

Indeed, the Romanian legislator has announced the intention to finance and develop an educational programme entitled “*Live Healthily*” (Romanian, *Trăiește sănătos*) by using the amounts thus collected.

*On several occasions, the supposedly targeted economic agents outlined the disadvantages to the business from the planned legislation.*

The president of the Federation of Patronages in the Food Industry for instance considers that the tax represents a desperate measure in desperate times. In his view, the junk food tax will have the immediate effect of increasing prices of the targeted products, triggering a decrease in general sales given the low purchasing capacity of the Romanian consumer. Moreover, there is a risk for the activity of small companies to be suspended. He also emphasized that such actions may lead to ruining the food industry in Romania. Thus, large multinational players might consider withdrawal from the Romanian market, relocating to other countries in the region where the tax regime is more permissive.

The representatives of the big fast-food chains present in Romania pointed out that, in moments of crisis, when local production and investments should be encouraged, the introduction of a new tax may not prove viable or prudent.

Moreover, the business community considers that Romania is not ready for such a fast-food tax. Rather, the better approach would be to educate Romanians about healthy habits, not introduce new taxes.

#### IV. Conclusion

Initially, the junk food tax was intended to take effect from 1 March 2010. However, according to the latest news released in the media by the representatives of the Health Ministry, the planned legislation, including the introduction of the new tax, was postponed for next year, due to its unfeasibility in the current market conditions.

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<sup>1</sup> The Chancellor of Justice (Justitiiekanslern) is a public body charged with ensuring the lawfulness of the exercise of official powers. Its tasks include receiving and deciding on claims for damages against the State. Although the Chancellor is not a court, a high degree of legal authority is nevertheless attributed to its decisions. The Chancellor's decisions can be 'appealed' by bringing a civil action for damages in the general civil court.

<sup>2</sup> No. 3271-08-40.

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## Spain

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### Spain launches salt-reduction plan

The Spanish health authorities have recently initiated a new strategy intended to cut down salt intake by more than 10% in three years. The plan envisages measures to reduce salt in processed foodstuffs as well as communication campaigns to raise the risk perception among the general population.

The authorities are targeting processed foods as the source of 70–75% of the salt consumed in Spain. Direct actions to limit what they call “hidden salt” contents are in the pipeline.

The plan, coordinated by the Spanish Ministry of Health together with the Spanish Food Safety and Nutrition Agency, seeks to attain the World Health Organization's recommendation of 5 grams of salt per day. Initially, the objective is to reduce the current intake from 9.7 to 8.5 grams per day by 2014.

According to the health authorities, a reduction in salt intake from 10 to 5 grams per day will not only improve health but allow for significant savings for the national healthcare system. Thus, cerebrovascular accidents would be reduced by 20,000 cases and cardiac events by 30,000 each year. Similarly, it would also have an impact on arterial hypertension, responsible for more than half of the ictus and for 45% of cardiac infarcts.

Finally, the plan envisages communication campaigns which will inform the oblivious consumers about the risks attached to a high consumption of salt.

The plan was presented on April 13, 2010 to the Council of Ministers and it is included within a more general strategy aimed at the promotion of a healthy lifestyle.

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## Sweden

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### Official advice killed sales of colloidal silver food supplements: No state liability for misleading information

#### I. Background

The Swedish Chancellor of Justice<sup>1</sup> in a recent decision<sup>2</sup> denied state liability for sales losses due to misleading information announced by the Swedish

National Food Administration (“NFA”) and the Medical Products Agency (“MPA”).

The NFA and the MPA had posted warnings on their websites concerning the dangers of food supplements containing colloidal silver, and officials had given TV interviews in the same vein. Specific brand names and companies were mentioned on the NFA homepage and there was even a link to the website of a specific company, Ion Silver. A leading professor at the MPA said on the TV news that the MPA had reported several companies to the police for selling colloidal silver products as food supplements. Those companies were however not identified by name, leaving the field open for speculation. The only company that featured in the news cast was Ion Silver. A representative of the NFA stated in the broadcast that consumption of colloidal silver has no beneficial effects on the human body. On the contrary, it could cause resistance to antibiotics as well as discoloration of the skin and internal organs. Also, the negative environmental effects of silver should be considered, the official said.

Ion Silver experienced a drastic decrease in sales of their colloidal silver product *Ionosil* immediately following the NFA-MPA campaign. According to Ion Silver, the NFA and the MPA had no factual basis for their statements and, in any event, the amount of colloidal silver contained in Ion Silver’s products was far too low to risk causing any of the alleged health hazards. Ion Silver filed a complaint with the Chancellor of Justice, claiming that the NFA and the MPA were liable for causing decreased sales by spreading false and misleading information concerning Ion Silver’s products.

In the course of the proceedings before the Chancellor of Justice, the NFA and MPA admitted that Ion Silver had never been subject to either criminal or administrative law enforcement and that Ion Silver’s products were in fact incapable of causing any of the health hazards mentioned in the information campaign, although some of the authorities’ statements might have been understood that way.

## II. The Chancellor of Justice’s decision

The Swedish Liability Act of 1972 contains two provisions concerning state liability. Section 3:2 provides for liability for damage caused by *negligence in connection with exercise of official powers*. Section 3:3 prescribes liability for damage *caused negligently in the course of providing information or advice*, provided there is some *particular cause* for

liability, having regard to the circumstances, in particular the kind of information or advice provided, the connection between the information or advice and the activities and expertise of the authority in question, and the circumstances in which the information or advice was provided.

The Chancellor began by considering Section 3:2 and concluded that it was not applicable, because the NFA and the MPA had not adopted any binding decision or taken any other action with direct legal effects. Therefore the information campaign had not involved an *exercise of official power*, which is a requisite under Section 3:2.

As for Section 3:3, the Chancellor noted that providing information on the health effects of food products and medical type products is one of the main tasks of the NFA and the MPA, and that it is ‘important’ that authorities do not make statements of the kind in question without having ‘good reason’. However, when scrutinizing the statements made by the NFA and the MPA, the Chancellor thought there should be a certain latitude for expressing ‘differing opinions’ concerning colloidal silver supplements. Section 3.3 is applicable only if the information is *objectively incorrect*. This means that liability will not occur if the information is merely *misleading* or *incomplete*, even if the information could cause a reasonable recipient to draw the wrong conclusions. The Chancellor thought that there was definite reason to question the conclusions presented by the MPA and the NFA in the media. In particular, the authorities had made categorical statements concerning the health hazards of colloidal silver without mentioning that this only applied if certain concentrations were consumed. Also, they had not mentioned that products such as those of Ion Silver did not contain hazardous levels of the substance. However, while the statements made by the authorities could be misleading, the Chancellor considered them not to be *objectively incorrect* in the sense required for liability to arise.

## III. Comments

What the Chancellor of Justice is saying, in effect, is that the state is liable for untrue information but not for information that is merely misleading in its context. This is basically in keeping with the tendencies in Swedish case law, but the decision can nevertheless be criticized.

Keeping the public informed of health risks is of course one of the most important tasks for authori-

ties dealing with food safety and medical products. But due to their credibility and access to the media, the NFA and the MPA are able to achieve almost the same effects as a sales ban by making categorical public announcements. In this way the sales of products can be largely blocked without a proper legal basis and without taking a formal decision that can be appealed. Considering the potentially devastating effects that product safety announcements can have for individual businesses, there needs to be some form of legal control. A certain margin for error and interpretation should be allowed without risking liability, especially in cases where the authorities are required to make quick judgments. However, it is difficult to find a legitimate reason why the authorities should be allowed to spread obviously misleading information. According to the Chancellor's argument, liability would not arise even if the authorities *intentionally* spread obviously misleading information. This hardly serves the public interest of receiving accurate health hazard information. In my opinion, the margin of error should in any case stop well short of allowing the authorities to make obviously misleading statements which can easily be foreseen to cause serious economic damage for businesses who are not at fault and whose products are not subject to any legal sales restrictions. This kind of unnecessary carelessness should not be met with a lack of legal accountability. The distinction between incorrect information and misleading information does not seem relevant for liability law purposes, since misleading information is just as likely to cause damage as incorrect information. The decisive question should instead be whether the authority has acted *negligently* when providing incorrect or misleading information. Hopefully case law will develop in this direction. It seems, though, that the Chancellor of Justice's decision does not support this view.

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## United Kingdom

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### Self Regulation and Regulation 1924/2006/EC

In the UK in addition to having over 400 local authorities which are responsible for enforcing the provisions of food law legislation there is also a

voluntary scheme of self-regulation in place. This scheme primarily involves compliance with three codes of practice: the British Codes of Advertising, Sales Promotion and Direct Marketing (*the CAP Code*) which covers all non-broadcast advertising; the Broadcast Committee of Advertising Practice, Radio Advertising Standards Codes (*the Radio Code*); and the Broadcast Committee of Advertising Practice Television Authority Standards Codes (*the TV Code*).

The Advertising Standards Authority (ASA) is responsible for determining whether the Codes have been breached. If an advert is in breach, the ASA's adjudication is made public and attracts a great deal of media attention. In the case of non-broadcast media, certain sanctions can be imposed such as requiring the BCAP members to withhold, sanction their services or deny access to advertising space. In relation to the TV and Radio Codes, Ofcom can also impose penalties such as fines or suspend and ultimately revoke operators' licences to broadcast.

Each of the Codes contain specific requirements relating to health and beauty products, food supplements and foods. Although there are differences between the Codes there are issues which are common to all. For example, the Codes all require that advertising for food supplements should be targeted at specific groups of people, such as women of childbearing age or the elderly.

Initially, when Regulation 1924/2006/EC on Nutrition and Health Claims (NHCR) was published, there was some resistance to amending the Codes as it was believed that the Codes and the NHCR were largely compatible. It was agreed that the overriding aim of NHCR was to ensure a high level of consumer protection from misleading claims. It was argued that whilst NHCR requires claims to be authorised in order to be used in foods, sets the compositional requirements the food must meet and aims to ensure the claim does not mislead consumers, it does not however control when and how an authorised claim is then used. On this basis, it was thought that additional restrictions may be imposed for the use of authorised claims such as target audiences etc.

The ASA has acknowledged that changes will need to be made to the relevant Codes to bring it into line with NHCR. The amended CAP Code is due to come into force in September of this year. Nevertheless it appears as if the ASA's position is