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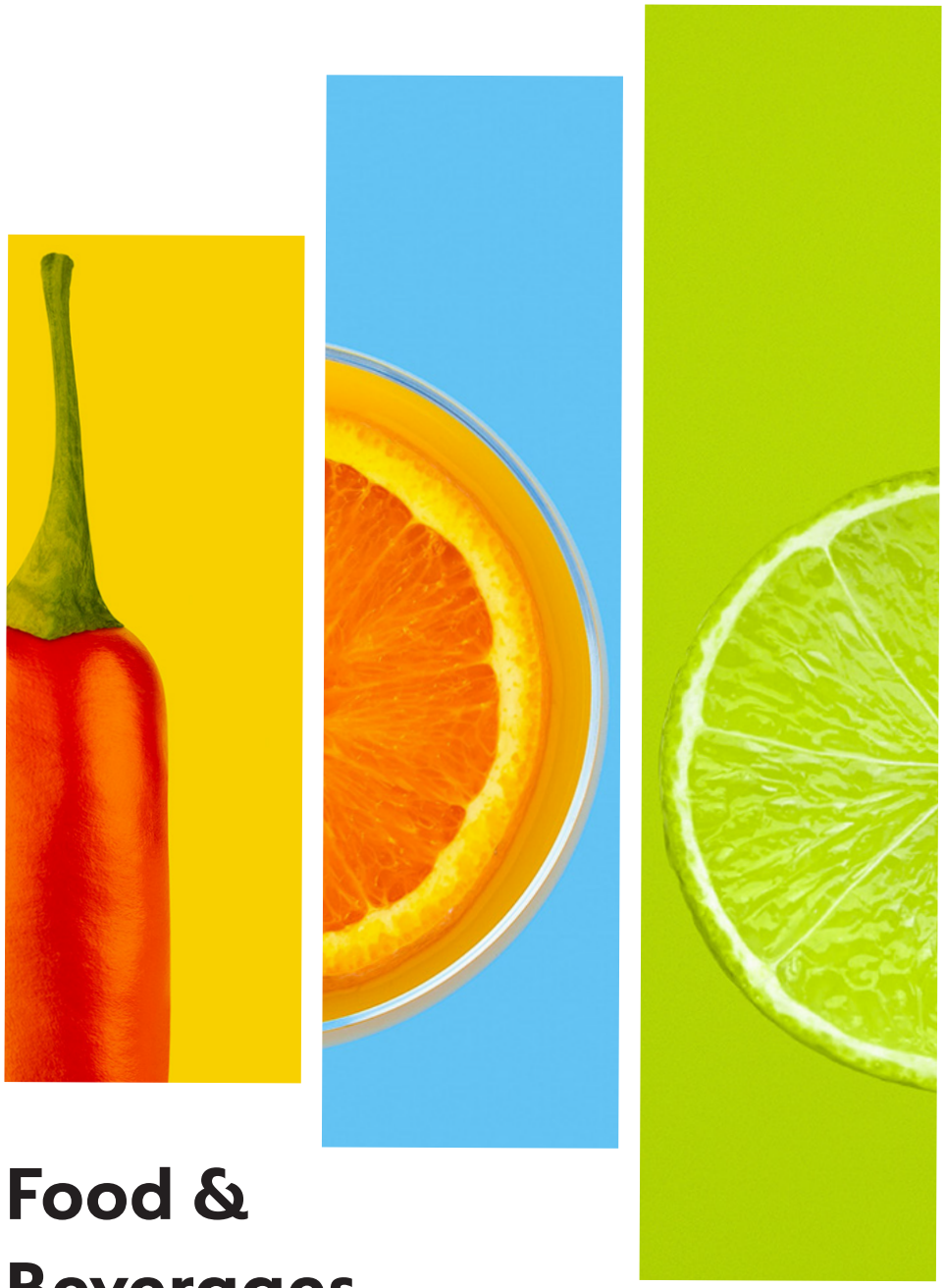
Gómez-Acebo & Pombo



Food & Beverages

Up to date in the sector

2022 No. 4

Contents

Labelling and advertising

Calling a spade a spade: “Powdered chocolate” is not the same as “powder of chocolate”

In its judgment of 13 January 2022 in Case C-881/19 (ECLI:EU:C:2022:15)[1], the Court of Justice of the European Union (‘CJEU’) rules on a question referred for a preliminary ruling by the Regional Court of Brno (Czech Republic) in a dispute concerning the marketing of certain foodstuffs (desserts and milk drinks) manufactured partly from powdered chocolate by a multinational distribution chain. Specifically, powdered chocolate was not identified in the list of ingredients under that name - which is the term set out in the Czech version of Annex I to Directive 2000/36 relating to cocoa and chocolate products intended for human consumption (‘Directive 2000/36’)[2] - but that name was replaced by its own translation into Czech on the basis of other versions of the term also set out in that annex, but in other languages: ‘powder of chocolate’.

Thus, the national court’s question was essentially whether or not the sales description set out in Annex I to Directive 2000/36 (in the language version of the Member State concerned) is mandatory.

In its answer to the question, the CJEU concluded that, to the extent that the compound ingredient is indeed “powdered chocolate “ within the meaning of Annex I to Directive 2000/36, it must be so identified, since the terms in each language version of Annex I to Directive 2000/36 are mandatory or, in the words of the CJEU, “constitute a prescribed “legal name””.

In its ruling, the CJEU argues that allowing economic operators to identify an ingredient with a specific sales name under Directive 2000/36 by

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0881

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0036&from=EN

freely translating that name would undermine the complete harmonisation of sales names for cocoa and chocolate products intended for human consumption under Directive 2000/36, the purpose of which is precisely to ensure the unity of the internal market and to guarantee that consumers are provided with correct, neutral and objective information.

Technology and innovation

Assessments of cannabidiol as a novel food put on hold pending new data

In our first newsletter, we discussed various issues related to the marketing of cannabidiol ("CBD") in Spain for human consumption[3].

CBD is a substance obtained from the *Cannabis sativa L.* plant. and can also be synthesised chemically. CBD could be considered a novel food if it meets the requirements set out in European Union ("EU") legislation on novel foods, in particular Regulation No 2015/2283 on novel foods ("Novel Foods Regulation")[4].

After receiving numerous applications for the use of CBD under the Novel Foods Regulation, the Commission asked the European Food Safety Authority ("EFSA") to issue an opinion on whether CBD is safe for human consumption. EFSA scientists published on 7 June 2022 a formal statement[5] setting out the reasons for the suspension of the authorisation process of CBD as a novel food.

It follows from this statement that EFSA has not been able to establish, at this stage, the safety of CBD as a novel food due to the lack of data provided by the applicants and the uncertainties about the potential risks arising from the intake of CBD. In particular, there would be insufficient data on the effect of CBD on the liver, the gastrointestinal tract, the endocrine system, the nervous system and the psychological function. Furthermore, animal studies show significant adverse reactions, in particular related to reproduction. Whether these effects are also observed in humans needs to be determined.

EFSA is currently working with the applicants to obtain further information and data and has

[3] Guía "Food & Beverages" No 1 (pp. 18 ff.) https://www.ga-p.com/wp-content/uploads/2021/03/Gui%CC%81a_Food_and_Beverage_n.o-1.pdf

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2283&from=EN

[5] https://efsa.onlinelibrary.wiley.com/doi/full/10.2903/j.efsa.2022.7322

insisted that it has not yet come to the conclusion that CBD is an unsafe food.

For the time being, there is only one CBD product authorised on the EU market: an "orphan medicine" subject to restricted medical prescription, whose active component is a CBD extract from *Cannabis sativa L.* with a purity of ≥ 98%. This medicine was favourably assessed by the European Medicines Agency (EMA)[6] and authorised by the European Commission[7] in September 2019 as an adjunctive therapy for seizures associated with Lennox-Gastaut syndrome, Dravet syndrome and tuberous sclerosis complex for patients over two years of age.

The first CRISPR genetically modified tomatoes are marketed in Japan

Following on from our publications in previous issues on CRISPR technology[8,9], it is worth mentioning in this issue the recent launch of the first tomatoes genetically modified with this technology in Japan.

As a result of the application of this genomic technique, the *Sicilian Rouge High GABA* tomato variety has been obtained, whose main characteristic is that it contains high levels of gamma-aminobutyric acid ("GABA"), a non-protein amino acid that is believed to help reduce blood pressure and enhance relaxation (in essence, through CRISPR technology, some genes were inhibited so that the plant would produce higher levels of GABA).

Although no product obtained by genomic techniques is currently marketed in the European Union[10], outside the EU, apart from the case of this tomato variety in Japan, there is another example of food edited with this technology in the United States, namely a soybean variety with a high oleic acid content[11]. There are also a number of agri-food products under development and/or in a pre-market phase.

[6] https://www.ema.europa.eu/en/medicines/human/EPAR/epidyolex

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1030(02)&from=EN

[8] CRISPR (*Clustered Regularly Interspaced Short Palindromic Repeats*) is a gene editing technique that allows the genome of any living thing to be modified with unprecedented precision and ease. Initially aimed at treating diseases of genetic origin, this revolutionary technique has also proved to be very useful in other industries such as the food industry, where a multitude of applications are being explored.

[9] In particular, on the "New proposed European legislation for plants produced by new genomic techniques such as CRISPR" in the Food & Beverages Guide No. 3 (p. 8 et seq.) https://www.ga-p.com/wp-content/uploads/2022/01/Gui%CC%81a_Food-Beverages_n.o-3_eng.pdf.

[10] As we commented in the article on " New proposed European legislation for plants produced by new genomic techniques such as CRISPR" in the Food & Beverages Guide No. 3 (see above), in view of the difficulties presented by the current regulatory system for the implementation and application of genomic techniques, the Commission has presented an initiative for a Proposal for a Regulation on plants produced with this technology. This initiative will propose a legal framework for plants obtained by targeted mutagenesis and cisgenesis and for their food and feed products and aims to maintain a high level of protection of human and animal health and the environment, enable innovation in the agri-food system and contribute to the goals of the European Green Deal and the 'Farm to Fork' Strategy.

[11] https://ec.europa.eu/food/plants/genetically-modified-organisms/new-techniques-biotechnology/ec-study-new-genomic-techniques/questions-and-answers_en

Designations of origin and geographical indications

Proposal for a Regulation to revise the system of geographical indications for wines, spirits and agricultural products

The European Commission has recently published a proposal for a Regulation on geographical indications for wines, spirit drinks and agricultural products, and on quality schemes for agricultural products, amending Regulations No 1308/2013 [establishing a common organisation of the markets in agricultural products], 2017/1001 [on the European Union trademark] and 2019/787 [on the definition, description, designation, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks and the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages] and repealing Regulation No 1151/2012 [on quality schemes for agricultural products and foodstuffs][12].

The overall objective of this proposal is to improve the existing provisions in the area of geographical indications ("GIs") and to provide for a simplified and streamlined set of rules, while strengthening certain elements of GI protection, notably by empowering producer groups and increasing the level of protection on the internet. For the European Commission, strengthening this system is key to having a high quality food and protecting cultural, gastronomic and local heritage across the Union.

This proposal aims, in particular, to:

1. Improve the enforcement of GI rules to better protect intellectual property rights and GIs on the internet, in particular against bad

[12] https://eur-lex.europa.eu/resource.html?uri=cellar:89aabe3e-b0ff-11ec-83e1-01aa75ed71a1.0002.01/DOC_1&format=PDF

faith registrations, fraudulent and deceptive practices and uses in the domain name system, and to combat counterfeiting.

2. Streamline and clarify the legal framework to simplify and harmonise the procedures for application for registration of new names and amendments to product specifications.

3. Contribute to making the EU food system more sustainable by integrating specific sustainability criteria.

4. Empower producers and producer groups to better manage their GI assets and encourage the development of structures and partnerships within the food supply chain.

5. Increase correct market perception and consumer awareness of the GI policy and Union symbols to enable consumers to make informed purchasing choices.

6. Safeguard the protection of traditional food names in order to better valorise and preserve traditional products and production methods.

In addition to this proposal, the European Commission has also recently published a proposal for a Regulation on geographical indication protection for craft and industrial products. The latter proposal represents a new paradigm at the European level, since until now the European Union only had a protection system for GIs in respect of agricultural products and certain alcoholic beverages. Following the suggestions of legal scholars, the protection of non-agricultural products will be similar to the protected geographical indication ("PGI"), and not to the protected designation of origin ("PDO"). The fundamental difference between the two concepts is that, while in the PDO the link with the geographical area is fundamental, since the quality or characteristic of a product are essentially or exclusively linked to a specific geographical environment, with the natural and human factors inherent in it (therefore all stages of production take place in the defined geographical area), in the PGI it is only necessary that a quality, reputation or characteristic is essentially attributable to its geographical origin (it is only necessary that one of the stages takes place in the same geographical area).

Both legislative proposals of the European Commission are currently in the pipeline. The deadline for comments is 28 June 2022 (foodstuffs and beverages) and 13 July 22 (non-agricultural products). The European Commission will summarise all responses and forward them to the European Parliament and the Council to stimulate legislative debate.

"Jamón Serrano": from a traditional speciality guaranteed to a protected geographical indication

Until now, among the Spain-linked traditional specialities guaranteed ("TSG") recognised by the European Union was that of "Jamón Serrano". According to Article 18 of Regulation No 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs[13], "[a] name shall be eligible for registration as a traditional speciality guaranteed where it describes a specific product or foodstuff that: *a*) results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff; or *b*) is

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=EN

produced from raw materials or ingredients that are those traditionally used. 2. For a name to be registered as a traditional speciality guaranteed, it shall: (a) have been traditionally used to refer to the specific product, or (b) identify the traditional character or specific character of the product". An EGT therefore does not refer to the origin of the product, but aims to protect traditional production methods and recipes or, in other words, highlights the traditional aspects of a product, such as its production or composition, without being linked to a specific geographical area.

However, the Spanish Ministry of Agriculture, Fisheries and Food applied to the European Commission for registration of that product as a protected geographical indication ('PGI')[14] ('a name, including a traditionally used name, which identifies a product: (a) originating in a specific place, region or country; (b) possessing a specific quality, reputation or other characteristic essentially attributable to its geographical origin; and (c) at least one of the stages of production of which takes place in the defined geographical area") and the consequent cancellation of the TSG "Jamón Serrano".

In this context, the Directorate-General for the Food Industry of the aforementioned Ministry issued two decisions dated 21 December 2021. The first one adopts and publishes the favourable decision on the continuation of the procedure for the registration of the PGI "Jamón Serrano"[15]. The second adopts and publishes the favourable decision on the application for cancellation of the TSG "Jamón Serrano"[16]. This last decision puts an end to the preliminary national procedure, and the application for cancellation is sent to the European Commission, at the same time as the decision in favour of continuing the procedure for registration of the PGI "Jamón Serrano" in the EU register.

As a result of the creation of this PGI, the production of Serrano ham will be limited to Spain only and the protection of the term "jamón serrano" in the EU will be improved.

[14] The PGI emphasises the link between the specific geographical region and the name of the product when its quality, reputation or other specific characteristics are essentially attributable to the geographical origin.

[15] "BOE" no. 10, 12 January 2022, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-485

[16] "BOE" no. 10, 12 January 2022, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-484

Intellectual property developments

Trade secrets in the food chain. Regarding a recent Supreme Court ruling

New law and new judgment

The Measures to Improve the Functioning of the Food Supply Chain Act 12/2013 of 2 August (hereinafter "LCA")[17] has been amended by the recently published Act 16/2021 of 14 December[18].

A legislative change usually requires, beyond its gradual internalisation by those affected, a certain minimum time to be effectively taken on board. However, contrary to this traditional maxim of legislative drafting, a Supreme Court ruling has just been published (judgment of 20 December 2021, 3rd Division, 5th Chamber, appeal no. 5756/2020 [ECLI:ES:TS:2021:4899][19]) which connects, almost contemporaneously, with the new regulation of trade secrets in the amen-ding Act 16/2021.

This coincidence in time of the new act and the interpretative judgment is of particular interest insofar as the ruling has taken into consideration several of the European legislative initiatives behind the new domestic law. This allows us to examine the new statutory text hand in hand with the court's hermeneutics. A legal curiosity, with singular nuances for the legal profession.

The facts to which the judgment refers

A food distributor, in the course of its business, agrees a series of contractual terms and conditions with a number of manufacturers and suppliers relating to the marketing of products and the prices of commercial references.

[17] https://www.boe.es/buscar/act.php?id=BOE-A-2013-8554

[18] https://www.boe.es/buscar/act.php?id=BOE-A-2021-20630

[19] https://www.poderjudicial.es/search/AN/openDocument/7cec9f1e4a626126/20220121

Said food distributor enters into an agreement with another food distributor in order to "increase its competitiveness through joint negotiation of purchasing conditions" (Point of Law 4 of the judgment). With the same aim of increasing competitiveness, the distributors also supplied that information to both an external consultancy firm and a law firm. Said information from suppliers and manufacturers was disseminated, prior to the meetings with them, without their consent.

The distributor's conduct was the subject of an administrative sanctioning procedure (initiated for the commission of 88 serious food procurement infringements) which concluded with a first sanctioning decision of 13 March 2017.

An application for administrative review was made against this decision, which was allowed in part by decision of 25 July 2017 of the Technical Secretary General of the Ministry of Agriculture, Fisheries, Food and the Environment.

An appeal against the aforementioned administrative review was lodged with the Judicial Review Court, which was rejected on 15 April 2020, with an order to pay costs.

An appeal in 'cassation'[20] was lodged with the Supreme Court and, by order of 12 February 2021, it was held that the issue was of interest for the formation of case law in terms of the following point.

From "commercially sensitive information" to "trade secrets

The first logical question raised by the Judgment is whether or not the contractual conditions agreed by a distributor with manufacturers or suppliers, relating to the marketing of products and the prices of commercial references are "commercially sensitive information" for the purposes of the LCA; and, secondly, whether or not the provision of such information to a consultant and a law firm, for a lawful purpose and with a guarantee of confidentiality of the information disclosed, constitutes an infringement under Article 23(1)(g) LCA 2013 version.

The Supreme Court resolves the first question without any doubt (applying the postulates of the LCA 2013 version), being of the opinion that the legal definition of "commercially sensitive information" includes the technical knowledge referring to the nature, characteristics or purposes of a product, and the means, quantities or forms for its distribution or marketing, which are necessary for the manufacture or marketing of the product.

The Supreme Court confirms this according to its reading of Articles 9 and 13 of the aforementioned LCA 2013 version, which regulate, respectively, the minimum content that the contractual terms agreed in food contracts must have and the provision of commercially sensitive information between operators in the food chain.

These are, we add, the provisions that will be changed by the 2021 version of the LCA, as the judgement itself later on hints at, illuminating what will be the new regulation that has just been published.

The judgment states that (Point of Law 4) that Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure[21], is the place where it is said that information which meets all of the

[20] Translator's note: An appeal on the grounds of a breach of the provisions governing the determination of a dispute.

[21] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&from=EN

following requirements constitutes a "trade secret": (a) it is secret; (b) it has commercial value because it is secret; and (c) it has been subject to reasonable steps under the circumstances to keep it secret.

As pointed out by the State Attorney in the lawsuit and referred to in the judgment, "the use or disclosure of a trade secret, in accordance with Article 4(3)(b) of the Directive, shall be considered unlawful when, among other cases, it is carried out, without the consent of its holder, by a person who is found to be in breach of a confidentiality agreement or any other duty not to disclose the trade secret." Indeed, in the same vein, Article 3(1)(g) of Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain[22], requires States to prohibit the buyer from unlawfully acquiring, using or disclosing trade secrets of the supplier within the meaning of Directive 2016/943.

And all of this has been incorporated, in these same terms, into Spanish law, through the Trade Secrets Act 1/2019 of 2 February, expressly mentioned in the 2021 version of the LCA (in its new Article 5(n)).

The guarantee of confidentiality and its breach by disclosure to consultants and lawyers

The second question is raised: whether or not the provision of such commercially sensitive information (now a trade secret) to a consultant and a law firm, for a lawful purpose and with a guarantee of confidentiality of the information disclosed, constitutes the infringement set out in Article 23(1)(g) LCA 2013 version.

And for the Supreme Court, accepting the view of the Audiencia Nacional, the answer must be clearly affirmative. The judgment considers that, although it is somewhat difficult to assume that, by virtue of such a confidentiality agreement, neither of the distributors knew the commercial terms and conditions of each of the other's suppliers (since, in order to achieve the aims of the collaboration agreement - it adds - it is clear that at some point in the negotiation they undoubtedly had to exchange this information, especially when the law firm was the advisor to both entities), what the Supreme Court has no doubt about is that the mere fact of making such information available to the consultancy firm and the law firm in itself constitutes a disclosure of commercially sensitive information to third parties unrelated to the two parties, the distributor and the relevant manufacturer or supplier.

The solution to the question of interest for the formation of case law is as follows: "(i) The supply of sensitive information - generated in the course of the negotiation or performance of a food contract - to a consultant or a lawyer for a lawful purpose and with a guarantee of confidentiality of the information disclosed, may or may not constitute the infringement defined in Article 23(1)(g) LCA, depending on the circumstances of the case. (ii) In the absence of the consent of the other operator in the food chain affected by the contract, the supply of sensitive information to those professionals - consultant or lawyer - will only be lawful if it is made for the purpose of the supplier receiving technical assistance from them in the course of the negotiation or performance of the food contract to which it is a party, and provided that the sensitive information supplied is strictly limited to that scope and purpose, and is not used for purposes other than those expressly agreed in the contract. (iii) Otherwise, the provision of such information could give rise to the infringement defined in Article 23(1)(g) LCA".

[22] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0633&from=EN

Plant variety denominations: New guidelines from the Community Plant Variety Office

The Community Plant Variety Office ("CPVO") adopted on 10 December 2021 new guidelines on plant variety denominations[23], applicable from 1 January 2022. This recent update is due to the fact that the CPVO has been confronted with certain situations where the explanatory notes did not provide sufficiently clear guidance and considered that the guidelines needed to be updated and further developed. These guidelines, drawn up by the CPVO, had been last updated in November 2012.

A "variety denomination" (or plant variety denomination) is the generic name of a plant variety. In the context of an application for registration of a plant variety with the CPVO ("CPVR"), the applicant must submit a suitable denomination for the new variety. In order to be suitable, the variety denomination must comply with the requirements of Article 63 of Regulation No 2100/94 on Community plant variety rights ("Plant Variety Rights Regulation").

In this respect, it should be noted that the denomination of a plant variety is unique and Article 17 of the Plant Variety Rights Regulation makes the use of the variety denomination compulsory for the offering for sale or placing on the market of propagating material of the variety, even after the termination of the CPVR.

The above-mentioned CPVO guidelines on the suitability of variety denominations implementing Article 63 of the Plant Variety Rights Regulation provide the basis for the interpretation of this Article and include explanatory notes.

Among the issues covered by these guidelines, the following can be highlighted:

1. **General principles applicable to the analysis of denominations:** The general principles that inform the analysis of plant variety denominations are listed first. For example, CPVR applicants should avoid purely descriptive denominations in any of the official EU languages or in Latin (e.g. "Primo Red" or "First Rojo" would be rejected as purely descriptive).

2. **Impediments for the designation of variety denominations:** The possible impediments to the designation of a plant variety denomination are listed and a wide range of examples are given. Essentially, the variety denomination must not be offensive in any of the EU languages or misleading as to the characteristics, value or identity of the variety, the breeder or any other party to the proceedings.

3. **Third party trademarks**: Among the prior rights of third parties, the guidelines pay particular attention to trademarks as one of the "most commonly encountered" impediments to plant variety denominations. For a trademark to hinder the designation of the plant variety denomination, it must be registered in one or more EU member states or as an EU trademark prior to the approval of the variety denomination, include an identical or similar linguistic expression, and refer to identical or similar products. The guidelines expressly state that the burden of objection against the plant variety denomination lies with the trademark holder.

[23] https://cpvo.europa.eu/sites/default/files/documents/cpvo_guidelines_on_article_63.pdf

Food safety

Fizzy bath bombs: Member States may, under certain conditions, restrict the distribution of products that may be confused with foodstuffs and cause health risks.

The CJEU has recently interpreted in its judgment of 2 June 2022 in case C-122/21 (ECLI:EU:C:2022:421)[24], following a request for a preliminary ruling from the Supreme Administrative Court of Lithuania, in relation to Article 1(2) of Directive 87/357/EEC on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers ("Directive 87/357")[25].

Directive 87/357, transposed into Spanish law by Royal Decree 820/1990[26], prohibits the manufacture, marketing, import and export of products which, without being foodstuffs, appear to be other than they are and are likely to endanger the health or safety of consumers. These products are defined as those that possess a form, odour, colour, appearance, packaging, labelling, volume or size, such that it is likely that consumers, especially children, will confuse them with foodstuffs and in consequence place them in their mouths, or suck or ingest them, which might be dangerous and cause, for example, suffocation, poisoning, or the perforation or obstruction of the digestive tract.

The request was made in proceedings between the company Get Fresh Cosmetics Limited and the Lithuanian Consumer Protection Authority concerning the sale by the former of cosmetic products - fizzy bath bombs - resembling cakes and sweets.

The Lithuanian court's question was whether such products appearing to be other than they are should be banned outright on the presumption that they are dangerous, or whether, on the

[24] https://curia.europa.eu/juris/document/document.jsf;jsessionid=0E1F88A30B186824F279E76C76F1B7C7?text=&docid=260187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25087

[25] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31987L0357&from=EN

[26] https://www.boe.es/buscar/act.php?id=BOE-A-1990-14814

contrary, such danger should be established by objective and substantiated data.

The CJEU has held that a product is subject to the prohibition of Directive 87/357 if four cumulative conditions are met: (i) the product must be a non-food product possessing the form, odour, colour, appearance, packaging, labelling, volume or size of a foodstuff; (ii) those characteristics must be such that it is likely that consumers, especially children, will confuse the product with a foodstuff; (iii) it must be likely that, in consequence, consumers will place that product in their mouths, suck or ingest it; and finally, (iv) placing the product in the mouth, sucking it or ingesting it may entail risks such as suffocation, poisoning, or the perforation or obstruction of the digestive tract.

Consequently, the CJEU has stated that there is no presumption that products appearing to be other than they are are per se dangerous, as this would amount to prohibiting de facto the marketing of all products which, not being foodstuffs, may be confused with foodstuffs. However, this also does not mean that the competent national authorities are required to demonstrate by objective and substantiated data that consumers will confuse the products with foodstuffs and that the risks of suffocating, poisoning, or the perforation or obstruction of the digestive tract have been established. In this respect, it is pointed out that the imposition of such an obligation would conflict with the requirement of protection of individuals and consumers and would not ensure a fair balance between that requirement and that of the free movement of products.

The CJEU has thus pointed out that Directive 87/357 requires the competent national authorities to assess, on a case-by-case basis, whether the conditions listed above are satisfied in order to justify the adoption of a decision to ban a product, having to assess, where the product at issue has the appearance or odour of a foodstuff, not only the likelihood that it will be confused with a foodstuff and, thereby, placed in the mouth, sucked or ingested, but also the risks of such an action. This assessment should be based on the objective characteristics of the products concerned (in particular their materials and composition) as well as on the vulnerability associated with the categories of persons and consumers likely to be faced with products with the appearance of foodstuffs, including in particular children.

National competent authorities may extend the microbiological food safety criteria referring to pathogenic microorganisms that may be present in different food categories (e.g. salmonella in fresh poultry meat)

In its judgment of 28 April 2022 in case C-89/21 (ECLI:EU:C:2022:313)[27], the CJEU rules on a reference for a preliminary ruling from the Supreme Administrative Court of Lithuania in a dispute between a poultry meat wholesaler and the Lithuanian State Food and Veterinary Service concerning the latter's decision to impose a fine on that company and to require it to withdraw from the market poultry meat in which certain salmonella serotypes had been detected.

In particular, Regulation No 2073/2005 on microbiological criteria for foodstuffs[28] provides that fresh poultry meat must not contain either

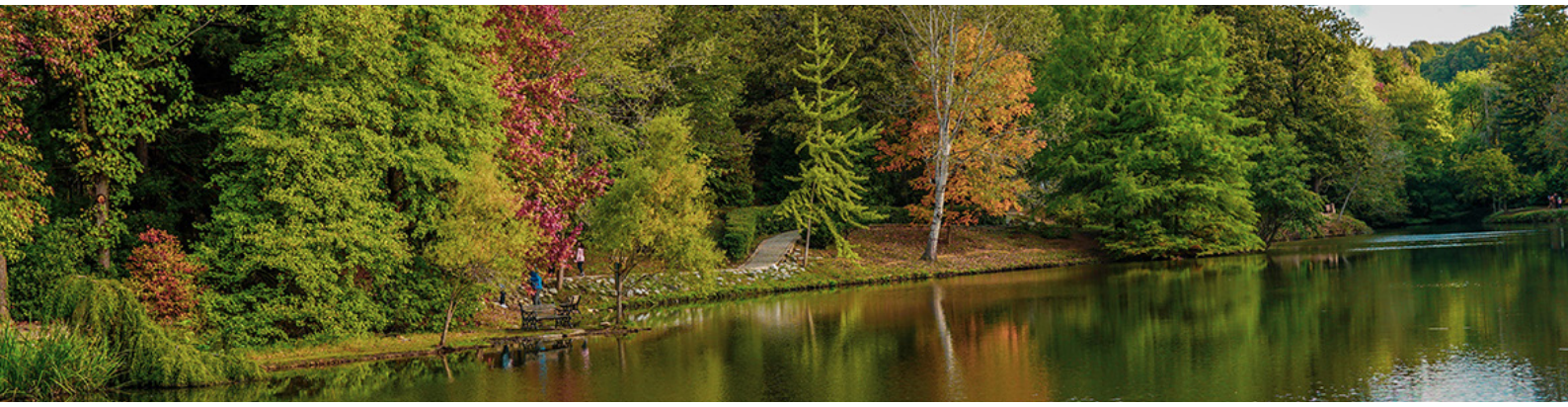
[27] https://curia.europa.eu/juris/document/document.jsf?text=&docid=258496&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=276687

[28] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R2073&from=EN

of the two salmonella serotypes mentioned in point 1.28 of Chapter 1 of Annex I thereto, namely *Salmonella Typhimurium* and Salmonella Enteritidis.

In essence, the national court asked the CJEU whether the national authorities may check for the presence, in that meat, of salmonella serotypes other than those listed in Regulation No 2073/2005 (i.e. *Salmonella Typhimurium* and *Salmonella Enteritidis*).

The CJEU answered in the affirmative in the above-mentioned judgment to the effect that "the competent authority of a Member State may regard as unsafe within the meaning of Article 14(1) and (2) of Regulation No 178/2002 the food category consisting in fresh poultry meat in which pathogenic microorganisms other than the salmonella serotypes listed in point 1.28 of Chapter 1 of Annex I to Regulation No 2073/2005 have been detected".



Sustainability

Introduction to Parliament of the Food Loss and Waste Bill

As we mentioned in last July's Guide, the central government announced that its legislative initiatives included the passage of a law against food loss and waste along the lines of countries such as France and Italy. On 7 June, the Cabinet approved the formal introduction to Parliament of the Food Loss and Waste Bill[29].

What are the objectives of this bill?

The aim of this project is to reduce the disposal of unconsumed food and to promote a better use of food. Specifically, the Bill mentions the following as specific objectives:

a) Reduce food losses and waste through a more efficient management of resources, thus promoting the circular bioeconomy.

b) Raise awareness and inform those involved in production, processing, distribution, hotels, catering, consumers and the general public, and to promote awareness-raising activities in the field of prevention and reduction of food losses and food waste.

c) Encourage food donation by ensuring food safety and traceability.

d) Promote the recovery and distribution of surplus food for social solidarity purposes, prioritising it for human use.

e) Promote research and innovation in the field of prevention and reduction of food losses and food waste.

f) Respond to the 2030 Agenda's goal on responsible production and consumption.

g) Reduce emissions of greenhouse gases and other pollutants

This regulation, which would be pioneering in Spain, and practically in Europe with the exception of the two countries mentioned, seeks to promote best practice and avoid food wastage at all stages of the food chain, from primary producers, at the harvesting and collection stage, to

[29] https://www.mapa.gob.es/es/prensa/anteproyectoleydesperdicio_tcm30-620834.pdf

consumers, either at home or in bars and restaurants.

What would be the implications of the bill's passage into law?

Among the most important changes that would result from the bill's enactment, we should highlight the following:

1. All actors in the food chain, except for shops of less than 1,300 square metres, will be required to have a specific plan for the prevention of food losses and food waste.

2. They should also enter into agreements or arrangements to donate their surplus food to non-profit organisations, unless it is justified that this is unfeasible.

3. In relation to food banks, only food that has not reached the 'best before' date may be donated.

4. All actors in the food chain should apply the following hierarchy of priorities in their actions and in deciding what to do with uneaten food: (i) to food donation; (ii) transformation of products not consumed but fit for human consumption into alternative products; (iii) for animal feed and feed manufacture; (iv) for use as by-products in other industrial use; (v) as waste, for recycling or for obtaining compost and digestate; and lastly (vi) for energy recovery by obtaining biogas or fuels.

5. Food chain operators in the hotel and catering business would be required to provide the consumer with the possibility to take away, at no additional cost, food that has not been consumed, except in buffet service formats or similar where the availability of food is not limited, and to inform of this possibility in a clear and visible way in the establishment itself, preferably on the menu. Food-safe, reusable or easily recyclable packaging should be used for this purpose.

6. Food banks and other companies involved in the distribution of food for donation shall ensure the traceability of donated products through a system recording incoming and outgoing food received and delivered, except in certain cases.

What sanctions could be applied in the event of non-compliance?

In terms of penalties, sanctions of up to 2,000 euros are envisaged for minor infringements, between 2,001 and 60,000 euros for serious infringements and between 60,001 and 500,000 euros for very serious infringements.

For example, it would be considered a minor infringement not to apply the hierarchy of priorities in the use of food or that industries, retail distribution companies, hotels and restaurants do not carry out the donation of unsold products that are fit for human consumption through an agreement. On the other hand, it would be considered a serious infringement not to have a plan in place as mentioned above, as well as a second or subsequent minor infringement involving a repeat infringement within a period of two years.

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