MASON HAYES & CURRAN

Food Agriculture & Beverage Sector Update

In Brief

Summer 2024

Welcome

Welcome to the summer edition of our Food, Agriculture & Beverage Update series. In this issue, we examine a selection of topics and trends impacting our clients.

First up, in the above video, Corporate partner Angela Freeman outlines the three key stages to the investment process in Ireland. Other popular insights featured in this edition include:

- Supermacs Beats the Big Mac in Latest Trade Mark Win
- The Adoption of the EU's Corporate Sustainability Due Diligence Directive
- European Commission Fines Food Sector Giant
- Determining the Employment Status of Workers for Tax Purposes
- Tethering Obligations and the Deposit Return Scheme Takes Off

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Supermacs Beats the BIG MAC in Latest Trade Mark Win

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The General Court of the EU has recently weighed in on the ongoing Supermacs v McDonalds fight over the BIG MAC EU trade mark (EUTM). The EUIPO Board of Appeal found, in March 2023, that McDonalds had established genuine use of its BIG MAC EUTM for at least some of the goods and services it had been registered for. This finding was reported in our previous article. However, the General Court of the EU has now reversed that decision. The Court has found in favour of the Irish fast food chain. We review the latest update in this long running dispute . In addition, we look at its impact for trade mark owners in the food and beverage sector.

Background

Supermacs filed a revocation application against the BIG MAC EUTM in April 2017. This trade mark had been registered since December 1998. The EUIPO Cancellation Division agreed with Supermacs, and revoked the BIG MAC EUTM for all of the goods protected including:

- "*Meat sandwiches*" in Class 29
- "*Chicken sandwiches*" in Class 30, and
- "*Services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities*" in Class 42

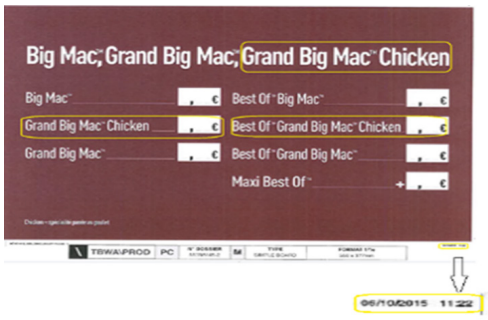
The Cancellation Division held that the evidence of use provided by McDonalds did not prove the extent of use of the BIG MAC mark. McDonalds appealed and the EUIPO Board of Appeal annulled the decision of the Cancellation Division. This annulment applied to the revocation of the BIG MAC EUTM for other goods and services, "*Foods prepared from meat and poultry products, meat sandwiches, chicken sandwiches, and edible sandwiches*."

Supermacs appeal

Supermacs appealed to the EU General Court. It accepted that McDonalds had provided use of the BIG MAC EUTM on 'meat sandwiches' in Class 30. However, it argued that the Board of Appeal decision should be annulled for all other goods and services protected by the mark. The key arguments made by Supermacs and which were successful before the General Court were the following:

There has not been genuine use of the 'BIG MAC' in connection with chicken sandwiches

Supermacs argued that the evidence produced by McDonalds was insufficient to substantiate genuine use of BIG MAC in connection with 'chicken sandwiches.' Before the EUIPO, McDonalds had relied on the following printouts of advertising posters, on which, the handwritten words 'September – November 2016' appear and menu boards relating to the 'Grand Big Mac Chicken.'



It also relied on screenshots of a television commercial relating to 'BIG MAC + Grand BIG MAC Chicken'. This commercial was broadcast in France in 2016. In addition, it relied on screenshots from the Facebook account of McDonalds France, relating to the offer of 'Grand Big Mac Chicken' in 2016, as depicted below.

The General Court concluded that this evidence does show '*chicken sandwiches*' represented under the BIG MAC in the context of advertisements in France during the relevant period. However, it did not provide any indication of the extent of use of the mark in connection with those goods.

In particular, it lacked information regarding:

- The volume of sales
- The length of the period during which the mark was used, and
- The frequency of use

For those reasons, the General Court concluded that the EUIPO Board of Appeal was incorrect. The evidence provided by McDonalds was sufficient to prove genuine use of BIG MAC on chicken sandwiches in France from 2015 to 2016.

The Board of Appeal incorrectly interpreted 'fast food restaurant services'

The BIG MAC EUTM was registered by McDonalds for *'services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods.'* The Board of Appeal had interpreted these as being (fast food) restaurant services. By doing so, the General Court held that the Board made an error of assessment which impaired the decision as regards the existence of genuine use of BIG MAC in connection with those services.

There has not been genuine use of BIG MAC in connection with the services concerned

Even if the services protected were understood to be fast food restaurant services, the General Court was satisfied that none of the evidence provided by McDonalds referred to those services. On the contrary, there was no solid and objective evidence of actual use of BIG MAC in connection with *'services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods.'*

In light of the foregoing, the General Court partially annulled the EUIPO Board of Appeal decision and found in favour of Supermacs. The BIG MAC EUTM has now been revoked for:

- '*Chicken sandwiches*' in Classes 29 and 30
- '*Foods prepared from poultry products*' in Class 29, and
- '*Services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods*' in Class 42.

Comment

McDonalds may decide to appeal the decision to the EU's top Court, the Court of Justice. There would be no further appeal available to either party after that if the Court of Justice does rule on the case. In the meantime, the General Court decision represents a major win for Supermacs. The key takeaway for brand owners is the importance of collecting and maintaining appropriate evidence of use of registered trade marks. This will help avoid costly and lengthy legal challenges by competitors.

The General Court was very clear in its assertion that the use of a trade mark cannot be proved by means of probabilities or presumptions. Rather, it must be demonstrated by "*solid and objective evidence of actual and sufficient use*" of the trade mark on the market concerned. As can be seen via the difficulties faced by McDonalds and the BIG MAC, this is not necessarily an easy test to meet.

For more information and expert advice, contact a member of our Intellectual Property team.

The Adoption of the EU's Corporate Sustainability Due Diligence Directive

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The much-anticipated Corporate Sustainability Due Diligence Directive was finally adopted by the Council of the EU on 24 May 2024. It is the latest in a package of measures designed to promote sustainable economic growth across the EU. It aims to hold large corporations accountable for their direct and indirect adverse environmental and human rights impacts. ESG Partners Emer Shelly and Jay Sattin discuss how the Directive will now be implemented across the EU.

We previously examined the status and scope of the draft Corporate Sustainability Due Diligence Directive (CSDDD or CS3D). In what was the final step in the EU legislative decision-making process, the Council of the EU officially adopted the CSDDD on Friday, 24 May 2024. The step marks a new age of corporate accountability for adverse environmental and human rights impacts within the EU.

We take a look at how the CSDDD will now be implemented and enforced across the EU.

Purpose

The CSDDD introduces obligations for many large companies to identify and address negative impacts on human rights and environmental protection in their own businesses and throughout their chains of activities. An in-scope company may be held liable for the damage caused by any failure to comply with its CSDDD obligations and may also be subject to significant financial penalties.

Timeline

Having now been adopted by both the European Parliament and the Council of the EU, the CSDDD will shortly be published in the Official Journal of the European Union. It will enter into force 20 days after its publication.

Member States will then be required to transpose the CSDDD into their national laws within two years.

Within that timeframe, Member States must also establish a supervisory authority to ensure compliance with the CSDDD. Obligations will then begin to apply to in-scope companies one year later. However, the rules will apply on a phased basis as follows:

- Within 3 years of the CSDDD coming into force, expected to be from 2027:
  - EU companies with over 5,000 employees and a net worldwide turnover of more than €1,500 million, and
  - Non-EU companies with over €1,500 million net turnover generated in the EU in the year preceding their last financial year
- Within 4 years of the CSDDD coming into force, expected to be from 2028:
  - EU companies with over 3,000 employees and a net worldwide turnover of more than €900 million, and
  - Non-EU companies with over €900 million net turnover generated in the EU in the year preceding their last financial year

- Within 5 years of the CSDDD coming into force, expected to be from 2029:
  - EU companies with over 1,000 employees and a net worldwide turnover of more than €450 million, and
  - Non-EU companies with over €450 million net turnover generated in the EU in the year preceding their last financial year

Guidelines are expected to be issued by the Commission to help companies to conduct the due diligence required by the CSDDD.

Conclusion

The CSDDD obligations will only begin to apply from 2027 onwards. However, scoping, planning and implementing the necessary level of due diligence will be complex. Preparation in good time will be vital, even for companies with existing sustainability due diligence processes. Early review and updating of current policies and practices will assist companies in identifying gaps and the issues to be addressed to ensure alignment with the requirements of the CSDDD.

In addition, companies outside the scope of the CSDDD are likely to face increasing demand for sustainability information and actions to the extent that they are within the chain of activities of an in-scope company. Those requests will most likely relate to the identification, prevention, mitigation and remediation of adverse impacts associated with the company's operations. As a result, out of scope companies will not be immune from the impact of the CSDDD.

For more information and expert guidance on CSDDD or the Corporate Sustainability Reporting Directive generally and how your business may be affected, please contact a member of our Corporate Governance or ESG teams.

European Commission Fines Food Sector Giant

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As the EU's competition watchdog, the European Commission (the Commission) plays a crucial role in protecting undistorted competition. Against the backdrop of cost-of-living and inflationary pressures, the Commission, like national competition authorities, is particularly focused on the food sector. In this context, the Commission recently imposed a significant fine on Mondeléz International, a multinational food conglomerate, for breaching EU competition law. We explore the key aspects of this case.

Background

Mondeléz International, headquartered in the United States, is a major player in the global food industry. The company owns well-known brands such as Cadbury, Oreo, and Toblerone. It distributes its products using traders, brokers and exclusive distributors. The Commission accused Mondeléz of engaging in anticompetitive behaviour by restricting cross-border sales of its products within the EU.

Specifically, the Commission claimed that Mondeléz prevented distributors from selling its chocolate, biscuit and coffee products across national borders. This action hindered competition and limited consumer choice.

The Commission found that Mondeléz engaged in 22 anticompetitive agreements by:

- Limiting the territories or customers to which wholesalers could sell Mondeléz' products, and
- Preventing exclusive distributors from responding to sales requests from customers in other Member States.

The Commission further found that Mondeléz abused its dominant position in certain national markets by refusing to supply chocolate to a wholesaler in Germany and ceasing the supply of chocolate in the Netherlands. The European Commission's investigation revealed the company's conduct led to pricing differences between Member States of between 10% and 40%, sometimes even more.

Substantial penalties

The Commission has the authority to impose hefty fines on companies for violating competition law. In Mondeléz' case, the Commission imposed a fine of €337.5 million. Margrethe Vestager, Commissioner for Competition, explained that the fine was set "*in view of …the value of Mondeléz' sales of the products concerned, the gravity of the infringement, the duration of the infringement and Mondeléz' cooperation. The Commission also took account of the fact that this type of behaviour had been sanctioned in the past*".

The fine imposed reflects a 15% reduction in return for Mondeléz' cooperation. This highlights the potential benefits of the Commission's cooperation procedure. This requires companies to acknowledge the infringement and cooperate with the Commission's investigation. In exchange, companies obtain a reduction of the fine they are required to pay.

Implications

The Mondeléz case sets an important precedent regarding cross-border trade restrictions. Companies operating in the EU must carefully assess their distribution agreements to ensure compliance with competition law. The Commission has a clear policy and track record of fighting territorial restrictions. As Vestager noted, "*[t]he fact that [territorial restrictions] are illegal and violate competition rules is well established and companies need to be deterred from engaging in this type of illegal conduct*".

The case also represents part of a broader focus by the Commission on the food industry. Commissioner Vestager noted that the food retail industry "*is a sector in which we have several ongoing investigations, such as the one in food delivery services and energy drinks*". She noted that "*this case is about the price of groceries. It is a key concern to European citizens, even more obvious in times of high inflation where many are living in a cost of living crisis. It is also about the heart of the European project: the free movement of goods in a single market*".

National competition authorities (NCAs) share similar concerns about competition in the food sector and are also conducting investigations.

Steps to mitigate risk

Clients must stay vigilant to mitigate the risk of being subject to a competition law investigation, which may lead to fines, including by:

- Advising: Advise your company on compliance with competition laws, especially regarding distribution agreements
- Monitoring Developments: Stay informed about Commission and NCA decisions and other relevant competition law developments
- Internal Training: Educate employees on antitrust compliance and best practices

Conclusion

At the heart of this case is a concern by regulators of the cost of groceries varying significantly across Member States. According to the Commission, a key theme in its findings was a strategic choice by Mondeléz to partition the internal market artificially and thus hurt consumers in the form of higher prices and less choice. Companies should exercise caution before implementing any strategy designed to prevent or reduce cross-border intra-brand competition.

For more information and expert advice, please contact a member of our Competition, Antitrust & Foreign Investment team.

Determining the Employment Status of Workers for Tax Purposes

Revenue Guidance Issued

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The Revenue Commissioners (Revenue) recently issued a Tax and Duty Manual entitled Guidelines for Determining Employment Status for Taxation Purposes (the Guidelines). The Guidelines are available online. They set out the tax implications of the Supreme Court's decision in *The Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza*. In that decision, it was held that delivery drivers of Domino's Pizza should be treated as employees and not independent contractors.

The Guidelines offer guidance on determining employment status for tax purposes in light of *Karshan*. Although the Guidelines are not concerned with the employment law implications of the Supreme Court's judgment, they are very relevant for employers in the context of determining employment status generally.

The Guidelines also include 19 practical examples which will assist employers in determining what *Karshan* means for the taxation of workers they engage.

The five-stage framework

The Guidelines set out a five-step "*decision-making framework*" which is derived from Karshan. The Framework enables employers to identify whether a worker is an employee, i.e. engaged under a contract of service, or self-employed, i.e. engaged under a contact for service.

The Framework consists of five questions, as follows:

1. Is there a work / wage bargain?

There must be an exchange of work for remuneration before a working arrangement can be categorised as a contract for service. This is a more "*straightforward analysis*" or reframing of the mutuality of obligation test. The Supreme Court stated that this has caused "*unnecessary confusion*" in the past. If there is no work / wage bargain, there is no contract for *or* of service.

2. Is there an agreement to provide personal services with limited substitution?

The more restrictions imposed on the freedom of a worker to appoint a substitute, the more this points towards the existence of a contract of service. If the answer to this question is no, the contract is likely a contract for service.

3. Does the employer "control" the worker?

This refers to the ability, authority or right of an employer to exercise control over a worker concerning what work should be done, and how, when and where it should be done. An assessment of the level of control may involve a consideration of the "*enterprise test*", i.e. which party "*bore the economic risk*", and the "*integration test*", i.e. the "*extent to which a worker, and their work, form a coherent part of the business*". If the answer to this question is no, the contract is likely a contract for service.

4. Does the factual matrix point to a contract of service?

This involves an examination of the "*complete factual matrix*" to establish if the working arrangement is consistent with a contract of service or whether the individual is self-employed. While a detailed written contract may carry "*significant weight*", it is not determinative. Any attempt to circumvent or frustrate the operation of statutory provisions will be challenged by Revenue. If the answer to this question is no, the contract is likely a contract for service.

5. Is there any legislative regime saying this is not a contract of service?

Consideration must be given to any legislation that requires an adjustment or supplement to questions 1 - 4 in the circumstances of the relationship being considered, e.g. where legislative provisions carry a different meaning.

Takeaways for employers

- Employers must ensure that the correct taxes are deducted from employees' pay and reported through the PAYE system. An employer that has not already self-reviewed their work force model in light of *Karshan* should carefully review the Guidelines and do so now. It is worth noting that Revenue anticipates an increase in the number of workers that will be determined as employees for tax purposes once the Framework is applied to their facts and circumstances.
- The *Karshan* decision relates solely to the tax treatment of individuals. However, it is of critical importance to employers given the overlap in the tests used by Revenue and also bodies adjudicating on employment rights, for example the WRC and civil courts, in determining worker status. Where a contractor is misclassified, this gives rise to considerable risks. This includes potential tax /social welfare liabilities and/or employment law claims.
- Revenue's view of the tax treatment of services supplied through a Personal Services Company or a Managed Services Company has not changed on account of *Karshan*.
  Revenue will not look behind corporate structures except in very limited circumstances specifically provided for in the *Taxes Consolidation Act 1997.*

For more information and expert advice, contact a member of our Employment Law & Benefits team.

‘Tethering’ Obligations and the Deposit Return Scheme Takes Off

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The Circular Economy Act 2022 was signed into law in August 2022. It places the Government’s circular economy strategy and Waste Action Plan for a Circular Economy on a statutory footing. Both policies are intended to give effect to the EU’s circular economy action plan. Some of the initiatives under this package of measures by the Irish Government have now been put in place, with others due to come into force soon.

There is an upcoming deadline this summer as the cap/lid ‘tethering’ obligations kick in from 3 July 2024. In addition, there are further duties on the horizon.

The Deposit Return Scheme has recently launched, with producers, retailers, consumers and the newly established Re-turn, the administrative body for the Scheme, now navigating the initial teething problems.

Single-use plastics and cap/lid ‘tethering’

The Government gave effect to the EU’s Single Use Plastics Directive[1] by the introduction of the Single Use Plastics Regulations[2] (SUP Regulations) in 2021.

The SUP Regulations take a phased approach to the introduction of obligations. The next one on the agenda is the introduction of the cap/lid tethering obligations.

From **3 July 2024**, all single use plastic beverage containers sold in Ireland for the first time that have a capacity of up to three litres and a cap or lid, must be manufactured so that the cap or lid remains attached to the container during the container’s intended use stage.

This obligation applies to all “producers” that place such products on the market in Ireland for the first time which may include manufacturers, sellers and importers.

Glass or metal containers are excluded, even where they have caps and lids made from plastic. There is a similar exemption available for containers of food in liquid form that is used for special medical purposes. It is also important to note that the obligation applies only to beverage containers and not to beverage cups. Cups and containers are treated as different product categories for the purpose of the SUP regime. The European Commission guidance[3] explains that one of the key elements for distinguishing between these is their shape.

Failure to comply with the tethering obligation is an offence. Persons who commit such an offence may be liable for a fine and/or imprisonment. This is the case for many of the obligations in the SUP Regulations.

1. *Directive (EU) 2019/904*
2. *SI 516/2021 - European Union (Single Use Plastics) (No2) Regulations 2021*
3. *Commission guidelines (2021/C 216/01) on single-use plastic products in accordance with Directive (EU) 2019/904*

Deposit Return Scheme

The Deposit Return Scheme (DRS) was launched on 1 February 2024 by the DRS Regulations 2024[4]. The DRS requires producers and retailers of PET beverage bottles and aluminium or steel beverage containers with a capacity between 150ml – 3 litres to charge a levy to purchasers. This levy is returned to the customers upon return of the products to a recycling facility. Producers and retailers must also register with Re-turn. They must also comply with other obligations to ensure customers are aware of the scheme such as product labelling, itemising deposits, and the take-back options.

There are some exemptions available to retailers:

- An automatic exemption from the scheme for retailers where the product is intended to be consumed on the premises
- Exemptions from the need to provide take-back options, subject to the approval of Re-turn, are for:
    - Retail stores 250m² or less in size
    - Purchases made online or through a vending machine
    - Products sold by a hotel, restaurant, pub or similar premises where food and drink is consumed

The availability of functioning deposit return facilities and the application of the exemptions seems to be giving rise to some initial teething problems within the DRS. This is particularly the case in hotel/restaurant settings where the premises can elect whether or not to charge the deposit depending on whether they are predominantly catering for onsite or offsite consumption. If the deposit is charged, then the container should be provided to the purchaser. This applies even where they consumed the beverage on the premises so that the customer, rather than the hotel/restaurant, collects the deposit[5] .

4. *SI No 33/2024 - Separate Collection Deposit Return \ Scheme Regulations 2024*
5. *Re-turn Hospitality Summary Information Guide*

What else is on the horizon?

The transition to a truly circular economy represents a huge change. The legal framework supporting this transition is constantly evolving, and there are many more circular economy measures on the horizon, including:

- Minimum targets for recycled content of certain single use plastic bottles, where the main component is PET, of 25% by **1 January 2025**. This is calculated as an average for all PET bottles placed on the market in Ireland. This will increase to 30% by **1 January 2030** under the SUP Regulations
- Due diligence obligations on certain coffee, cocoa, soya, cattle, oil palm, rubber, and wood products to ensure they are 'deforestation free' and comply with certain legislation. These obligations are due to come into effect from **30 December 2024**. For more information, see our previous article.
- A proposed Regulation on Packaging and Packaging Waste is being considered at EU level. This legislation would impose additional sustainability requirements for packaging, such as recyclability, reusability and compostability targets

Conclusion

The introduction of the Deposit Return Scheme and the single use plastic cap/lid 'tethering' obligations are the most recent measures in Ireland's drive to establish a circular economy. However, there are more on the horizon.

All retailers, hotel/restaurant/bar operators, producers and manufacturers will need to familiarise themselves with the existing and future obligations. In particular, it is time to ensure that you're ready to comply with the cap/lid 'tethering' obligations kicking in from 3 July 2024.

For more information, please contact a member of our Planning & Environment team.

Food, Agriculture & Beverage Sector

From food security to sustainability, we are seeing huge changes in the food, agriculture and beverage sector. Our lawyers are uniquely skilled at managing these challenges and capitalising on opportunities for clients.

Ranging from indigenous start-ups to some of the largest food organisations in the world, we work across the entire business life cycle. Our expert advice covers issues from product development to protecting IP and regulation to investment. We also have dedicated teams specialising in food innovation, fast growth companies and consumer sales.

Our lawyers can rapidly respond to emerging EU regulation and local legislation to ensure that we are ahead of issues before they arise. We also have a specialised team for crisis management from product recall to dawn raids.

Contact our Food, Agriculture & Beverage Sector team

About Us

We are a business law firm with 120 partners and offices in Dublin, London, New York and San Francisco.

Our legal services are grounded in deep expertise and informed by practical experience. We tailor our advice to our clients' business and strategic objectives, giving them clear recommendations. This allows clients to make good, informed decisions and to anticipate and successfully navigate even the most complex matters.

Our working style is versatile and collaborative, creating a shared perspective with clients so that legal solutions are developed together. Our service is award-winning and innovative. This approach is how we make a valuable and practical contribution to each client's objectives.

What Others Say

Our Food, Agriculture & Beverage Team

"They deliver thoughtful and complex work."

Chambers & Partners, 2024

Our Food, Agriculture & Beverage Team

"The team at Mason Hayes & Curran is very capable of advising on complex matters and devising solutions that are practical."

Chambers & Partners, 2024