

CLIPPING THE WINGS OF ENERGY DRINKS

By: Craig Simpson

Introduction – the Market

Since the late nineties, the energy drinks market has expanded at an impressive rate, outstripping growth in other carbonated soft drinks. During 1999, energy drink sales increased in Western Europe by 65%. Sales in 2003 amounted to 311 million litres (1.3 billion 25cl cans) with a market value of € 2.3 billion (£1.55 billion). This is therefore an important section of the drinks market.

This article refers specifically to functional non-alcoholic high energy, stimulation or pep drinks such as Red Bull (rather than products with added caffeine or glucose based drinks such as Lucozade). Red Bull is the dominant energy drink brand in 12 European countries (11 EU Member States plus Switzerland), accounting for 67.6% of total energy drinks volume sales in 2003.¹

The article will analyse:

- current EU and national law relevant to the marketing and production of energy drinks
- EU legislative proposals which may in the future restrict production or marketing of energy drinks
- current ECJ caselaw relating to energy drinks.

What the scientists say

In its opinion of 21 January 1999,² the EU Scientific Committee on Food found that the contribution of energy drinks to caffeine consumption was not, in general, a cause for concern. However, it noted that care should be taken in the case of pregnant women and that an increase in a child's daily intake of caffeine may result in temporary behavioural changes. The Committee was unable to say whether or not the amounts of amino acids in energy drinks were safe or not, concluding that further studies would be necessary to establish upper safe levels for daily intake of taurine. A more recent Opinion of the same Committee³ considered whether or not the conclusions of the first report now needed modification following further national scientific research on energy drinks. Once again, the Committee was unable to reach firm conclusions on the safety of these ingredients. Its views on caffeine remained unchanged and it was again unable to establish upper safe levels for taurine. It noted, however, that focused neurological studies in this area were needed with the result that the European Food Safety Authority has now been asked to give its views on these ingredients.

¹ The information in the first two paragraphs is taken from the Zenith International Zenith Report on West Europe Energy Drinks, January 2004.

² *Opinion on Caffeine, Taurine and D-Glucrono- g - Lactone as constituents of so-called "energy" drinks (expressed on 21 January 1999).*

³ *Opinion of the Scientific Committee on Food on Additional information on "energy" drinks (expressed on 5 March 2003).*

Whether or not there is a scientific basis for imposing upper limits on the key ingredients of energy drinks continues to be a question at both national and EU level. A number of Member States already have also carried out research.⁴

Legislation

Energy drinks are, of course, subject to the myriad of European Directives and Regulations applying to food (including drinks) generally. However, the current and future legislation concerning composition and labelling discussed below is of particular relevance to the manufacture and successful marketing (and, perhaps, even survival, of) energy drinks.

Current Legislative Framework

European level

Despite widespread political and scientific concerns in EU Member States about their potential effects, there is as yet no European regulation of energy drinks as a specific product class. This reflects the general lack of firm scientific data to date suggesting that energy drinks pose any serious public health risks which might justify either setting upper compositional limits for their distinctive ingredients (namely amino acids (such as taurine and glutamine), caffeine and, in some cases, very high contents of certain vitamins) or introducing labelling provisions specific to energy drinks.

One instrument of general application which is particularly pertinent to energy drinks is caffeine labelling *Commission Directive 2002/67* which is already in force but does not apply until 1 July 2004. This provides that caffeine must be specifically labelled as an ingredient when used as a flavouring. Where caffeine is present in drinks in excess of 150 mg/l, the words 'high caffeine content' (accompanied by the caffeine content in mg/100ml) must also appear on the label in the same field of vision as the product name.⁵ *Directive 2002/67* does not, however, establish limits on caffeine content.

National level

The extent of restriction of energy drinks under national legislation varies and may be a reflection of national scientific research and/or political pressures.⁶

In the majority of Member States, use of amino acids is permitted subject to specific approval of the competent national food authority. In a few cases (for example, Austria, Belgium,

⁴ For example, the *Agence Francaise de Sécurité Sanitaire des Aliments (AFFSA)* reviewed a 13-week mouse oral toxicity study on Red Bull in 2001. It concluded that authorisation of the use of various substances in energy drinks was not acceptable on the precautionary basis that harmlessness at the concentrations found had not been demonstrated. The UK Committee on Toxicity (COT 2001) has concluded that caffeine intakes above 300 mg/day show a plausible association with low birth weight and spontaneous abortion.

⁵ There is an exception where a beverage is based on coffee, tea or their extracts and where the word 'coffee' or 'tea' appears in the name of the product.

⁶ In Ireland, Health Minister, Michael Martin, previously threatened Red Bull with court action if it continued to make claims that Red Bull "gives you wings" and that it could boost sexual and sporting performance. Red Bull faced a ban on television advertisement of its product unless the adverts were changed. This followed a Food Safety Promotion Board report on health effects of energy drinks commissioned in 1999 following the death of an 18 year old Limerick student who died during a basketball tournament and was found to have consumed three cans of Red Bull that day. A jury had previously found that there was no evidence to connect Red Bull with the death.

Ireland, Portugal and the UK), amino acids are unregulated subject to the general overriding requirement (now incorporated in *Regulation 178/2002*) that the product must not be unsafe or injurious to human health. A few countries (notably Denmark and France), however, maintain controversial direct or *de facto* prohibitions on amino acids.

Regarding caffeine, Member State legislation typically sets caffeine limits of around 150 mg/l, with less restrictive *de facto* limits (typically 320 mg/l) often being applied in practice. In some cases, acceptance of these higher limits is subject to labelling obligations supplementary to those required by *Directive 2002/67*.

Caselaw

Given the fast expansion of energy drink sales, it is not surprising that market players have sought to challenge national rules restricting the sale of energy drinks which they view as trade barriers. There have been a number of cases in the European Courts in which the common theme has been a concern by national authorities regarding the public health risks which energy drinks may pose, coupled with inconclusive scientific evidence to support a marketing restriction based on health grounds.

In *Commission v Italian Republic*,⁷ the European Court of Justice found that an Italian law prohibiting marketing of energy drinks in Italy whose caffeine content exceeded 125mg/l was, in the absence of scientific evidence demonstrating a public health risk above that level, an effect equivalent to a quantitative restriction on imports in breach of Article 28, EC Treaty. Significantly, the caffeine restriction had been introduced following the repeal of an earlier provision banning taurine which had also had the effect of prohibiting the marketing of energy drinks. The Article 226 infringement action was brought by the Commission at the instance of various energy drink manufacturers including Red Bull, which typically contains caffeine levels from 250-320 mg/l.⁸ Similarly, the Commission has recently threatened Spain with infringement action regarding what the Commission views as a ‘disproportionate’ ban on certain energy drinks in the Valencia region on the basis of their high caffeine content.⁹

In its judgment of 5 February 2004 in *Commission v France*,¹⁰ the ECJ found that French legislation subjecting additives including amino acids lawfully manufactured in other Member States to a prior authorisation procedure was contrary to free movement of goods. Whilst noting that such prior authorisation was not, in principle, contrary to Community law, the Court found that the French system failed to provide for a simplified procedure for entering substances (including amino acids) on the national positive list of permitted additives within reasonable time limits, was not readily accessible and did not realistically permit an appeal in the case of an authorisation refusal. The judgment specifically refers to the authorization request of Red Bull which “waited seven months for acknowledgment of receipt of its application and more than two years to be informed of the decision to refuse it”.¹¹

⁷ Case C-420/01.

⁸ As a comparison, Coca-Cola contains approximately 90 mg/l.

⁹ Spain’s response to the Commission has been to try a new argument: that the drink contains guarana which is a medicine requiring clearance from the Spanish Medicinal Products Agency.

¹⁰ Case C-24/00.

¹¹ Paragraph 41.

The Court acknowledged that “there is no mainstream toxicology for opposing the marketing of” energy drinks. However, it recognised the French government’s margin of discretion in deciding the level at which it wished to protect human health “to the extent that there is still uncertainty in the current state of scientific research”¹² and, in contrast to the Italian case, upheld the French arguments on public health. The French arguments relied on a 1996 Opinion by the French Public Health Authority (*CSHPF*) which had found that marketing of energy drinks should not be authorised because of the risk of excessive caffeine consumption (especially for pregnant women) and the misleading nature of claims regarding the energy enhancing character of energy drinks. The French government also referred to the EU Scientific Committee for Food’s Opinion of 21 January 1999. The Court found that the Commission had failed to adduce evidence to show that the French Government’s arguments, that energy drinks should not be marketed, were insufficient to justify a measure of equivalent effect to a quantitative restriction on public health grounds under Article 36 EC Treaty. The Court therefore had little choice but to uphold the French argument. Following previous ECJ caselaw, the Court noted that French consumer protection concerns could be adequately protected by appropriate labelling such that an absolute ban on marketing was disproportionate.

The Commission is apparently now considering further action against France in relation to an administrative decision (rather than a law) banning taurine. The Commission is also currently considering whether or not to begin a formal infringement action against Denmark concerning its prohibition of taurine.

Future Legislative Framework

Whilst the current regulatory environment for energy drinks is relatively favourable, certain Community level proposals relating to composition and labelling will have an impact on the future energy drinks market and threaten its continued growth.

Future prohibition on taurine and restrictions on caffeine and vitamin levels

On 10 November 2003, DG Sanco published a Proposal for a Regulation¹³ creating a positive list of vitamins and minerals substances (and substances derived therefrom) permitted in foods. Whilst still at an early stage, the Proposal foresees establishment of maximum permitted levels of certain vitamins and minerals (such as vitamin B12) typically added in excessive quantities to energy drinks.

Of particular significance regarding taurine is the provision in the Proposal for an Annex of “substance[s] under Community scrutiny”. Adopting a precautionary approach, this lists substances added to foods “in conditions that would result in the ingestion of amounts of this substance greatly exceeding those reasonably ingested in normal conditions of consumption of a balanced diet, and, where following an assessment of available information by [EFSA], the possibility of harmful effects on health resulting from such use is identified but scientific uncertainty persists”. The Proposal provides for scientific data collected by food producers which demonstrates the safety and purpose of a substance in this list in a particular food to be submitted to the European Food Safety Authority. Based on this evidence, EFSA may, within four years of the listing of the substance as “under Community scrutiny”, decide either

¹² Paragraph 49. Paragraph 56 specifically refers to the precautionary principle.

¹³ *Proposal for a Regulation of the European Parliament and of the Council on the addition of vitamins and minerals and of certain other substances to foods, COM/2003/0671 final.*

to allow general use of the substance, or to restrict or prohibit it.¹⁴ In the preliminary draft of the Proposal¹⁵ (but not in the final Proposal), taurine was specifically listed as a ‘substance under Community scrutiny’ and caffeine was included in the same Annex as a ‘restricted substance’ subject to a maximum limit in soft drinks. Therefore, the indication is that one key ingredient of energy drinks – taurine - may in the future be prohibited altogether, and that the use of another (caffeine) may be subject to compositional limits.

Future Labelling restrictions

In comparison with other soft drinks, the promotion and packaging of energy drinks is particularly crucial in reinforcing their image. Claims of increased performance and heightened energy levels are their essential selling point. These claims may be restricted in the future by the new Commission *Proposal for a Regulation on nutrition and health claims*.¹⁶ The Proposal covers health claims and “any claim which states, suggests or implies that a food has particular nutritional properties due to the energy (calorific value) it provides [or] provides at a reduced rate [or] the nutrients it contains or contains in reduced or increased proportions”. The substance in respect of which the claim is made must have been shown to have a beneficial nutritional or physiological effect established by generally accepted scientific data. The food business operator making the nutritional claim must be able to justify it and Member State authorities may request a food business operator to produce scientific evidence establishing compliance with the proposed Regulation. In short, energy drinks manufacturers will have to ensure that their claims can be scientifically substantiated. Furthermore, claims making vague reference to psychological and behavioural functions (“can energize your body and mind” and “can lift your spirits as well as your energy level”) will be prohibited¹⁷. The Proposal also sets down minimum levels of vitamins which must be present in energy drinks for claims of high or enriched/fortified in vitamins and minerals to be permitted.

Furthermore, the *Proposal on additives of vitamins and minerals*¹⁸ provides that, in addition to current rules under Food Labelling Directive 2000/13, labelling and advertising of products fortified by vitamins and minerals must not “mislead or deceive the consumer as to the nutritional merit of the food that may result from the addition of these nutrients”. This may have a further chilling effect on some of the performance related claims currently made on energy drink cans. Fortified products will also be subject to compulsory (rather than voluntary) nutrition labelling.

Conclusion

The lack of convincing evidence to date that energy drinks pose a real risk to public health has meant both that they have so far escaped product specific regulation and that national

¹⁴ The rather questionable provision in the preliminary draft that the substance would automatically be deemed entirely prohibited if no decision is taken by EFSA within the three year period has, sensibly, been dropped.

¹⁵ *Preliminary Draft Proposal for a Regulation of the European Parliament and of the Council on nutrition and health claims made on food, SANCO/329/03 of 17 January 2003.*

¹⁶ *Proposal for a Regulation of the European Parliament and of the Council on nutrition and health claims made on food, 2003/0165 (COD).*

¹⁷ The Commission has confirmed that the Proposal will not restrict advertising slogans (such as “Red Bull gives you wings”) as these do not constitute health or nutrition claims.

¹⁸ See footnote 13 *ante*.

barriers which have attempted to restrict marketing of energy drinks and their key ingredients have been found to infringe Community law.

However, the future of energy drinks as a growing market looks less rosy. The recent judgment in *Commission v France* emphasises the European Court's respect for the margin of discretion afforded to national governments in legislating public health measures. Unless a party challenging national marketing restrictions is able to discredit the public health arguments relied on, the Court must respect such national measures. Following the precautionary principle, this is the case even in circumstances where the scientific evidence of risks from energy drinks is not "mainstream", merely plausible and rather inconclusive. Given the difficulties for energy drink manufacturers in proving that energy drinks are not harmful, this is likely to constitute a significant hurdle in future actions against national trade barriers.

Meanwhile, pending proposals at EU level threaten both the future use of key ingredients in energy drinks, and the specific marketing practices used in their sale.

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