also provides specific details of the information that must appear on packaging. There are special rules for highly perishable products and certain derogations and special provisions exist for specific products. The Commission recently put forward a proposal for a new Regulation relating to labelling with the aim of modernising labelling rules and making the requirements uniform for all operators. If this proposal is adopted, industry will be given a grace period in which to adjust systems to enable adherence with the new regime. The proposal is currently out for consultation in Member States, and the final text will eventually require approval by both the European Council and the European Parliament; hence it is not expected to be published until at least 2010.

Regulation 852/2004 – on the hygiene of foodstuffs:

This Regulation is part of the “hygiene package”, a set of measures prescribing hygiene rules for foodstuffs. This particular Regulation sets out rules ensuring the hygiene of food products at all the stages of the production process. Business operators are obliged to ensure that all procedures from primary production up to and including the supply of foodstuffs to the final consumer are carried out in a hygienic way in accordance with the provisions of the Regulation, principally by applying the system of hazard analysis and critical control points (HACCP).

In addition to these examples, there are many other EC legislative measures dealing with very specific areas of food law. For instance, regulations have been adopted in relation to microbiological sampling, testing of foodstuffs, organic production and labelling, the protection of geographic indications and designations of origin as well directives relating to avian influenza, genetically modified produce, food supplements, and food additives and sweeteners.

III. Examples of Food Law Cases:

Despite a wealth of consultative papers, secondary legislation and guidance being issued by the EU, many cases relating to food law still arise before the European Courts. Over the years, cases have mainly concerned the mutual recognition principle as developed in Cassis (breaches of the

free movement of goods rules), Member State restrictions on the marketing of nutritional foods and in relation to GM products. Set out below are some examples of this case law.

The German beer case⁶: The German beer market had been protected for decades by the “Reinheitsgebot” (the German beer purity law which prevented the importation of beer containing additives which were authorised in other Member States but prohibited in Germany). This legislation was typical of “purity laws” existing in many Member States at the time. The Commission took the view that, in most cases at least, this type of legislation – although ostensibly to protect health – was protectionist in nature. Within the Commission, a rearguard action was fought by German interests to prevent Article 226 proceedings being launched. Once the case came to the European Court of Justice however, the Court had no difficulty in finding that the German legislation was in breach of Article 28 EC. Enforcement in practice was another matter. Beer traders were forced to bring other actions in the German courts in order to enforce the judgment won by the Commission and indeed to claim damages for breach of fundamental rules of Community law.⁷

Pfizer Animal Health v Council of the European Union⁸: In this case, Pfizer contested a Regulation that prevented four antibiotics being added to animal feed within the EU. Pfizer contested the circumstances in which the competent authorities may, as a precautionary step, adopt a measure withdrawing the authorisation of an antibiotic. The CFI, however, stated that where there is uncertainty as to the existence or extent of risks to human health, the institutions might take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. Despite the uncertainty, the CFI found that there was enough evidence to cause concern and therefore, the CFI held that *“in those circumstances, without prejudging the examination by the Court of the assessment of the extent of the risk, which must be established by the institutions concerned when adopting a precautionary measure, the mere existence of the risk so identified is enough in itself to justify taking into account, in the balancing of interests, the protection of human health.”* (emphasis added).

In May 2003, the United States of America, Canada, and Argentina launched a WTO case⁹ complaining that the EU had imposed a moratorium on new authorisations of GM products. The European Commission had halted the approval of new GM varieties in 1998 but had recommenced limited approvals in May 2004, after the US launched the WTO case. The US argued that GM products that are considered to be safe in the US should be deemed to be safe for the rest of the world. They also opposed GM traceability rules because they constituted an obstacle to US commodity exports. The US hoped that a favourable ruling by the WTO would prevent European-style restrictions on GMO foods from spreading to Africa, China and other parts of the world. The WTO Panel ruled on 7 February 2006 that the EU's moratorium on GM products, effective between June 1999 and August 2003, was illegal and that Austria, France, Germany, Greece, Italy and Luxembourg had no legal grounds to impose their own unilateral import bans. The Commission described the ruling as “a mixed bag” that criticised former EU regulatory measures but would not impact on the current legislation, which was brought into force after the complaint was filed in 2003.

⁶ Case 178/84 *Commission v Germany* [1987] ECR 01227.

⁷ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland* [1996] ECR I-01029.

⁸ T-13/99 *R. Pfizer Animal Health SA/NV v Council of the European Union* [1999] ECR II-01961.

⁹ Complaints by the United States (WT/DS291), Canada (WT/DS292) and Argentina (WT/DS293). Dispute Settlement: DS293, European Communities — Measures Affecting the Approval and Marketing of Biotech Products.

Other Cases to Consider:

- Case 53/80 *Eyssen* [1981] ECR 409.
- Case 407/85 *Drei Glocken* [1988] ECR 4233.
- Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland* [1996] ECR I-01029.
- Case C-180/96 *UK v Commission* [1996] ECR I-03903.
- Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211.
- Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105.
- Case C-41/02 *Commission v Netherlands* - Judgment 2/12/2004.
- Case C-132/03 *Ministero della Salute v. Codacons* - Judgment 26/5/2005.
- Cases C-154/04 & C-155/04 *Alliance for Natural Health, Nutri-Link v. Secretary of State for Health* - Judgment 12/7/2005.
- Cases T-366/03 & T-235/04 *Austria v Commission* - Judgment 5/10/2005.
- Cases C-465/02 & C-466/02 *Germany v Commission and Denmark v Commission* - Judgment 25/10/2005.
- Case 178/84 *Commission v Germany* [1987] ECR 01227.
- Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland* [1996] ECR I-01029.
- Case C-383/08 *Commission v Italian Republic* - Action brought on 25 August 2008.
- T-13/99 R. *Pfizer Animal Health SA/NV v Council of the European Union* [1999] ECR II-01961.
- Case C-147/04 *De Groot en Slot Allium BV* – Judgment 10/01/2006.
- Case C-12/00 *Commission v Spain* - Judgment 16/01/2003.
- Case C-315/05 *Lidl Italia Srl* – Judgment 23/11/2006.
- Case C-434/04 *Jan-Erik Anders Ahokainen and Mati Leppik* – Judgment 28/09/2006.
- Case C-189/95 *Franzén* – Judgment 23/10/1997.
- Case C-192/01 *Commission v Denmark* – Judgment 23/09/2003.
- Case C-174/82 *Sandoz*.

- Case C-170/04 *Rosengren* – Judgment 05/06/2007.