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Gómez-Acebo & Pombo

Food & Beverages

Up to date in the sector

2022 No. 5

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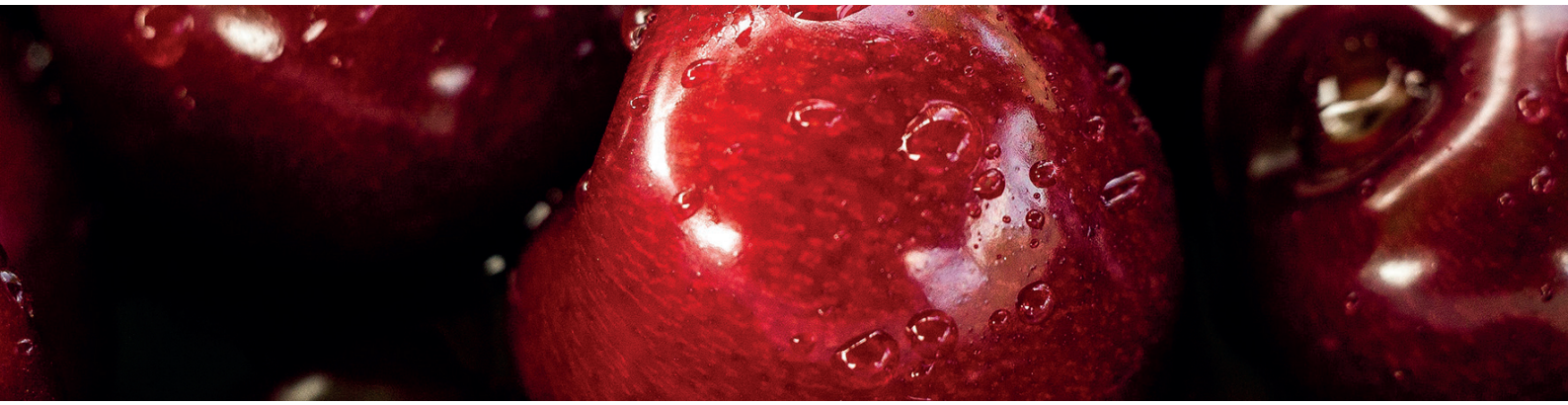

Labelling and advertising

Suspension of the ban on the use of meat names in relation to plant-based products marketed in France

As we already mentioned in our July 2021 Food & Beverages newsletter[1], France last year amended its Consumer Code[2] (Article 412(10)) to include a provision stating that "names used to designate foodstuffs of animal origin may not be used to describe, market or promote foodstuffs containing vegetable proteins". This same provision already announced that a subsequent regulation would implement its modalities of application, as well as the possible penalties applicable in the event of non-compliance.

This subsequent regulation came in the form of Decree 2022-947 of 29 June[3] "on the use of certain names to designate foodstuffs containing vegetable proteins", which finally allowed the effective application of the aforementioned Article L412-10 of the Consumer Code. This Decree expressly prohibits "the use of sector-specific terminology traditionally associated with meat and fish to designate products that do not belong to the animal world and are essentially not comparable", and includes terms such as ham, sausage, steak, sirloin or nuggets.

In theory, this Decree was due to enter into force on 1 October 2022. However, the French Conseil d'Etat has decided to suspend its application

[1] Food & Beverages Newsletter No. 2 (p. 6). https://www.ga-p.com/wp-content/uploads/2021/07/Gui%CC%81a_Food-Beverages_no.2.pdf

[2] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069565/LEGISCTA000032222679/#LEGIARTI000041983720

[3] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045978360

following a request for interim relief by the organisation Protéines France, which brings together vegetable protein companies such as Accro, Happyvore, La Vie, Nutrition & Sante, Olga and Umiami. In his decision of 27 July4, the Conseil d'Etat judge, Jean-Philippe Mochon, decided to suspend the implementation of the Decree on the grounds that, as justified by Protéines France, the producers of vegetable protein products were unable, before the date of entry into force of the Decree, to make the necessary adaptations required by the new rules, in terms of changes to packaging and sales supports and the creation of new sales descriptions. The Conseil d'Etat also expresses its doubts as to the legality of the Decree, given the lack of an exhaustive list of the designations whose use it prohibits, the imprecise characterisation of the prohibited terms, and the lack of free public access to the codes of ethics to which the general government refers to clarify the scope of the prohibition, which, in its view, makes the Decree unclear and inaccessible. We will have to be very attentive to the forthcoming developments on this issue in our French neighbour.

Food and drink advertising aimed at children: Key aspects of the draft Royal Decree published on 7 March by the Ministry of Consumer Affairs

Objective/Purpose: *a*) To ensure the protection of children's rights to health and integral development, establishing a minimum regulatory framework for the advertising of food and beverages aimed at children in order to curb the problems of childhood overweight and obesity in Spain; and *b*) to promote new correlation agreements and codes of conduct in the field of commercial communications subject to the Royal Decree.

Definition of "advertising aimed at children": Any form of advertising of food or beverages that meets any of the following criteria, *a*) by virtue of the design of the message (content, language or images), is objectively and predominantly likely to attract the attention or interest of children under the age of 16; and *b*) the circumstances in which it is carried out, i.e. it is disseminated in the following media:

- Children television channels.
- Generalist television channels: when it is inserted in programmes aimed at children; or it is broadcast in child protection slots (Monday to Friday from 8h-9h and from 17h-20h and on weekends from 9h-12h), or in advertising blocks immediately following programmes aimed at children or in blocks where 25% of the viewers are children.
- Cinemas, in sessions showing films "suitable for all audiences" or "specifically recommended for children".
- Press: sections aimed at under-16s and children's magazines.
- Websites, apps, social networking and video-sharing services whose content is intended for children under the age of 16.

Prohibitions:

- The use of fantasy elements such as cartoons or animations that create unattainable expectations or exploit children's naivety in distinguishing between fantasy and reality.

[4] https://juricaf.org/arret/FRANCE-CONSEILDETAT-20220727-465844

- Suggesting *a*) that purchase of the product will bring social success, popularity or special qualities of those featured in the advertisements; *b*) that consumption will lead to greater acceptance in their social or educational environment or that non-consumption will lead to rejection; orc *c*) that the product makes those who buy or consume it more intelligent or generous than those who do not.

- Encouraging children to ask or persuade their relatives or friends to buy the advertised product from them.

- Show sedentary lifestyle habits, compulsive or excessive eating and drinking.

- Based on nutrient profiles: any form of advertising or marketing communication for foods and beverages high in sodium, sugars, sweeteners, fats and saturated fatty acids determined on the basis of their nutrient profiles, based on the WHO nutrition tables published in 2015 and in any case for the following food categories: chocolates and confectionery, energy bars, sweet toppings and desserts (including cereal bars), cakes, sweet biscuits and pastries, other bakery products, powders for baking; juices, energy drinks, and ice cream.

- The appearance of mothers or fathers, educators, teachers, professionals from children's programmes, athletes, artists, influencers, people or characters of relevance, public notoriety or proximity to children, real or fictitious.

- Promotions such as prizes, giveaways, contests, sweepstakes or sponsorships, aimed at supporting the advertising of foods and beverages high in sodium, sugars, sweeteners, fat and saturated fatty acids and the placement of these products aimed at children.

Restrictions/Limitations: A number of conditions are set for the broadcasting of commercial communications about this type of food in the media:

- Websites or apps. They may only be displayed if they have effective mechanisms to prevent access by children and disseminate healthy eating messages on a regular basis.

- Electronic mail. They may be advertised where the providers of these services have effective tools in place to segment the audience in order to ensure that they do not target children.

- Social networking and sharing platforms. Advertisements may be broadcast with a user profile, provided that the social network has tools to prevent targeting of children and mechanisms to block or hide pop-up advertisements.

Penalties: These will be considered as nutrition infringements in accordance with the Food Safety and Nutrition Act, with fines ranging, depending on whether the infringements are classified as minor, serious or very serious, from 5,000 to 600,000 euros.

Who will be affected?

a) Companies that produce or manufacture food or beverages that are marketed in Spain;

b) natural and legal persons disseminating commercial communications of this type of products by any means or medium in Spain (audiovisual or electronic communication service providers, information society service providers, including affiliates, websites and social networks and any other media); and

c) natural and legal persons at intermediate stages of the production, transmission or dissemination of commercial communications (advertising networks, advertising agencies or intermediary service providers).

Transitional regime:

- Self-regulatory codes in force: 3 months.
- Sponsorship and advertising contracts entered into prior to the entry into force of the rule: 6 months

What stage has the draft Royal Decree reached?

The period of availability for public objection ended on 29 March. A large number of companies, associations and public interest organisations in the sector have submitted allegations. The Spanish Markets and Competition Authority (CNMC) has recently published a report with a series of recommendations on the future regulation, urging a review of several aspects ranging from assessing the time chosen to adopt this regulation, in view of the forthcoming regulation by the European Union of aspects relating to the labelling of nutritional products and the effects that successive changes could have for the companies affected and consumers, to recalling the legal obligation to exhaust the options of self-regulation and co-regulation before limiting commercial communication.

As can be seen, there are many relevant points still to be clarified, so it will be necessary to follow the process closely.

The return to television of advertising for alcoholic beverages over 20 proof

The Audiovisual Communication Act 13/2022 of 7 July, passed in the summer of 2022, was a revolution in that it meant the return to television, radio and on-demand audiovisual communication services (both sound and television) of commercial communications of alcoholic beverages over twenty proof. Although broadcasting was limited to the time slot between 1:00 and 5:00 a.m., rather than a limitation, this meant a liberation for the producers and marketers of this type of beverages, since, until this modification, audiovisual advertising of beverages with an alcohol content above 20 proof was completely prohibited since the entry into force of the Advertising Act 34/1988 of 11 November.

Consequently, the first final provision of the Act also amended the Advertising Act in order to also allow audiovisual commercial communication of these alcoholic beverages in the aforementioned time slot. And all of this in order to bring it into line with the provisions established for the advertising of gambling, esotericism and para-sciences.

Notwithstanding the above, audiovisual commercial communication of alcoholic beverages (of any strength and at any time) that meets any of the following requirements is prohibited: *a*) Specifically targets minors, or depicts minors consuming such beverages; *b*) Associates consumption with improved physical performance or driving; *c*) Gives the impression that its consumption contributes to social or sexual success, or associates, links or relates it with ideas or behaviour expressing personal, family, social, sporting or professional success; *d*) Suggests that alcoholic beverages have therapeutic properties, or a stimulant or sedative effect, or that it is a means of conflict resolution, or that it has health benefits; *e*) Encourages immoderate consumption or portrays a negative image of abstinence or sobriety; *f*) Emphasises as a positive quality of the beverages their alcoholic content;

g) Does not include a message of moderate and low-risk consumption.

Although this modification has not made as much noise as could have been expected, -especially taking into account the public consultation on the Draft Bill on the Prevention of the negative effects of alcohol consumption in minors or the non-legislative proposal on the introduction of health warnings on the labelling of alcoholic beverages -, it has led to criticism from FACUA--Consumidores en Acción, which has stated that this Act represents "a real step backwards in policies to defend and promote citizens' health and reduce alcohol consumption, eliminating prohibitions on which there was already a general consensus in society, and aligning itself with the alcoholic beverages industry to the detriment of citizens".

Goodbye to the best-before date?

In recent weeks, several UK supermarket chains such as Marks and Spencer, Asda and Waitrose have announced the withdrawal of the popularly known as "best-before date" from a large number of their food products. In particular, they have withdrawn it mainly from fresh fruit and vegetables sold with a label, as is the case for example with some imported food products.

The main reason behind this decision is due to the general lack of knowledge among consumers about the real meaning of the best-before date, which often leads them to confuse this date with the expiry date of the product. This confusion often leads consumers to discard products in good condition before they have actually expired, thus contributing to further food waste.

According to data from a Eurobarometer conducted in 2015, less than one in two consumers understood the concept of best-before date. According to a 2018 European Commission study, of the 88 million tonnes of food waste generated each year in the EU, up to 10% would be linked to the dates indicated on food products.

The difference between these two concepts, as clarified by the European Food Safety Authority (EFSA), is that "the expiry date for food is a safety issue: food can be consumed until that date, but not after that date, even if it smells good. "Best before" refers to quality: the food will be safe to eat after that date, but it may not be in its best shape. For example, its taste and texture may not be as good".

In the European Union, the obligation to include the best-before date on foodstuffs is laid down in Article 9 and Annex X to Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers[5]. This Annex X sets out both the requirements to be met when including such a statement, as well as the food products for which such a statement is not mandatory. After Brexit, in the United Kingdom, as compliance with the provisions of this regulation is no longer mandatory, companies would be entitled to remove the reference to the best-before date.

However, it is possible that in the EU itself, the obligatory nature of this mention will also change in the near future. The European Commission already announced in May 2020 its intention to reduce the environmental and climate impact of the EU food system by adopting the Farm to Fork strategy, which aims to revise the EU date labelling rules. A first Commission report on the impact of this revision proposes three

[5] https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:32011R1169&from=ES

scenarios: *a*) keeping the regulation as it is, *b*) revising the regulation and abolishing the concept of the best-before date, *c*) improving the expression and presentation of date marking to consumers to avoid confusion with the expiry date.

A first proposal for a revision of this regulation is expected in the last four months of 2022, so we hope to have news soon on the direction to be taken by the European Union.

Technology and innovation

The Metaverse and NFTs reach the wine industry

Following in the footsteps of the retail and automotive sectors, the wine industry has also landed in the metaverse to explore and exploit the business opportunities that exist in the virtual world.

Some wineries and wine companies have found new ways to promote their products and interact virtually with their customers who, as is typical of the sector, are not only mere consumers of wine but also collectors and enthusiasts who appreciate the product, the entire production chain and its revaluation over time.

Some companies in the sector have already decided to build their digital twin in the metaverse to offer the possibility of virtual tours of their vineyards and wineries. In Spain, the Dominio del Pidio winery, in the heart of Ribera del Duero, has been a pioneer in offering this virtual experience to its customers, who can enjoy it from their electronic devices.

Also, outside Spain, many wineries have identified NFTs as an innovative tool in the virtual world that also contributes to a better marketing and sales strategy. For example, Yao Family Wines, a winery owned by NBA star Yao Ming, has offered 200 bottles of “The Chop Cabernet Sauvignon 2016” along with its corresponding NFT that certifies its origin and authenticity.

These initiatives by wine and other spirits companies have been the starting point for the creation of ad hoc marketplaces where NFTs representing the bottles in question are traded.

In particular, BlockBar is the first marketplace specialised in this sector where NFTs of well-known spirits brands are traded. BlockBar works with the Ethereum network -currently one of the blockchains with the highest market capitalisation of cryptoassets- in order to guarantee the authenticity and ownership of the bottles, as well as the traceability of the supply chain, thus avoiding counterfeiting and fraud. Users of this marketplace can buy NFTs and also trade them on the platform, but, in addition, when they so

wish, they can deliver the digital asset (NFT) in exchange for the physical bottle it represents.

This being the case, it seems clear that, without the vocation of replacing the experience of enjoying a bottle of wine, the digital world presents itself as an alternative that allows wineries to continue to bring the business closer to their customers all over the world.

In any case, it should not be overlooked that, as in other sectors, the metaverse raises new and interesting business opportunities - intimately linked to technological innovation - but also various legal questions and challenges that must be taken into due consideration, such as the protection of intellectual property rights or the privacy of users. In particular, in this sector, there are also some specific legal risks related, for example, to the advertising of spirits or the applicable regulations and age control of users. All of these need to be analysed in depth on a case-by-case basis.

Designations of origin and geographical indications

Protection of the designation of origin (PDO) 'Feta': its use is prohibited to designate cheese produced in Denmark and intended for export to third countries

In its judgment of 14 July 2022 in Case C-159/20 (ECLI:EU:C:2022:561)[6], the Court of Justice of the European Union ("CJEU") rules on an action brought by the European Commission (the "Commission") against the Kingdom of Denmark for failure to fulfil its obligations under Regulation (EU) 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ("Regulation 1151/2012")[7] in relation to a case concerning the designation of origin ("PDO" or "PDOs", in plural) "Feta".

Specifically, the PDO "Feta" was registered as such in the register of PDOs in 2002, by virtue of Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name "Feta"[8] ("Regulation 1829/2002"). Thus, broadly speaking, since its publication, the term "Feta" can only be used for a type of white cheese produced in a defined area of Greece according to the conditions applicable to this product, in accordance with the PDO specification set out in Regulation 1829/2002.

[6] https://curia.europa.eu/juris/document/document.jsf;jsessionid=DB18FDFA703E464C7767BA1EB14C99E8?text=&docid=262936&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=475612

[7] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:343:0001:0029:en:PDF

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R1829&from=EN

This case arises out of the proceedings initiated as a result of the communication sent to the Commission by the Greek authorities informing it that certain undertakings established in Denmark were exporting cheese to third countries under the designations 'Feta', 'Danish Feta' and 'Danish Feta cheese' despite the fact that that product did not comply with the specification for the PDO 'Feta' and also despite the requests made by the Greek authorities to the Danish authorities, which refused to put an end to that practice, considering that it was not contrary to EU law, since, in their view, Regulation 1151/2012 would apply only to products marketed in the territory of the EU and would not therefore prohibit Danish undertakings from using the term 'Feta' to designate Danish cheese exported to third countries where that designation is not protected.

The Commission sent the Kingdom of Denmark a letter of formal notice according to which that Member State was in breach of EU law, in particular Article 13 of Regulation 1151/2012 and Article 4(3) of the Treaty on European Union ('TEU'), for failing to prevent and stop the infringement that such a practice represented.

In response to this request, Denmark replied that it did not share the Commission's view, and the Commission issued a reasoned opinion requesting Denmark to put an end to the infringements in question. Denmark responded to the opinion by letter in which it maintained its position.

In these circumstances, the Commission decided to bring an action before the CJEU, supported by the Republics of Greece and Cyprus, accusing Denmark of having failed to fulfil its obligations under Article 13 of Regulation 1151/2012 and of having breached the principle of sincere cooperation laid down in Article 4(3) TEU.

In its judgment, the CJEU declares that Denmark has failed to fulfil its obligations under Article 13(3) of Regulation 1151/2012 "by failing to prevent and stop Danish milk producers from using the protected designation of origin (PDO) "Feta" to designate cheeses manufactured in Denmark and intended for export to third countries". The CJEU's reasons for its decision are essentially as follows:

- the wording of that article, in so far as it provides that 'Member States shall take appropriate administrative and judicial steps to prevent or stop the unlawful use of [PDOs] and [PGIs], as referred to in paragraph 1, that are produced or marketed in that Member State', and the use of the last conjunction 'or' does not preclude the use of the PDO term to designate products not covered by the registration which are manufactured in the Union and intended for export to third countries; and,

- the objectives of the Regulation, which include ensuring that producers are rewarded fairly for the qualities of their products, providing consumers with clear information on the value-adding properties of their products, respecting intellectual property rights and the integrity of the internal market.

However, the CJEU does not consider that the principle of sincere cooperation has been infringed by Denmark because, in accordance with the case law of the CJEU, its application only applies in so far as it relates to conduct other than that which forms the basis of the breach of the specific obligations of which the Member State in question is accused.

The inclusion of a PDO or PGI in a trademark: the "Tequila" case

It is relatively common for signs incorporating a protected designation of origin ("PDO") or a protected geographical indication ("PGI" or "PGIs", in plural) to be applied for as trade marks by parties other than the PDO or PGI's control body, in order to distinguish products covered by that designation or indication. And in these cases it is also common for the control body to oppose the registration of such trade marks.

This is what has recently happened in relation to the PGI "Tequila", protected in the European Union under the provisions of Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of spirit drinks names 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 (the "Regulation 2019/787").

The Control Body of IGP 'Tequila' ('CRT') objected to the registration as EU trade marks of the following signs to distinguish agave spirits in accordance with the specification for the indication 'tequila' (class 33):

However, the European Intellectual Property Office ("EUIPO") has rejected the oppositions in two decisions of the Opposition Division of 27 September 2022 (numbers B3142533[9] and B3154093[10], respectively). In the view of the Opposition Division, none of the cases against which Regulation 2019/787 protects PGIs, as set out in Article 21 thereof, are present. According to that provision, PGIs are protected against: *a*) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including where those products are used as an ingredient; *b*) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation', 'flavour', 'like' or similar, including when those products are used as an ingredient; *c*) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product in the description, presentation or labelling of the product liable to convey a false impression as to the origin of the product; *d*) any other practice

[9] https://euipo.europa.eu/eSearch/#details/trademarks/018342465

[10] https://euipo.europa.eu/eSearch/#details/trademarks/018475517

liable to mislead the consumer as to the true origin of the product.

In the Opposition Division's view, none of these hypotheses is met because the marks are applied for in order to distinguish products covered by the PGI specification. It is true that the CRT argued that the applicants for the marks are not authorised to market the contested goods. But, in the view of the Opposition Division, "the power to verify the requirements, procedures and formalities of a designation of origin does not correspond to the Opposition Division since the only verification that can be carried out at this stage is to verify that the products protected by the contested trademark are limited according to the specifications of the denomination", and the "opponent has not demonstrated that to date it has initiated infringement proceedings before a competent body on the ground that the product marketed does not comply with the specifications of the PGI and, therefore, until proven otherwise, they must be considered to be in accordance with the said specifications". Therefore, what may happen in the further commercialisation of the goods concerned is out of the scope of the opposition procedure and "the actual compliance on the market with the corresponding specification cannot be verified in a registration procedure from an *ex ante* perspective".

This interpretation of the EUIPO's Opposition Division is contrary to that held by the Third Chamber of the Spanish Supreme Court, which in different rulings has understood that it is not in accordance with the law to include a protected designation of origin as part of a trade mark when the trade mark registration has been applied for products covered by that specific designation of origin, without the prior authorisation of the relevant Control Body[11].

In these cases, the Spanish Supreme Court applies the prohibition of Article 5(1)(g) of the Trade Marks Act 17/2001 of 7 December, on the grounds that this type of trade mark may mislead the public as to the nature, quality or geographical origin of the products, since consumers may believe that the products protected by the trade mark have the backing of the corresponding PDO, when there is no record of the authorisation of the Control Body. And although it is not excluded that, if the application for registration of the trade mark were accompanied by the authorisation of the Control Body, this circumstance could be taken into consideration by the Spanish Patent and Trade Mark Office, "of course, the authorisation of the Control Body cannot be considered as a requirement for the registration of the trade mark, nor can the opinion of the Control Body be considered binding with respect to the decision to be taken by the Spanish Patent and Trade Mark Office"[12].

Ángel García Vidal

[11] Vid. Judgments of the Supreme Court (Judicial Review Division) No. 498/2021, of 12 April, "Lar de Duero" case (ECLI:ES:TS:2021:1341); No. 1568/2020, of 20 November, "Deepsea Cava" case (ECLI:ES:TS:2020:4121); No. 1695/2020, of 10 December, "Cavarquia Barcelona" case (ECLI:ES:TS:2020:4116); and No. 1777/2020, of 17 December, "Cavarquia Barcelona" case (ECLI:ES:TS:2020:4116). 1695/2020, 10 December, "Cavarquia Barcelona" case (ECLI:ES:TS:2020:4116); and No. 1777/2020, 17 December, "Cava Brot Vins de Taller" case (ECLI:ES:TS:2020:4359).

[12] Judgment of the Supreme Court (Judicial Review Division) No. 498/2021, 12 April, "Lar de Duero" case (ECLI:ES:TS:2021:1341) (FJ 5).

Intellectual property

Lindt wins ruling in Switzerland against chocolate bunnies marketed by Lidl

Lindt's Gold Bunny chocolate rabbit is as famous as this company's efforts to protect its iconic design. Recently, Lindt has won a major victory in Swiss proceedings against Lidl for the marketing of its own version of this famous chocolate bar.

The history of the Lindt Goldhase / Gold Bunny dates back to the 1950s. According to the story told by Lindt on its website, it all started with a little girl and a little bunny. Apparently, the Lindt Bunny was created in 1952 by Rodolphe Lindt. One Easter day, the daughter of the Swiss Master Chocolatier spotted a bunny in her garden while they were enjoying their traditional Easter meal. When the girl went out to play with the bunny, it disappeared into the bushes. The girl was so sad that her father decided to create a bunny that his daughter could always find, thus the Lindt Gold Bunny was born, with his golden suit and red bow with a bell.

For several years, the Swiss chocolate company has been at war with Lidl in several jurisdictions, including Switzerland, France and Italy - where it has obtained mixed rulings - over the marketing in the German company's shops of bunny-shaped chocolates, wrapped in golden paper and decorated with a bow and a bell under the Favorina brand name.

In late 2018, Lindt filed a complaint with the Tribunal de commerce du canton of Aargau asking the Court to prohibit Lidl from offering for sale its version of the chocolate bunnies, whatever their colour, and to destroy them on the grounds that they are confusingly similar in shape and appearance to the Swiss company's trade marks.

Following the dismissal of the lawsuit in 2021, Lindt appealed to the Swiss Federal Court. In its decision of 30 August 202213 , the Court took

[13] https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://30-08-2022-4A_587-2021&lang=fr&zoom=&type=show_document

LINDT BRAND

FAVORINA CHOCOLATE FROM LIDL

into account the market surveys submitted by Lindt, recognising that its trade marks featuring the golden bunny are well known among consumers and are associated by a very large part of the public with its corporate origin. The existence of trade mark infringement is therefore accepted. The Federal Court then examined whether Lidl's conduct amounted to an act of unfair competition on account of the similarity of the goods at issue, concluding that, although the goods differed in certain respects, their overall impression gave rise to clear associations so that the public might not be able to distinguish between them. As a result, and upholding Lindt's appeal, the Federal Court ordered the prohibition of the offer for sale of the aforementioned Lidl bunnies as well as the destruction of those in stock, stating in relation to the destruction that such a measure is not disproportionate since it does not imply that the chocolate is destroyed, but that it can be remoulded and converted into a different shape.

Sustainability

How does the entry into force of the new waste act affect plastics?

On 1 January 2023, Waste and Contaminated Soils for a Circular Economy Act 7/2022 of 8 April comes into force, transposing the Waste Directive adopted in 2018 (Directive (EU) 2018/851) as well as the measures provided for in Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (hereinafter the "Single Use Plastics Directive"), also known as the "SUP Directive".

The main novelty of this Act is the inclusion of plastics in its scope, which implies that plastics are recognised as waste. In particular, the Act excludes from its application substances that are not and do not contain animal by-products and are intended to be used as feed materials or foodstuffs.

Focusing on the measures included in the Act for the reduction of the consumption of certain plastic products, the aim behind them is to considerably reduce the arrival of plastic waste at sea and also to contribute to the good ecological status of the seas. This regulation would therefore fit within the Sustainable Development Goals of the 2030 Agenda, in particular the "European Strategy for Plastics in a Circular Economy" adopted by the European Commission in January 2018, which lays the foundations for a new plastics economy in which the design and production of plastics and plastic products fully respect the needs for reuse, repair and recycling, as well as the development and promotion of more sustainable materials.

Such is the importance given to plastic products in the new Waste Act that for the first time in a national act an entire title is devoted to this waste fraction, namely Title V which is dedicated to "reducing the impact of certain plastic products on the environment".

Among the measures included for the reduction of the consumption of certain single-use plastic products such as cups and food containers, quantitative reduction targets are established, and for others such as single-dose or plastic

rings, progress in reducing consumption is also provided for; while for other products such as cutlery, plates, cups and oxo-degradable plastic products, as well as intentionally added plastic microbeads of less than 5 millimetres, their introduction on the market is prohibited.

In addition, depending on the type of single-use plastic product, the following reduction schedule for the placing on the market is established: *a*) for products listed in Part A of Schedule IV to the Waste Act (e.g. beverage cups, food containers or products intended for immediate consumption) a 50% reduction by weight is to be achieved by 20126 compared to 2022. While for products listed in part B of the Schedule (e.g. cotton swabs, cutlery, plastic cups, straws, beverage containers and cups made of expanded polystyrene) a reduction of 70% by weight is to be achieved by 2030 compared to 2022.

As noted in the next article of this Newsletter, new developments include the incorporation of new design requirements for plastic beverage containers, which among other things require lids and caps to remain attached to the container at all times, including during use.

New marking requirements are also included for certain single-use plastic products (e.g. sanitary towels, tampons, tobacco products with filters) which must be marked in a clearly legible and indelible way, informing consumers about appropriate waste management options for the product or the means of waste disposal to be avoided for that product, as well as about the presence of plastics in the product and the possible negative environmental impact of leaving scattered litter or inappropriate means of waste disposal of the product in the environment.

Finally, this title includes targets for the separate collection of plastic products referred to in Schedule IV(E) (bottles up to three litres capacity except glass or metal beverage bottles with caps and closures made of plastic and those intended for beverages and food for special medical purposes) as well as the announcement of new extended producer responsibility schemes to be established by regulation by the government and the adoption of necessary awareness-raising measures by the competent authorities to inform and encourage responsible consumer behaviour.

Reminder of key dates in relation to the restrictions on single-use plastic packaging in the new waste act

As commented in the previous article of this Newsletter, last April 2022, the Waste and Contaminated Soils for a Circular Economy Act 7/2022 of 8 April ("Act 7/2022") - which transposes two European Union Directives- was published in Spain's Official Journal, including Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment - which entered into force generally on 10 April 2022.

Well, and without prejudice to other issues that are also regulated in Act 7/2022, by virtue of its Article 57, we point out below some key dates to be taken into account:

- From 3 July 2024, only single-use plastic packaging may be placed on the market if the lids and caps remain attached to the container during the intended use phase of that product (metal lids and caps with plastic seals shall not be considered as plastic).

- From 1 January 2025, only certain polyethylene terephthalate ("PET") bottles[14] containing at least 25% recycled plastic, calculated as an average of all PET bottles placed on the market, may be placed on the market.

- From 1 January 2030, only certain bottles[15] containing at least 30% recycled plastic, calculated as an average of all such bottles placed on the market, may be placed on the market.

Among other obligations also imposed by Act 7/2022, it should also be noted that from 1 January 2023 a differentiated price per product must be charged to the consumer (broken down on the sales receipt) in the case of certain single-use plastic products (Art. 55(2) of Act 7/2022); or that which prohibits the placing on the market of cutlery, plates, straws (unless they fall within the scope of Royal Decree 1591/2009, of 16 October, regulating medical devices), etc. made of single-use plastic, as well as any plastic product made of oxo-degradable plastic[16] or containing plastic microspheres of less than 5 millimetres added intentionally (Art. 56 of Act 7/2022).

[14] Those specified in paragraph E of Schedule IV to Act 7/2022. For example, beverage cylinders of up to three litres capacity, including caps and closures (except for glass or metal beverage cylinders with caps and closures made of plastics or beverage cylinders intended and used for foodstuffs for special medical purposes).

[15] Ibid.

[16] Oxo-degradable plastics are conventional plastics that incorporate certain oxidising chemical additives that catalyse the fragmentation of the plastic material into micro-fragments. As a result of the presence of these additives and UV radiation or exposure to heat, the materials degrade more rapidly as they fragment into small suspended particles that can pose a risk to health and the environment. Some conventional plastic materials such as polyethylene (PE), polystyrene (PS), polypropylene (PP) or polyethylene terephthalate (PET) are often treated in this way.

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