



**EUROPEAN COMMISSION**  
Secretariat-General

Directorate E - Policy Co-ordination II  
The Director

Brussels, 14.08.2017  
SG/E/

**NOTE IN REPLY TO AN INTER-SERVICE CONSULTATION**

**Subject: Commission Notice on the application of EU law protecting consumers' interests and safety to issues of Dual Quality of products – The specific case of food**

**ISC/2017/06593 (internal reference: ARES(JUST)4400649) from DG JUST - deadline: 14/09/2017**

The SG gives a positive opinion subject to the following comments being taken into account:

Firstly the Notice, announced to AGRIFISH Ministers at the end of July and in the Letter of Intent to President Tajani and Prime Minister Ratas, is part of a broader political approach to the question. Recognising that the format of a Notice, the text could nevertheless reflect more clearly the political intention:

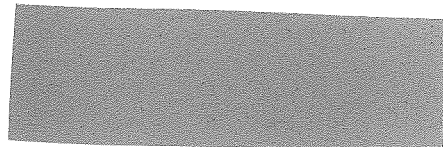
- The introduction should explain more clearly the political context for issuing the Notice, present this as one amongst different steps undertaken by the Commission to tackle the issue of dual quality of products and briefly present the legal framework. It should also explain the reasons to limit this Notice to food products. SG provided drafting accordingly.

Second, the Notice aims at helping national authorities to enforce relevant EU legislation. It should therefore seek to be as practical as possible:

- It should be written in a clear language, understandable by both lawyers and non-lawyers, and explain the concrete steps to be followed by national authorities in their assessment of potentially unlawful practices.
- The section on possible unfair practices in the marketing of differentiated food products in the Single Market could be further worked to be as operational and concrete as possible (recognising the constraints of the Notice format). SG therefore suggests to list differentiation practices which are actually compatible with the Single Market, to give indicators allowing national authorities to assess whether a suspicious practice may be considered as a breach of EU law, and to clearly identify the different steps to be undertaken by national enforcement authorities in their assessment.
- SG considers that the last section on cross-border cooperation is of particular importance and should be further developed, both as regards the role of Consumer Protection Authorities and that one of the Commission.

In addition:

- Consistency with the Guidance on the Food Information to Consumers Regulation must be ensured.
- References to relevant provisions of the Unfair Commercial Practices Directive should be made clear. If need be, such provisions can be copied.
- Last, the Flowchart should be added at the end of the Notice.

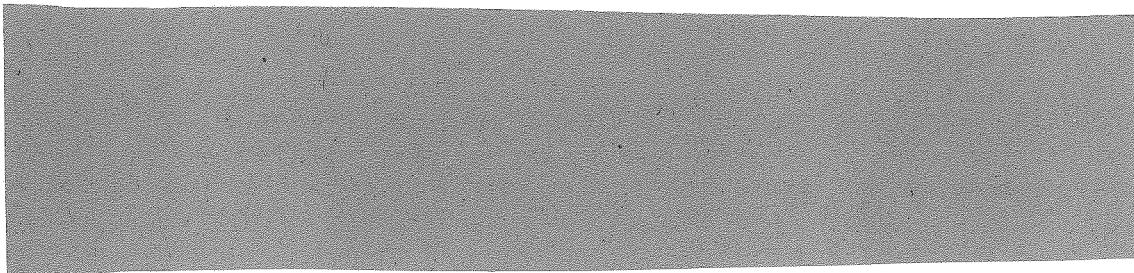


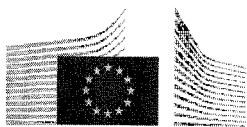
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EUROPEAN  
COMMISSION

Brussels, XXX  
[...] (2017) XXX draft

#### COMMISSION NOTICE

**on the application of EU law protecting consumers' interests and safety to issues of Dual  
Quality of products – The specific case of food**

(Text with EEA relevance)

EN

EN

However, a key principle of these laws is that food business operators may not mislead consumers by giving the impression that a product is of the same quality and composition as the products of the relevant brand in other Member States if this is not the case.

The Commission has already adopted a clear guidance on this issue for the implementation/application of Directive 2005/29/EC on Unfair Commercial Practice (hereafter the UCPD)<sup>1</sup>: *"Under the UCPD, commercial practices marketing products with a different composition are not unfair per se. However, the UCPD needs to be considered in cases where traders promote a product as having the same quality and composition as the products of the relevant brand marketed in other Member States. If such commercial claims are incorrect or misleading, they could be considered misleading under Article 6(1)(b) of the UCPD if they could cause the average consumer to take a transactional decision that he would not have taken otherwise."*

Aside of safety considerations, whose legality must be checked in light of the product's compliance with the relevant EU product safety rules, the overall legality of such differentiation practices needs to be assessed against both EU sector-specific and horizontal consumer protection rules, taking due account of the *lex specialis* principle, as enshrined under EU law as explained in the UCPD guidance<sup>2</sup>.

Of particular importance are EU rules concerning the truthfulness and transparency of product information to consumers and the possibility for average consumers to make an informed choice when choosing a product. Such an assessment has to take into account the specific facts and circumstances of each case. The free movement of goods is one of the four fundamental freedoms of the Single Market. The Single Market in goods encourages innovation in product markets while contributing to more opportunities for businesses and allowing more choice for consumers across Europe.

The free movement of goods does not necessarily mean that every product must be identical in every corner of the Single Market. Whilst consumers are free to buy the products of their choice, business operators are also free to market and sell goods with different composition or characteristics, provided that they fully respect EU legislation (whether on the safety of products, labelling or other horizontal or sectoral legislation). In order to remain successful, businesses must continuously adapt and innovate their products, responding to different trends in demand, logistical issues and emerging technologies. Even products under the same brand may have different characteristics, due to legitimate factors such as the place of manufacture or consumer preferences in the destination regions. However, what can be a source of concern is when different compositions of identically branded goods are marketed in a way that has the potential to mislead the consumer.

The EU has developed a comprehensive legislative framework to safeguard consumer rights. Effective consumer protection is essential for an efficient and well-functioning market. This framework includes the protection of consumers against misleading information and commercial practices.

<sup>1</sup> Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices SWD(2016)163 final, p. 60-61.

<sup>2</sup> Ibid see in particular p. 14-17.

The issue of dual quality of certain products<sup>3</sup>, and in particular food products, has been a source of growing concern. In March 2017, the European Council welcomed action by the Commission to take the issue further. As clearly underlined by President Juncker in his State of the Union address<sup>4</sup>, there cannot be second-class consumers in a Union of equals and it cannot be acceptable that *"in some parts of Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical"*. The Commission is taking forward action on various fronts with a view to restore citizens' confidence and trust in the Single Market, and has decided to focus in the first instance on the area of food.

This action combines dialogue with the parties concerned and practical steps to enable concrete measures to be taken by the responsible authorities. Following the discussion at the the European Council in March 2017, the Commission brought the issue to the High Level Forum for a better functioning food supply chain, to engage a dialogue between the industry, consumers and national authorities. This dialogue will continue in the coming months. In addition, the Commission has been working on concrete measures to ensure reliable and comparable evidence, starting in the area of food. The Joint Research Centre is working on guidelines for a robust harmonised testing methodology, as a step towards comparable and authoritative tests across the EU. This is essential to assess the magnitude of the issue, and to provide the sound evidence basis required for action to be taken.

Another step towards clarity and transparency would be to improve information on the exact content of a product. In the area of food, the Commission is discussing with business, in particular food manufacturers and retailers, how to ensure full transparency in product composition (beyond the current legal obligations). One option being explored is a Code of Conduct for producers, to set out standards to be respected to prevent dual quality problems. Last, the Commission has been looking at enforcement of relevant EU legislation together with national consumer protection and food authorities.

This Notice contributes to this overall strategy and seeks to facilitate the practical application of existing law. Several pieces of EU legislation are relevant to tackle the issue of dual quality of products. In the particular case of foodstuffs, which is the focus of the present Notice, these include:

- the 'General Food Law Regulation'<sup>5</sup>, which aims at ensuring that only safe food products are placed on the EU market and that consumers are accurately informed and not misled as to the composition and characteristics of the food products offered for sale;
- the 'Food Information to Consumers Regulation'<sup>6</sup> which lays down general labelling rules and requirements, including mandatory provision of a complete list of ingredients enabling the consumers to be fully informed of the composition of the food products<sup>7</sup>;
- the 'Unfair Commercial Practices Directive'<sup>8</sup>, which ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated. It seeks to enable consumers to make informed

<sup>3</sup> i.e. goods marketed in the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States.

<sup>4</sup> Add reference

<sup>5</sup> Regulation (EC) 178/2002

<sup>6</sup> Regulation (EU) 1169/2011

<sup>7</sup> Certain products such as chocolate, fruit juices and jam are subject to specific composition requirements or covered by quality schemes, by virtue of EU harmonised or national legislation.

<sup>8</sup> Directive 2005/29/EC

and meaningful choices. This horizontal Directive applies to many commercial practices which are also regulated by other general or sector-specific EU legislation, such as food, toys, cosmetics, detergents and others, but only for those aspects which are not covered by sector legislation.

It is the role of Member States, and in particular national consumer and food authorities, to ensure compliance with the EU consumer acquis and enforce the European safety and food labelling legislation at national level. However, the Commission is committed to assist national authorities by providing the necessary support and guidance. This Notice clarifies the relevant legislative framework in order to provide national authorities with tools and indicators to ensure proper enforcement. It should be seen as a first step in the Commission action to support national enforcement authorities in their efforts to put an end to unfair practices. It may be further updated in light of new evidence based on the common methodology, including to products other than food.

#### **1. Fair information practices under Regulation (EU) No 1169/2011 on the provision of food information to consumers**

Food business operators are first of all required, by Regulation (EU) No 1169/2011 on the provision of food information to consumers (the Food Information Regulation), to provide clear, accurate and easy to understand information on elements such as the characteristics of the food, including, in particular, information as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production.

Pursuant to the requirement in Article 8 of Regulation (EC) No 178/2002 on general principles and requirements of food law, whereby food law shall aim at the prevention of practices misleading consumers, the Food Information Regulation puts in place a comprehensive legal framework aimed at ensuring not only a high level of protection of health of consumers and their social and economic interests, but also the free movement of safe and wholesome food in the EU Single Market.

To this end, the Food Information Regulation introduces a general principle that food information shall not be misleading and it clarifies the responsibilities of food business operators in relation to the provision of food information. It also specifies modalities for how food information should be provided, language requirements, when foods should indicate the presence of substances or products causing allergies or intolerances, how nutritional information should be provided, and which criteria apply to the provision of food information on a voluntary basis.

Under the Regulation, certain food information is mandatory, such as the list of ingredients and the quantity of certain ingredients or category of ingredients.

The Commission has provided specific guidance<sup>9</sup> on the application of the rules of the Food Information Regulation and is currently updating this guidance to reflect the evolution of food production. It also issued a specific guidance as regards information on substances or products causing allergies or intolerances, by way of Commission Notice C(2017) 4864 final of 13 July 2017.<sup>10</sup>

**Commented** This section briefly presents the main features of the food legislation and does not seem to bring much added-value

**Commented** When this updated guidance will be published? Is the present Notice fully consistent with these guidances?

<sup>9</sup> DG SANTE please add relevant reference.

<sup>10</sup> Commission Notice C(2017) 4864 final of 13 July 2017.



Food producers and retailers should take this guidance fully into account to ensure that they respect the expected level of professional diligence in their sector and good market practices.

For competent enforcers, checking the respect of the Food Information Regulation and of the applicable guidance should therefore be the first step in an investigation of the compliant marketing of food products.

## 2. Fair information practices about the characteristics of products under the Unfair Commercial Practices Directive 2005/29/EC (the UCPD)

Interplay with Food law and in particular the Food Information Regulation ((EU) No 1169/2011) – the *lex specialis* principle and its impact on enforcement

By virtue of the *lex specialis* principle enshrined in Article 3(4) of the UCPD, in case of conflict or overlap between the UCPD and sector-specific provisions of EU law which regulate specific aspects of unfair commercial practices, the sector-specific rules prevail and apply to those specific aspects. Nonetheless, the UCPD will continue to remain relevant to assess other possible aspects of the commercial practice which are not covered by the sector-specific provisions. Thus, the UCPD can usually be applied together with sector-specific EU rules in a complementary manner. Since Article 11 of the UCPD requires all Member States to ensure that adequate and effective means exist to combat unfair commercial practices, in those Member States where different authorities are responsible for enforcing the UCPD and the relevant sector-specific legislation, the authorities should co-operate closely to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent<sup>11</sup>.

It is also important to stress that information required by sector-specific EU law in relation to commercial communications, including advertising and marketing, is considered "material" under the UCPD.<sup>12</sup> Material information refers to key pieces of information that traders are required to provide to consumers to enable the latter to take informed transactional decisions.<sup>13</sup> Failing to provide such material information qualifies as a misleading commercial practice if the omission can be considered likely to cause the average consumer to take a transactional decision he or she would not have taken otherwise.

For example, the Food Information Regulation requires business operators to provide accurate information on products such as the quantity of certain ingredients or categories of ingredients. This is "material" information within the meaning of Article 7(5) UCPD. A significant inaccuracy of this information is misleading to the extent that it is likely to affect the transactional decisions of the average consumer.

Potentially unfair business practices which are not specifically regulated under sector specific EU law

The UCPD thus operates as a safety net ensuring that a high, common level of consumer protection can be maintained in all sectors, complementing and filling gaps in other EU laws.

<sup>11</sup> See in particular p. 17 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

<sup>12</sup> Article 7(5) UCPD and p. 17-19 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

<sup>13</sup> Articles 7(1) and 7(2) UCPD and p. 69 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

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Commented: Language could be less technical and more in the style of a practical handbook.

The UCPD prohibits any commercial practice if it contains false information or if, in any way, notably by either action or omission; it deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the main characteristics of the product.

As a consequence, assessing whether a commercial practice is in breach of the UCPD requires a case-by-case assessment.

Marketing and selling goods under the same brand that are in reality not the same could be contrary to the UCPD if it can be showed, on a case-by-case basis, that:

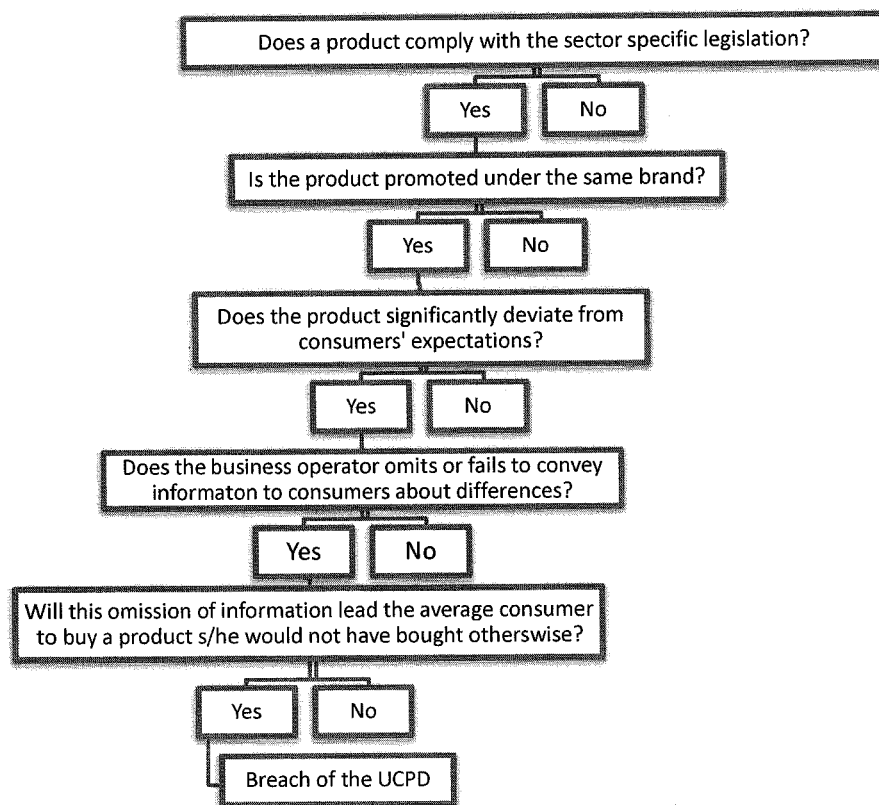
- consumers have specific expectations to a product;
- the product significantly deviates from these expectations;
- the business operator omits or fails to convey information to consumers so that they can understand a difference exists;
- this omission is likely to lead the average consumer to buy a product he or she would not have bought otherwise.

To carry such a case by case assessment it is first necessary to research the following:

- which main elements an average consumer is likely to take into account when making purchasing decisions of food and drinks including when there are branded product on offer;
- what are the elements available to the consumer on the specific product;
- whether some main elements would have been omitted or are unclear;
- whether the identified gaps are likely to alter the average consumer transactional decision.



Assesment of potentially unfair business practices – flowchart:



#### Important elements considered by consumers when buying branded products

The existence of one or several branded products in the general offer of a certain category of manufactured or processed food products (e.g. coffees, chocolates, teas, sodas, etc.) influences most consumers when making their choice. The transactional decision of a consumer for a branded product is in large part based on his/her perception of what this brand represents for him/her. Concerning foods, this is a subjective opinion formed through the sensory experience of each consumer, its dietary preferences and through factors such as exposure to brand advertising and image building efforts.

It can be assumed that the average consumer would not purchase a branded product if he or she would have reasons to doubt the accordance of the actual product with his/her perception of what a standard product of this brand should be.

The difficulty of assessing the presence of possibly deceptive elements in communication about branded products lies in the fact that the perceived "branded" characteristics of a given product are not translated into an objective explicit description by brand-makers. They are

suggested to consumers by various inexplicit communication means and/or generic assertions such as "original", "unique", "the founder's recipe" etc...

Studies made on brand loyalty demonstrate that brands act in the mind of consumers as a certificate for a controlled and constant (high) quality. This explains why the average consumer typically expects branded products to be of equivalent quality if not exactly the same<sup>14</sup> wherever and whenever purchased. This also explains why brand-owners have a professional diligence duty to clearly inform their customers when they decide to change any significant element of the composition of their products or any significant component of their brand or packaging in addition to their commercial interest to ensure brand loyalty of consumers.

It should also be recalled that in the Single Market where consumers have a general understanding that this is the market in which they purchase and where the free circulation of goods and equal access to goods is ensured, do not, a priori, expect branded products sold in different countries to be differentiated.

#### Objective differentiation criteria

For food and drink operators, however, a "constant quality" does not necessarily mean identical products across the different markets. Indeed, it is common for food business operators to tailor their products to local consumer preferences and other conditions. In particular, sensory optimisations are performed to fit dietary habits that may be very different from one region to another. Furthermore, there may be objective differences in sourcing, due to the geographical and/or seasonal availability of raw materials (or specific local requirements), that have an effect on the composition and/or taste of products and that are therefore difficult to avoid for producers. There may also be the introduction of new recipes to reflect technological progress or nutritional reformulation policies, which cannot technically or economically be done simultaneously in all markets. Finally, food business operators may also have to adapt the composition of products to the price elasticity of local demand.

#### Possible unfair practices in the marketing of differentiated food products in the Single Market

Insufficient information on differences in products marketed under the same name/brand may influence consumers' transactional decisions.

After checking compliance to sector-specific requirements, when enforcement authorities have a reasonable suspicion that unfair commercial practices occur in the differentiation practices of food business operators, they might consider performing market tests that involve product comparisons across different regions and countries. Such tests should be carried out with a robust harmonised testing approach on which the Commission is currently working. The outcome of this work might provide further evidence and recommendations to the issue at stake.

If tests identify food products that have:

- a seemingly identical presentation<sup>15</sup>;

<sup>14</sup> For perfumes, or luxury clothing brands for example, people are looking for exactly the same products and fear counterfeits.

<sup>15</sup> Consumers usually remain unaware of small differences in colours, format, and presentation of packages and this is one of the sources of confusion for average consumers. Authorities may need to study the reaction by a representative group of consumers on the presentation of the relevant differentiated products in order to assess

**Commented:** In this section, would it be possible to refer to indicators allowing to assess whether a suspicious practice may be considered as a breach of EU law rather than speaking about possible unfair practices?



sensory profile, and present the necessary evidence.<sup>17</sup> Due consideration should be given to cases where such differences cannot be linked to sensory preferences of consumers or specific legal or technical requirements.

#### Cross border cooperation

As this issue concern practices of business operators across the Single Market and involve a cross border dimension, competent authorities should seek to conduct the above mentioned investigation in a coordinated manner, under the Consumer Protection Cooperation (CPC) Regulation 2004/2006. In particular, the CPC authorities where consumers may be harmed, in cooperation with the other relevant national authorities of their country, should seek to ask mutual assistance to the CPC authorities of the countries where the business operator is established. If consumers in several countries may be harmed by the practices of the same trader, these authorities and that of the trader's country shall seek to coordinate their investigations. The Commission can facilitate this work and funds may be allocated under the Consumer Programme.

**Commented** This section should be strengthened. It could amongst other mention the following points: obligation for CPC authorities to inform each other in case of cross-border testing; obligation to cooperate with the MS where the trader is located; further detail the role of the COM (including to monitor the application for the guidance?); recommendation to MS to use the JRC testing methodology

<sup>17</sup> Under Article 12 of the UCPD, any claim should be based on evidence which can be verified by the relevant competent authorities. Traders must be able to substantiate their claims with appropriate evidence. Consequently, claims should be based on robust, independent, verifiable and generally recognised evidence which takes into account updated scientific findings and methods. The fact that the burden of proof for this rests on the trader reflects the principle in Article 12(a) of the UCPD that enforcement authorities should have the power 'to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice'.