Legal Consequences of Non-Compliance

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Overview

- Civil and criminal sanctions
- Product liability
- Fraud
- Unfair commercial practices
Criminal and Civil Sanctions (1)

- Main incentive to comply with food law and labelling rules is risk of criminal prosecution
- Criminal sanctions
  - fines or imprisonment for unsafe food
  - other measures: withdrawal, recalls, compliance notice, suspension of licences
  - certain key elements: *actus reus* and *mens rea*
  - exception for strict liability (no fault) offences
  - due diligence defence enshrined in certain statutes, including food law
  - criminal standard of prosecution: beyond reasonable doubt
- Prosecution Codes
Criminal and Civil Sanctions (2)

- Civil remedies
  - statutory redress (e.g., Consumer Protection Act 1987)
  - contract
  - tort (civil wrongs, e.g., negligence, deceit, fraudulent misrepresentation, passing off)
  - public law
  - equitable relief (including injunctions)
  - civil standard: balance of probabilities

- Main reason for claim: damages
Product Liability (1)

  - Consumer Protection Act 1987
  - principle of **no fault liability**
  - applies to EU producers
  - where a defective product causes damage to a consumer, the producer may be automatically liable

- Product is defective where it does not provide the safety that a person is entitled to expect, taking all circumstances into account, including:
  - the **presentation** of the product
  - the **reasonable use** of the product
  - the **time when the product was put into circulation**
Product Liability (2)

• Key area in the labelling context
  – failure to include adequate warnings (e.g., allergens, pregnancy warnings, mandatory warnings) or other information to the consumer to allow them to use the product safely

• Allergen case study
  – product unintentionally cross-contaminated with an allergen may be defective
  – does labelling advice about the possible presence of the allergen cure such a defect (e.g., “may contain…”)?
  – Depends on a number of factors (for example the size and prominence of the advisory statement and consumer expectation as to the nature of the product)
  – case by case assessment
Product Liability (3)

- Reasonable use and time the product was placed into circulation
  - food on the market after its use-by date is “deemed unsafe” (Art. 24(1) FIR).
- What about 24-hour stores?
  - Use-by date is 27 November 2013
  - Consumer purchases product at 00.01am on 28 November 2013?
  - Opens door to potentially frivolous personal injury claims
Negligence

- Fault liability regime for harm to consumers
  - duty of care
  - breach of duty
  - causation
- Well-established that manufacturers owe a duty of care to their consumers to supply safe products
- Must take all reasonable steps to ensure the safety of foods
  - failure to warn (allergens)
  - labelling!
- *Bhamra v Dubb (2010)*
Fraud (1)

- Food fraud
  - heightened awareness following horse meat scandal
  - focus on labelling rather than safety

- UK criminal offence for falsely describing or presenting food (s15 Food Safety Act)
  - up to 2 years in prison and/or a fine
Fraud (2)

- **Key aspects of the s15 offence**
  - **Label**: (whether or not attached to or printed on the wrapper or container) that
    - falsely describes the food; or
    - is likely to mislead as to the nature or substance or quality of the food
  - Any person who sells, or offers or exposes for sale, or has in his possession for the purpose of sale, any food the presentation of which is likely to mislead as to the nature or substance or quality of the food shall be guilty of an offence
  - **Due diligence defence!**

- **Euro Food Group v Cumbria CC**
- **Sussex County Council v Stark Naked Foods Ltd**
Food fraud (3)

• Common law fraud
  – *R v Stansfield (Neil Andrew) (2010)*
  – fraudulent trade in non-organic food marked as organic

• Fraud Act 2006
  – offence to make a dishonest false representation and it is intended to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss (s 2(1))
  – up to 10 years in prison
  – no statutory due diligence defence

• Draft EU definition on food fraud
  – focus on action being misleading, non-compliant, deliberate and done for financial gain
Unfair Commercial Practices (1)

  - Consumer Protection from Unfair Trading Regs 2008
- Prohibits unfair commercial practices
  - not professionally diligent, and
  - it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer
- Prohibits misleading and aggressive commercial practices
  - lead a consumer to take a different transactional decision
Unfair Commercial Practices (2)

• Commercial practice
  – any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product

• Due diligence defence

• Statutory enforcers
  – Competition & Markets Authority
  – local Trading Standards
  – Food Standards Agency and DEFRA
  – Advertising Standards Authority (self-regulation)
Other Legal Consequences (1)

• **Health Claims**
  – Applies to *voluntary* health and nutritional claims made on food (does not apply to puffery)
  – Claims must be authorised by the Commission
  – Subject to criminal prosecutions in England
  – Number of ASA adjudications (Actimel and immunity)
  – English cases
  – EU litigation
    • E.g., T-296/12 *HFMA and others v European Commission*
    • Seeks annulment of permitted list of health claims adopted under Regulation 432/2012
Other legal consequences (2)

• Public procurement
  – *Harry Yearsley Ltd v Secretary of State for Justice*
  – Contract to supply Halal food to Muslim prisoners
  – Alleged that food was mislabelled as it did not adhere to Halal standards

• Administrative redress
  – *R (otao Newby Foods Ltd v Food Standards Agency)*
  – Dispute over the description of food
  – “meat preparation” or “mechanically separated meat”
  – CJEU reference
Summary

• Mind the gap
  – think beyond food labelling laws to other laws that might apply
  – labelling fraud is under the spotlight
  – continuous risk assessment
  – effective and clear messaging
Questions?