

# EUROPEAN COMMUNITY LAW

## FOOD SUPPLEMENTS I: EU RULES AND FOOD SAFETY<sup>1</sup>

In a document on consumer rights published in January 2006 the Commission says:

3. Look around your local supermarket – you will see products from across the whole of Europe. Are they all safe? Yes, they have to be. The EU has laws to help ensure the products you buy are safe. Though no system of regulation can guarantee consumers zero risk, or 100% safety, EU countries have among the highest safety standards in the world.

Food safety is based on the principle that we need to look at the whole of the “food chain” in order to ensure safety. EU food safety laws therefore regulate how farmers produce food (including what chemicals they use when growing plants and what they feed their animals), how food is processed, what colourings and additives can be used in it and how it is sold. The EU also has laws regulating the safety of food imported into the EU from our trading partners in other parts of the world.

The EU’s safety laws on other consumer goods are also strict. It is a general requirement of EU law that all products sold in the EU must be safe. If a company discovers it has placed unsafe products on the market it has a legal duty to inform the authorities in the EU countries affected. If the product poses a significant danger the company has to organise a product recall...

4. How can you find out what’s in your food? Just look at the information on the package! EU laws on food labelling enable you to know what you are eating. Full details of the ingredients used to make a food product must be given on the label, along with details of any colouring, preservatives, sweeteners and other chemical additives used. If an ingredient is one to which some consumers may be allergic – for example, nuts – it must be marked on the label even if the quantities used are very small.

EU food labelling laws regulate which products can be called “organic” and the use of names associated with quality products from particular European regions – for example, if it is labelled Prosciutto di Parma you can be sure the ham comes from Parma, if it is labelled Kalamata you can be sure the olives are from Kalamata. EU law also enables you to know if food is genetically modified (GM) or contains GM ingredients. If it is, then it must be labelled as genetically modified.<sup>2</sup>

Food safety involves many different policy areas, including health, consumer protection (in relation to health matters and consumer understanding of the nature of food products available for purchase) and farming. Food labelling also involves issues

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<sup>1</sup> There is a lot of detail in places in this document. This is intentional in order to try to make it clear that the EU has put in place a lot of very complex regulation. And, in case anyone is keen on exploring the BSE issue (in particular) further I have included some quite detailed cites. However you are not expected to look at the text of any of the materials cited unless I ask you to do so expressly.

<sup>2</sup> EU Commission, Consumer Protection in the European Union: Ten Basic Principles, (Jan. 9, 2006) at [http://www.europa.eu.int/comm/consumers/cons\\_info/10principles/en.pdf](http://www.europa.eu.int/comm/consumers/cons_info/10principles/en.pdf)

of competition between different food producers.

The Member States all have their own systems for regulating food, but the details of the different regulatory schemes differ. One characteristic of food products is that traditionally food products generally available in the different Member States have been different. Domestic rules may reflect these differences and act as a barrier to the free movement of food products throughout the EU. Chocolate sold in the UK tends to be different from chocolate sold in the other Member States because it contains higher proportions of vegetable fat which does not come from the cocoa plant than chocolate produced in the other Member States.

If other Member States were to restrict the use of the term “chocolate” to products conforming to their traditional practices (containing a high proportion of cocoa and cocoa butter) this could interfere with the ability of UK chocolate producers to compete with the domestic production. They would be forced to:

1. change the name of their product (to one which did not suggest that the product was like the domestic chocolate and which would therefore interfere with the ability of the imported chocolate to compete with the domestic product) or
2. change the characteristics of their product, at least in so far as they planned to export the chocolate to other Member States.

Having to work out how to comply with different rules in effect in 24 other Member States could be very complex (and expensive) and the UK producer might just decide to give up. If this happened there would be less competition in the EU chocolate market than if the UK products could compete.

Free movement of goods is supposed to ensure that goods lawfully marketed in one Member State can be sold freely throughout the EU unless there is a compelling public policy reason why that should not be the case.

UK chocolate producers could respond to this problem by challenging the rules in effect in the different Member States which would interfere with their ability to sell their product throughout the EU. They would argue that Article 28 of the EC Treaty prohibited the Member States from imposing their rules to restrict the sale of UK chocolate. **Article 28** provides:

Quantitative restrictions<sup>3</sup> on imports **and all measures having equivalent effect** shall be prohibited between Member States.

Measures having equivalent effect to a quantitative restriction have been defined in *Procureur du Roi v Dassonville*<sup>4</sup> as follows:

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<sup>3</sup> Quotas. Emphasis added.

<sup>4</sup> Case 8-74.

All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions .

This language is very broad. It covers rules which discriminate against imports on their face and also rules which do not discriminate against imports on their face but which impose an additional burden on imports. The sort of rule described above, restricting the use of the description “chocolate” to products with a high proportion of cocoa and cocoa butter is not a rule which discriminates in its terms against imports but it does have an effect on imports. We call rules of this type “**indistinctly applicable**” rules.

We’ll look at the free movement of goods rules in more detail later. The Member states would be able to argue that they should be able to regulate the use of the term “chocolate” in this way, but they probably shouldn’t be able to succeed in justifying the rule. **Article 30** of the EC Treaty lists some justifications the Member States can invoke:

The provisions of Articles 28... shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

In the context of indistinctly applicable rules the Member States may also invoke justifications based on the public interest (including consumer protection) (we’ll look at this in more detail later).

But although the UK chocolate producers should be able to succeed in its challenges, challenging all of the different rules in the different Member States could take a long time and be very expensive.

The EU has addressed the problem of chocolate with a directive which sets out the EU’s criteria for chocolate.<sup>5</sup> The recitals to the directive state:

differences between national laws on several kinds of cocoa and chocolate products could hinder the free movement of this product, and

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<sup>5</sup> Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, OJ No. L 197/19 (Aug. 3, 2000) [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_197/l\\_19720000803en00190025.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_197/l_19720000803en00190025.pdf)

thereby have a direct effect on the establishment and functioning of the common market.

The directive specifies which vegetable fats other than cocoa butter may be used in chocolate and provides in Article 2(2):

Chocolate products which, pursuant to paragraph 1, contain vegetable fats other than cocoa butter may be marketed in all of the Member States, provided that their labelling, as provided for in Article 3, is supplemented by a conspicuous and clearly legible statement: 'contains vegetable fats in addition to cocoa butter'. This statement shall be in the same field of vision as the list of ingredients, clearly separated from that list, in lettering at least as large and in bold with the sales name nearby; notwithstanding this requirement, the sales name may also appear elsewhere.

This regulation of labelling addresses the risk that without such a statement consumers might be misled into buying an arguably inferior product or at least a product which contained cheaper ingredients than cocoa butter. The labelling requirement thus addressed the risk of consumer confusion and unfair competition with a rule that meets the requirement of proportionality (the least restrictive rule to achieve the objective).

As well as issues of consumer protection and competition, food involves issues of health. These health issues may involve the need to protect consumers of food products from disease, or to protect them from dangerous substances in food products. Within the Commission a Directorate General on health and consumer protection<sup>6</sup> addresses issues relating to food. In addition there is a European Food Safety Authority (EFSA).<sup>7</sup> The EFSA was established after some dramatic issues arose involving questions about the safety of food in Europe. One of these was the BSE (bovine spongiform encephalopathy) crisis which originated in the UK.<sup>8</sup> The UK's Department for Environment, Food and Rural Affairs, Defra, says:

BSE is a relatively new disease of cattle. It was first recognised and defined in the United Kingdom in November 1986. Over the next few years the epidemic grew considerably and affected all parts of the country but to different degrees. It reached its peak in 1992, when 36,680 cases were confirmed, and since then has shown a steady decline....  
BSE occurs in adult animals in both sexes, typically in animals aged five

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<sup>6</sup> [http://europa.eu.int/comm/food/index\\_en.htm](http://europa.eu.int/comm/food/index_en.htm)

<sup>7</sup> <http://www.efsa.eu.int/> . Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002  
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_031/l\\_03120020201en00010024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_031/l_03120020201en00010024.pdf) established the EFSA.

<sup>8</sup> On the BSE issue in the US, see, e.g. <http://www.aphis.usda.gov/lpa/issues/bse/bse.html> .

years and more. It is a neurological disease in which affected animals show signs that include; changes in mental state, abnormalities of posture and movement and of sensation. The clinical disease usually lasts for several weeks and it is invariably progressive and fatal.<sup>9</sup>

Leading up to the BSE crisis deregulation of animal feed had led to a situation in which cattle (which are not naturally carnivorous) were being fed with rendered animal protein and bone meal and this development seems to have encouraged the transmission of the disease. As increasing numbers of cases of BSE were noticed among cattle there also seemed to be an increase in cases of variant Creutzfeldt-Jakob disease, which affects humans. Defra says that “as at 10 January 2005, there were 153 cases of definite or probable variant Creutzfeldt-Jakob disease in the United Kingdom of whom 148 had died.”<sup>10</sup>

In 1996 the UK banned the feeding of rendered mammalian protein to farmed livestock. The UK also instituted a programme of culling cattle and a system of tracking cattle. The EU Commission adopted a decision in 1998 recognising the steps the UK had taken to control BSE and authorising the UK to send certain meat products to other Member States,<sup>11</sup> although the UK still may not send live bovine animals to other Member States.<sup>12</sup> The EU also introduced rules prohibiting the use of processed animal proteins in feeds for farm animals kept for food production.<sup>13</sup> An EU Animal By-Products Regulation regulates the safe collection, transport, storage, handling, processing, uses and disposal of animal by-products.<sup>14</sup> And, because of the risk of transmitting the

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<sup>9</sup> <http://www.defra.gov.uk/animalh/bse/index.html> .There is a similar disease, called scrapie, which affects sheep.

<sup>10</sup> Defra, Transmissible Spongiform Encephalopathies (TSEs) in Great Britain 2004 – A Progress Report, 36, <http://www.defra.gov.uk/animalh/bse/publications/progress/dec04/order.pdf>

<sup>11</sup> Commission decision of 25 November 1998 amending Decision 98/256/EC as regards certain emergency measures to protect against bovine spongiform encephalopathy OJ No. L 328/28 (Dec. 4, 1998) [http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l\\_328/l\\_32819981204en00280035.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_328/l_32819981204en00280035.pdf) And see now Commission Decision of 20 August 2002 amending Council Decision 98/256/EC concerning emergency measures to protect against bovine spongiform encephalopathy, OJ No. L 228/22 (Aug. 24, 2002) [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_228/l\\_22820020824en00220024.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_228/l_22820020824en00220024.pdf)

<sup>12</sup> See, e.g., <http://www.defra.gov.uk/corporate/consult/bse-exports/letter.htm>

<sup>13</sup> See, e.g., Commission Regulation (EC) No 1234/2003 of 10 July 2003 amending Annexes I, IV and XI to Regulation (EC) No 999/2001 of the European Parliament and of the Council and Regulation (EC) No 1326/2001 as regards transmissible spongiform encephalopathies and animal feeding, OJ No. L 173/6 (Jul. 11, 2003) [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_173/l\\_17320030711en00060013.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_173/l_17320030711en00060013.pdf)

<sup>14</sup> Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption, OJ

disease through infected blood, a directive regulates the collection and distribution of human blood.<sup>15</sup>

The EU's collective action in response to the BSE threat should substitute for unilateral action by the individual Member States. So, when the Commission decided that the UK could begin importing meat into the other Member States the other Member States should not restrict those imports (restrictions would be violations of Art. 28 and not justified by Art. 30 once the Commission had decided on the basis of expert scientific opinion that there was no basis for stopping the export of meat from the UK). France, however, maintained its ban on UK beef after this decision. The Commission initiated enforcement proceedings against France under Art. 226, and the ECJ found that France was in breach of its obligations under the Treaty. This judgement is attached as an example of enforcement proceedings in the EU before the ECJ. Subsequently France successfully sued before the ECJ to annul a Commission decision that Portugal would be able to begin to export bovine products. This judgment is attached as an example of a challenge to an act of an EU institution.

Read both judgments carefully. Think about what the cases tell us about the different procedures involved. Why did France win in the second case and not the first? Should France have won the first case? What about the second case?

After the French BSE cases you will find some materials on the Food Supplements Directive which we have considered briefly before. Like the chocolate directive the food supplements directive is designed to make sure that conforming products can be sold throughout the EU. This will provide an opportunity to consider some EU legislation in some detail. I've included the original proposal for the directive, the Opinion of the Economic and Social Committee and the directive as adopted. Read these documents carefully, together with the documents relating to the challenge to the UK's implementing rules. I'll provide some more detailed questions about this material later.

In both sets of cases there is an underlying question about how legislators and regulators should deal with questions of risk, and of interpretation and application of scientific data.

## **ATTACHED DOCUMENTS:**

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No. L. 273/1 (Oct. 10, 2002) as amended by Commission Regulation (EC) No 808/2003 OJ No. L117/1 (May 13, 2003)

<sup>15</sup> Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending directive 2001/83/EC, OJ No. L 33/30 (Feb. 8, 2003) at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_033/l\\_03320030208en00300040.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_033/l_03320030208en00300040.pdf). Implemented in the UK by the Blood Safety and Quality Regulations 2005 at <http://www.opsi.gov.uk/si/si2005/20050050.htm>

## THE BSE CRISIS

1. *Commission v France*, Case C-1/00; 2. *France v Commission*, Case C-393/01

## THE FOOD SUPPLEMENTS DIRECTIVE: THE EU LEGISLATIVE PROCESS

3. Proposed Directive on the Approximation of the Laws of the Member States Relating to Food Supplements OJ C 311 E/207 (Oct. 31, 2000)

(<http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/ce311/ce31120001031en02070212.pdf>)<sup>16</sup>

4. Opinion of the Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements, OJ. No. C 14/42 (Jan16, 2001)

([http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c\\_014/c\\_01420010116en00420046.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_014/c_01420010116en00420046.pdf))

5. Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the Approximation of the Laws of the Member States Relating to Food Supplements OJ No. L 183/51 (Jul. 12, 2002)

([http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_183/l\\_18320020712en00510057.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_183/l_18320020712en00510057.pdf))

6. The Food Supplements (England) Regulations 2003, SI 2003 No. 1387

<http://www.opsi.gov.uk/si/si2003/20031387.htm> (Omitting schedules and notes)

7. *R. On the application of Alliance for Natural Health v Secretary of State for Health* Cases C154/04, 155/04:<sup>17</sup>

A. Decision of the English High Court to make a preliminary reference to the ECJ; B. Opinion of Advocate General Geelhoed; C. Judgment of the ECJ of 12 July 2005

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<sup>16</sup> There are amendments to the proposal: OJ C 180 E/ 248 (Jun. 26, 2001) (<http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce180/ce18020010626en02480259.pdf>); Parliament amendments: OJ C 276/126 (Oct. 1, 2001) ([http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c\\_276/c\\_27620011001en01260134.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_276/c_27620011001en01260134.pdf))

<sup>17</sup> The Alliance for Natural Health has a web site at <http://www.alliance-natural-health.org/>