



Andrew Sim, Partner, and Maggie Ma, Associate, Baker McKenzie
貝克·麥堅時國際律師事務所合夥人沈淵明及律師馬夢喬

Legal Landscape for F&B in China

Businesses should ensure they are up to speed with the Mainland's latest food and beverage requirements including those relating to advertising, labelling and e-commerce

When we discuss the food and beverage (F&B) industry in Mainland China, we are looking at a huge market. Specifically, China's imported F&B market posted US\$72.47 billion in 2018. Overall, the growth of per capita disposable income, the ever-improving logistics system, the continued societal concerns for food safety, and the preference for imported food and beverages together constitute the four driving forces driving the growth of the industry.

Demographics analysis reveals that the majority of F&B consumers are in the range of 25-44 years old. This demographic consists mainly of young professionals or graduate students, who are more inclined to use online platforms or mobile phone apps, and pay closer attention to taste and food safety.

The current legal framework of the F&B industry in China mainly consists of the Food Safety Law, Advertising Law, Consumer Protection Law, Anti-Unfair Competition Law, E-Commerce Law as well as the two five-year plans to strengthen food and drug safety.

The operation of the legal system cannot be separated from the efficient operation of administrative law enforcement agencies. The 13th National People's Congress in 2018 approved the institutional reform plan of the State Council, in which the former State Administration for Industry and Commerce, the former State Food and Drug Administration and the former State Administration of Quality Supervision, Inspection and Quarantine were reorganized and merged into the State Administration of Market Supervision (SAMR).

The National IP Administration will be in charge of matters in relation to trademarks, patents and geographical indicators, and serve as a part of the SAMR. This institutional restructuring plan seeks to improve the efficiency of administrative law enforcement in the long run.

Compliance issues of food labelling and food advertising should be the focus in practice. According to a report by PRC General Administration of Customs, labelling issues constitute 16% of the reasons for non-compliant imported food – the third most common reason for non-compliance.

The requirements of food labelling are mainly stipulated in the Administrative Measures of Food Labelling and National Standards on Pre-packaged food labelling. The core requirement for food labelling is that it must be true and objective: namely, the labelling information shall not contain any false or exaggerated descriptions. In terms of the content of the label, the regulations and national standards provide for mandatory labelling information, such as food names, ingredients list and shelf life.

Regulations and national standards also provide for the prohibition of certain labelling contents, such as food labels may not be labelled “express or implied to have the effect of prevention, treatment of disease” (such as claiming to have the effect of “lowering blood pressure”), or describe the food as “organic” or “Green Food” without obtaining the relevant certificates.

Food advertising is mainly regulated by the Advertisement Law and the Food Safety Law. Article 2 of the Advertisement Law provides a broad definition of advertisement, and commercial advertising activities in which product operators or service providers introduce their own goods or services directly or indirectly fall within the scope of advertising. Any promotional materials – whether on products, the brand owner's or distributor's own websites, online stores or social media accounts, third party's websites, online stores or social medial accounts – fall within this broad scope.

The current legal system also puts forward requirements for the content of advertisements, which should be true and should not contain false or misleading content. Laws and regulations have specific advertising requirements for food products that require additional attention: e.g., health food shall not contain claims of any assertion or guarantee for efficacy and safety, any involvement of functions of disease prevention or treatment, any claim or hint that the product advertised is necessary to safeguard health, or comparison with pharmaceuticals or other health food.

In terms of endorsement, the Advertisement Law requires the genuine use experience of endorsers, and minors under the age of 10 cannot act as endorsers.



Health food advertising is not allowed to use endorsers.

When looking at the legal issues in Mainland China's F&B industry, "professional anti-counterfeiters" must be given special attention. Professional anti-counterfeiters purchase products when they are aware of counterfeiting or non-compliance issues, and then claim compensation from the brand owner or distributor. If the brand owner or distributor does not agree to the professional anti-counterfeiter's demands, the latter will further file administrative complaints or even civil litigation. The vast majority of these professional anti-counterfeiters will disclose the issues to the public media at the same time, so as to create a negative impact.

The most popular targets for professional anti-counterfeiters are non-compliant food labels, such as improper use of the registered trademark symbol, shelf life marks, and missing Nutrient Reference Values. Large supermarkets and retail stores are more likely to be targeted by professional anti-counterfeiters than brands because they are less equipped to handle disputes and are more willing to settle. In addition to label issues, professional anti-counterfeiters are now also focused on advertising issues, especially the use of absolute descriptors such as "most" or "top" in online marketing materials.

Finally, let's talk about the e-commerce market. The rapid development of e-commerce in Mainland China has made consumers more interested in buying

imported food and beverages online. After five years of research and consultation, the E-Commerce Law came into force on January 1, 2019. The E-Commerce Law covers almost all goods and services provided by all subjects on various e-commerce platforms, including e-commerce platform operators (e.g. Alibaba, JD.com), in-platform operators (e.g. Taobao stores), and operators using their own websites or other online channels (like WeChat's Mini Programmes).

In view of problems such as the difficulty of identifying the responsible subject in the past, malicious repeated infringement, and the time-consuming complexity of the complaint process, the E-Commerce Law provides corresponding solutions such as the compulsory registration of operators, preservation of taxation records and transaction history, and the construction of a faster and easier notice-and-takedown mechanism. The joint liability of the e-commerce platform operator is also confirmed in the E-Commerce Law.

Mainland China has established a relatively integrated legal framework to regulate business in the F&B area, and continues to introduce new laws and regulations in response to new issues arising in the industry. At the same time, food safety has always been the most important concern of the Chinese government. In this case, brands should be fully aware of all relevant local laws and regulations, and comply with the local provisions. ❀

中國餐飲業法律透析

企業應確保貼內地最新的餐飲業規定，包括與廣告、標籤和電子商務相關的要求

討論中國餐飲業時，我們放眼研究的是一個龐大市場。2018年，中國進口食品飲料市場規模達到724.7億美元。總體而言，居民人均可支配收入的增長、不斷完善的物流體系、社會對食品安全的持續關注，以及對進口食品飲料的青睞，共同構成了驅動行業增長的四駕馬車。

我們對消費市場進行人口分析後發現，餐飲業的消費者年齡分布主要集中在25至44歲之間。這一群體多為年輕的專業人士或研究生，他們更傾向使用網上平台和手機應用程式，在消費時也更著重口味和食品安全。

中國現行餐飲業法律制度主要由《食品安全法》、《廣告法》、《消費者權益保護法》、《反不正當競爭法》、《電子商務法》及加強食品藥品安全的兩個五年計劃等共同構成。



法律制度的運作離不開行政執法機構的高效運作。2018年十三屆全國人大一次會議通過了國務院機構改革方案，前國家工商行政管理總局、前國家食品藥品監督管理總局和前國家品質監督檢驗檢疫總局職能重組，合併為國家市場監督管理總局。

國家智慧財產權局負責商標、專利和地理標誌事務，由國家市場監督管理總局管理。是次機構重組計劃旨在長遠提高行政執法效率。

食品標籤和食品廣告的合規問題是實務中應當關注的重點。根據中國海關總署的報告，在海關查處的不合規進口食品案件中，標籤問題佔16%，是第三常見的不合規情形。

食品標籤的要求主要規定於《食品標籤管理規定》和《預包裝食品標籤通則》。食品標籤的核心要求是資訊的真實性和客觀性，即標籤資訊不得包含任何虛假或誇大的陳述。在標籤內容上，法規和國家標準規定了強制標註的資訊，如食品名稱、成分表和保質期等。

法規和國家標準同時對禁止標註的內容作出了規定，如食品

標籤不得標註「明示或暗示具有預防、治療疾病作用」（如聲稱有「降低血壓」的功效）、不得在未取得相關證書的情況下對食品作出「有機」或「綠色食品」的描述。

食品廣告主要由《廣告法》和《食品安全法》規管。《廣告法》第2條對廣告作出了較廣的定義，商品經營者或服務供應商直接或間接介紹自己商品或服務的商業廣告活動，皆屬廣告範疇。任何宣傳材料，不管發布於產品上、品牌所有人或經銷商的網站、網店或社交媒體賬號上、第三方網站、網店或社交媒體賬號上，均屬此類。

現行法律體系對廣告內容也作出了規定，廣告的內容應當真實，不得含有虛假或誤導內容。法律法規對需要格外注意食品安全的食品廣告作出了特別規定，如保健食品廣告不得作出表示功效、安全性的斷言或保證，不得涉及疾病預防或治療功能，不得聲稱或暗示為保障健康所必需，也不得與藥品或其他保健品進行比較。

在廣告代言的規制上，《廣告法》要求廣告代言人具有真實的使用經歷，而不足十歲的未成年人士不得作為廣告代言人。保健食品廣告則不得利用代言人進行推薦、證明。

談到中國內地餐飲領域的法律問題時，我們必須對「職業打假人」施以格外關注。職業打假人明知商品為假冒或存在不合規因素，卻仍然購買商品，繼而向品牌所有人或經銷商索償。如品牌所有人或經銷商不同意職業打假人提出的要求，後者則會進一步提出行政投訴乃至民事訴訟，而他們當中絕大部分會同時向媒體披露事件，以期給品牌製造負面影響。

職業打假人最為青睞的目標，是如不當使用註冊商標標誌、保質期資訊和未標記營養成分表等不合規的食品標籤。相比品牌，大型超市、零售店更容易成為職業打假人的目標，因為他們往往較欠缺處理糾紛的能力，更傾向和解。除了標籤問題，食品廣告也日漸成為了職業打假人的焦點，特別是在網店使用「最」、「極」等絕對性描述。

最後，讓我們來談談電子商務市場。中國內地電子商務的迅速發展令消費者更喜愛網購進口食品和飲料。經過五年的研究和諮詢，《電子商務法》自2019年1月1日起施行，涵蓋了幾乎所有主體在各種電子商務平台所提供的一切商品和服務，所規管的主體包括電子商務平台經營者（如阿里巴巴、京東）、平台內經營者（如淘寶店舖），以及通過自建網站或其他網上渠道的電子商務經營者（如微信小程序）。

針對過去存在的責任主體難以認定、惡意反復侵權、投訴流程複雜耗時等問題，《電子商務法》提出了對應的解決方案，如強制市場主體登記、保存納稅資訊和交易紀錄，以及建立快速便捷的刪除機制等。《電子商務法》也確認了電子商務平台的連帶責任。

中國內地已建立了較完整的法律體系來規管餐飲行業，並持續引入新的法律法規來回應業界出現的新問題。與此同時，食品安全始終是中國政府最為關注的議題。因此，品牌應充分了解一切相關的法律法規，並遵守當中的規定。✿