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Welcome to the latest edition of Food and Drink, designed to bring you topical content and comment from our people working in this dynamic and growing sector.

In this issue we cover matters such as the Food Standards Scotland's (FSS) Five-year Scottish dietary goals strategy; exclusive distribution arrangements; and explore the new apprenticeship levy due to come into effect in April 2017.

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Watered down UK obesity plan attacked

Food Standards Scotland explores a distinct strategy for Scotland

Public Health professionals have reacted with disappointment at the long awaited announcement of the UK Government's plans to tackle childhood obesity and the inadequacy of its responses to incessant marketing of foods high in sugar, salt and saturated fat. While the main planks of the strategy include targeted reduction of sugar content through a voluntary scheme, plus the imposition of the 'soft-drink tax', the absence of any challenge to unsuitable marketing of unhealthy food, or any suggested regulation of it, is regarded by many as a capitulation.

Interestingly, on August 17, Foods Standards Scotland issued its five-year strategy towards meeting the Scottish Dietary Goals, which acknowledged the importance of a collaborative approach with stakeholders. The report is however, unclear on what form the regulatory enforcement would take other than that the progress from voluntary steps to regulatory measures would need to be considered. As a strategy document it is short on specifics and long on options. Responses to it are invited.

Clearly there will be challenges ahead for both manufacturers and retailers if different standards are applied across different parts of the UK, but it is likely that Public Health England will be held to account against its claim that there will be "no hiding place" if sufficient progress is not made on a six-monthly basis: they admit that without such progress, "the need for further, broader action would be unarguable".

Across the whole of the UK, the challenge will be to ensure that policies adopted are based on wide and balanced evidence rather than rhetoric. The degree of success of the industry's effort to reduce obesity will take some time to measure, but manufacturers should assume that regulation will follow if they do not play their part by modifying their marketing.

Apprenticeship levy: are you levy-ready?

Following an initial announcement in the 2015 Summer Budget, and the publication of draft legislation in February 2016, the Government is set to introduce an apprenticeship levy with effect from 6 April 2017. But what is it and who does it affect?

The purpose of the levy is to fund and facilitate increased numbers of apprenticeships in the UK. It will be applied to all employers in the UK, across all industries, and is payable regardless of whether the business currently has or intends to have any apprentices. It is payable at the rate of 0.5% of the employer's total wage bill. All employers will, however, receive an offset allowance of £15,000, meaning that only employers with an annual wage bill in excess of £3m will have to pay the levy. The government has stated that, as a result, only 2% of employers in the UK will be liable to pay. However, given that an employer with 125 employees on average salaries of £25,000 would have a wage bill in excess of £3m, this is clearly not an issue only for the largest employers.

The levy will be paid through the PAYE system, in the same way as income tax and national insurance. In calculating an employer's annual wage bill, all remuneration relating to employment will be relevant including salary, bonus, commission payments and pension contributions, but excluding benefits in kind. Groups of companies will only be able to use one £15,000 allowance between them, and it is up to the companies within the group to decide what proportion of the allowance each company will be entitled to for a given tax year.

How will the funds be used?

As apprenticeships are a devolved matter, how the levy will be used to fund apprenticeship training in each of England, Scotland, Wales and Northern Ireland will vary. So far, the Scottish Government and Welsh and Northern Irish Assemblies are yet to determine how the levy will be used in their part of the UK.

We do however know how the levy will be used in England. In England, a digital apprenticeship service account will be set up, and UK employers with employees in England, who are liable to pay the levy, will be able to access funding through their own personal account. This funding can then be used to pay for training and assessments for apprentices in England (but not an apprentice's wages, which would have to be met by the employer separately from the levy). The amount of funding an employer will be able to access will be calculated as a proportion of the levy which they have paid, based upon the proportion of their wage bill which is paid to employees living in England. Therefore, for an employer with all of its employees in England, the funds available will be equal to the full levy which they have paid. If only 50% of its employees are in England (with the other 50%, for example, in Wales or Scotland), the funds available under the digital account in England will be equal to 50% of the levy it has paid. However, in addition, the government will apply a 10% top up on all funds through the English system, meaning that for every £1 an employer pays into the scheme, they will receive £1.10 back to fund English apprenticeships. Funds will however expire 18 months after they have been paid into an employer's digital account, if they haven't been spent. The UK Government also plans to establish a new body, the Institute of Apprenticeships to support employers to uphold the high quality of apprenticeship standards in the context of the apprenticeship levy. The IFA will be an employer-led statutory body tasked with ensuring high quality standards in apprenticeships. The UK Government is also intending to regulate the use of the word "apprenticeship" to cover only government accredited schemes.

Funds from the apprenticeship levy fund will be allocated to each of Scotland, Wales and Northern Ireland, and it will be for the Scottish Government and the Welsh and Northern Irish Assemblies, to determine how the levy is spent in respect of apprenticeship schemes in those countries.

Therefore, it will remain to be seen whether, in Scotland, a similar system to the English one will be introduced, or whether the Scottish Government will, for example, hold the funds centrally to be distributed to employers who wish to take on apprentices in the form of grants, or to fund Government-run apprenticeship training programmes, rather than individual employers each being allocated their own funding, as under the English system.

Implications for employers

The apprenticeship levy has, perhaps unsurprisingly, not been welcomed with open arms by many employers. For medium-sized employers, this could represent a significant additional cost at a time when the economy is still very much in recovery. For some of the UK's largest employers, the levy could run into millions of pounds, and is unlikely to ever be fully recoverable through recruitment of apprentices. Some employers will be used to taking on apprentices, and may now decide to do so in increased numbers, to make full use of the levy they are paying. There may be others, however, which are liable to pay the levy but have never taken on apprentices in the past. They may now need to consider whether this is something they should be doing, in order to benefit from the levy. Whether an employer intends to recruit apprentices or not, the levy is a significant additional cost many employers will now face in the coming years, which needs to be considered and planned for now.

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Exclusive distribution agreements: what you need to know

Exclusive distribution arrangements can in some circumstances be subject to EU and UK competition law rules. John Schmidt and Zeno Frediani look at some of the key issues that operators in the food and drink industry should keep in mind to avoid falling foul of competition rules.

Although distribution agreements tend to be vertical (that is, between firms at different levels of the supply chain) they can affect competition between brands and between suppliers. Sometimes a distributor may make significant investments in setting up and developing a market for a particular product. To justify this investment, the distributor may look for protection from competition from other distributors or even the supplier itself. These exclusive distribution arrangements can engage the EU and UK competition provisions and are likely to be prohibited where they confer absolute protection within a territory (eg a part(s) of the UK, or a specific country). A further consideration in the EU context is that agreements that isolate national markets and try to maintain different prices in different Member States may also engage the EU competition provisions.

How do you assess an exclusive distribution agreement?

The first step is to check whether the agreement could benefit from the exemption in the Commission's Notice of agreements of minor importance. This De Minimis Notice applies to agreements that do not contain any hardcore restrictions and are between SMEs or involve larger companies where the parties' combined market shares do not exceed certain thresholds. If the *De Minimis* Notice does not apply, the next step is to identify the market shares of the supplier and buyer on the market for that product. If the market shares of the supplier and the buyer each do not exceed 30% in the products covered by the agreement, the agreement could be automatically exempt under the Verticals Block Exemption Regulation, subject to certain conditions. If one of the parties' shares exceeds 30%, the agreement would have to be assessed individually as to whether it could benefit from an exemption. An agreement is exemptible if it contributes to improving production or distribution, promotes technical or economic progress, allows consumers a fair share of the resulting benefit, does not impose restrictions which are not indispensable to achieving those objectives, and does not eliminate competition.

Verticals Block Exemption Regulation

What usually happens in practice is that firms will try to shape their agreements so as to be able to rely on the exemption in the Verticals Regulation. An exclusive distribution agreement is likely to benefit from the Verticals Regulation provided that:

- the relevant market shares of the supplier and the buyer each do not exceed 30%;
- the agreement is not an agreement between competitors within the meaning of the Verticals Regulation; and
- the agreement does not contain any hardcore restrictions.

What are hardcore restrictions? Typically, setting resale prices or other terms on which the products could be on-sold amounts to a hardcore restriction. Restrictions on sales to end-users and restrictions on authorised dealers making cross-supplies to other authorised dealers can also be problematic in certain circumstances.

Distribution agreements, particularly those with exclusivity, often contain non-compete provisions. Such provisions can be allowed under the Verticals Regulation but again there are limitations, depending on the circumstances.

One issue which is becoming increasingly the focus of competition authorities is where suppliers seek to stop or reduce the sale of their product through the internet. There are only very limited circumstances in which this can be done. Moreover, it is generally not possible to restrict a seller in one country or in one exclusive sales territory from meeting orders in a different distributors sales territories, particularly if such orders are made via the internet.

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Our Latest deals

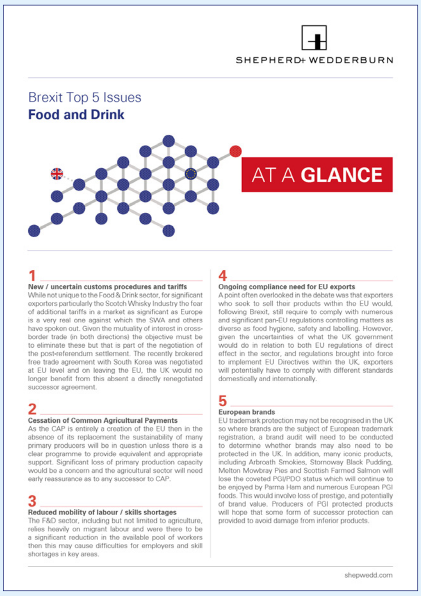
Shepherd and Wedderburn acts for Whyte & Mackay in purchase of regional distribution hub.

Shepherd and Wedderburn acted for the distiller and global whisky brand, Whyte & Mackay, in the purchase from Asda of a 127,000 square foot logistics facility at DC2, West Mains Industrial Estate, Grangemouth. Read more...

Shepherd and Wedderburn advises Scottish Sea Farms in £35m salmon hatchery investment.

Shepherd and Wedderburn acted for Scottish Sea Farms, one of Scotland's leading salmon producers, in its recent acquisition of a development site for a new freshwater fish facility near Oban. Read more...

Brexit Top 5 Issues
Food and Drink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Brexit Top 5 Issues
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AT A GLANCE

1 New / uncertain customs procedures and tariffs
While not unique to the Food & Drink sector, for significant exporters particularly the Scotch Whisky Industry the fear of additional tariffs in a market as significant as Europe is a very real one against which the SWA and others have spoken out. Given the mutuality of interest in cross-border trade (in both directions) the objective must be to eliminate these but that is part of the negotiation of the post-referendum settlement. The recently brokered free trade agreement with South Korea was negotiated at EU level and on leaving the EU, the UK would no longer benefit from this absent a directly renegotiated successor agreement.

2 Cessation of Common Agricultural Payments
As the CAP is entirely a creation of the EU then in the absence of its replacement the sustainability of many primary producers will be in question unless there is a clear programme to provide equivalent and appropriate support. Significant loss of primary production capacity would be a concern and the agricultural sector will need early reassurance as to any successor to CAP.

3 Reduced mobility of labour / skills shortages
The F&D sector, including but not limited to agriculture, relies heavily on migrant labour and were there to be a significant reduction in the available pool of workers then this may cause difficulties for employers and skill shortages in key areas.

4 Ongoing compliance need for EU exports
A point often overlooked in the debate was that exporters who seek to sell their products within the EU would, following Brexit, still require to comply with numerous and significant pan-EU regulations controlling matters as diverse as food hygiene, safety and labelling. However, given the uncertainties of what the UK government would do in relation to both EU regulations of direct effect in the sector, and regulations brought into force to implement EU Directives within the UK, exporters will potentially have to comply with different standards domestically and internationally.

5 European brands
EU trademark protection may not be recognised in the UK so where brands are the subject of European trademark registration, a brand audit will need to be conducted to determine whether brands may also need to be protected in the UK. In addition, many iconic products, including Arbroath Smokies, Stornoway Black Pudding, Melton Mowbray Pies and Scottish Farmed Salmon will lose the coveted PGI/PDO status which will continue to be enjoyed by Parma Ham and numerous European PGI foods. This would involve loss of prestige, and potentially of brand value. Producers of PGI protected products will hope that some form of successor protection can provided to avoid damage from inferior products.

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On 23rd June Britain voted to leave in the EU referendum. While the process of leaving the union may be some way off, the changes we can expect are already starting to shape.

So, what are the top 5 Brexit issues for the food and drink industry?

In our at-a-glance guide we summarise some of the most significant issues affecting the food and drink industry post Brexit.

Click here to read Brexit Top Five Issues: Food and Drink

Our dedicated, cross-sectoral Brexit advisory team offer what-if analysis and advice on next steps to clients seeking to understand how developments in the constitutional space will affect them.

For more sector specific analysis and up to date information, visit our dedicated Brexit page.

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