

Reporting about carbonated pineapple beverages: instructions to Parliamentary Counsel

1. These are instructions for a measure to be included in the Drinks Safety Bill, expected to be introduced into Parliament early in the next session.

Background

2. There have recently been several well publicised scientific studies about the health effects of consuming pineapple-flavoured carbonated beverages. There is some evidence to suggest that the interaction of carbon dioxide with some of the specific enzymes and flavour compounds found in pineapples can lead to harmful side effects in some consumers. The government feels that the evidence so far is insufficient to justify legal restrictions on the sale of such drinks, but would like to gather more information about how popular these beverages are with the general public.

What we want

3. We would like vendors to be subject to a duty to submit an annual report to the Drinks Regulator for England (“the Regulator”), a body set up by last year’s Beverages Act. The report must contain details of the number of pineapple-flavoured carbonated soft drinks sold by the vendor to customers during the year to which the report relates and the total amount sold by volume.
4. “Soft drinks” for this purpose should have the same meaning as in Part 2 of the Finance Act 2017 (soft drinks industry levy).
5. We would like the first reporting year to begin when the clause in question comes into force, which should be 2 months after the Drinks Safety Bill receives Royal Assent.
6. A person who fails to comply with the reporting requirement should be liable to a penalty not exceeding £2,000.
7. We do not want the new duty to be unduly onerous for small businesses. Accordingly, the duty should not apply unless the business in question has a turnover of £1m or more for the reporting year in question.
8. Food and drink safety is a devolved matter, so the duty should only apply in relation to England and not in relation to Scotland, Wales or Northern Ireland.

Notification of sales of carbonated pineapple soft drinks

- (1) This section applies to a person who, in the course of a business, sells carbonated pineapple soft drinks to persons in England during a reporting year.
- (2) But this section does not apply to a person if the turnover in the reporting year of the business referred to in subsection (1) is less than £1 million.
- (3) A person to whom this section applies must notify the Drinks Regulator for England of the total amount by volume that it sells in the form of carbonated pineapple soft drinks during the reporting year.
- (4) A notification must be made before the end of the period of two months following the reporting year to which it relates.
- (5) A notification must be made in the manner and form specified by the Regulator.
- (6) The Regulator may impose a penalty not exceeding £2,000 on a person who fails to comply with this section.

(7) In this section—

“carbonated pineapple soft drink” means a carbonated drink—

- (a) that contains pineapple or substances designed to produce the flavour of pineapple, and
- (b) whose alcoholic strength is 1.2% or less;

“reporting year” means—

- (a) the year beginning with the day on which this section comes into force, and
- (b) each subsequent year.

From: Office of the Parliamentary Counsel
To: Department of Food and Drink Legal Advisers

1. Attached is a clause for your instructions about carbonated pineapple soft drinks.

Subsection (1)

General scope

2. Subsection (1) sets out the scope of the clause. My impression from the instructions is that you only have in mind persons selling pineapple drinks in the course of a business as opposed to in a personal capacity. Is that right? I have drafted on that basis for now.
3. The instructions talk about “vendors” being subject to the duty. At the moment the draft is broad enough to catch both sales to the public and sales to other businesses. You say in your background section that what you are really interested in is the popularity of these drinks with the general public. With that in mind, do you think subsection (1) should in fact be confined to sales to the general public, and so exclude wholesale distributors and the like?

Territorial scope

4. You say in your para 8 that the duty should only apply in relation to England. I’ve taken that to mean that you only want to catch sales in England. Is that right, or did you want businesses operating in England to have to provide the English regulator with data relating to its sales in other parts of the UK (or, even, its sales overseas)?
5. There could in theory be awkward cross-border cases – say, if a customer in Wales or Scotland orders drinks online from a vendor whose place of business is in England. How would you want such cases to be dealt with? Should it be the vendor’s location that matters or the customer’s?

“Carbonated pineapple soft drink”

6. I have suggested the tag “carbonated pineapple soft drink”. I have preferred “drink” to “beverage” as being shorter and plainer English, but if you think “beverage” carries a special connotation please let me know.
7. “Carbonated pineapple soft drink” is defined in subsection (7). You refer in the instructions to “pineapple-flavoured” drinks. It wasn’t quite clear to me whether you only have in mind drinks that actually contain pineapple or whether you also want to catch drinks that may contain chemicals designed to synthesise a pineapple flavour. For now the latter are caught. From what you say, the scientific studies you mention in your para 2 seem to focus on the interaction of carbonation with substances actually found in pineapples, which might suggest it should be confined to products that actually contain pineapple. Should it?
8. Are you content for the duty to apply to drinks that contain only a very small proportion of pineapple (or pineapple flavour)? Or should pineapple need to be a major (or

non-negligible) ingredient? For now any drink containing pineapple, however small a proportion, is caught.

9. I've referred to "pineapple" undefined, on the basis that it should be clear enough what is a pineapple and what isn't! If you think there's likely to be any doubt at the margins then we could consider referring to botanical names etc, but I didn't want to get into that unless we have to.
10. I've also used the word "carbonated" undefined. It seems to me to carry a clear enough ordinary meaning but if you have any concerns please say.
11. You say in your para 3 that you want "soft drink" to have the same meaning as in the soft drinks industry levy provisions in the Finance Act 2017. I wondered whether that definition is more elaborate than is needed for our purposes. We are only concerned in our case with carbonated soft drinks, so some of the material in section 26 of that Act is surplus to requirements (in particular, section 26(2) presents combination with carbon dioxide as only one way in which a liquid might be prepared so as to fall within the definition of "soft drink"). I wanted to test whether we could get away without a separate definition of "soft drink": see limb (b) of the definition of "carbonated pineapple soft drink", which matches section 26(1)(a) of that Act but doesn't bring with it any of the other material from the definition there. What do you think?
12. I note you don't want to catch alcoholic drinks. Presumably the risks associated with combining carbonation with pineapple might also apply to those? Is there a reason for excluding them?

"Reporting year"

13. The definition of "reporting year" in subsection (7) reflects your para 5. The commencement clause will provide for this clause to come into force 2 months after Royal Assent. Are you confident that this gives businesses enough time to get their processes in place to comply with the duty for the first reporting year? I did wonder whether there might be some merit here in aligning the reporting years with (say) the financial year (i.e. 1 Apr-31 Mar) or the calendar year, on the basis that those are likely to be periods by reference to which businesses already produce sales data. Have stakeholders expressed any view on this point?

Turnover test

14. Subsection (2) contains the turnover test (your para 6). You talk about the turnover "of the business in question" not exceeding £1 million. I have taken that to mean the turnover of the business in the course of which the pineapple drinks are being sold. So, if a company had a high turnover from other business lines, but only a modest one from selling food and drink, the food and drink business wouldn't necessarily be caught by the new duty. Is that in line with what you want, or do you want it to be the turnover of the person from all their businesses?
15. The turnover test at present seems to me to have the practical disadvantage that it operates by reference to the same reporting year as the duty. So a business won't

necessarily know at the outset of a given reporting year whether it's going to be subject to the duty or not. Would it perhaps be better to operate by reference to a business's turnover for (say) the last period of account that ends before the start of the reporting year? That way businesses would have certainty throughout the reporting year as to whether they are subject to the duty.

16. Are you confident that it will be clear what "turnover" means and how it's calculated?

Notification duty

17. Subsection (3) contains the duty. I've suggested styling this as a duty to "notify" rather than to give a report, since at the moment the policy seems to be to require quite particular information to be provided. "Report" might suggest a longer-form, more discursive document. For now I haven't made reference to the "number of drinks" sold, but only to the amount by volume sold. It wasn't quite obvious to me how a reference to the "number of drinks" sold would be read in every case. E.g., if a 2-litre bottle is sold, does that count as just one drink or as multiple? I wondered if it is simpler all round just to refer to the volume sold?
18. Is there any other information that you might want to be notified? E.g. information about the brands or manufacturers of drinks sold?

Timing and form of notifications

19. It would probably be best to include a specific deadline by which a notification needs to be made. I have suggested 2 months after the end of the reporting year. Let me know if you would like something different.
20. Subsection (5) is not asked for in the instructions, but I thought it might be useful to provide that the Regulator can specify the manner and form in which a notification must be made. E.g. it may want to have a particular portal on its website for information to be submitted.

Penalties

21. Subsection (6) reflects your instruction on penalties (your para 5). On this, I did wonder if a £2,000 cap will be sufficient? A large business may well prefer to ignore the duty and simply incur that penalty. One sometimes sees the maximum penalty framed by reference to a percentage of a business's turnover. Do you think something like that would better achieve the policy aim here?
22. It would also be usual to include something here allowing for an appeal to be brought against the imposition of a penalty; and Parliament is likely to expect to see provision of that sort. What is wanted in that regard? Has any thought been given to the procedure around the imposition of penalties (e.g. giving of notices in respect of the imposition of a penalty, or deadlines for payment)?