

[REDACTED] (JUST)

From: [REDACTED] (GROW)
Sent: jeudi 21 décembre 2017 12:35
To: [REDACTED] (JUST)
Cc: [REDACTED] (GROW); [REDACTED] (JRC); [REDACTED] (JUST); [REDACTED] (JUST-EXT)
Subject: RE: Dual Quality of food - document on "Towards Shared Principles in Addressing the Dual Food Quality"

Dear [REDACTED] and colleagues),

We spoke. I hope our conversation clarified at least partially the genesis and status of the document (most definitely not a Commission document) and the state of the discussions (very much open, the document is up for debate by HLF Members and was not submitted for HLF endorsement). All this was clearly and transparently spelled out at the HLF Sherpa meeting which created the Internal Market Subgroup, at the subgroup meeting in November, in the e-mail asking subgroup members for comments and, most important, at the HLF plenary meeting – where, incidentally, a large number of HLF members (including, emphatically, BEUC – which provided constructive input to the drafting) welcomed this process.

In a nutshell, it's work in progress and it has no direct Commission ownership. As agreed, we'll go through this in detail and face-to-face in January.

A Merry Christmas and a top quality New Year to all of you.

From: [REDACTED] (JUST)
Sent: Thursday, December 21, 2017 11:37 AM
To: [REDACTED] (GROW)
Cc: [REDACTED] (GROW); [REDACTED] (JRC); [REDACTED] (JRC); [REDACTED] (JUST); [REDACTED] (JUST); [REDACTED] (JUST-EXT)
Subject: Dual Quality of food - document on "Towards Shared Principles in Addressing the Dual Food Quality"

Dear [REDACTED]

I have tried to call you.

We are concerned by the possible implications of the paper "*Towards Shared Principles in Addressing the Dual Food Quality*", which we understand was prepared by your team in DG GROW for consultations within the High Level Forum Internal Market subgroup, in view of the HLF of 6 December.

Could you please clarify what is the nature and status of the document? Will it be adopted by the HLF. If so when? Some additional information on the overall process could help us assessing the possible impact of this paper.

In fact, the draft was not agreed with us and it was shared with DG JUST at the same time as it was sent for consultation to the HFL subgroup. We appreciate that this might have been due to the last days rush to prepare the HLF, nevertheless we are now writing to ensure that its content and objectives are fully aligned with what the Commission stated in the Guidance document on Dual Quality of products.

To our understanding, the paper contains a number of conclusions / commitments to be endorsed by HLF Members in order to address dual quality issues. It is problematic in the part where it attempts to codify a number of situations where difference in composition should be considered justified. In addition to the "usual suspects" normally advocated by the industry, such as consumer preferences, technical and logistical reasons (e.g. local availability of ingredients) and price expectations connected to the brand, there are references to brand advertisement and presentation of the information.

In substance, it appears that the draft attempts to create a "safe harbour" of practices where differentiation /dual quality should be accepted, supposedly without undergoing the tests we outline in our Guidance, in particular the need to proceed to a case by case assessment to establish whether the consumer was misled due to inadequate or insufficient information on those differences. Regardless of whether these were intended consequences of the paper, we must avoid any confusion amongst the industry and the stakeholders and restate clearly that – in the first place - dual quality practices need to be assessed based on the Guidance document, which to date is the only official agreed position of the Commission on the matter.

We understand that most members of the High Level Forum are still studying the paper and promised to provide written comments. Some of them have already criticised this approach during the HLF. Could you please provide us with an update on where we stand on the consultation?

To continue to closely and constructively coordinate on this file we would please ask you to involve us in any further development of this (and other key) document/s. In this connection, we have included some comments in the attached document which could be used to fine tune the language of the paper. I have copied in our JRC colleagues in case they also have observations.

Happy to discuss when you have a moment and all the best,

[Redacted signature]

[Redacted name]
[Redacted title]


European Commission
Directorate-General for Justice and Consumers

[Redacted contact information]
[Redacted contact information]
[Redacted contact information]

CONCLUSIONS OF THE BRAINSTORMING SESSION IN THE HLF INTERNAL MARKET SUBGROUP:

'TOWARDS SHARED PRINCIPLES IN ADDRESSING 'THE DUAL FOOD QUALITY'

I. GENERAL CONSIDERATIONS

It was noted by the experts that differences in composition and sensory profiles of identically branded products are present across the Single Market. Experts pointed out that those differences do not always correspond to the national markets but occur also within the same country.

The overwhelming majority of the experts (with the exception of the experts representing Hungary and Slovakia) agreed that generally there is no need for identically branded products to have always exactly the same composition.

The majority of experts pointed out that forcing economic operators to alter the packaging of a product for every small difference in product composition can have severe consequences for: (I) the functioning of the single market (lower cross-border competition and parallel import), (II) competitiveness of SMEs (high operational costs for economic operators), III innovation in the sector (higher cost of experimental receipts), and IV consumer choice (some brands could withdraw their products from certain markets).

At the same time, the experts agreed that in certain cases the differentiation in product composition can have an unfair character and a negative impact on consumers. The experts were unanimous in their call for elimination of practices which are unfair, misleading and have detrimental effect on the consumers.

II. THE COMMISSION'S NOTICE OF 26 SEPTEMBER (COM(2017)6532 FINAL) ON THE APPLICATION OF EU FOOD AND CONSUMER PROTECTION LAW TO ISSUES OF DUAL QUALITY OF PRODUCTS ACKNOWLEDGES THE FREEDOM OF FOOD BUSINESS OPERATORS TO LEGALLY DIFFERENTIATE THEIR PRODUCTS AS LONG AS ALL LEGAL REQUIREMENTS IMPOSED BY EU LAW ARE FULLY RESPECTED. IN THIS DRAFT, STAKEHOLDERS SEEK TO IDENTIFY AND BRING TO THE ATTENTION OF THE COMMISSION THOSE SITUATIONS WHERE DIFFERENTIATIONS OF PRODUCTS ARE COMMONLY PRACTICED. IT IS, HOWEVER, IMPORTANT THAT, IN ACCORDANCE WITH THE COMMISSION'S GUIDANCE, THE FAIRNESS OF THESE PRACTICES CAN ONLY BE ESTABLISHED BY THE COMPETENT AUTHORITIES AND FOLLOWING A CASE-BY-CASE ASSESSMENT UNDER THE RELEVANT LEGISLATION. AS DISCUSSIONS CONTINUE WITHIN THE HLF AND THE JRC PROCESS, THIS FORUM WILL ALSO AIM TO IDENTIFY A SET OF GUIDING PRINCIPLES THAT COULD BE IMPLEMENTED WITHIN THE EUROPEAN SINGLE MARKET TO EFFECTIVELY TACKLE THE ISSUE OF UNFAIR PRODUCT DIFFERENTIATION. AN INITIAL DRAFT FOR FURTHER DISCUSSION IS INCLUDED IN THIS PAPER. *ANY WORDING WHICH BEARS THE POTENTIAL OF CONFLICTING WITH THE REQUIREMENT OF A CASE BY CASE ASSESSMENT UNDER THE UCPD SHOULD BE AVOIDED. FROM OUR POINT OF VIEW THE LIST OF "PRINCIPLES" BELOW CAN ONLY BE REGARDED AS AN ATTEMPT TO BRAINSTORM WHERE COMPOSITION DIFFERENCES GENERALLY TAKE PLACE IN ORDER TO IDENTIFY THOSE SITUATIONS WHICH COULD BE A SOURCE OF CONCERN IF THE CONSUMER IS NOT SUFFICIENTLY*

INFORMED.COMMON PRACTICES OF DIFFERENTIATION OF IDENTICALLY BRANDED PRODUCT COMPOSITION AS REPORTED BY THE MAJORITY OF EXPERTS:

1.) The differences in products are directly linked to the different ways the brand is advertised in the relevant market.

This refers to situations where the difference between two products is clearly reflected in diverging advertising on the relevant markets. In this case the difference is easily identifiable by consumers, who are exposed to both streams of advertisement. This situation is especially prevalent when economic operators communicate the main element of the difference as a key feature of their product.

Example: A company advertises a product as 'salmon fish stick' in a country/region, and as 'cod fish stick' in another

Whether a "significant" difference between the two products is easily and clearly identifiable needs to be confirmed by an appropriate case-by-case assessment, taking into account all facts and circumstances of a real situation, including in particular the presentation of the product and the characteristics of the advertising. See our general and previous comments on the fact that the legal tests in the Guidance cannot be avoided when an issue of dual quality has been raised.

2.) The differences respond to different consumer preferences.

The differences in taste can be explained by local circumstances and traditions. In almost every region, consumers have different lifestyles, customs and habits which then forge a special preference towards certain product characteristics.

Example: consumers in Southern Europe traditionally prefer sweeter jams than people in Northern Europe; therefore a manufacturer may produce two versions of their jams for the EU market.

However, it should be noted that consumer preferences are dynamic and their expectations can change faster than companies marketing practices. To respond to changing consumer demand, economic operators follow closely consumer trends and keep a constant dialogue with consumer representatives.

It should be also noted that there isn't always evidence showing that consumer preferences and tastes stop precisely at the border of a Member State, though cross border sales may be difficult due to regulatory and non-regulatory barriers.

In our guidance, we explicitly acknowledge the freedom to legally differentiate the product "...to tailor [the] product to local consumer preferences and other conditions" (Commission Notice, p.7). However, as explained above, it is key that the consumer is able to understand this. We believe that in particular in the case of adaptation to the local taste it is also in the interest of food business operators of providing the consumer with this information.

3.) The differences are caused by technical and logistical reasons.

The differences in product composition can be caused by the local availability of ingredients. Furthermore, it should be noted that various differences can be time-related (caused by the duration of transport and storage).

Example I: Product A is labelled as 'produced from local ingredients' and has two recipes. One in a country with abundance of raw material 'A', and another in a country with abundance of raw material 'B', having the same function as 'A'.

Example II: a product with a limited shelf-life comes from the same factory and has the same recipe, but due to the distance is sold usually a few days later in country A than country B. In effect its sensory profile may slightly differ between two countries.

*See previous comment on information. Especially Example II further highlights the importance of a case-by-case assessment: In this case the difference will probably in most cases not be "significant". Where differentiations resulting from the transport etc. are, however, "significant", it is then important to assess on a case by case basis whether consumers have been adequately informed/not been misled.***4.) Consumers' price expectations connected to the brand.**

The experts underlined that the fact that in some national markets, producers can adjust the composition of their products in order to increase their competitiveness on the local market should be taken into account. There are regions where the predominant part of consumers would prefer to pay a lower price for a product made of lower cost ingredients, rather than paying a higher price for higher cost ingredients. However, the experts underlined the difficulty to substantiate this reasoning, as the price of ingredients is not the only factor in the retail price of the product.

Example: a producer of frozen pizzas uses a less expensive kind of cheese in a price-sensitive market A, and more expensive kind of cheese in a high-end market B.

In addition to our general comments regarding the importance of a case-by-case assessment and sufficient consumer information, it must not be suggested to consumers that he/she makes a "good deal" by buying a branded product for a cheaper price than compared to other Member States without being aware that the product is in fact different.

During the discussions in the expert sub-group on 9 November some representatives of the industry acknowledged that the adaptation to purchasing power is very difficult since the consumer does not have the choice between the product available in the other Member States and the "adapted" product which he/she finds in his/her local supermarket. Furthermore, it should be noted that the question of prices is very difficult due to various factors affecting it, such as retailer competition, taxes etc.

5.) National regulation or national initiatives influence the composition of the product.

National authorities are responsible for public health matters and to large extent for consumer protection. Various national requirements may exist in the area of food, provided they are compatible with EU legislation (e.g. General Food Law and Food Information to Consumer Regulation) and with the Treaty. In case of such divergences, a direct impact on product composition can be the consequence.

Similarly, product reformulation may take place in accordance with varying national strategies, and as a consequence, product composition may differ.

Example: a beer producer sells his product in Sweden with <3.5 % alcohol content in order to be allowed to sell it in supermarkets, while he is selling a 5% version for Germany, where there are no similar retail restrictions.

This appears to be a differentiation based on legitimate grounds as long as the information on the product is also adequate and compliant with the applicable legal requirements, which needs to be assessed taking into account all the circumstances of the particular case.6.) The front pack of the product contains adequate indications

Provided products comply with EU rules on food information and nutrition and health claims, in many cases packaging of the food product can contain in the front information regarding the formula or highlighting certain ingredients. This can often indicate that the product version has been altered compared with the past version. This situation can often occur when an experimental new receipt of an established product is launched on one market, in order to probe the consumer reaction before a wider release.

Example: Frozen cake producers decide to increase the fruit content in a country/region and, if legally correct, put a description on the front pack 'now with more fruits'. The same frozen cake in the rest of the rest of EU is available only under the old version for the time being.

See our previous comments, it is important to assess on a case-by-case basis whether the information provided is adequate.

III. POTENTIAL SHARED PRINCIPLES IN ADDRESSING THE DUAL FOOD QUALITY

1. HLF MEMBERS (AND THEIR MEMBERS) COMMIT TO ENGAGE IN THE METHODOLOGICAL WORK LEAD BY THE JRC AND RESPECT ITS RESULTS. THE HLF MEMBERS WILL USE, TO THE MAXIMUM POSSIBLE EXTENT, THE HARMONISED TESTING APPROACH BLUEPRINT DEVELOPED BY THE JRC FOR ANY FUTURE TESTS COMPARING FOOD PRODUCTS IN THE SINGLE MARKET

2. IT COULD BE MADE MUCH MORE CLEAR HERE THAT THE COMMITMENT TO RESPECT THE JRC'S RESULTS ALSO ENCOMPASSES THE COMMITMENT TO RESPECT THE RESULTS OF ALL TESTS WHICH WILL BE CARRIED OUT IN ACCORDANCE WITH THE JRC METHODOLOGY.

2. HLF MEMBERS SUGGEST A LIST OF REASONS WHICH MAY JUSTIFY DIFFERENCES IN COMPOSITION BETWEEN IDENTICALLY BRANDED PRODUCTS (FIRST DRAFT SUGGESTIONS ABOVE). THIS LIST COULD BE AMENDED, AS OUR KNOWLEDGE OF THE ISSUE, ITS SCOPE AND RATIONALE INCREASES.

Please see our previous and general comments – it has to be made clear that there cannot be “safe harbour” type of situations which are deemed to be a priori legitimate.

3. *HLF MEMBERS COMMIT TO SUPPORT ACTIVITIES AND ACTIONS THAT RAISE CONSUMER AWARENESS ABOUT THE MANUFACTURING AND MARKETING OF FOOD PRODUCTS, AND HELP THEM MAKE MORE INFORMED CHOICES.*

4. *HLF MEMBERS WILL SUPPORT THE INVOLVEMENT OF NATIONAL CONSUMER ASSOCIATIONS, SO THAT THEY CAN HAVE MORE ADEQUATE CAPACITY ENABLING THEM TO PLAY THEIR ADVOCACY ROLE EFFECTIVELY.*

5. *HLF MEMBERS CALL FOR INCREASED TRANSPARENCY OF THE PRODUCTION AND MARKETING PRACTICES IN THE FOOD SUPPLY CHAIN.*

This is a good start, however, the transparency commitment should be more clearly linked to differentiation practices.

6. *HLF MEMBERS CALL ON THE EUROPEAN COMMISSION TO ASSESS THE IMPACT OF SO-CALLED 'TERRITORIAL SUPPLY CONSTRAINTS' ON THE CONSUMER CHOICE IN VARIOUS MEMBER STATES.*

7. *HLF MEMBERS CALL ON THE MEMBER STATES AND THE EUROPEAN COMMISSION TO ELIMINATE THE REMAINING BARRIERS IN THE SINGLE MARKET FOR FOOD AND PROMOTE THE FREE MOVEMENT OF FOOD PRODUCTS IN THE EU.*

8. *HLF MEMBERS CALL ON THE EUROPEAN COMMISSION AND THE MEMBER STATES TO EXPLORE THE FEASIBILITY AND VALUE ADDED OF POTENTIAL FURTHER HARMONISATION OF LEGAL PROVISIONS, WHICH HAVE A DIRECT IMPACT ON FOOD PRODUCT COMPOSITION.*

9. *HLF MEMBERS COMMIT TO STRIVE FOR INCREASED STANDARDS FOR FOOD QUALITY THROUGHOUT THE EU, SO THEY CAN KEEP UP WITH CONSUMER EXPECTATIONS AND SCIENTIFIC PROGRESS.*

10. *HLF MEMBERS COMMIT TO PROMOTE THE DEVELOPMENT OF DIGITALISATION IN THE FOOD SUPPLY CHAIN, INCLUDING THE USE OF DIGITAL TOOLS TO PROVIDE SUPPLEMENTARY PRODUCT INFORMATION TO CONSUMERS.*