

Liability Scenarios within the Supply and Information Chain (B2B/B2C)

**Result of the Working Group Foodservice Law about
food product liability scenarios in the context of the
Food Information Regulation (FIR)**

**This is not a one-to-one translation of the
German liability scenario document but a
version based on European legislation**

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1 Introduction

This document describes the liability scenarios in the context of the Food Information Regulation (EU) No. 1169/2011 (FIR) that can potentially arise in cases where mandatory or voluntary food information that is provided to consumers or wholesalers is inaccurate, incomplete, or outdated. It then concludes with some recommendations as to how such situations can be handled.

This discussion does not cover liability under competition law (in particular paragraph 4 no. 11 of the Act Against Unfair Competition) and penalty liability scenarios.

2 Which information must be provided to consumers? Which information may be provided on a voluntary basis?

2.1 Information required by law

2.1.1 The current situation

European law requires that the labels on food products sold by food retailers/online food business operators meet all current legal requirements for example concerning food additives. Additives that the law requires to be indicated on product labels must also be listed, in their entirety, by online food business operators.

2.1.2 The situation going forward

Implementation of the new European FIR in December 2014 will entail considerable changes in food labelling requirements.

This regulation is intended to (i) ensure that food labelling is clear and consistent in the EU and (ii) provide consumers with better information. It will supersede a number of other European food labelling regulations.

In accordance with article 14 of the regulation, labelling requirements under the new regime will apply not only to food information on prepacked foods, but also to information concerning food that is sold over the internet ('distance selling').

Article 9 (paragraph 1) of the regulation stipulates that the following information is to be provided for prepacked foods that are sold by online food business operators:

- The name of the food;
- The list of ingredients;
- Any ingredient or processing aid listed in annex II or derived from a substance or product listed in annex II causing allergies or intolerances used in the manufacture or persons or undertakings claiming to be potential system users may be required to substantiate such claims;
- The quantity of certain ingredients or categories of ingredients;
- The net quantity of the food;
- Any special instructions regarding storage conditions and/or conditions of use;
- The name or business name and address of the food business operator referred to in article 8 (paragraph 1);
- The country of origin or place of provenance where provided for in article 26;
- Instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions;
- With respect to beverages containing more than 1.2 % by volume of alcohol, the actual alcoholic strength by volume; and
- A nutrition declaration.

Article 14 (paragraph 1a) of the regulation stipulates that the date of minimum durability or the 'use by' date need not be indicated for food products that are sold online.

By comparison with the current situation, the following key new product food labelling/information requirements will come into effect under the new legislation:

- The ingredients will have to be listed;
- The name of any allergenic substance is to be 'emphasized through a typeset that clearly distinguishes it from the rest of the list of ingredients, for example by means of the font, style or background colour';
- Nutritional information, whose provision is currently optional in the EU, will become mandatory for all EU member states. The calorific value and six nutrients will have to be indicated;
- Indicating Guideline Daily Amounts (GDAs) will remain voluntary.

The said changes will take effect on the 13th of December 2014, while the nutritional information requirements will come into effect at latest on the 13th of December 2016.

2.2 Voluntary food information

This concerns food information exceeding the scope of the mandatory requirements – for example manufacturers' or vendors' statements concerning the absence of particular ingredients (allergen free; no artificial flavourings).

Such information must be accurate and demonstrable, on pain of violation of the regulations concerning false advertising.

Certain particulars such as nutritional information (light, low-fat and the like) are subject to additional requirements such as those indicated in the annex to the Health Claim Regulation.

Voluntary food information is also covered by the FIR (article 36).

3 Which information are food business operators required or permitted to provide to wholesalers/large-scale consumers?

Article 6 of the regulation states as follows (in its entirety): 'Any food intended for supply to the final consumer or to mass caterers shall be accompanied by food information in accordance with this regulation'. This also applies to food information provided for foods sold by online food business operators.

4 Manufacturer liability

4.1 Manufacturer liability toward third parties (i.e. purchasers) for mandatory food information

4.1.1 In cases where a manufacturer provides inaccurate food information

- a) Contractual liability
No contractual liability is incurred insofar as contracts concluded between the process-chain parties do not provide for purchaser protection. The only exception in this regard is in cases where an information-related guarantee is provided.
- b) Liability in tort
Culpable provision of inaccurate food information can be grounds for liability in tort arising from breach of organizational and instruction duties.
- c) Statutory product liability
Statutory product liability will remain in force.
- d) Liability under the regulation
Jurists generally agree that the regulation cannot be invoked as grounds for the direct assertion of liability claims. Accountability by stages in accordance with article 8 applies.

4.1.2 In cases where inaccurate information is provided in connection with data processing or by a database operator, food retailer, telecom operator or any other third party

- a) Contractual liability
Contractual liability toward purchasers is excluded.
- b) Liability in tort
Culpable provision of inaccurate food information can be grounds for liability in tort arising from breach of organizational and instruction duties.
- c) Liability resulting from breach of control and monitoring duties.

Which control and monitoring duties arise from:

- Inaccurate and/or incomplete information?
- Outdated information?

Product control and monitoring duties are deemed to have been breached in

cases where information becomes inaccurate after being provided. Such duties arise in particular in cases where product specifications are altered.

The scope of product control and monitoring duties is somewhat unclear, both in the statutes per se and in case law. In the absence of any particular relevant event, compliance with product control and monitoring duties should be verified only through routine random sampling. But on the other hand, manufacturers are probably expected to proactively supply information in the event product specifications change.

Any failure to provide information in such cases can potentially entail liability in tort concerning product control and monitoring duties.

4.2 Manufacturer liability for voluntary food information

From the standpoint of liability law, there is no difference between voluntary and mandatory food information.

5 Other types of liability toward third parties (i.e. purchasers)

5.1 Food retailers/online food business operators

Food retailers and online food business operators are subject to contractual liability toward purchasers, particularly liability arising from the provisions of purchase agreements.

Online food business operators are invariably liable for the accuracy and completeness of mandatory food information. They are also subject to liability in tort and may even incur liability under product liability law.

5.2 Data processor liability

Culpable provision of inaccurate food information can be grounds for liability in tort on the grounds of breach of organizational and instruction duties.

5.3 Cases involving pro rata liability incurred by two or more parties

Note: The foregoing observations notwithstanding, recourse claims may be asserted between parties that are part of the process chain, provided that the assertion of such claims is stipulated in the contracts concluded between such parties.

6 Exclusion/limit of liability and liability between process-chain parties

6.1 Liability toward third parties (i.e. consumers)

Is it possible for a disclaimer/notice concerning mandatory and voluntary information to exclude or limit liability toward consumers – particularly if the following wording is included?

‘It is up to the consumer to check the information on the packaging.’

A disclaimer to the effect that ‘only the information on the packaging applies’ is not acceptable/allowable in connection with the statutory requirements that come into play here.

Such a notice/disclaimer is legally invalid in cases where the purchaser is not afforded the opportunity to see the correct information before the purchase is concluded. This applies to notices/disclaimers appearing on food business operator websites. The vendor is required to provide the purchaser with information concerning the main product characteristics and all mandatory food information before the purchase is concluded. In other words, at the time of purchase the purchaser should have no doubts in his or her mind as to the characteristics of the product being purchased.

Such a notice/disclaimer is allowable in cases where the purchaser is afforded the opportunity to see the correct information before the purchase is concluded (‘transparency requirement’). This applies to situations such as information on store shelves, by virtue of the fact that the purchaser has the opportunity to see the relevant information on the packaging before the purchase is concluded.

6.2 B2B liability

The scope of B2B liability – particularly that involving manufacturers, database operators and food retailers – is to be expressly stipulated contractually in terms of the recourse claims that are allowable.

In summary, any party that intentionally or otherwise provides inaccurate information or that alters existing information incurs liability toward their contractual partner.

7 Intermediate result

It is generally agreed that food business operators that provide inaccurate information incur liability.

Hence, it is important for such operators to minimize – and if possible share – the risk of incurring such liability. In order for a food business operator to minimize/share liability risk, it is necessary to elaborate performance specifications (including control and due diligence duties) for all parties in the process chain.

The definition of such specifications should include the control and due diligence duties for the process chain parties.

Such specifications should also indicate how outdated and modified information is to be handled.

8 Functional specification document for the utilisation of 1Worldsync article master data pool

8.1 Responsibility

Since the FIR became valid, the party responsible for public information about a foodstuff is the same party under whose name or company the food is merchandised. If the said party does not have a site in the EU, the responsibility lies with the importer (article 8, paragraph 1).

In the event of any change in information regarding a foodstuff, the party responsible for the change is also responsible for the change in information (article 8, paragraph 4).

In the case that a food business operator knows that information about a foodstuff does not meet the legal conditions, he is not allowed to distribute this incorrect information, whereby he is as a result co-responsible for the continued distribution of this information (article 8, paragraph 3).

The results of these scenarios of responsibility for the user of the 1Worldsync article master data pool are as follows:

- a) The one, who generates information about a food and enters it to the data pool is responsible for the information.
- b) The user of the information is responsible for correct utilization of the information in the data pool.
- c) Change of information via positions, which did not provide the corresponding information initially, is not intended.

8.2 Liability

If in relation to outside parties the user of information is made legally liable for incorrect information, a recourse claim exists against the party who provided the information in question. This only applies, if the information in question is indeed incorrect and led to the outside parties claim; and that the said claim is valid.

8.3 Duties and diligences

Each piece of information has to be unambiguously assigned to a product by the manufacturer, e.g. via an item number (GTIN) or the like. If data is changed, e.g. updated, it is necessary to establish an unambiguous connection between the new information and the respective product – e.g. via allocation of a new reference number.

If the provider of the information changes/updates the said information regarding a foodstuff resulting in a change of reference number, the said provider

has then to immediately inform the user of the changes in the accepted manner – via the operator of the data pool. For this purpose the data is transferred – within the framework of the standard process – to the subscribers.

1Worldsync ensures that information made available by the provider can be retrieved by the user in an unmodified form. To aid in this, 1Worldsync checks and controls the functionality of its systems. A change of data does not happen.

In the framework of data provision, validation of data takes place (GDSN target market profile for Germany). Invalid data is communicated directly to the supplier, so that it can be corrected. The information provider checks the validity of his data entry using the workflow provided by the data pool. The provider of the data can check his data in the data pool on the web interface of the system.

By using the 1Worldsync master data pool, the user (provider and recipient) shows due diligence with regard to the technical processing of the information.

Change history

| Date | Section | Page | Change |
|----------|---------|------|---|
| 12.12.14 | 8.3 | 9 | <p>The following passages have been deleted due to technical innovation at 1WorldSync:</p> <p>„Here, it is necessary to differentiate between the WS1 data pool and the new WS2:</p> <p>a) With the WS1 data pool, the delivery of data, which has been entered by 12 o'clock, takes place from 12 o'clock onwards (batch processing). The data user then receives the information in the course of the afternoon.</p> <p>b) With the new WS2 data pool, data transfer in real time is possible (standard). The user can also decide to continue with delivery by way of batch processing. The data pool operator provides the required technical infrastructure. The platform is so constructed, that following the sharing of data by the supplier the said data becomes visible for trading partners. The forwarding of data to the trading partner is carried out as described in the preceding paragraph.“</p> |
| 12.12.14 | 8.3 | 9 | <p>Change from „ Both 1Worldsync data pools ensure that information made available by the provider can be retrieved by the user in an unmodified form“ into „1Worldsync ensures that information made available by the provider can be retrieved by the user in an unmodified form“ due to technical innovation at 1WorldSync.</p> |