SURPRISE FOR SOFT DRINKS MANUFACTURERS

When George Osborne announced his plans to implement a sugar tax on soft drinks from 2018, many food and drink manufacturers were left in a state of surprise. Now, though, the tax and its implications are facing mounting scrutiny. Could a legal challenge be brewing?

There was little doubt that the sugar tax was the biggest surprise in George Osborne's 2016 budget, but media speculation is suggesting the government will face substantial opposition in its bid to implement its proposals.

The new tax is set to add 24p per litre to the price of those soft drinks with the highest sugar levels with a lower tier tax of 18p per litre. Osborne tried to deflect attention away from any increased prices as a result of the tax by focusing instead on the planned beneficiaries of any extra income.

Proposed benefits of a sugar tax

The tax is intended to address alleged concerns about the role of sugary drinks in childhood obesity. The Chancellor suggested a sugar tax would raise more than £500m per year, and promised to use the extra cash to double the funding available for primary school sports – although of course, if the tax is successful in its stated aim of reducing consumption and changing products to reduce their sugar content, the tax take may be somewhat lower. The two-year gap between the announcement and implementation also gives enough time for manufacturers to change their product mix and reduce their sugar content, the Chancellor argued.

On unveiling the tax in the House of Commons, Osborne said: "I'm not prepared to look back at my time here in this parliament doing this job, and say to my children's generation: 'I'm sorry, we knew there was a problem with sugary drinks, we knew it caused disease, but we ducked the difficult decisions and we did nothing'."

However, revelations that the tax would cost £1bn to implement further angered soft drink manufacturers who insist an exemption of fruit juices and milkshakes, which often have higher sugar content than soft drinks, is fundamentally unfair and discriminatory.

What are the legal options for food and drink manufacturers?

Osborne's announcement has already had a significant impact: sharp falls were recorded in the share prices of soft drink manufacturers.

Any legal challenge will need to be prompt, but that does not appear to be deterring drink manufacturers. An industry source told The Sunday Times: "It's fair to say we are more than just considering legal action. This has been rushed through without warning." Furthermore, reports suggest that any regulatory challenge is likely to be supported by the food industry as a whole, with concerns mounting that a tax on sugar in soft drinks could be widened to other food and drink products with a high sugar content and could also represent the first of a number of 'sin' taxes on food that might also focus on fat and salt.

Contravention of EU law?

Any legal action is likely to be on the basis that the sugar tax is incompatible with an element of EU law or, potentially, human rights law. There are parallels – most recently a successful challenge to the introduction of minimum alcohol pricing in Scotland.

For example, is the tax discriminatory, in that it applies to manufacturers of some products and not others, without good reason? Or is it disproportionate to achieving the objective of protecting public health? The European Commission has undertaken research into the distortions caused by food taxes, which is likely to be a key reference point. The research found that the impacts where such food taxes have been introduced are uncertain.

Nevertheless, any regulatory challenge would be likely to last for several years, and food and drink manufacturers could be tempted by the prospect of buying time in this manner. So far, Osborne's reaction to the threat of challenge has been robust – "bring it on".

Whether any legal challenge is successful or not, there is an argument that the Chancellor is not wanting to raise extra revenue: he wants to change behaviours, with the UK now the fattest nation in Europe by some distance (28.1% of Brits are obese, while France, the next fattest nation, has 23.9% of its population as obese).

There is evidence to suggest he is succeeding on that front. Within a month of Osborne's sugar tax budget, Mars Food, the makers of Dolmio and Uncle Ben's products, voluntarily labelled some food with warnings that they should be eaten no more than once a week.

The Government is likely to face some kind of challenge to the sugar tax, but the final outcome is far from predictable.

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View from Mexico

For many, a strong tax policy against obesity in a country recognized as number two in world obesity was not only a necessity, but a clear step forward in tackling a public health issue affecting society from a very young age.

The Mexican Government's response came in 2012 with a bill proposing an *ad valorem* tax of 20% over the retail price of drinks sweetened with sugar. The proposed bill estimated tax collections of $22,861 MM Mexican Pesos (€1,125 MM- £890 MM), however, it was not approved and thus never entered into force.

On 31st October 2013 a second strongly supported bill proposed by the executive power set forth a specific tax of $1.00 Mexican Peso (€0.049-£0.039) per litre of any drinks sweetened with sugar as well as an additional 25% tax over energy drinks. The reform not only targeted sweetened beverages but also some non-basic foods with a caloric density of 275 kilocalories or more per 100 grams (including, among others: potato chips, chocolates and ice-cream) with an 8% tax.

Said bill entered into force on January 2014 and was recently reviewed by Congress upon the discussion of the 2016 tax reform. The proposal of one of the parliamentary groups consisted of reducing the sweetened beverage tax by 50% in cases where the beverages did not exceed the 5 grams of sugar per 100 milliliters threshold. The proposal was overturned by the Senate.

The 2014 reform has been scrutinized by the public and affected groups. In this sense, the response from the authorities has been loud and clear, stating that the impact of the new tax over sweetened beverages will not be fully visible in the short term; however, the past two years have seen an estimated reduction of 6% in the consumption of fizzy drinks and an increase between 3% and 5% on the consumption of bottled water, which has been gladly acknowledged.

The Mexican government has made a public commitment to not increase taxes in the remainder of its term (i.e. until 2018) and at the same time tax collections remain considerably low due to low oil prices. Therefore, it is expected that the tax on sugared drinks and caloric foods is here to stay in the Mexican tax system.

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